U.S. Department of Labor

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

BRB No. 21-0329 BLA

WILLIAM E. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KELLY'S CREEK RESOURCES	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 6/27/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

Kathleen H. Kim (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, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2019-BLA-05218) rendered on a claim filed on April 7, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 18.66 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he 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). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ lacked the authority to hear and decide the case because he 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 indicated he filed a previous claim for benefits which he later withdrew. Hearing Tr. at 7-8; Director's Exhibit 2 at 1. Though the record contains no documentation of this previous claim, *see* Hearing Transcript at 7, a withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has 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 rendered his appointment unconstitutional. Employer also contests the ALJ's admission of Dr. Nader's supplemental medical report. On the merits, it argues the ALJ erred in finding Claimant established total disability and that it failed to rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (Director), responds, urging the Benefits Review Board to reject Employer's constitutional and evidentiary challenges. Employer replied to Claimant's and the Director's briefs, reiterating its contentions on appeal.

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

Employer urges the Board to vacate the ALJ's Decision and Order and remand this case[6] to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*,

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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] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 18.66 years of underground coal mine employment and had a smoking history of ten pack-years. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 12-13.

[6] Employer argues the United States Supreme Court's decision in *Carr v. Saul*, 593 U.S. , 141 S. Ct. 1352 (2021), "suggested the Board is unable to decide matters of constitutional dimension." Employer's Brief at 11 n.1; Employer's Reply to Director at 1. Contrary to Employer's contention, the constitutionality of the ALJ's appointment raises a substantial question of law and is therefore within the Board's scope of review. 33 U.S.C. §921(b)(3); *see Jones Bros, Inc. v. Sec'y of Labor*, 898 F.3d 669, 676 (6th Cir. 2018) (Appointments Clause argument is to be first considered by the administrative agency); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1118 (6th Cir. 1984) (Board is vested with

585 U.S. , 138 S. Ct. 2044 (2018).[7] Employer's Brief at 11-15; Employer's Reply to the Director at 2-5. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 12-15; Employer's Reply to Director at 2-5. For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-5 (May 26, 2023), we reject Employer's arguments.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 15-19; Employer's Reply to the Director at 6-10. It generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 14-16; Employer's Reply Brief at 5-8. It also relies on 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. , 140 S. Ct. 2183 (2020), as well as the United States Court of Appeals for the Federal Circuit's holding in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019),

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"same judicial power to rule on substantive legal questions as was possessed by the district courts") (citation omitted); *see also Energy W. Mining Co. v. Lyle*, 929 F.3d 1202, 1206 (10th Cir. 2019) (Board has authority to remedy an Appointments Clause violation).

[7] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme 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.

[8] The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as a District Chief [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary of Labor's December 21, 2017 Letter to ALJ Johnson.

vacated, 594 U.S. , 141 S. Ct. 1970 (2021). *See* Employer's Brief at 14-20; Employer's Reply to the Director at 5-8. For the reasons set forth in *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Evidentiary Issue

Employer argues the ALJ erred in admitting Dr. Nader's supplemental medical report, obtained as part of a DOL pilot program, contending the development of supplemental reports exceeds the DOL's statutory and regulatory authority to provide each miner with a complete pulmonary evaluation. Employer's Brief at 20-23. We disagree.

The Act requires "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b). A complete pulmonary evaluation includes, "but [is] not limited to, a chest radiograph (X-ray), physical examination, pulmonary function tests, and a blood-gas study." 20 C.F.R. §718.101(a); *see also* 20 C.F.R. §725.406(a) (complete pulmonary evaluation "includes a report of physical examination, a pulmonary function study, a chest radiograph, and, unless medically contraindicated, a blood gas study"); *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 640-42 (6th Cir. 2009) (complete pulmonary evaluation must include "all the necessary tests" and address "all the elements of entitlement").

In 2014, pursuant to Black Lung Benefits Act (BLBA) Bulletin No. 14-05, the DOL established a pilot program allowing the district director, in certain claims, to request a supplemental opinion from the physician who performed the DOL-sponsored complete pulmonary evaluation. *See* BLBA Bulletin No. 14-05 (Feb. 24, 2014). The purpose of the program is to allow the physician to clarify his or her opinion in light of more recently submitted medical evidence and any discrepancies between that evidence and the physician's original report. *Id*. The program applies to claims where: the evidence could establish fifteen or more years of qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption of total disability due to pneumoconiosis; the physician's diagnosis from the DOL-sponsored complete pulmonary evaluation indicated the miner is entitled to benefits; the DOL claims examiner issued a Schedule for the Submission of Additional Evidence (SSAE) recommending an award of benefits; and the employer submitted evidence contrary to the claims examiner's initial proposed finding of entitlement. *Id*. The program became standard procedure in 2019. *See* BLBA Bulletin No. 20-01 (Oct. 24, 2019); Director's Response Brief at 2 n.2.

At Claimant's request, Dr. Nader conducted the DOL-sponsored complete pulmonary evaluation on July 5, 2017. Director's Exhibits 8, 11. Dr. Nader concluded

Claimant is totally disabled due to hypoxemia and has legal pneumoconiosis[9] in the form of chronic hypoxemic respiratory failure caused in part by coal mine dust exposure. Director's Exhibit 11 at 3-4. The claims examiner issued an SSAE on December 11, 2017, determining that, based on a preliminary analysis of the available evidence, Claimant is entitled to benefits. Director's Exhibit 47. Thereafter, Employer submitted Drs. Vuskovich's and Jarboe's medical reports opining Claimant does not have a totally disabling pulmonary or respiratory impairment arising out of coal mine employment. Director's Exhibits 17, 20.

On June 25, 2018, the district director notified the parties that, pursuant to the pilot program, she was requesting supplementation of Dr. Nader's report to address Dr. Vuskovich's September 11, 2017 report and Dr. Jarboe's February 1, 2018 report.[10] Director's Exhibits 21, 22. Employer objected, contending the pilot program is invalid

[9] "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).

[10] Dr. Nader initially opined Claimant is totally disabled due to hypoxemia, as demonstrated by the July 5, 2017 exercise arterial blood gas study, as well as his symptoms of shortness of breath and chronic cough. Director's Exhibit 11 at 3. Dr. Vuskovich opined the July 5, 2017 exercise study results do not indicate a totally disabling respiratory or pulmonary impairment as the observed decrease in arterial oxygen tension is normal for a person of Claimant's age and having performed only three minutes of exercise. Director's Exhibit 17 at 9-10. Dr. Jarboe reviewed Dr. Nader's examination report and disputed whether the July 5, 2017 exercise study demonstrated a disabling impairment. Director's Exhibit 20 at 3, 7. He asserted that his own testing, conducted on February 1, 2018, did not demonstrate any abnormality and thus opined Claimant is not totally disabled. *Id.* at 6-7. At the DOL's request, Dr. Nader reviewed Drs. Vuskovich's and Jarboe's reports. Director's Exhibit 23. Based on his review of the additional evidence, Dr. Nader continued to diagnose totally disabling legal pneumoconiosis but explained his opinion had changed somewhat "only for the etiology of [Claimant's] pulmonary diagnosis." *Id.* at 3-4. While his initial report identified coal mine dust exposure as "a major contributing and aggravating factor" for Claimant's hypoxemia, Director's Exhibit 11 at 3, his supplemental report identified it as an "in part contributing and aggravating factor." Director's Exhibit 23 at 7. He disputed, however, Drs. Vuskovich's and Jarboe's interpretations of the July 5, 2017 exercise study, and expanded on his rationale for concluding that the blood gas testing demonstrates Claimant is totally disabled. *Id.* at 5-7.

under the regulations. Director's Exhibit 39. Nonetheless, the district director obtained and submitted a supplemental report from Dr. Nader.[11] Director's Exhibit 23. She issued a Proposed Decision and Order awarding benefits on September 4, 2018. Director's Exhibit 56.

At Employer's request, the district director referred the case to the Office of Administrative Law Judges for a hearing.[12] Director's Exhibits 57, 65. At the hearing, Employer continued to object to Dr. Nader's supplemental report for the same reasons it raised to the district director. Hearing Transcript at 9. The ALJ overruled Employer's objection, indicating he would explain his reasoning in his decision. *Id.* at 10-11. In his Decision and Order, the ALJ found the supplemental report admissible and consistent with the Director's obligations to provide a complete pulmonary evaluation, as Employer's contradictory evidence "cast doubt" on Dr. Nader's report. Decision and Order at 7. Therefore, he found that the district director's decision to seek clarification of Dr. Nader's opinion was consistent with the DOL's "wide latitude" in meeting its obligation to provide a complete pulmonary evaluation under the Act. *Id.*; *see* 30 U.S.C. §923(b); 20 C.F.R. §725.406.

Employer argues the ALJ's admission and consideration of Dr. Nader's "pilot program report" was erroneous as the DOL lacks statutory or regulatory authority to solicit supplemental reports from the physician who conducts the complete pulmonary evaluation. Employer's Brief at 20. It asserts the DOL's authority is limited to providing "a report of physical examination, a pulmonary function study, a chest [x-ray], and unless medically contraindicated, a blood gas study." *Id.* (citing 20 C.F.R. §725.406(a)). Thus, Employer argues the regulations do not provide for the DOL to submit an "additional rebuttal report." *Id.*

The Director responds that the regulations do not limit what can be included in a complete pulmonary evaluation but rather provide the minimum of what must be included for the evaluation to be complete. Director's Response Brief at 12-13 (citing 20 C.F.R. §725.406(a)). He asserts "the term 'complete pulmonary evaluation' reasonably

[11] The district director's request to Dr. Nader asked that he review the "additional medical evidence received [by the district director] since [Dr. Nader] examined the miner," and "provide a written report that updates [his] initial opinion," with an explanation as to whether he "continue[s] to hold the same views" or "if any changes or additions to [his] original opinion . . . are warranted." Director's Exhibit 23 at 1.

[12] Employer continued to object to the admission of Dr. Nader's supplemental report in its request for a hearing. Director's Exhibit 57.

encompasses not only the physician's own report and testing, but also his review of additional pulmonary testing and reports developed by other doctors." *Id.* at 13 (citation omitted). Further, because the regulations provide that "[s]upplemental medical reports prepared by the same physician must be considered part of the physician's original medical report," 20 C.F.R §725.414(a)(1), he argues the submission of Dr. Nader's supplemental report is consistent with the DOL's statutory and regulatory authority. Director's Response Brief at 13, 14-15 (citing 20 C.F.R. §§725.414(a)(1), 725.457(d)). We agree with the Director's position.

The statutory purpose of a DOL-sponsored complete pulmonary evaluation is to provide a miner with an "opportunity to substantiate his or her claim," 30 U.S.C. §923(b); thus, the examination focuses on "develop[ing] the medical evidence necessary to determine each claimant's entitlement to benefits." 20 C.F.R. §718.101(a); *see* 20 C.F.R. §725.406; *Hodges v. BethEnergy Mines Inc.*, 18 BLR 1-84, 1-89-90 (1994). Consistent with that purpose, a complete pulmonary evaluation must include, at a minimum, "a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §§725.406(a), 718.101(a); *see Greene*, 575 F.3d at 641.[13]

As the Director avers, the complete pulmonary evaluation may encompass not only the examining physician's own testing and examination report, but also that physician's review of additional testing and reports developed by other physicians. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101(a), 725.406(a), (c), 725.414(a)(1); Director's Response Brief at 13. To that end, the regulations provide the Director with broad authority to determine what should be included in the complete pulmonary evaluation. Sections 718.101(a) and 725.406(a) indicate that the evaluation must include, but is "not limited to," a physical examination, chest x-ray, and pulmonary function and arterial blood gas studies.

[13] Employer cites *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641 (6th Cir. 2009), for the proposition that 20 C.F.R. §725.406(c) "requires only that DOL obtain additional evidence if the underlying tests do not meet the quality standards or does not allow (sic) address all elements of entitlement." Employer's Brief at 20. But the question addressed in *Greene*—whether a medical opinion found unpersuasive by the ALJ nevertheless satisfied the DOL's obligation to provide the miner with a complete pulmonary evaluation—is not at issue here. The court's holding that a complete pulmonary evaluation must include "all the necessary tests" and address "all the elements of entitlement," but need not be found by the ALJ to "meet the claimant's burden of proof," does not support Employer's argument that the district director is prohibited from seeking supplemental information from a DOL-examining physician under the circumstances set forth in BLBA Bulletin Nos. 14-05 and 20-01.

20 C.F.R. §§718.101(a) (miner is entitled to a complete pulmonary evaluation "including, but not limited to" a physical examination and specified medical tests), 725.406(a) (complete pulmonary evaluation "includes" a physical examination report, pulmonary function study, chest x-ray, and a blood gas study). The regulations also define "medical reports" as including not just the report of the physical examination but also the physician's "review of the available admissible evidence," and require that any "[s]upplemental medical reports prepared by the same physician must be considered part of the physician's original medical report."[14] 20 C.F.R. §725.414(a)(1). Further, the DOL must obtain additional evidence if the complete pulmonary evaluation does not provide sufficient information to allow the district director to determine whether the miner is eligible for benefits. 20 C.F.R. §725.406(c); *see also* 20 C.F.R. §725.456(e) (providing for the ALJ to remand a claim to the district director for the development of additional evidence if the complete pulmonary evaluation does not "permit[] resolution of the claim"). We therefore reject Employer's argument that the regulations do not authorize the district director to request a supplemental medical report from the physician who conducted the DOL-sponsored complete pulmonary evaluation.

Thus, as the ALJ held, if evidence is submitted to the district director which calls into doubt the conclusions of the DOL-sponsored complete pulmonary evaluation and the claims examiner's proposed finding of entitlement, the DOL has authority to submit that evidence to the physician who performed the evaluation for review and provision of a supplemental report clarifying or revising that physician's opinion. Decision and Order at 7; *see* 20 C.F.R. §§718.101(a), 725.406(a), (c), 725.414(a)(1). Further, because the regulations consider a supplemental medical report to be part of the physician's original medical report, supplemental reports from the physician performing the complete pulmonary evaluation are not "additional rebuttal" reports as Employer asserts, but rather are part of the complete pulmonary evaluation.[15] *See* 20 C.F.R. §§718.101(a), 725.406, 725.414(a)(1); 65 Fed. Reg. 79,920, 79,982 (Dec. 20, 2000) (DOL examining physician

[14] It is undisputed that parties routinely submit supplemental medical reports addressing later evidence and contrary opinions, as Employer itself did in this case. Director's Exhibits 17, 23; Employer's Exhibits 3, 4. Employer has not explained why the regulations do not permit the district director to seek a supplemental medical report in the specific circumstances set forth in the pilot program.

[15] Thus, contrary to Employer's argument, Employer's Brief at 22-23, the DOL was not required to engage in notice and comment rulemaking before implementing the pilot program because the authority to solicit supplemental reports from the physician who performed the complete pulmonary evaluation is already contained within the regulations.

"may be asked to clarify and/or supplement an initial report if unresolved medical issues remain"); Employer's Brief at 20.

We further reject Employer's assertion that the ALJ's consideration of Dr. Nader's supplemental report violated its due process rights because it contravenes the DOL's role as an "impartial administrator" and denied its right to "rehabilitate" its evidence before issuance of the proposed decision and order. Employer's Brief at 21-22. Due process requires an employer be afforded notice of the claim and the opportunity to mount a meaningful defense. *See Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). Employer was permitted to submit evidence in response to Dr. Nader's supplemental report before the ALJ, and it did so with Dr. Jarboe's second medical report. Employer's Exhibit 3. The ALJ, in turn, considered the relevant evidence and rendered findings de novo on the elements of entitlement. *See* 20 C.F.R. §725.455(a) ("any findings or determinations made with respect to a claim by a district director shall not be considered by the [ALJ]"). Thus, we find no violation of Employer's due process rights based on the allegation that it was not permitted to "rehabilitate" its evidence prior to the issuance of the district director's proposed decision and order.[16] *See Hatfield*, 556 F.3d at 478.

Finally, Employer generally argues that the solicitation of supplemental reports under the pilot program transforms the DOL into an advocate for claimants rather than an impartial administrator, asserting it "bias[es] the opinions of [the] doctors [who perform the complete pulmonary evaluations] by providing letters that guide them to find in favor of entitlement," thereby resulting in a violation of its right to due process. Employer's Brief at 21-22. However, while Employer broadly asserts the DOL's letter requesting a supplemental report from Dr. Nader constituted a biased solicitation,[17] it points to no

[16] In addition, as the Director notes, Dr. Nader's supplemental report did not constitute rebuttal evidence, and Employer thus could not have rehabilitated its evidence in response. Director's Response Brief at 16; 20 C.F.R. §725.414(a)(3)(ii). Moreover, Employer was free to have its own experts review and comment on Dr. Nader's supplemental report in their own supplemental reports and in fact Employer did so with Dr. Jarboe's supplemental opinion while the case was pending before the ALJ. *See* Employer's Exhibit 3 at 5, 9.

[17] The Director avers that the DOL submits supplemental reports obtained under the pilot program as a party-in-interest to ensure proper administration of the Act and to protect the Black Lung Disability Trust Fund, which pays interim benefits to miners when a district director awards benefits and the responsible operator refuses to commence payment. Director's Response Brief at 11-12. He asserts review of later-submitted evidence may

specific statement or question in the letter that demonstrates or suggests the DOL was guiding Dr. Nader to provide an opinion supporting Claimant's entitlement to benefits.

Moreover, other than quoting conclusions made by different ALJs in unrelated claims,[18] Employer has cited no authority supporting its assertion that the pilot program resulted in bias or violated its right to due process. Nor does it identify any aspect of BLBA Bulletin Nos. 14-05 or 20-01 that could be construed as demonstrating bias in favor of a finding of entitlement or inappropriately encouraging an examining physician to diagnose total disability due to pneumoconiosis regardless of the physician's medical findings. As previously discussed, the bulletins instruct district directors to request that the physician who conducted the miner's DOL-sponsored complete pulmonary evaluation clarify his or her opinion in light of newly submitted evidence and any discrepancies between that evidence and the physician's original report. Upon receiving the physician's supplemental report, the district director is then instructed to issue a Proposed Decision and Order recommending either an award or denial of benefits based on a weighing of "all evidence." BLBA Bulletin No. 14-05 at para. 5.

Thus, we reject Employer's argument that the solicitation of Dr. Nader's supplemental report under the pilot program violated its right to due process, and we affirm

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result in the DOL physician strengthening or revising the initial report; supplemental reports strengthen and support proposed decisions and orders issued by district directors; and they may assist ALJs in making more accurate decisions, thereby furthering those interests. *Id.* Finally, he notes that a supplemental report could reach conclusions in support of or "contrary to the claimant's entitlement," but the DOL's interest "is in properly evaluating black lung claims and fulfilling its statutory obligation to administer the [Act], not in developing information that benefits a particular party." *Id.* at 16.

[18] Employer quotes a hearing transcript from another claim, which is not part of the record in this claim, in which Employer asserts that the ALJ in that other claim cast doubt on the DOL's authority to establish the pilot program. Employer's Brief at 21 (quoting a hearing transcript in *Robbins v. Westmoreland Coal Co.*, Case No. 2018-BLA-05659). It also cites to ALJ orders in two other claims questioning the DOL's authority to seek supplemental medical reports under the pilot program. *Id.* at 21-22 (quoting *Grimmett v. Arch of W. Va.*, Case No. 2017-BLA-06184, Order at 6 (Aug. 29, 2018); *Pletcher v. Hobet Mining, LLC*, Case No. 2017-BLA-05230, Order at 10-11 & n.18 (Sept. 11, 2017)). The conclusions of the ALJs in those other claims, however, are not binding on the Board, nor are the propositions for which Employer cites to them persuasive for the reasons set forth in this opinion.

the ALJ's decision to admit Dr. Nader's supplemental report, as it is consistent with applicable law.

Invocation of the Section 411(c)(4) Presumption: Total Disability

Employer next contends the ALJ erred in finding Claimant entitled to the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. To invoke the Section 411(c)(4) presumption, Claimant must establish that he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.[19] 20 C.F.R. §718.204(b)(1). A 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). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 on the medical opinion evidence and the evidence as a whole.[20] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21. We affirm those findings.

The ALJ considered the medical opinions of Drs. Nader, Green, Vuskovich, and Jarboe. Decision and Order at 10-16, 19-21. Dr. Nader opined Claimant is totally disabled by a pulmonary impairment due to hypoxemia, as demonstrated by the qualifying[21] July 5,

[19] The ALJ observed Claimant testified that his last coal mine job was working in equipment maintenance at the mine face in underground mines. Decision and Order at 3 (citing Hearing Tr. at 19-25). He found this work required sustained heavy exertion. *Id.* at 19. We affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1-711.

[20] The ALJ found Claimant did not establish total disability based on the pulmonary function studies or arterial blood gas studies, 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 18-19.

[21] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

2017 exercise blood gas study, as well as his symptoms of shortness of breath and chronic cough.[22] Director's Exhibits 11 at 4; 23 at 7. Dr. Green opined Claimant is disabled due to significant hypoxemia as demonstrated by the July 5, 2017, March 2, 2019,[23] and April 20, 2019[24] blood gas studies. Claimant's Exhibits 1 at 5; 2 at 5. Dr. Vuskovich opined Claimant is not disabled and that the July 5, 2017 blood gas study was normal for Claimant's age. Director's Exhibit 17 at 9-10. Dr. Jarboe opined Claimant is not disabled based on the non-qualifying February 1, 2018 and June 6, 2019 blood gas studies, and he questioned whether the April 20, 2019 exercise study was performed at peak exercise. Director's Exhibit 20 at 17; Employer's Exhibit 3 at 8-9. Additionally, he opined that all the blood gas studies demonstrated a nearly normal oxygen tension for a man of Claimant's age. Employer's Exhibit 3 at 8-9. The ALJ gave Drs. Vuskovich's and Jarboe's opinions little weight and, relying on the opinions of Drs. Nader and Green, found Claimant established total disability at 20 C.F.R. §718.204(b)(2).

Employer initially contends Dr. Nader's total disability opinion is equivocal because he stated that other non-coal-dust related causes of Claimant's disabling hypoxemia, such as vascular disease, need to be ruled out. Employer's Brief at 23-24. We disagree.

As the ALJ noted, Dr. Nader clearly opined Claimant is "totally disabled from a pulmonary capacity standpoint" and cannot perform the exertional requirements of his usual coal mining job due to hypoxemia, shortness of breath, and chronic cough. Director's

[22] The July 5, 2017 arterial blood gas study produced non-qualifying values at rest and qualifying values during exercise. Director's Exhibit 11 at 16.

[23] Claimant underwent two resting blood gas studies on March 2, 2019. Claimant's Exhibit 1 at 13-15. The first study, collected at 3:40 p.m., produced qualifying values, with a pCO2 of 36 and pO2 of 64, whereas the second study, collected at 3:45 p.m., produced non-qualifying values, with a pCO2 of 34 and pO2 of 69. *Id.* at 14-15. Dr. Green noted the second study "did not quite" produce qualifying values, but that it "continue[d] to demonstrate significant hypoxemia which was not significantly different than" the values produced by the initial study. *Id.* at 5.

[24] The April 20, 2019 blood gas study produced non-qualifying values at rest, but Dr. Green opined the study nonetheless reflected resting hypoxemia. Two exercise studies were performed. The study collected at 2:50 p.m. produced qualifying values, with a pCO2 of 35 and pO2 of 65, whereas the study collected at 2:51 p.m. produced non-qualifying values, with a pCO2 of 36 and a pO2 of 65. Claimant's Exhibit 2 at 5, 19-20. Dr. Green opined both exercise results revealed "significant hypoxemia" that would prevent Claimant from performing his previous coal mine work. *Id.* at 5.

Exhibits 11 at 4; 23 at 7. Employer's argument conflates the question of whether a disabling impairment exists with the cause of that impairment, but these are separate inquiries. 20 C.F.R. §718.204(b), (c). The regulations specifically state that, "[i]f . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a). We therefore reject Employer's argument.[25]

Employer next asserts the ALJ erred by failing to address Dr. Jarboe's opinion that the qualifying 2:50 p.m. April 20, 2019 exercise blood gas study may have been unreliable, and that this error undermines his crediting of Drs. Green's and Nader's opinions, both of which were based in part on this study. Employer's Brief at 24. Alternatively, Employer contends the ALJ erred in crediting Dr. Green's opinion because the physician "cherry-pick[ed]" the qualifying 2:50 p.m. results from the April 20, 2019 exercise blood gas studies, when the 2:51 p.m. results were non-qualifying. Employer's Brief at 27. We disagree.

Contrary to Employer's argument, the ALJ observed Dr. Jarboe's opinion that it "is quite possible" the 2:50 p.m. April 20, 2019 study may have been conducted when Claimant was in "phase II oxygen kinetics" and therefore may not have been conducted at peak exercise, and that the April 20, 2019 resting and exercise studies reflect normal oxygen tension for a man of his age. Decision and Order at 15; Employer's Exhibit 3 at 8. However, as the ALJ also noted, Dr. Green based his opinion on the July 5, 2017, March 2, 2019, and April 20, 2019 blood gas studies and specifically opined each study, whether qualifying or non-qualifying, demonstrates significant hypoxemia that would prevent Claimant from performing his usual coal mine work. Decision and Order at 11-12; Claimant's Exhibits 1 at 3; 2 at 3-4.

With respect to the two April 20, 2019 exercise blood gas studies, Dr. Green determined both results—the 2:50 p.m. results (which Dr. Jarboe questioned) *and* the 2:51 p.m. results—demonstrate significant, totally disabling hypoxemia. Claimant's Exhibit 2 at 5. In particular, he opined that although the 2:51 p.m. results "did not quite" produce qualifying values, they were still "significantly abnormal" and demonstrated

[25] We likewise reject Employer's argument that the ALJ erred in discounting Dr. Jarboe's critique of Dr. Nader's total disability opinion because Dr. Jarboe found Dr. Nader's opinion on the etiology of Claimant's impairment to be equivocal. Decision and Order at 20; Employer's Brief at 25; Director's Exhibit 20 at 17-18. The existence of a totally disabling respiratory or pulmonary impairment and the cause of that impairment are separate inquiries. 20 C.F.R. §718.204(b), (c).

"significantly-impaired gas exchange and hypoxemia" such that Claimant "certainly could not perform the duties of his previous coal mine employment." *Id.* Thus, Employer's argument that Dr. Green "cherry-pick[ed]" his findings by relying on the 2:50 p.m. results is factually incorrect. Further, given Dr. Green's reliance on the 2:51 p.m. results and two other blood gas studies of record, Employer fails to explain how any alleged error in evaluating the 2:50 p.m. exercise study results could have made 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."); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment).

We further reject Employer's contention that the ALJ erred in crediting Drs. Green's and Nader's opinions over that of Dr. Jarboe because, unlike Dr. Jarboe, they did not review the non-qualifying June 6, 2019 blood gas study, which Employer asserts is the most probative study due to its recency. Employer's Brief at 26. An ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise found to be well-reasoned, documented, and based on the physician's own examination of the miner, objective test results, and exposure histories. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996). Further, contrary to Employer's contention, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held it is irrational to credit evidence solely on the basis of recency where that evidence shows the miner's condition has improved.[26] *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (citing *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992)); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993).

[26] In explaining the rationale behind the "later evidence rule," the court reasoned that a "later test or exam" is a "more reliable indicator of [a] miner's condition than an earlier one" where a "miner's condition has worsened" given the progressive nature of pneumoconiosis. *Woodward v. Director, OWCP*, 991 F.2d 314, 319 (6th Cir. 1993) (quoting *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992)). Since the results of the tests do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's current condition." *Id.* (quoting *Adkins*, 958 F.2d at 52). But if "the later test or exam" shows the miner's condition has improved, the reasoning "simply cannot apply"—one must be incorrect—"and it is just as likely that the later evidence is faulty as the earlier." *Id.* (quoting *Adkins*, 958 F.2d at 52).

Employer further asserts the ALJ erred in discrediting Dr. Jarboe's opinion.[27] Employer's Brief at 26-27. We disagree. As the ALJ correctly observed, Dr. Jarboe noted the record contains multiple qualifying and non-qualifying blood gas studies, but asserted the studies of record are normal or nearly normal for a man of Claimant's age. Decision and Order at 14-15, 20. The ALJ permissibly discredited Dr. Jarboe's opinion because, in evaluating total disability, the question is whether Claimant can perform his usual coal mine work, and Dr. Jarboe failed to adequately explain how the blood gas studies show Claimant is able to perform the sustained heavy exertion required by his usual coal mine work.[28] *See Cornett*, 227 F.3d at 578; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); 20 C.F.R. §718.204(b); Decision and Order at 19. In addition, because blood gas studies and pulmonary function studies measure different types of impairment, the ALJ permissibly discredited Dr. Jarboe's opinion that it would be "quite unusual" for Claimant to develop hypoxemia while also having normal pulmonary function studies.[29] Decision and Order at 19; *see Tussey v. Island Creek Coal Co.*, 982 F.3d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984).

Consequently, we affirm the ALJ's determination that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21. As Employer raises no other challenges to the ALJ's weighing of the evidence, we affirm his determination that the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2). We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); Decision and Order at 21.

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[27] Employer also contends the ALJ erred in rejecting Dr. Vuskovich's opinion on the basis that he did not consider the non-qualifying June 6, 2019 blood gas study. Employer's Brief at 27. Contrary to Employer's assertion, the ALJ discredited Dr. Vuskovich's opinion because he relied solely on the July 5, 2017 objective testing and did not review or consider the four additional blood gas studies of record, including the qualifying studies Dr. Green conducted. Decision and Order at 21.

[28] Employer's assertion that Dr. Jarboe credibly explained that Claimant's hypoxemia is caused by his age again conflates the issues of the existence of a totally disabling impairment with the cause of that impairment. 20 C.F.R. §718.204(b), (c); Employer's Brief at 26.

[29] Because the ALJ provided valid reasons for discrediting Dr. Jarboe's opinion, we need not address Employer's additional arguments regarding the weight the ALJ assigned his opinion. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 15.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[30] 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 Employer failed to establish rebuttal by either method.[31] Decision and Order at 28-29.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does 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. §§718.201(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 Sixth Circuit requires Employer to establish Claimant's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on Dr. Jarboe's medical opinion to disprove legal pneumoconiosis. Dr. Jarboe opined the evidence is equivocal for a diagnosis of chronic bronchitis, but that, if Claimant does have chronic bronchitis, it is unrelated to coal mine dust exposure. Employer's Exhibit 3 at 8-10. He also opined Claimant "does not have an abnormality of oxygen tension or transfer" on blood gas testing, but "even if one accepts the variable levels of oxygen tension" on Drs. Green's and Nader's testing, "the evidence does not show causation by a coal dust induced lung disease." *Id.* at 9. The ALJ found his opinion unpersuasive and insufficient to satisfy Employer's burden of proof. Decision and Order at 26-28.

[30] "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).

[31] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 24.

Employer argues the ALJ applied an incorrect legal standard in discrediting Dr. Jarboe's opinion.[32] Employer's Brief at 33. We disagree.

As the ALJ correctly observed, because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to rebut the presumed existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 24. He correctly noted this requires Employer to prove Claimant's hypoxemia is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 24 (quoting 20 C.F.R. §718.201(b)); *see Young*, 947 F.3d at 405; *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 667 (6th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013); 20 C.F.R. §718.201(a)(2).

Contrary to Employer's argument, the ALJ did not discredit Dr. Jarboe's opinion based on an incorrect standard. Rather, he permissibly found Dr. Jarboe's opinion unpersuasive and insufficient to satisfy Employer's burden because he did not adequately explain why Claimant's history of coal mine dust exposure did not contribute to or aggravate his disabling hypoxemia.[33] *See Huscoal, Inc. v. Director, OWCP* [*Clemons*], 48 F.4th 480, 489-90 (6th Cir. 2022); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 26-27. Although Employer generally states Dr. Jarboe adequately explained his opinion, Employer's Brief at 33, its assertion amounts to a request to reweigh the evidence, which we are not empowered to do.[34] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[32] Employer further asserts the ALJ erred in his evaluation of Drs. Nader's and Green's opinions that Claimant has legal pneumoconiosis in the form of hypoxemia due in part to coal mine dust exposure. Decision and Order at 25; Director's Exhibits 11 at 3-4; 23 at 4; Claimant's Exhibits 1 at 5; 2 at 3-4. These opinions do not support Employer's burden to disprove the disease and, therefore, we need not address these allegations of error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[33] Employer does not specifically contest the ALJ's finding that Dr. Jarboe failed to adequately explain why coal mine dust exposure did not contribute to or aggravate Claimant's hypoxemia, but instead reiterates its contentions that the ALJ erred in finding Claimant totally disabled due to hypoxemia, a finding we have already affirmed. *Supra* page 16; Employer's Brief at 29.

[34] Because the ALJ provided valid bases for discrediting Dr. Jarboe's opinion regarding the cause of Claimant's disabling hypoxemia, we need not address Employer's

Because the ALJ provided valid reasons for discrediting Dr. Jarboe's opinion, the only opinion supportive of Employer's burden on rebuttal,[35] we affirm his finding that Employer failed to establish that Claimant does not have legal pneumoconiosis. *Ogle*, 737 F.3d at 1072-73; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 27-28. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer did not rebut the presumption by establishing that "no part of [Claimant'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 29. He found Dr. Jarboe's opinion on disability causation unpersuasive because the physician did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease. *See Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 29; Director's Exhibit 20 at 17-18; Employer's Exhibit 3 at 9-10. Employer does not challenge that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711

remaining arguments concerning the weight afforded to his opinion as to the cause of Claimant's chronic bronchitis. *See Kozele*, 6 BLR at 1-382 n.4.

[35] As we note above, *supra* note 27, Employer also submitted Dr. Vuskovich's report evaluating the July 5, 2017 pulmonary function and arterial blood gas studies. Director's Exhibit 17. In that report, Dr. Vuskovich stated Claimant does not have legal pneumoconiosis based on the July 5, 2017 pulmonary function study. *Id.* at 10. However, as the ALJ correctly observed, Employer did not submit Dr. Vuskovich's opinion as a medical report. Decision and Order at 26 n.6; Employer's Evidence Summary Form. The ALJ further correctly observed Dr. Vuskovich did not offer an opinion as to whether coal mine dust exposure caused or contributed to Claimant's disabling hypoxemia. Decision and Order at 26 n.6; Director's Exhibit 17.

(1983). Therefore, we affirm the ALJ's determination that Employer failed to prove no part of Claimant's respiratory or pulmonary disability was caused by legal pneumoconiosis.[36] 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[36] Claimant asserts that, because Employer submitted two affirmative medical reports from Dr. Jarboe, the ALJ erred in considering the opinion of Dr. Vuskovich because it exceeds the evidentiary limitations and Employer did not argue good cause exists to consider it. 20 C.F.R. §§725.414(a)(3)(i), 725.456(b)(1); Employer's Evidence Summary Form; Claimant's Response at 6 n.2. Given our affirmance of the award of benefits, we need not address Claimant's argument.