U.S. Department of Labor

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

BRB Nos. 23-0221 BLA
and 23-0223 BLA

ANNA C. FERRELL (o/b/o and Widow of HARRY F. FERRELL) Claimant-Respondent v. APOGEE COAL COMPANY and ARCH RESOURCES Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/05/2024 DECISION and ORDER

Appeal of the Decisions and Orders Awarding Benefits of Patricia J. Daum, Administrative Law Judge, United States Department of Labor.

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

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Amanda Torres (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman 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: GRESH, Chief Administrative Appeals Judge, BUZZARD, and JONES, Administrative Appeals Judges.

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Patricia J. Daum's Decisions and Orders Awarding Benefits (2018-BLA-06032 and 2019-BLA-05924) 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 claim filed on September 9, 2015, and a survivor's claim filed on August 1, 2018.

The ALJ found Apogee Coal Company (Apogee) is the responsible operator and Arch Coal Company, Incorporated (Arch)[1] is the responsible carrier. She credited the Miner with 22.18 years of surface coal mine employment in conditions substantially similar to those in an underground mine and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant[2] invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] She further found Employer did not rebut the presumption and awarded benefits. Based on the award of benefits in the miner's claim, the ALJ determined

[1] Employer indicates in its appeal to the Board that the carrier is now Arch Resources. Petition for Review and Brief at 1.

[2] Claimant is the widow of the Miner, who died on August 1, 2018. Survivor's Claim (SC) Director's Exhibit 5. She is pursuing the Miner's claim on behalf of his estate as well as her own survivor's claim. SC Director's Exhibit 3.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis or his 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

in a separate Decision and Order that Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[4]

On appeal, Employer argues the ALJ erred in finding Arch is the liable carrier. In addition, it asserts the ALJ erred in denying its request to obtain discovery from the Department of Labor (DOL) regarding the scientific bases for the preamble to the 2001 regulatory revisions, and in admitting Dr. Silman's supplemental medical report under the DOL's pilot program for obtaining such reports from physicians who perform DOL-sponsored complete pulmonary evaluations. On the merits, Employer contends the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. It also contends she erred in finding it did not rebut the presumption.[5]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's challenge to the DOL's pilot program and to affirm the ALJ's determination that Arch is liable for benefits. Employer replied to Claimant's and the Director's briefs, reiterating its contentions. The Director filed a surresponse addressing Employer's reply.[6]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

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[4] Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his 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).

[5] We affirm, as unchallenged on appeal, the ALJ's determination that the Miner had a totally disabling respiratory impairment. *See Skrack v Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 35.

[6] On October 20, 2023, the Director filed a motion asking the Board to accept his surresponse to address Employer's "mischaracterizations" about his response brief. As no party has objected to the Director's motion, it is granted. 20 C.F.R. §802.215.

[7] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner performed his last coal mine employment in West Virginia. *See*

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Apogee is the correct responsible operator, and it was self-insured by Arch on the last day Apogee employed the Miner; thus, we affirm these findings.[8] *See Skrack v Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 11-18. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (Trust Fund). Employer's Brief at 17-37.

In 2005, after the Miner ceased his employment with Apogee, Arch sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Employer's Brief at 5; Director's Brief at 2. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Brief at 2; Employer's Brief at 5. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Apogee, Patriot later went bankrupt and can no longer provide for those benefits. Director's Brief at 2. Nothing, however, relieved Arch of liability for paying benefits to miners last employed by Apogee when Arch owned and provided self-insurance to that company. Decision and Order at 13-18.

Employer raises several arguments to support its contention that Arch was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Arch, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 17-37. It argues the ALJ erred in finding Arch liable for benefits because: (1) no evidence establishes Arch's self-insurance covered Apogee for this claim;

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim (MC) Director's Exhibit 3.

[8] Employer argues there is no insurance policy or self-insurance agreement establishing Arch's liability. Employer's Brief at 17-21. However, the Notice of Claim specifically identifies Arch as Apogee's insurance carrier, MC Director's Exhibit 29, and moreover, Employer's other arguments tend to acknowledge that Arch was the self-insurer of Apogee at the time of the Miner's last date of employment with Apogee. *See, e.g.*, Employer's Brief at 5-6, 17-18, 21-22 (framing the DOL's decision to name Arch liable instead of Patriot Coal Corporation (Patriot) as involving a choice between Apogee's last insurer (Patriot) or its insurer on the date of the Miner's last exposure to coal mine dust (Arch) and arguing that Arch sold its liabilities to Magnum Coal when it sold Apogee to it); *see also* Employer's Closing Arguments at 17-18.

(2) without proof of coverage, the DOL improperly pierced Arch's corporate veil in holding it liable; (3) the ALJ treated Arch as a commercial insurer under the regulations rather than a self-insurer; (4) retroactive application of the policy reflected in Black Lung Benefits Act (BLBA) Bulletin No. 16-01[9] imposes new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the Administrative Procedure Act (APA);[10] and (5) the ALJ erred in denying Arch discovery to establish BLBA Bulletin No. 16-01 was an arbitrary and capricious change in policy.[11] *Id.*

The Board has previously considered and rejected similar arguments under the same material facts in *Bailey v. E. Assoc. Coal Co.*, 25 BLR 1-323 (2022) (en banc); *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-308-18 (2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments in this case. Thus, we affirm the ALJ's determination that Apogee and Arch are the responsible operator and carrier, respectively, and are liable for this claim.

Evidentiary Issue – Order Denying Discovery Regarding the Preamble

While the case was pending before the ALJ, Employer sought discovery from the DOL to identify the drafters of the preamble to the 2001 revised regulations, provide copies of the scientific literature or studies the DOL relied upon to support the preamble, and

[9] The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum the DOL issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

[10] Employer argues the DOL's policy is a retroactive change that amounts to an unlawful taking of its property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 29-30. As the Director correctly points out, requiring Employer to satisfy its liability under the Act by paying benefits does not constitute an unconstitutional taking of property. Director's Brief at 6 (citing *W. Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011) ("the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause")).

[11] Employer argues that the regulations' restrictions on the submission of liability evidence, the Department of Labor's adoption of Bulletin 16-01, or both, divest the ALJ of her "powers, duties, and responsibilities" and thus render the district director an inferior officer not properly appointed under the Appointments Clause. Employer's Brief at 37-38. As Employer has offered no explanation or argument to support this assertion, we decline to address it as inadequately briefed. *See Cox v. Benefits Review Bd.*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

admissions concerning the definition of certain terms used in the preamble. March 29, 2021 Order Granting Motion for Protective Order at 2. In response, the Director moved for a Protective Order barring the requested discovery. The ALJ granted the Director's motion, finding Employer's discovery request would not lead to evidence relevant to adjudication of the present claim or to relevant information regarding the DOL's deliberative process or the science underlying the 2001 revised regulations that was not already set forth in the preamble. March 29, 2021 Order at 3-5.

Because ALJs exercise broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Employer has not met its burden.

Employer argues that it was entitled to discovery because, it alleges, the preamble has become a de facto rule, and the deliberative process privilege is inapplicable in this case. Employer's Brief at 44-45. Contrary to Employer's assertion, several federal circuits, including the Fourth Circuit, whose law applies to this claim, have held ALJs may permissibly evaluate expert opinions in conjunction with the preamble to the revised 2001 regulations, as it sets forth the Department's resolution of questions of scientific fact relevant to the elements of entitlement. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314 (4th Cir. 2012); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). The ALJ in this case did not even rely on the preamble to evaluate the medical opinion evidence; thus, Employer has not shown how its discovery request would make a difference. *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"). Regardless, given the ALJ's unchallenged finding that Employer's discovery requests were either redundant of information already in the public record or unlikely to lead to admissible or relevant evidence, Employer has not established she abused her discretion in denying its requests. *Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63.

Evidentiary Issue – DOL's Pilot Program

Employer contends the ALJ erred by considering the supplemental opinions of Dr. Silman obtained as part of the DOL pilot program.[12] Employer's Brief at 45-49. Employer

[12] In 2014, the DOL established a pilot program allowing the district director, in certain claims, to request a supplemental opinion from the physician who performed the

asserts that the DOL has no legal authority to request supplemental opinions under the pilot program, that the pilot program deprives it of due process, that the implementation of the pilot program, without notice and comment, violates the APA, and that the pilot program transforms the DOL into an advocate for claimants. *Id.* For the reasons set forth in *Smith v. Kelly's Creek Resources*, 26 BLR 1-15, 1-20-24 (2023), we reject Employer's arguments.

Miner's Claim

Invocation of the Section 411(c)(4) Presumption—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 "substantially similar" surface coal mine employment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [the Miner] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001). Employer argues the ALJ erred in finding Claimant established the Miner was regularly exposed to coal mine dust. Employer's Brief at 38-40. We disagree.

The ALJ considered Claimant's hearing testimony and the Miner's application for benefits. Decision and Order at 5. Claimant testified the Miner was hired as a diesel mechanic and drove trucks to haul raw coal out of the mines. Hearing Transcript at 21-23. She stated she has film showing the Miner surrounded by coal dust "everywhere" as the trucks hauled and dumped coal at the site.[13] *Id.* at 24. Further, she testified the Miner's clothes were dirty and she "tried different things . . . to get all the grease out." *Id.* at 26. The ALJ also considered the Miner's statement that his last coal mine job with Employer required driving a truck to haul coal without breathing protection and that he previously worked as a mechanic, when he air-blasted filters, which "made massive dust clouds." Miner's Claim (MC) Director's Exhibit 4 at 1, 4.

DOL-sponsored complete pulmonary evaluation. *See* BLBA Bulletin No. 14-05 (Feb. 24, 2014). The program became standard procedure in 2019. *See* BLBA Bulletin No. 20-01 (Oct. 24, 2019).

[13] Claimant confirmed the film was never transferred to a disk and did not submit it as evidence in the claim. Hearing Transcript at 24.

Contrary to Employer's contention, the ALJ permissibly found that the Miner's and Claimant's uncontradicted testimony establish the Miner was regularly exposed to coal mine dust throughout his surface coal mine employment. Decision and Order at 6. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). The Board cannot substitute its inferences for those of the ALJ. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-112, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established the Miner had at least fifteen years of qualifying coal mine employment and invoked the Section 411(c)(4) presumption. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 170-74 (4th Cir 1997) (substantial evidence defined as "evidence that a reasonable mind might accept as adequate to support a conclusion"); Decision and Order at 8.

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,[14] or that "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 that Employer failed to rebut the existence of clinical pneumoconiosis and therefore could not rebut the presumption by establishing the Miner did not have pneumoconiosis.[15] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 40. We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[14] "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 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).

[15] The ALJ did not make a finding on whether Employer disproved legal pneumoconiosis. Decision and Order at 40.

The ALJ also found Employer did not rebut the presumption by establishing "no part of the [M]iner's 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)(ii); Decision and Order at 41-43.

Employer relies on the opinions of Drs. Rosenberg and Tuteur to rebut the presumption. Dr. Rosenberg opined the Miner's elevated PCO_2 on the September 22, 2015 qualifying blood gas study[16] was due to hyperventilation and was unrelated to clinical or legal pneumoconiosis. MC Director's Exhibit 24 at 2; Employer's Exhibit 17 at 5. Similarly, Dr. Tuteur opined the Miner had a minimal degree of clinical pneumoconiosis but concluded it did not contribute to the Miner's mild obstruction indicated on pulmonary function testing or to his abnormal blood gas study. Employer's Exhibit 17 at 5. The ALJ found their opinions unpersuasive and therefore found Employer did not rebut the presumption that the Miner's pneumoconiosis contributed to his impairment. Decision and Order at 43.

Employer contends the ALJ mischaracterized the opinions of Drs. Rosenberg and Tuteur, and therefore erred in her analysis of the medical opinion evidence. Employer's Brief at 40-42. We agree.

The ALJ found that Dr. Rosenberg's opinion is "well-documented as it relies on the entire record and specifically lays out his reasoning for why this evidence supports his conclusion." Decision and Order at 43. However, she found that his opinion was not sufficient to rebut the presumption because it "still falls short of ruling out the Miner's clinical pneumoconiosis altogether as a factor." *Id.* She therefore gave his causation opinion "some, but not significant weight." *Id.*

The ALJ erred to the extent she found Dr. Rosenberg's opinion facially insufficient to satisfy the standard for rebutting disability causation. Dr. Rosenberg opined the Miner's impairment did not represent an oxygenation abnormality as his normal A-a gradient indicates the alveolar gas exchange is normal and there is no scarring on the lungs. MC Employer's Exhibit 16 at 3; Director's Exhibit 24 at 30. Thus, he attributed the Miner's impairment on his blood gas study solely to hyperventilation, a "disorder of the general

[16] The ALJ found the Miner had a totally disabling respiratory impairment based on the qualifying September 22, 2015 resting arterial blood gas study that Dr. Silman administered and Dr. Silman's medical opinion. MC Director's Exhibits 17, 25; Decision and Order at 34-35. A "qualifying" blood gas study yields results equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

public" unrelated to coal mine dust exposure, and likely caused by an impairment to the respiratory control center of his brain due to medications he was taking.[17] *Id*. Because Dr. Rosenberg completely excluded clinical pneumoconiosis as a cause of the Miner's disability, it *could* meet Employer's burden of proof *if*, exercising her discretion to weigh the evidence, the ALJ were to find his underlying rationale to be credible. Thus, we vacate the ALJ's basis for giving Dr. Rosenberg's opinion "some, but not significant weight." *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 (4th Cir. 1999); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand).

Turning to the ALJ's analysis of Dr. Tuteur's opinion, Dr. Tuteur opined the Miner had a mild airflow obstruction and a "slightly elevated PCO_2" on blood gas testing that "is best explained" by mild chronic pulmonary congestion due to atrial fibrillation and decreased cardiac output. Employer's Exhibit 17 at 5. He explained that, with the Miner's lack of pulmonary symptoms and clinical pneumoconiosis that was not of "sufficient severity and profusion" to be expected to cause an impairment, "there is no convincing evidence" of pulmonary disease. *Id*. The ALJ found Dr. Tuteur's opinion entitled to little weight as he "found no total disability at all[,] contrary to my finding." Decision and Order at 43. However, when evaluating Dr. Tuteur's opinion on total disability, the ALJ found that he actually did not address whether the Miner was totally disabled and that to infer a finding of no total disability "would require me to engage in pure speculation and that is not appropriate." Decision and Order at 35. In light of her apparent contradictory findings, the ALJ's findings are not adequately explained. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The ALJ further discredited Dr. Tuteur's opinion as his statement that the Miner did not suffer from breathlessness and cough is contrary to the record. Decision and Order at 43. However, as Employer notes, Dr. Tuteur did not state the record was devoid of reports of symptoms of breathlessness and a cough. Employer's Brief at 41-42. Rather, he considered Dr. Sidwell's 2015 medical report which noted the Miner reported these symptoms. Employer's Exhibits 17. But he found the Miner's impairment was not a pulmonary impairment, in part, because the Miner denied such symptoms in his subsequent

[17] Dr. Rosenberg explained central hypoventilation occurs when "the mechanism in the brainstem stimulating a person to breathe is impaired." Employer's Exhibit 16 at 3-4. He explained that neither clinical nor legal pneumoconiosis contributed to the impairment because if either disease was clinically significant it would cause a ventilation perfusion mismatch that would present as an increased A-a gradient and the Miner's clinical pneumoconiosis, which did not appear on x-rays and was not associated with scar tissue, was not severe enough to have contributed to his impairment. *Id*.

treatment records dating from 2016 to 2018. Employer's Exhibits 17, 20. Thus, as the ALJ mischaracterized Dr. Tuteur's opinion and did not adequately explain her findings, we also vacate her determination that Dr. Tuteur's opinion is entitled to little weight and remand the case for the ALJ to explain her findings regarding Dr. Tuteur's opinion on disability causation. *See Mays*, 176 F.3d at 762; *McCune*, 6 BLR at 1-998.

As the ALJ failed to weigh all the relevant evidence and explain her findings, her decision does not comply with the APA.[18] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165. We therefore vacate the ALJ's conclusion that Employer did not rebut the Section 411(c)(4) presumption and thus the award of benefits in the miner's claim. 30 U.S.C. §923(b); 20 C.F.R. §718.305(d)(1)(ii).

Survivor's Claim

Because we have vacated the award of benefits in the miner's claim, we also vacate the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act. 30 U.S.C. §932(*l*).

Remand Instructions

On remand, the ALJ must reconsider if Employer has rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. In determining whether Employer established rebuttal of the Section 411(c)(4) presumption, the ALJ should first determine whether Employer has disproved legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A), despite its concession that the Miner had simple clinical pneumoconiosis.[19] 20 C.F.R. §718.305(d)(1)(i)(A). Performing the rebuttal analysis in the order set forth in the regulation satisfies the statutory mandate to consider all relevant evidence, as well as provides a framework for the analysis of the credibility of the medical opinions at Section 718.305(d)(1)(ii) pursuant to the second rebuttal method. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-159 (2015). To establish that the Miner's impairment was not legal pneumoconiosis, Employer must demonstrate it was not

[18] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[19] The definition of pneumoconiosis encompasses a broad category of diseases, which includes, but is not limited to, clinical pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 210 (4th Cir. 2000); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 821-22 (4th Cir. 1995).

"significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

Upon completing the analysis at 20 C.F.R. §718.305(d)(1)(i), the ALJ should then reconsider whether Employer has established that no part of the Miner's disabling impairment was caused by clinical or legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *Minich*, 25 BLR at 1-159. When weighing the medical opinion evidence, the ALJ must consider the physicians' qualifications, explanations for their conclusions, the documentation underlying their medical judgements and the sophistication of, and bases for, their diagnoses and medical conclusions. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439 (4th Cir. 1997). If Employer fails to rebut the Section 411(c)(4) presumption, Claimant will have established the Miner's entitlement to benefits, and the ALJ may reinstate her award in the miner's claim; if Employer succeeds in rebutting the Section 411(c)(4) presumption, the ALJ may deny benefits in the miner's claim.

On remand, should the ALJ again award benefits in the miner's claim, Claimant is derivatively entitled to benefits in the survivor's claim. 30 U.S.C. §932(*l*). If the ALJ denies benefits in the miner's claim, however, she must consider whether Claimant can establish entitlement to survivor's benefits pursuant to the Section 411(c)(4) presumption or by establishing that the Miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). In making her determinations, the ALJ must consider all relevant evidence, set forth her findings in detail and must explain her underlying rationale as the APA requires. 5 U.S.C. §557(c)(3)(A); 30 U.S.C. §932(a); *Wojtowicz* 12 BLR at 1-165.[20]

[20] Because the burden of proof shifted to Employer to rebut the presumption of total disability due to pneumoconiosis, we need not reach Employer's assertion that Claimant cannot establish this element of entitlement under 20 C.F.R. §718.204(c). 20 C.F.R. §718.305(d)(1)(i), (ii); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-159 (2015); Employer's Brief at 24-27.

Accordingly, the ALJ's Decisions and Orders Awarding Benefits are affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority opinion except its determination that the ALJ must reconsider Dr. Tuteur's opinion. Because Claimant invoked the Section 411(c)(4) presumption, Employer bears the burden to rebut disability causation by establishing that "no part of the [M]iner's respiratory or pulmonary total disability was caused by pneumoconiosis[.]" 20 C.F.R. §718.305(d)(1)(ii). Under Fourth Circuit precedent, physicians who "erroneously fail to diagnose" either of the two predicates to disability causation – total disability and pneumoconiosis – "may not be credited at all, unless an ALJ is able to 'identify specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest upon' the 'predicate[ ]' misdiagnosis." *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015) (quoting *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir.1995)).

The ALJ correctly determined *Epling's* holding applies to Dr. Tuteur's opinion. In finding Claimant is totally disabled, the ALJ evaluated Dr. Tuteur's medical report but permissibly discredited it because the physician did not offer an opinion on whether Claimant could return to his previous coal mine work and conflated his analyses of total disability and the separate issue of disability causation. Decision and Order at 35. Those findings, and the ALJ's corresponding determination that Dr. Tuteur's opinion on total disability is not well-reasoned or documented, are unchallenged on appeal and therefore must be affirmed. *See Skrack v Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because the ALJ found Dr. Tuteur did not offer an opinion on total disability (i.e., he failed

to diagnose it)[21] and conflated total disability and disability causation, the ALJ rationally determined his opinion could not then credibly establish that pneumoconiosis played no part in the Miner's total disability. *Epling*, 783 F.3d at 505; *Toler*, 43 F.3d at 116; Decision and Order at 43.

GREG J. BUZZARD
Administrative Appeals Judge

[21] After initially concluding that Dr. Tuteur did not address total disability, the ALJ later characterized his opinion as "finding no total disability." The majority views these two statements as contradictory. However, even if a doctor who "found no total disability" could be distinguished factually from a doctor who "did not find total disability," as a legal matter both findings reflect the ALJ's proper application of the *Epling/Toler* holdings. Under either characterization, it remains, as the ALJ found, that Dr. Tuteur failed to diagnose total disability, contrary to the ALJ's finding that Claimant is totally disabled. Given the ALJ's permissible rationale for discrediting Dr. Tuteur's opinion on that basis and for conflating total disability and disability causation, the Board need not consider whether the ALJ erred in also discrediting his opinion for allegedly understating the Miner's history of breathlessness. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).