U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 23-0395 BLA

MATILDA JERRY (on behalf of TONY O. JERRY) Claimant-Respondent v. PEABODY WESTERN COAL COMPANY and PEABODY ENERGY CORPORATION Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/07/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

Scott A. White (White & Risse, LLC), Arnold, Missouri, for Employer and its Carrier.

Donna E. Sonner and Joseph E. Wolfe (Wolfe, Williams & Reynolds), Norton, Virginia, for Claimant.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer L. Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

BUZZARD and JONES, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Awarding Benefits (2019-BLA-05614) rendered on a claim filed August 5, 2013,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found the Miner had twenty-nine years of surface coal mine employment in conditions substantially similar to those in an underground coal mine and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption, and she awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, art. II §2, cl. 2,[3] and because the removal provisions applicable to the

[1] Claimant is the widow of the Miner, who died while this appeal was pending before the Benefits Review Board. She is pursuing the claim on the Miner's behalf. *See* February 19, 2024 Letter from Claimant's Attorney.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment

ALJ render her appointment unconstitutional. On the merits, Employer argues the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment and total disability thereby invoking the Section 411(c)(4) presumption. It also argues the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject Employer's argument that the ALJ lacked the authority to decide the case. Employer has filed a reply brief reiterating its arguments.[4]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause / Removal Protections

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. 237 (2018).[6] Employer's Brief at 33-38. It contends that the ALJ was appointed

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> of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, §2, cl. 2.

[4] By order dated February 27, 2024, the Board granted Employer's motion for an extension of time to file a consolidated reply brief and gave Employer twenty days from receipt of the order to file its brief. *Jerry v. Peabody Western Coal Co.*, BRB No. 23-0395 BLA (Feb. 27, 2024) (Order) (unpub.). On April 17, 2024, Employer filed a second motion for an extension of time indicating that its counsel was out of the country and ill on the applicable deadline date. April 17, 2024 Mot. for Ext. Employer filed its reply brief contemporaneously with the request for a second extension. Based on the foregoing, we grant the second request for an extension and accept Employer's reply brief.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, as the Miner performed his coal mine employment in Arizona. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 36.

[6] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges in the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. 237, 251 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor has conceded that the Supreme

prior to the decision in *Lucia* in a manner inconsistent with the Appointments Clause and that her appointment was later ratified by the Secretary of Labor. *Id*. at 37. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017, but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id*. at 33-38. Contrary to its contentions, the ALJ was directly appointed by the Secretary of Labor two years after *Lucia* was decided, and no ratification was ever issued or required.[7] *See Johnson v. Apogee Coal Co.*, BLR , 22-0022 BLA, slip op. at 3-6 (May 26, 2023), *appeal docketed*, No. 23-3612 (6th Cir. July 25, 2023).

It also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 33-38. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. 197 (2020). Employer's Brief at 33; Employer's Consolidated Reply Brief at 2-5. It also cites Justice Breyer's separate opinion in *Lucia*. Employer's Consolidated Reply Brief at 2-5. However, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has rejected this argument. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs); *see also Johnson*, BRB No. 22-0022 BLA, slip op. at 3-5; *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022). We therefore also reject it.

Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[7] The Secretary of Labor issued a letter to the ALJ on September 12, 2018, stating:

> Pursuant to my authority as Secretary of Labor, I hereby appoint you as an Administrative Law Judge in the U.S. Department of Labor, authorized to execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office. U.S. Const. art. II, § 2, cl. 2; 5 U.S.C. §3105. This action is effective upon transfer to the U.S. Department of Labor.

Secretary's September 12, 2018 Letter to ALJ Hoffman.

Invocation of the Section 411(c)(4) Presumption

Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar" to those in an underground mine. 20 C.F.R. §718.305(b)(1)(i); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The conditions in a surface mine are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The ALJ found the Miner was engaged in coal mine employment at surface mines for approximately twenty-nine years[8] and he was regularly exposed to coal mine dust throughout all of his surface employment. Decision and Order at 19-20. She thus found Claimant established the Miner had at least fifteen years of qualifying coal mine employment. *Id*. Employer argues the ALJ erred. Employer's Brief at 39-40. We disagree.

The ALJ considered the Miner's detailed testimony on this issue. Decision and Order at 4-5, 20; Hearing Transcript at 20-26. The Miner testified that he initially worked in open-cab vehicles, and later air-conditioned closed-cab vehicles. Decision and Order at 4-5; Hearing Transcript at 20-23, 25-26. He stated he was exposed to large amounts of airborne dust while working in both open-cab and closed-cab vehicles because the air conditioning filters of the closed-cab vehicles would become clogged with dust, leading to "dust everywhere" in the cab. *Id*. He testified he left work covered in dust, as if "one was buried inside a dust bowl," and that he was still dusty when working in closed-cab vehicles. *Id*. at 24, 26.

The ALJ permissibly found the Miner's uncontradicted, "fully credible" testimony establishes he was regularly exposed to coal mine dust during his surface coal mining employment. Decision and order at 20; *see Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) (rejecting argument that miner must provide evidence of "the actual dust conditions" and citing with approval the Department of Labor's position that "dust exposure evidence will be inherently anecdotal"); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664 (6th Cir. 2015) (claimant's "uncontested lay testimony" regarding his dust conditions "easily supports a finding" of regular dust exposure); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 487-88

[8] We affirm as unchallenged the ALJ's finding of twenty-nine years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19-20.

(6th Cir. 2014) (testimony that a surface miner's clothes were covered in dust at the end of his shift supports a finding of regular dust exposure, as it is "typical" of testimony from underground miners who "similarly complain about being exposed to dust while in the mines and having significant dust on their clothes when they return home from work").

Employer argues the Miner's testimony "does not establish the required comparability" to the conditions present in underground coal mines. Employer's Brief at 39. Contrary to Employer's argument, however, Claimant is not required to prove the dust conditions aboveground were identical to those underground. *See Kennard*, 790 F.3d at 664-65; 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013). Rather, Claimant need only establish the Miner was "regularly exposed to coal mine dust" while working in the surface mines.[9] 20 C.F.R. §718.305(b)(2).

As it is supported by substantial evidence, we affirm the ALJ's finding the Miner had at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b); Decision and Order at 20.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv).[10] The ALJ must weigh all relevant supporting evidence against all relevant contrary

[9] We reject Employer's argument that the regulation at 20 C.F.R. §718.305(b)(2) is invalid. Employer's Brief at 39-40. While not precedential in this case, the United States Courts of Appeals for the Sixth and Tenth Circuits have rejected similar arguments in upholding the validity of 20 C.F.R. §718.305(b)(2), and we find those rulings persuasive. *See Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 301-03 (6th Cir. 2018); *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018); *see also Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988).

[10] Citing *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834 (7th Cir. 1994) and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994), Employer argues Claimant is not entitled to benefits if the Miner is disabled for reasons other than his pneumoconiosis. Employer's Brief at 5. It thus asserts Claimant bears the burden of proving the Miner would not have been totally disabled "but for" his pneumoconiosis. *Id*. at 53-54. But the decisions Employer cites interpreted a prior version of 20 C.F.R. §718.204 (1999). In revising that regulation, the DOL explicitly rejected *Vigna's* premise that a non-pulmonary

evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based upon the medical opinion evidence and in consideration of the evidence as a whole.[11] Decision and Order at 21-24. Employer contends the ALJ erred. Employer's Brief at 40, 41-46, 47-49. We disagree.

Before addressing the medical opinion evidence, the ALJ considered the exertional requirements of the Miner's usual coal mine employment. Decision and Order at 4-5, 24. The ALJ noted that during his deposition, the Miner testified his last job as a "service man" involved driving a truck around the mine to service equipment, that he worked alone, and that the job required him to load and unload supplies and change filters weighing forty to fifty pounds "when new" and ninety pounds "when used." Decision and Order at 4-5, 24; *see* Hearing Transcript at 27-31. Relying on Dr. Tuteur's description of Claimant's work as requiring "moderately heavy labor," the ALJ concluded the Miner's last usual coal mine job required moderately heavy exertion. Decision and Order at 24.

Employer argues the ALJ erred in reaching this finding because she improperly "focused on the hardest part of" the Miner's usual coal mine employment. Employer's Brief at 47-48. Contrary to Employer's argument, in evaluating the exertional requirements of a miner's usual coal mine employment, an ALJ must determine the exertional requirements of the most difficult job the miner performed. *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991). As it is supported by substantial evidence, we affirm the ALJ's finding that the Miner's usual coal mine work required moderately heavy exertion. *See Martin v. Ligon Preparation Coal Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion); Decision and Order at 24.

The ALJ next considered the opinions of Drs. Gagon, Farney, and Tuteur concerning whether the Miner had a totally disabling respiratory or pulmonary

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disability precludes entitlement. 20 C.F.R. §718.204(a); 65 Fed. Reg. 79,920, 79,923, 79,946 (Dec. 20, 2000) ("This change emphasized the Department's disagreement with [*Vigna*] . . . ."). For these reasons, we reject Employer's argument.

[11] The ALJ found the pulmonary function study and arterial blood gas study evidence does not support total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 21-22.

impairment.[12] Decision and Order at 22-24. The ALJ found their opinions support a finding of total disability when considered in their entirety. *Id.* at 24. She therefore found the medical opinion evidence supports a total disability finding. *Id.* This finding is supported by substantial evidence. *Martin*, 400 F.3d at 305.

Dr. Gagon initially opined the Miner had a "moderate/severe" lung impairment and "fairly significant" exercise hypoxemia based upon his pulmonary function study and arterial blood gas study results. Director's Exhibit 18 at 40. In a subsequent deposition, Dr. Gagon opined the Miner was not totally disabled, and instead would have been able to return to the "mild to moderate" exertion required of an equipment operator, though he acknowledged that he did not know the specific exertional requirements of the Miner's usual coal mine work. Director's Exhibit 57 at 15-18. In a supplemental report provided after his deposition, Dr. Gagon opined that the Miner was totally disabled due to "abnormalities/hypoxia noted on the [arterial blood gas study] results[.]" Director's Exhibit 43 at 2-3.

In his initial report, Dr. Farney opined the Miner was totally disabled due to exercise induced hypoxemia and possible mild restrictive chest disease. Director's Exhibit 36 at 14-15. In his two depositions, Dr. Farney opined the Miner was disabled due to a combination of respiratory impairment alongside factors such as age, obesity, and limited mobility, but that the Miner retained the respiratory capacity to perform his usual coal mining job. Director's Exhibit 59 at 10, 19-22; Employer's Exhibit 40 at 20-21. In a supplemental report, Dr. Farney stated that the Miner would "probably be able to perform most of his duties as a heavy equipment operator" based on his respiratory function, but explicitly opined that the Miner was disabled from a respiratory or pulmonary impairment in the form of exercise induced hypoxemia and "likely . . . ventilatory difficulties[.]"[13] Employer's Exhibit 8 at 17-18.

[12] The ALJ also considered the opinions of Drs. Green and Crum, but she accurately found that neither "squarely addressed the issue of total disability[.]" Decision and Order at 24; *see* Claimant's Exhibits 4 at 69-70, 9 at 8.

[13] The ALJ noted that Dr. Farney "equivocated at his depositions . . . [b]ut his testimony reflects that he . . . [c]ontinued to believe Claimant was disabled from a pulmonary or respiratory impairment, only questioning whether it was due to his gas exchange abnormalities alone." Decision and Order at 23. She therefore found Dr. Farney's opinion supports a finding of total disability overall. Decision and Order at 24. Employer does not challenge this aspect of the ALJ's finding. Thus we affirm it. *Skrack*, 6 BLR at 1-711.

Dr. Tuteur opined the Miner would not be able to return to his usual coal mine employment due to the "primary pulmonary process of [usual interstitial pneumonia (UIP),]" causing a restrictive impairment and exercise induced hypoxemia. Director's Exhibits 37 at 3-4, 59 at 158-59. At his deposition, Dr. Tuteur stated that the Miner retained the pulmonary capacity to perform his usual coal mine work "if he were working at sea level," but noted that the Miner was living "at about 6,600 to 7,000 feet in altitude[.]" Employer's Exhibit 41 at 12-13.

Employer argues the ALJ erred in failing to address whether Dr. Farney's opinion supported finding that the Miner had a compensable disability, rather than a non-compensable disability caused by the secondary effects of factors such as the Miner's age and obesity. Employer's Brief at 48-49, 52. We reject this argument, as Employer conflates the issue of the presence of a total respiratory or pulmonary impairment with the cause of that impairment. The relevant inquiry at 20 C.F.R. §718.204(b) is whether the Miner had a totally disabling respiratory or pulmonary impairment; the underlying etiology of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption. *See Bosco v. Twin Pines Coal Co.*, 892 F.3d 1473, 1480-81 (10th Cir. 1989).

As it is supported by substantial evidence,[14] we affirm the ALJ's finding that Claimant established total disability based upon the medical opinion evidence, 20 C.F.R. §718.204(b)(2)(iv), and thereby invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b); Decision and Order at 24-25.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[15] or that

[14] To the extent Employer argues the ALJ erred in assigning less weight to the opinions of Drs. Farney and Tuteur, Employer's Brief at 43-44, it has not explained how the alleged error would make a difference as the ALJ found their opinions support a finding of total disability, and her total disability finding is otherwise supported by Dr. Gagon's opinion. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Decision and Order at 24.

[15] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those

"no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not establish rebuttal by either method. Decision and Order at 31-32.

Legal Pneumoconiosis

Employer argues the ALJ erred in finding it failed to rebut the presumption of legal pneumoconiosis. We disagree. To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.305(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ weighed the opinions of Drs. Farney and Tuteur that the Miner did not have a chronic lung disease or impairment significantly related to, or substantially aggravated by, coal mine dust exposure. Decision and Order at 26-30. Substantial evidence supports her finding their opinions are unpersuasive.

Dr. Farney opined the Miner's pulmonary impairment was caused by non-specific interstitial fibrosis, or idiopathic pulmonary fibrosis (IPF), which he stated has an unknown etiology. Director's Exhibit 36 at 14; Employer's Exhibit 8 at 17. He based his diagnosis on the pattern of honeycombing fibrosis seen in the lower and middle lung zones on the Miner's chest x-rays. Director's Exhibit 36 at 14; Employer's Exhibit 8 at 17. When asked how he could exclude coal workers' pneumoconiosis as the cause of the Miner's respiratory impairment, Dr. Farney opined that the pattern of fibrosis was not characteristic of coal workers' pneumoconiosis, stating that it would be "very atypical" for the disease. Director's Exhibit 59 at 46-47; *see also* Employer's Exhibit 40 at 28, 49041. Dr. Farney also opined the Miner had a mild restrictive pulmonary impairment, though he attributed the condition to a combination of IPF and obesity. Director's Exhibits 36 at 15; 59 at 46-47.

Dr. Tuteur opined the Miner had both exercise-induced hypoxemia and a restrictive impairment caused by UIP, "an interstitial pulmonary process of unknown etiology not associated with the inhalation of coal mine dust." Director's Exhibit 37 at 5; *see also* Director's Exhibit 59 at 145, 154. He diagnosed the condition based upon the Miner's x-ray and computed tomography scan results, which he stated were consistent with UIP, but

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diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

atypical for someone with pneumoconiosis due to coal mine dust. Director's Exhibits 37 at 5; 59 at 152-56; Employer's Exhibit 41 at 22, 26-27, 29-30. He further opined that legal pneumoconiosis "clinically mimics chronic obstructive pulmonary disease[,]" and noted that the Miner did not have obstructive impairment. Director's Exhibit 59 at 155-56.

In weighing their opinions, the ALJ noted that both physicians excluded legal pneumoconiosis by focusing on and identifying the Miner's condition as UIP or IPF, meaning its cause is unknown. Decision and Order at 29. She permissibly discredited their opinions because neither physician explained why the Miner's "extensive" twenty-nine year history of coal mine dust exposure could not have been a significantly contributing or aggravating factor to the Miner's exercise-induced hypoxemia or restrictive defect, even if an idiopathic disease like UIP or IPF was also a cause.[16] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 29.

Employer generally argues the opinions of Drs. Farney and Tuteur are better reasoned and documented than the contrary opinions of Drs. Green, Crum, and Gagon that the Miner had legal pneumoconiosis. Employer's Brief at 43-47. This argument amounts to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because the ALJ permissibly discredited the opinions of Drs. Tuteur and Farney, the only opinions supportive of Employer's burden on rebuttal, we need not consider its argument that the ALJ erred in finding Drs. Gagon's, Crum's, and Green's opinions credible.[17] *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's

[16] We reject Employer's argument that an ALJ cannot rely on the preamble to the 2001 revised regulations when weighing medical opinion evidence. Employer's Brief at 40-41, 45. The Ninth Circuit has held an ALJ may rely upon the preamble when evaluating medical opinions. *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1125-27 (9th Cir. 2014). Contrary to Employer's contention, however, the ALJ did not rely upon the preamble when weighing the medical opinions or any other category of evidence.

[17] Employer argues the treatment records rebut the presumption of legal pneumoconiosis because they do not contain a diagnosis of the disease. Employer's Consolidated Reply Brief at 7-8. The ALJ rationally found, however, that the treatment records do not rebut the presumption of legal pneumoconiosis because the physicians who diagnosed lung diseases and impairments did not exclude coal mine dust exposure as a possible cause of the conditions. *See W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018) (rebuttal inquiry is "whether the employer has come forward with affirmative proof that the [miner] does not have legal pneumoconiosis, because his

Brief at 41-42, 46-47, 50. We therefore affirm the ALJ's finding Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).[18]

Disability Causation

The ALJ next considered whether Employer established "no part of the [M]iner's total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The ALJ rationally discredited the disability causation opinions of Drs. Farney and Tuteur because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 32.

As it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's total disability was due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

impairment is not in fact significantly related to his years of coal mine employment"); Decision and Order at 30-31.

[18] We thus need not consider Employer's contention that the ALJ erred in evaluating whether it disproved the existence of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 46.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring.

I concur in result only.

JUDITH S. BOGGS
Administrative Appeals Judge