U.S. Department of Labor

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

BRB Nos. 23-0026 BLA-A
and 23-0027 BLA-A

CAROL A. KEEN (Survivor and o/b/o of ROGER L. KEEN) Claimant-Petitioner/ Cross-Respondent v. DOMINION COAL CORPORATION Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest/ Cross-Petitioner	)	DATE ISSUED: 05/03/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Carol A. Keen, Cedar Bluff, Virginia.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, 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: GRESH, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BOGGS, Administrative Appeals Judge:

Claimant[1] appeals, without representation,[2] and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Denying Benefits (2017-BLA-05317 and 2017-BLA-06139) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on May 28, 2010,[3] and a survivor's claim filed on October 5, 2016.

The ALJ credited the Miner with 6.65 years of coal mine employment and thus found Claimant could not invoke the presumption of total disability or death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[4] Considering entitlement under 20 C.F.R. Part 718 in the miner's claim, the ALJ found Claimant did not establish the Miner had clinical or legal pneumoconiosis.[5] Accordingly,

[1] The Miner died on September 17, 2016. Miner's Claim (MC) Director's Exhibit 43. The Miner's widow, Carol A. Keen, is pursuing the miner's claim on his behalf along with her own survivor's claim. Claimant's Exhibit 3; Survivor's Claim (SC) Director's Exhibit 2.

[2] On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the ALJ's decision, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude v. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] The Miner filed one prior claim on January 8, 1996, which the district director denied as abandoned. Director's Exhibit 1 at 13-14. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

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

[5] Clinical pneumoconiosis consists of "those 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). Legal pneumoconiosis "includes any chronic lung disease or impairment

she found Claimant did not establish a change in an applicable condition of entitlement and denied benefits in the miner's claim.[6] 20 C.F.R. §§718.202(a), 718.204(b)(2).

In the survivor's claim, the ALJ found Claimant was not automatically entitled to derivative benefits under Section 422(*l*) of the Act,[7] as the ALJ denied the miner's claim. 30 U.S.C. §932(*l*) (2018). Moreover, she found Claimant could not establish entitlement to survivor's benefits under 20 C.F.R. Part 718, as the record contains no evidence that the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b). The ALJ therefore denied benefits in the survivor's claim.

On appeal, Claimant generally challenges the ALJ's denial of benefits in both claims. Neither Employer nor the Director has filed a response brief. On cross-appeal, the Director contends the ALJ erred in finding Employer is not the responsible operator and asserts the Board should vacate that finding if it vacates the denial of benefits in the miner's or survivor's claim. Neither Claimant nor Employer responded to the Director's cross-appeal.

In an appeal a claimant files without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the ALJ's Decision and Order if it is rational,

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and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses "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).

[6] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the district director denied the Miner's prior claim by reason of abandonment, Claimant had to submit evidence establishing at least one element of entitlement to obtain review of the merits of the current claim. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309; MC Director's Exhibit 2.

[7] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of the miner's death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

supported by substantial evidence, and in accordance with applicable law.[8] 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).

Length of Coal Mine Employment

Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The dates and length of employment may be established by any credible evidence, and the Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986). The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003).[9]

On his first application for benefits, the Miner alleged ten years of coal mine employment between 1961 and 1984. Miner's Claim (MC) Director's Exhibit 1. In his

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 4.

[9] Although our colleague would apply the rationale of the decision of the United Staes Court of Appeals for the Sixth Circuit in *Shepherd v. Incoal, Inc*., 915 F.3d 392 (6th Cir. 2019), this case arises in the Fourth Circuit, which has not adopted *Shepherd* or otherwise held that 125 days of earnings establishes a year-long employment relationship. To credit a miner with a year of coal mine employment in the Fourth Circuit, the Board has long interpreted Fourth Circuit case law as supporting the position the ALJ must first determine whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (recognizing the 2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark v. Barnwell Coal Co*., 22 BLR 1-277, 1-280 (2003).

current claim, he alleged eleven years of employment between 1961 and 1984. MC Director's Exhibit 3. Employer conceded to 7.19 years of coal mine employment, consistent with the district director's finding. MC Director's Exhibit 22; Employer's Closing Arguments at 3. However, after reviewing the evidence, the ALJ found Claimant established only 6.65 years of coal mine employment. Decision and Order at 8-10.

In determining the length of the Miner's coal mine employment, the ALJ considered his testimony, employment history form (CM-911a), Social Security Administration (SSA) earnings record, pay stubs, W-2 forms, and Employer's personnel records. Decision and Order at 9. Based on our review of the record, we conclude substantial evidence supports the ALJ's determination that the Miner worked for less than ten years in coal mine employment.

The Miner stated on his CM-911a form that he worked in coal mine employment for a variety of employers from 1961 to 1965, although he was unsure of the dates.[10] MC Director's Exhibit 4. However, his SSA earnings record reflected only $54.40 in earnings from Richlands Red Ash Coal Company (Red Ash) in the first quarter of 1962, and other earnings from non-coal mine employment from 1961 to 1965.[11] MC Director's Exhibit 8. At his deposition, he testified that in 1961 he and his brother contracted with Red Ash to "get the mines ready to run," but that he didn't know how long he worked there. MC Director's Exhibit 17 (Deposition at 51). However, he subsequently agreed that a three-month period of work seemed correct, given that his SSA earnings record shows income from Red Ash during only one quarter. *Id.* He did not testify as to any of the other coal mine employment reflected on his CM-911a form that was not reflected on his SSA earnings record. The ALJ permissibly found the Miner's SSA earnings record to be more reliable than the Miner's unsubstantiated report of coal mine employment from 1961 to 1965. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); Decision

[10] The Miner reported on his claim forms that he and his brother leased and worked at a coal mine from 1961 to 1962, and that he worked in coal mine employment for Jake Huffman from 1962 to 1963, Hubert Proffit from 1963 to 1964, and Ted Sparks from 1964 to 1965. MC Director's Exhibits 1, 4.

[11] From 1961 to 1965, the Miner earned income from Wilburt R. Snyder, Rockland Drive in Theater, Inc., Crescent Ribbon Mills, Inc., Formed Container Corporation, Rocko Cut Stone Co., Technical Material Corp., Siemens Realty Co., MRW Siemens Electric Corp., CC Selfe Taxi & Bus Co., Grant Pulley & Hardware Corp., and Glenshaw Glass Co., Inc. MC Director's Exhibit 8. He subsequently testified that none of this work was coal mine employment. MC Director's Exhibit 17.

and Order at 9. Thus, for the period of 1961 to 1965, she rationally credited the Miner with coal mine employment only in 1961 for Red Ash. Decision and Order at 10.

For the years prior to 1978, where there was no evidence of the exact dates of employment, the ALJ permissibly credited the Miner with a quarter of a year of coal mine employment for each quarter in which his SSA earnings record indicated he earned at least $50.00 from coal mine operators, except for the year 1977.[12] *See Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984); Decision and Order at 9-10. Using this method of calculation, the ALJ permissibly credited the Miner with 0.25 years of coal mine employment in 1962 for Red Ash and 0.75 years of coal mine employment in 1976 for Raven Smokeless Coal Company (Raven Smokeless) for a total of one year of coal mine employment. *See Tackett*, 6 BLR at 1-841; Decision and Order at 10.

Dominion Energy reported that the Miner worked for it continuously from February 11, 1977 to May 5, 1982. MC Director's Exhibit 6. As the ALJ had the exact dates of the Miner's coal mine employment for that period, she reasonably credited him with 5.23 years of employment with Dominion.[13] *Muncy*, 25 BLR at 1-27; *Vickery*, 8 BLR at 1-432; 20 C.F.R. §725.101(a)(32)(ii); Decision and Order at 10.

The ALJ further found that she could not determine the beginning and ending dates of the Miner's employment with Raven Smokeless in 1977 and for Raven Coal Company, Inc. in 1982. Decision and Order at 10. For those years, the ALJ referenced the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine the length of the Miner's coal mine

[12] In 1977, Claimant received more than $50 from Raven Smokeless for the first quarter. MC Director's Exhibit 88. However, he also was employed by Dominion Energy from February 11, 1977 to December 31, 1977. MC Director's Exhibit 6. To determine how long Claimant worked for Raven Smokeless prior to February 11, 1977, the ALJ used a different method of calculation, as discussed below. Decision and Order at 10. Based on these methods of calculation, Claimant was credited with a combined 0.99 years of coal mine employment in 1977 for Raven Smokeless and Dominion Energy. *Id.*

[13] Because the Miner worked for Dominion Coal continuously from 1977 to 1982, the ALJ credited him with full years of employment from 1978 to 1981. Decision and Order at 10; MC Director's Exhibit 6. Because the Miner worked for Dominion in 1977 from February 11 to December 31, the ALJ credited him with 323 days, or 0.89 years, of coal mine employment in 1977. *Id.* Because the Miner worked for Dominion in 1982 from January 1 to May 5, the ALJ credited him with 124 days, or 0.34 years, of coal mine employment in 1982. *Id.*

employment.[14] *Id*. at 10. Based on this calculation, the ALJ credited the Miner with an additional 0.42 years of coal mine employment (0.11 years in 1977 and 0.31 years in 1982), for a total of 6.65 years of coal mine employment.[15] *Id*.

As the ALJ's length of coal mine employment calculation is based on a reasonable method of calculation and is supported by substantial evidence, we affirm her finding that Claimant established less than ten years of coal mine employment. *See Muncy*, 25 BLR at 1-27; Decision and Order at 10.

The Miner's Claim - Entitlement under 20 C.F.R. Part 718

Without the Section 411(c)(3)[16] and (c)(4) presumptions,[17] Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment);

[14] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may divide the miner's annual earnings by the average daily earnings for that year for a coal miner as reported by the Bureau of Labor Statistics. 20 C.F.R. §725.101(a)(32)(iii).

[15] The ALJ's use of a 365-day work year to determine the Miner's length of employment in 1977 and 1982 may underestimate the Miner's work history. However, even considering a 125-day work year (which would be too short for purposes of establishing a calendar year of employment), Claimant would at most be able to establish only 7.402 years (0.256 years of coal mine employment in 1977 and 0.912 years in 1982). *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Thus, any error in the ALJ's calculations would be harmless as Claimant still would not have the required length of coal mine employment to invoke the presumptions at 20 C.F.R. §718.203(b) or at 20 C.F.R. §718.305(b). *See Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249 (6th Cir. 1995) ("If the outcome of a remand is foreordained, we need not order one."); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[16] The ALJ accurately determined there are no x-rays positive for complicated pneumoconiosis, Decision and Order at 17, and there is no other evidence that would support a diagnosis of a large opacity or massive lesion. Thus, Claimant cannot invoke the irrebuttable presumption of total disability or death due to pneumoconiosis found at Section 411(c)(3) the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[17] As Claimant established less than fifteen years of coal mine employment, the ALJ accurately determined Claimant cannot invoke the rebuttable presumption of total disability due to pneumoconiosis found at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305; Decision Order at 17.

disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). The ALJ found Claimant failed to establish either clinical or legal pneumoconiosis in the miner's claim, and therefore denied benefits.[18] 20 C.F.R. §718.202(a); Decision and Order at 19.

Clinical Pneumoconiosis

X-ray Evidence

The ALJ considered eight interpretations of three x-rays dated October 8, 2009, July 12, 2010, and February 21, 2011. Decision and Order at 16. All the interpreting physicians are dually qualified as B readers and Board-certified radiologists except Dr. Forehand, who is a B reader. *Id.*

Dr. Miller read the October 8, 2009 x-ray as positive for simple pneumoconiosis, while Dr. Meyer read it as negative for pneumoconiosis. MC Director's Exhibit 13 at 1; 17 at 141. Drs. Forehand and Ahmed read the July 12, 2010 x-ray as positive for simple pneumoconiosis, while Drs. Scott and Meyer read it as negative for the disease. MC Director's Exhibits 12 at 5, 14 at 10, 17 at 323; Claimant's Exhibit 1. Dr. Miller read the February 21, 2011 x-ray as positive for pneumoconiosis, while Dr. Meyer read it as negative for pneumoconiosis. MC Director's Exhibits 13 at 10; 17 at 139.

The ALJ permissibly found the readings of the x-rays in equipoise because an equal number of similarly qualified readers interpreted each x-ray as positive and negative for pneumoconiosis. Decision and Order at 16; *see Director, OWCP v. Greenwich Collieries*

[18] Before addressing the ALJ's findings, we note that the parties designated the same medical evidence for consideration in both the miner's and survivor's claims. Claimant's Evidence Summary Form in the Miner's Claim; Claimant's Evidence Summary Form in the Survivor's Claim; Employer's Evidence Summary Form in the Miner's Claim; Employer's Evidence Summary Form in the Survivor's Claim. As we explain in greater detail below, we refer to medical evidence with a survivor's claim exhibit number when discussing the ALJ's findings that Claimant did not establish the existence of pneumoconiosis in the miner's claim, for while the ALJ did not consider that exhibit in the miner's claim, she nevertheless considered it on the same issue in the survivor's claim.

[*Ondecko*], 512 U.S. 267, 281 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992).

Medical Opinion Evidence

The ALJ further considered the medical opinion of Dr. Forehand, who conducted the Department of Labor (DOL) complete pulmonary evaluation of the Miner on July 12, 2010, and diagnosed him with clinical coal workers' pneumoconiosis. MC Director's Exhibit 12 at 20. The ALJ permissibly found his initial diagnosis of clinical pneumoconiosis unpersuasive, as he primarily relied upon his own reading that the July 12, 2010 x-ray was positive for pneumoconiosis, while the ALJ found the readings of the x-ray were in equipoise and therefore insufficient to establish the disease. Decision and Order at 18; *see Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (en banc) (reliability of a physician's opinion may be "called into question" when the diagnostic tests upon which the physician based his diagnosis have been undermined); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984).

While Dr. Forehand indicated in a supplemental April 30, 2018 opinion that the Miner's medical records show findings consistent with clinical pneumoconiosis, the ALJ permissibly found his opinion unpersuasive as it was unclear what films he was relying on in making his diagnosis or otherwise explain his diagnosis.[19] *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 23-24.

Finally, the ALJ considered the Miner's treatment records with Tazewell Hospital, which included x-rays and CT scans. Decision and Order at 18; MC Director's Exhibit 13. The ALJ permissibly found that, while the records chronicle the Miner's treatment for various pulmonary diseases, "they do not rise to the level of being well-reasoned or documented medical opinions" and the physicians' credentials are not in the record. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012);

[19] Although the ALJ did not specifically consider Dr. Forehand's supplemental April 30, 2018 report in conjunction with the miner's claim, despite Claimant's designation of the report in both the miner's claim and the survivor's claim, she did consider the report when determining Claimant did not establish clinical pneumoconiosis in the survivor's claim. Decision and Order at 23; Claimant's Evidence Summary Form in the Miner's Claim at 5-6. As the ALJ's reasons for crediting or discrediting this medical opinion on clinical pneumoconiosis in the survivor's claim are equally applicable to the miner's claim, any error is harmless. *See Webb*, 49 F.3d at 249; *Larioni*, 6 BLR at 1-1278.

Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 18.

The ALJ also considered the Miner's treatment records from Dr. Jawad, Stone Mountain Health Services, and Clinch Valley Medical Center. Decision and Order at 23. The ALJ permissibly found that, although the records contained diagnoses of coal workers' pneumoconiosis alongside other pulmonary diseases, the physicians did not adequately document their diagnoses.[20] *Looney*, 678 F.3d at 316-17; *Clark*, 12 BLR at 1-155; Decision and Order at 23.

We note that the ALJ failed to consider the treatment records from Lewis Gale Medical Center, which Employer submitted and designated as evidence in the miner's claim. MC Director's Exhibit 17; Employer's Evidence Summary Form in the Miner's Claim at 8. However, while these records note a diagnosis of "black lung," the basis for the diagnosis is not specified. MC Director's Exhibit 17. Thus, like the Miner's other treatment records that the ALJ weighed, they do not contain a documented diagnosis of pneumoconiosis and thus any error in not considering them is harmless. *See Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249 (6th Cir. 1995) ("If the outcome of a remand is foreordained, we need not order one."); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Consequently, because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant failed to establish clinical pneumoconiosis in the miner's claim. 20 C.F.R. §718.201(a)(1)-(4);[21] Decision and Order at 16.

[20] The ALJ erred in only considering the Miner's treatment records from Carilion Tazewell Community Hospital in the miner's claim, when the parties designated his other treatment records in their evidence summary forms in the miner's claim. Claimant's Evidence Summary Form in the Miner's Claim at 8-9; Employer's Evidence Summary Form in the Miner's Claim at 8. However, any error is harmless as the ALJ did consider those additional treatment records in the survivor's claim and permissibly found they did not establish clinical pneumoconiosis as they did not adequately document their diagnoses and the same reasoning would apply in both claims. *Webb*, 49 F.3d at 249; *Larioni*, 6 BLR at 1-1278.

[21] As there is no biopsy or autopsy evidence, Claimant cannot establish pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 20.

Legal Pneumoconiosis

"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). To establish legal pneumoconiosis, Claimant must prove that the Miner had a "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).

The ALJ weighed the opinions of Drs. Forehand,[22] Vuskovich, and Tuteur.[23] Decision and Order at 23-25.[24] Dr. Forehand opined the Miner had legal pneumoconiosis in the form of an exercise-induced oxygen exchange impairment due "primarily" to his coal mine dust exposure. MC Director's Exhibit 12; Claimant's Exhibit 2. Dr. Vuskovich opined the Miner did not have legal pneumoconiosis, but instead had smoking-induced[25]

[22] Although the ALJ failed to consider Dr. Forehand's April 30, 2018 report and Dr. Rhinehart's September 29, 2016 report in conjunction with the miner's claim, despite Claimant's designation of both reports in both the miner's and the survivor's claims, she did consider this evidence when determining Claimant did not establish legal pneumoconiosis in the survivor's claim. Decision and Order at 43; Claimant's Evidence Summary Form in the Miner's Claim at 5-6. As the ALJ's reasons for crediting or discrediting the medical opinions on legal pneumoconiosis in the survivor's claim are equally applicable to the miner's claim, any error is harmless. *Webb*, 49 F.3d at 249; *Larioni*, 6 BLR at 1-1278.

[23] The ALJ reasonably found Dr. Rinehart did not offer an opinion on the existence of legal or clinical pneumoconiosis. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 23; SC Director's Exhibit 11 at 38.

[24] The ALJ also failed to consider the opinions of Drs. Vuskovich and Tuteur in the miner's claim, although Employer designated them as its affirmative evidence in both the miner's claim and the survivor's claim. Employer's Evidence Summary Form in the Miner's Claim at 5. But again, the ALJ nevertheless did consider their opinions in the survivor's claim and the same reasoning applies in both claims. *Webb*, 49 F.3d at 249; *Larioni*, 6 BLR at 1-1278. Thus, we address the ALJ's consideration of that evidence as to both the miner's claim and the survivor's claim. Moreover, Claimant bears the burden of establishing legal pneumoconiosis and neither physician diagnosed the disease.

[25] The ALJ permissibly found the Miner smoked about 0.75 packs of cigarettes per day for forty-four years, or approximately a total of thirty-three pack-years based on his statements to physicians and as reported in his treatment records. *See Harman Mining Co.*

"pulmonary Langerhans cell histiocytosis (PLCH)," a disease of the lungs characterized by the development of nodular interstitial fibrosis in the upper lungs, cystic bronchiectasis, and the development of cysts. SC Director's Exhibit 41 at 75. Dr. Tuteur opined that the Miner suffered from an oxygen gas exchange impairment due to advanced heart disease. *Id.* at 91.

The ALJ found Dr. Forehand's opinion was not persuasive in light of the Miner's personal history, work experience, and medical history. Decision and Order at 24. She found Dr. Vuskovich provided a "more credible" explanation for the cause of the Miner's impairment. *Id.* Further, she found Dr. Tuteur offered a well-reasoned and documented opinion that was supported by Dr. Vuskovich's opinion, and therefore found Claimant failed to establish the Miner had legal pneumoconiosis. *Id.* For the following reasons, we affirm the ALJ's permissible findings.

Dr. Forehand opined in his July 12, 2010 report that the Miner had a totally disabling gas exchange impairment due to coal dust exposure based on his work history, abnormal breathing and abnormal exercise arterial blood gas study, and the lack of "evidence of cigarette smoking related lung disease or cardiovascular disease." MC Director's Exhibit 12 at 21. Because Dr. Forehand had relied on fourteen years of coal mine employment in his initial report, which was contrary to the district director's finding, he provided a supplemental report on December 21, 2010, reiterating his opinion that the Miner was totally disabled due to coal dust exposure because a respiratory impairment "can and will develop . . . with as little as seven years coal mine dust exposure." *Id.* at 1.

After his DOL complete pulmonary examination of the Miner, Dr. Forehand began treating him "from time to time for ongoing complaints of shortness of breath," and offered a supplemental April 30, 2018 opinion regarding the Miner's condition. Claimant's Exhibit 2. In this report, Dr. Forehand excluded cigarette smoke-related lung disease as a possible cause for the Miner's impairment because the Miner had a gas exchange impairment but no ventilatory impairment, and excluded cardiac disease because the Miner's resting pO2 on blood gas testing was relatively normal compared to his exercise pO2. *Id.* at 1-2. He further noted a September 19, 2014 pulmonary function study and May 8, 2015 arterial blood gas study reflected the same pattern of impairment as his 2010 examination. He opined that if heart disease or smoke-related lung disease caused the

v. Director, OWCP [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985) (ALJ is responsible for making a factual determination as to the length and extent of a miner's smoking history); Decision and Order at 14.

Miner's disability, "his ventilatory study and lung volume studies would have been abnormal" and "the change in pO2 with exercise would no longer be present." *Id.* at 2-3.

Dr. Vuskovich diagnosed the Miner with PLCH, a smoking-related lung disease of the upper lung zones, as well as heart disease based on his review of the record and medical literature. SC Director's Exhibit 41 at 75-81. He described PLCH as being associated with shortness of breath, nodules and cysts, pulmonary interstitial fibrosis, and pulmonary hypertension as reflected in the Miner's medical history. *Id.* Specifically, Dr. Vuskovich explained PLCH destroys pulmonary blood vessels which significantly degrades pulmonary oxygen transfer while maintaining the Miner's normal ventilatory capacity. He attributed the Miner's respiratory impairment entirely to PLCH and severe congestive heart failure with valvular heart disease. *Id.* He opined the Miner's lower pO2 during exercise on blood gas testing compared to rest is most consistent with pulmonary vascular disease. *Id.* at 79. Further, he opined coal mine dust exposure did not significantly contribute to, or substantially aggravate, the Miner's impairment. *Id.* at 130.

Dr. Tuteur reviewed the Miner's medical records and opined he developed dilated ischemic cardiomyopathy which manifested as recurrent episodes of congestive heart failure.[26] SC Director's Exhibit 41 at 92, 99-100. He opined the chest x-rays demonstrated the Miner's waxing and waning congestive heart failure through the increasing and decreasing of fluid in the interstitial space in the lungs, which he opined was complicated by significant chronic obstructive pulmonary disease (COPD). *Id.* at 100. While acknowledging the absence of a ventilatory impairment in the form of significant airway obstruction, he noted an oxygen exchange impairment that worsened during exercise, "a typical finding of advanced heart disease." *Id.* at 92.

It is within the ALJ's discretion to draw inferences from the evidence and determine the weight to accord the medical opinions. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319 (4th Cir. 2013); *Anderson*, 12 BLR at 1-113 (Board is not empowered to reweigh the evidence). Here, the ALJ found Dr. Forehand's conclusion, that the Miner's seven years of coal mine employment was the cause of his impairment, inadequately explained. Decision and Order at 18, 24. The ALJ permissibly found Dr. Vuskovich's diagnoses of smoking-related PLCH and heart disease more plausibly explained the cause of the Miner's impairment, noting that although the physician relied on an "extremely high" smoking

[26] Dr. Tuteur explained ischemic cardiomyopathy turns the heart muscle necrotic, fibrotic, and dysfunctional. SC Director's Exhibit 41 at 99-100. He described the Miner's cardiac impairment as "a very severe condition" producing chronic shortness of breath and reduced systolic ejection fractions of twenty to twenty-five percent compared to the normal amount of sixty-five to seventy-five percent. *Id.* at 100.

history, his opinion was still "well supported by the medical studies he relied on." *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 24. Similarly, the ALJ permissibly found that Dr. Tuteur persuasively explained how cigarette smoking and the progression of cardiac disease likely caused radiographic abnormalities and the Miner's respiratory impairment given his relative histories of coal dust exposure and smoking. *Id.* She further found Dr. Tuteur's opinion well-reasoned and well-documented and accorded it full probative weight. *Id.*

Finally, the ALJ considered the Miner's treatment records. She accurately noted that the treatment records from Tazewell Hospital Center included diagnoses of COPD, emphysema, and a number of other pulmonary conditions and symptoms. Decision and Order at 18; MC Director's Exhibit 13. The ALJ again permissibly found that while the records chronicle the Miner's treatment for various pulmonary diseases, "they do not rise to the level of being well-reasoned or documented medical opinions" and the physicians' credentials are not in the record. *See Looney*, 678 F.3d at 316-17; *Clark*, 12 BLR at 1-155; Decision and Order at 18.

The ALJ also considered the Miner's treatment records from Dr. Jawad, Stone Mountain Health Services, and Clinch Valley Medical Center. Decision and Order at 23. The ALJ permissibly found that, although the records contained diagnoses of pulmonary diseases, the physicians did not adequately document their diagnoses or explain how they linked his pulmonary conditions to his coal mine employment.[27] *Looney*, 678 F.3d at 316-17; *Clark*, 12 BLR at 1-155; Decision and Order at 23. The ALJ again failed to consider the treatment records from Lewis Gale Medical Center that Employer submitted and designated as evidence in the miner's claim. MC Director's Exhibit 17; Employer's Evidence Summary Form in the Miner's Claim at 8. However, while these records note a diagnosis of "black lung" at times, the basis for the diagnosis is not explained. MC Director's Exhibit 17. Thus, like the Miner's other treatment records that the ALJ weighed, they do not contain a documented diagnosis of legal pneumoconiosis and any error in considering them is harmless. *See Webb*, 49 F.3d at 249; *Larioni*, 6 BLR at 1-1278.

[27] The ALJ erred in only considering the Miner's treatment records from Carilion Tazewell Community Hospital in the miner's claim, when the parties designated the Miner's other treatment records in their evidence summary forms in the miner's claim. Claimant's Evidence Summary Form in the Miner's Claim at 8-9; Employer's Evidence Summary Form in the Miner's Claim at 8. However, any error is harmless as he did consider them in the survivor's claim and permissibly found they did not establish legal pneumoconiosis, and the same reasoning would apply in both claims. *Webb*, 49 F.3d at 249; *Larioni*, 6 BLR at 1-1278.

Claimant has the burden of establishing entitlement to benefits and bears the risk of non-persuasion if the evidence is found insufficient to establish a required element of entitlement. *Ondecko*, 512 U.S. at 281; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Because it is supported by substantial evidence, we affirm the ALJ's determination that Claimant did not establish the Miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 20-21.

As Claimant failed to establish clinical or legal pneumoconiosis, an essential element of entitlement, we affirm the ALJ's denial of benefits in the miner's claim.

Entitlement Under 20 C.F.R. Part 718 (Survivor's Claim)

Because we affirm the denial of benefits in the miner's claim, we affirm the ALJ's finding that Claimant is not entitled to derivative survivor's benefits under Section 422(*l*) of the Act. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 19-20. In a survivor's claim where no statutory presumptions are invoked,[28] Claimant must establish the Miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(b)(1), (2). The ALJ accurately found there is no evidence in the record linking the Miner's death to pneumoconiosis. Decision and Order at 25 n.18. We therefore affirm the ALJ's finding that the medical evidence does not establish that the Miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b) and the denial of benefits in the survivor's claim.[29] *Id*.

[28] We affirm the ALJ's determination that the presumptions at Sections 411(c)(3) and (4) of the Act, 30 U.S.C. §921(c)(3), (4), are not applicable because there is no evidence establishing the presence of complicated pneumoconiosis and Claimant did not establish the Miner had at least fifteen years of underground coal mine employment. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305; Decision and Order at 25.

[29] On cross-appeal, the Director sets forth multiple arguments regarding the ALJ's responsible operator determination, in the event the denial of benefits is vacated. Director's Brief at 5-7. Because we affirm the denial of benefits, we need not address the Director's cross-appeal.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits in the miner's and the survivor's claims.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring:

I concur in the majority's decision but write separately to address two problematic findings in the ALJ's decision.

First, for the reasons I explained in *Baldwin v. Island Creek Kentucky Mining*, BRB No. 21-0547 BLA, 2023 WL 5348588, at *5-8 (July 14, 2023) (Buzzard, J., concurring and dissenting), a miner is entitled to credit for a full year of coal mine employment "for all purposes under the Act" if he establishes 125 "working days" in a given year. Thus, the ALJ erred in holding that the Miner was required to establish full 365-day employment relationships with his employers in 1977 through 1982, before he could be credited with a "year" of coal mine employment in each of those calendar years. Decision and Order at 10; *see Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019); *Landes v. OWCP*, 997 F.2d 1192 (7th Cir. 1993). The error was harmless, however, because 1982 is the only year she undercounted, and the difference between being credited with one full year of coal mine employment and the ALJ's finding of .65 years does not enable Claimant to invoke the Section 411(c)(4) presumption or otherwise warrant overturning the ALJ's decision. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Second, the ALJ erred in finding that aspects of Dr. Forehand's opinion "do[] not address the link between impairment and dust exposure that is needed for a diagnosis of legal pneumoconiosis." Decision and Order at 18. Contrary to the ALJ's finding, a medical opinion that attributes a miner's impairment "in part" to coal mine dust exposure is sufficient to meet the regulatory definition of legal pneumoconiosis. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657 (6th Cir. 2015). Thus, Dr. Forehand's statement that the Miner's totally disabling respiratory impairment arose "in part" from his

coal mine dust exposure does identify the link needed for a diagnosis of legal pneumoconiosis. But this error, too, was harmless, because the ALJ otherwise considered the entirety of Dr. Forehand's explanations for diagnosing legal pneumoconiosis and, as the majority holds, provided permissible reasons for finding the physician's opinion unpersuasive. Decision and Order at 18, 24; *see Larioni*, 6 BLR at 1-1278; *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

I therefore concur.

GREG J. BUZZARD
Administrative Appeals Judge