U.S. Department of Labor

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

BRB No. 21-0042 BLA

RAYMOND OGLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHINE COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 4/27/2022
	)	
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Jonathan C. Masters (Masters Law Office PLLC), South Williamson, Kentucky, for Claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits (2019-BLA-05584) rendered on a claim 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 April 2, 2018.

The ALJ credited Claimant with 15.6 years of underground coal mine employment, and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits commencing April 2018.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the ALJ erred in finding Claimant established at least fifteen years of coal mine employment and total disability necessary to invoke the presumption. It also asserts the ALJ erred in finding it did not rebut the presumption. Furthermore, it challenges the commencement date for benefits. Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional argument and its challenge to the ALJ's finding the September 5, 2018 and April 2, 2019 pulmonary function studies reliable. In a reply brief, Employer reiterates its contentions.

The Benefits Review 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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

[1] 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.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 20.

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 30-32. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

Section 411(c)(4) Presumption – Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar" to underground mines. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the length of his 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 Board will uphold the ALJ's determination if it is based on a reasonable method of calculation and supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

Employer challenges the ALJ's determination that Claimant worked for 15.6 years in coal mine employment. Employer's Brief at 11-12. Its argument has no merit.

The regulations define "year" as "a period of one calendar year (365 days, or 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). If the miner's employment lasted for a calendar year, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" and the miner is entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii). If the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the ALJ may determine the length of the miner's work history by dividing his yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS data is reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*.

The ALJ considered Claimant's signed employment history forms, hearing testimony, and Social Security Administration (SSA) earnings records. Decision and Order at 4-6. On his employment history forms, Claimant stated he worked for Caney Branch from 1971 to 1976, Kentucky Carbon from 1976 to 1979, Jacinda Coal from 1979 to 1980, Chisholm Coal from 1980 to 1983, Annetta Coal in 1983, Blue Ridge Coal in 1983, Shine Coal from 1986 to 1990, Mahon Enterprises from 1990 to 1991, and Kris Energy in 1991. Director's Exhibits 6, 7. He testified at the hearing he started working in the coal mines "somewhere around 1971," but stopped working in September 1991 due to a back injury. Hearing Transcript at 12, 21. On cross-examination, however, he clarified he first worked for Caney Branch from 1972 to 1976. *Id*. at 30. He further testified he last worked for Kris Energy in 1991. *Id*. at 13, 20.

The ALJ noted Claimant's SSA earnings records reflect he first worked for Caney Branch in 1972 and last worked for Kris Energy in 1991. Decision and Order at 4-5, *citing* Director's Exhibits 6, 7. He found Claimant's testimony uncontested, credible, and consistent with his SSA earnings records. *Id*. He further found his testimony establishes a calendar-year relationship with the coal mine operators that employed Claimant from 1972 to 1983 and 1986 to 1991: Caney Branch, Kentucky Carbon, Jacinda Coal, Chisholm Coal, Annetta Coal, Blue Ridge Coal, Shine Coal, Mahon Enterprises, and Kris Energy. *Id*.

Having determined Claimant established calendar-year relationships with these coal mine operators during these years, the ALJ next addressed whether Claimant worked for at least 125 days in each of these years. Decision and Order at 5-6. Because he was unable to ascertain the specific beginning and ending dates of Claimant's employment, he divided Claimant's yearly income, as set forth in his SSA earnings records, with the coal mine industry's average daily earnings as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*. *Id*. If Claimant's earnings reflected 125 or more working days in a given year, the ALJ credited him with one year of coal mine employment. *Id*. If Claimant had less than 125 working days, the ALJ credited him with "a fractional year based on the ratio of the actual number of days worked to 125." *Id*.; 20 C.F.R. §725.101(a)(32)(i). Based on this method of calculation, he found Claimant had a total of 15.6 years of employment from 1972 to 1983 and 1986 to 1991. Decision and Order at 4-6.

Employer argues Claimant's testimony is not credible because it is not wholly consistent with his SSA earnings records. Employer's Brief at 10-12. It therefore argues the ALJ erred in finding calendar-year employment relationships between Claimant and the coal mine operators that employed him between 1972 and 1991. *Id*. This argument has no merit.

The ALJ evaluates the credibility and weight of the evidence, including witness testimony. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (declining to reweigh witness testimony on smoking history in spite of alleged inconsistencies identified by employer); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). The Board will not disturb an ALJ's credibility findings unless they are inherently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc).

Employer first alleges Claimant's testimony is not credible because he testified his coal mine employment began in 1971, but his SSA earnings records do not show any earnings in that year. Employer's Brief at 11. As noted above, Claimant clarified during cross-examination at the hearing that he first worked in coal mining in 1972 with Caney Branch. Hearing Transcript at 30.

Employer next argues Claimant's SSA earnings records reflect no coal mine earnings from 1984 to 1986, and thus Claimant's testimony is not credible because he omitted that he had no coal mine employment in those years. *Id*. On his employment history forms, however, Claimant did not list any employment for those years and stated he worked for Annetta Coal and Blue Ridge Coal in 1983, then for Shine Coal from 1986 to 1990. Director's Exhibits 6, 7. Moreover, Claimant testified he did not work the entirety of 1972 through 1991 in coal mine employment, and the ALJ did not credit him with any coal mine employment between 1984 and 1986 because he had no reported income during those years. Hearing Transcript at 12; Decision and Order at 4-6.

Employer finally argues it "is not certain" from the record if Claimant worked full calendar years in 1972, 1983, and 1987. Employer's Brief at 10-11. The ALJ, however, credited Claimant's testimony that he worked for Caney Branch from 1972 through 1976 as consistent with his SSA earnings records showing income with that operator during those years. Decision and Order at 5, *citing* Hearing Transcript at 20. As for 1983 and 1987, the ALJ credited him with only fractional years of employment, 0.74 and 0.45, respectively, using the formula at 20 C.F.R. §725.101(a)(32)(iii), which may be applied "[i]f the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year." Employer has not identified any error in these findings; its arguments constitute a request to reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Tackett*, 12 BLR at 1-14 (miner's testimony as to "the length of coal mine employment need not be corroborated in order to be found credible" by the ALJ).

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established at least fifteen years of underground coal mining from 1972 to 1983

and 1986 to 1991.[3] *Stallard*, 876 F.3d at 670; *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) ("In referring to a singular 'reasonable mind,' the United States Supreme Court has directed us to uphold decisions that rest within the realm of rationality."); *see Mitchell*, 479 F.3d at 334-36; *Muncy*, 25 BLR at 1-27; *Clark*, 22 BLR at 1-280; Decision and Order at 4-7.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable gainful work. *See* 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 pulmonary function studies.[4] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8-11. Employer challenges this finding. Employer's Brief at 13-17. Its arguments have no merit.

[3] Claimant specifically testified he stopped working in coal mines in September 1991 because of a back injury. Hearing Transcript at 21. Any error in finding Claimant established a calendar year employment relationship that year is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Employer argued to the ALJ that where the record does not establish a calendar-year relationship, the ALJ should divide the number of days Claimant worked in a given year by a 252-day divisor. Employer's Brief at 12 n.2. The ALJ found Claimant worked 51.23 days in 1991. Decision and Order at 6. Use of the method of calculation that Employer advocated would result in a finding of 0.2 of a year in 1991 (51.23/252), or a reduction of 0.21 of a year in the ALJ's length of coal mine employment determination (the 0.41 of a year that the ALJ found compared to 0.2 of a year that Employer advocates). Decision and Order at 4-6. Thus, this alleged error does not affect his conclusion that Claimant had at least fifteen years of coal mine employment.

[4] The ALJ found the arterial blood gas studies and medical opinions do not establish total disability and there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii)-(iv); Decision and Order at 7, 11-13.

The ALJ considered five pulmonary function studies conducted on May 14, 2018, July 23, 2018, September 5, 2018, April 2, 2019, and May 8, 2019. Decision and Order at 8; Director's Exhibits 10, 15; Employer's Exhibits 5, 11; Claimant's Exhibit 1. The September 5, 2018, April 2, 2019, and May 8, 2019 studies produced qualifying values for total disability, but the May 14, 2018 and July 23, 2018 studies produced non-qualifying values.[5] Decision and Order at 8-11.

The ALJ found the September 5, 2018 and April 2, 2019 qualifying studies reliable, but the May 8, 2019 qualifying study invalid. Decision and Order at 9-11. Because the qualifying September 5, 2018 and April 2, 2019 studies were taken more recently, the ALJ assigned them greater weight than the non-qualifying May 14, 2018 and July 23, 2018 studies. *Id*. Thus he found the pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 9.

We reject Employer's assertion that the ALJ erred in finding the September 5, 2018 and April 2, 2019 qualifying studies reliable. Employer's Brief at 13-17; Reply Brief at 5-7.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards.[6] 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are unreliable); 20 C.F.R. Part 718, Appendix B. If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b).

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

[6] An ALJ must consider a reviewing physician's opinion regarding a miner's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

The quality standards, however, do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment). An ALJ must still determine, however, if treatment record pulmonary function studies are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

The ALJ found Claimant performed the September 5, 2018 and April 2, 2019 studies as part of his medical treatment and not in anticipation of litigation. Decision and Order at 9-11; Director's Exhibit 15; Claimant's Exhibit 1. Employer does not challenge this finding; thus we affirm it. *Skrack*, 6 BLR at 1-711. Based on this finding, the ALJ correctly determined the quality standards are not applicable to these studies. *Stowers*, 24 BLR at 1-92; Decision and Order at 9-11. However, he appropriately addressed whether the studies are reliable.

The ALJ noted Drs. Zaldivar and Spagnolo reviewed the September 5, 2018 and April 2, 2019 studies and opined these tests are not reliable.[7] Decision and Order at 9-11; *see* Employer's Exhibits 5, 9, 14. He also recognized the technicians who administered each study indicated Claimant gave good effort and had adequate understanding of how to perform the test. Decision and Order at 9-11; *see* Director's Exhibit 15; Claimant's Exhibit 1. Specifically, the technician who administered the September 5, 2018 study indicated Claimant demonstrated good effort and understanding during the FVC, diffusion capacity, and slow vital capacity testing. Director's Exhibit 15 at 3. The technician who administered the April 2, 2019 study also indicated Claimant demonstrated good effort and understanding during these aspects of the testing. Claimant's Exhibit 1 at 9. She further

[7] Dr. Zaldivar stated the September 5, 2018 study is invalid because the "flow-volume" tracings "are extremely small and difficult to evaluate, but they are not visually reproducible." Employer's Exhibits 5 at 2. He testified in his deposition that this study is not reliable because it "did not meet the American Thoracic Society criteria for validity," and it does not "show the maximum lung function at all." Employer's Exhibit 14 at 15-17. He opined the April 2, 2019 study is not reliable because the volume versus time curve and the flow-volume loops demonstrate hesitation during exhalation. Employer's Exhibit 14 at 16. Dr. Spagnolo opined both studies are not reliable because of Claimant's poor effort. Employer's Exhibit 9 at 6; 13 at 19. He specifically stated the September 5, 2018 study is invalid because it "shows a limited and poor inspiratory effort on the flow-volume loop." Employer's Exhibit 9.

stated Claimant's "panting was gentle and uniform" and he put forth "maximal effort" during the slow vital capacity test. *Id.*

The ALJ found the medical opinions of Drs. Zaldivar and Spagnolo unpersuasive because neither adequately explained why the September 5, 2018 and April 2, 2019 studies are unreliable in light of the fact that the technicians who administered them indicated Claimant demonstrated good effort and understanding. Decision and Order at 9-11.

Employer contends the ALJ erred in finding these studies reliable because the technicians only stated Claimant "demonstrated good effort and understanding for the [FVC, MVV], diffusion, . . . and slow vital capacity tests," but "did not comment on his performance for the FEV1 tests." *Id.* Because the regulations require the FEV1 portion of a study to be qualifying to support a finding of total disability, 20 C.F.R. §718.204(b)(2)(i), Employer asserts these studies cannot meet Claimant's burden because there is no indication the FEV1 testing is reliable. Employer's Brief at 13-17; Reply Brief at 5-7.

An ALJ has the discretion to weigh the evidence and draw inferences therefrom. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990). The Board cannot disturb factual findings that are supported by substantial evidence even if it might reach a different conclusion if it were reviewing the evidence *de novo*. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187 (4th Cir. 2002). Contrary to Employer's argument, the ALJ acted within his discretion as factfinder to conclude the technicians' notations that Claimant understood, cooperated, and put forth good effort in performing the September 5, 2018 and April 2, 2019 studies supports the conclusion that these studies are reliable. *Held*, 314 F.3d at 187-89; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Underwood*, 105 F.3d at 949; Decision and Order at 9-11. Employer's argument again constitutes a request to reweigh the evidence, which we are not empowered to do; we thus reject it. *See Anderson*, 12 BLR at 1-113.

Further, neither Dr. Zaldivar nor Dr. Spagnolo specifically stated that the failure of the technicians to specify Claimant gave good effort on the FEV1 portion of the study supports the conclusion that the September 5, 2018 and April 2, 2019 studies are not reliable. Because Employer does not challenge the ALJ's finding that the opinions of Drs. Zaldivar and Spagnolo are inadequately explained in light of the technicians' observations, we affirm these findings. *Skrack*, 6 BLR at 1-711; Decision and Order at 9-11. As it is supported by substantial evidence, we affirm the ALJ's finding that the September 5, 2018 and April 2, 2019 qualifying studies are reliable. *Owens*, 724 F.3d at 557; *Mays*, 176 F.3d at 756; *Stowers*, 24 BLR at 1-92; 65 Fed. Reg. at 79,928. Because Employer raises no further argument, we affirm the ALJ's finding the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11.

The ALJ also considered the medical opinions of Drs. Forehand, Zaldivar, and Spagnolo that Claimant is not totally disabled. Decision and Order at 12-14; Director's Exhibit 10; Employer's Exhibits 5, 9. He discredited their opinions as inconsistent with the weight of the pulmonary function study evidence. Decision and Order at 12-14. Further, the ALJ discredited the opinions of Drs. Forehand and Zaldivar because they acknowledged Claimant's usual coal mine employment as a foreman, but they "did not indicate the exertional requirements of this job or discuss how much weight the Claimant was required to carry and lift." *Id*. The ALJ also discredited Dr. Spagnolo's opinion because he failed to explain "how Claimant could meet the exertional demands of his usual coal mine work in light of the chronic respiratory systems reported in the medical records he considered." *Id*.

Employer raises no specific arguments regarding the medical opinion evidence other than its contention that the pulmonary function studies do not establish total disability, which we have rejected. As Employer does not specifically challenge any of the ALJ's credibility findings, we affirm the ALJ's finding that the medical opinions are not credible on the issue of total disability. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(iv).

Because there is no credible evidence undermining the qualifying pulmonary function studies, we affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 14. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal[8] nor clinical pneumoconiosis,[9] or that

[8] "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).

[9] "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).

"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); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). The ALJ found Employer failed to establish rebuttal by either method.[10]

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*, 25 BLR at 1-155 n.8.

Dr. Zaldivar

Dr. Zaldivar opined Claimant has a restriction of his forced vital capacity evidenced by pulmonary function testing. Employer's Exhibits 5, 14. He concluded this impairment is due to obesity and unrelated to coal mine dust exposure. *Id*. The ALJ found Dr. Zaldivar's rationale for excluding legal pneumoconiosis inconsistent with the regulations and inadequately explained. Decision and Order at 18. Thus he assigned it diminished weight. *Id*.

We reject Employer's argument that the ALJ erred in discrediting Dr. Zaldivar's opinion. Employer's Brief at 21-24. Dr. Zaldivar testified that for coal mine dust exposure to cause a restrictive lung impairment, he would expect to see "something within the lungs radiographically" that explains a "shrinkage of the lungs." Employer's Exhibit 14 at 11-13. He further testified he has not come across medical literature showing "legal pneumoconiosis causing a restriction in the absence of pneumoconiosis." *Id*. He reiterated "there has to be something in the chest x-ray" for coal mine dust exposure to cause restriction, and Claimant would "have to have clinical pneumoconiosis for a restriction to occur from coal workers' pneumoconiosis." *Id*. The ALJ permissibly found Dr. Zaldivar's opinion unpersuasive because the regulations provide that legal pneumoconiosis may be present even in the absence of a positive x-ray for clinical pneumoconiosis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (ALJ properly concluded the regulations provide legal pneumoconiosis may

[10] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 17.

exist in the absence of clinical pneumoconiosis); 20 C.F.R. §§718.201, 718.202(a)(4), 718.202(b); Decision and Order at 18.

Dr. Zaldivar also excluded a diagnosis of legal pneumoconiosis because "there is an explanation" for Claimant's restrictive impairment insofar as he is obese and obesity causes restriction of forced vital capacity on pulmonary function testing. Director's Exhibit 14 at 9. The ALJ permissibly found Dr. Zaldivar "did not adequately explain how Claimant's 15.6 years of coal mine employment did not also substantially contribute to, or aggravate[,] Claimant's restrictive impairment." Decision and Order at 18; *Stallard*, 876 F.3d at 673-74 n.4; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); 20 C.F.R. §718.201(a)(2), (b).

Dr. Spagnolo

Dr. Spagnolo opined Claimant does not have any obstructive or restrictive lung impairment because his pulmonary function testing is either non-qualifying or invalid, and his arterial blood gas testing does not establish total disability. Employer's Exhibits 9, 13. Thus, Dr. Spagnolo excluded a diagnosis of legal pneumoconiosis. *Id*. He further concluded Claimant's symptoms of cough, shortness of breath, and wheezing are unrelated to coal mine dust exposure and instead due to obesity, deconditioning, and cardiac disease. *Id*. Contrary to Employer's argument, the ALJ permissibly found "Dr. Spagnolo's statement that the Claimant has normal lung function [is] unsupported by the objective evidence of record" because the ALJ found the pulmonary function studies support a finding of total disability.[11] Decision and Order at 19; *see 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); Employer's Brief at 24-27.

Because the ALJ permissibly discredited the opinions of Drs. Zaldivar and Spagnolo, the only opinions supportive of Employer's burden on rebuttal, we affirm his conclusion that Employer did not disprove legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1)(i).

[11] Because the ALJ provided a valid reason for discrediting Dr. Spagnolo's opinion on legal pneumoconiosis, we need not address Employer's remaining arguments regarding the weight accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 24-27.

[12] The ALJ credited Dr. Forehand's opinion that Claimant has legal pneumoconiosis, which does not aid Employer in rebutting the presumption. Decision and Order at 19-20; Director's Exhibit 10. Because the ALJ discredited the opinions of Drs. Zaldivar and Spagnolo, Employer cannot establish Claimant does not have legal

Disability Causation

The ALJ next considered whether Employer established "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 20-21. Contrary to Employer's argument, the ALJ permissibly discredited the disability causation opinions of Drs. Zaldivar and Spagnolo because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove Claimant has the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 20-21. We therefore affirm the ALJ's findings that Employer failed to establish no part of Claimant's respiratory disability is caused by legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(ii), and Employer failed to establish rebuttal of the Section 411(c)(4) presumption.

Commencement Date for Benefits

The date for the commencement of benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless credible evidence establishes Claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

The ALJ found the onset date of Claimant's total disability due to pneumoconiosis is not ascertainable from the record and awarded benefits commencing April 2018, the month in which he filed his claim. Decision and Order at 21. Employer maintains the earliest date benefits can commence is September 2018, the month in which Dr. Mettu evaluated Claimant and obtained a qualifying pulmonary function study. Employer's Brief at 27-29. We disagree.

Contrary to Employer's contention, the onset date is not established by the first "qualifying" pulmonary function study because this evidence shows only that Claimant

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pneumoconiosis. *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 255-56 (2019); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus, we decline to address Employer's arguments regarding the ALJ's weighing of Dr. Forehand's opinion. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 17-19.

became totally disabled at some time prior to the date of that evidence. *See Owens*, 14 BLR at 1-50; *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). Moreover, having rejected the medical opinions diagnosing no totally disabling impairment and no legal pneumoconiosis, the ALJ found no credible evidence in the record that Claimant was not totally disabled due to pneumoconiosis after April 2018. Decision and Order at 21.

Because it is supported by substantial evidence, we affirm the ALJ's finding that the onset date of Claimant's total disability is not ascertainable from the record; therefore, benefits should commence in April 2018, the month in which Claimant filed his claim. 20 C.F.R. §725.503(b); *see Edmiston*, 14 BLR at 1-69; *Owens*, 14 BLR at 1-47; Decision and Order at 21.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge