U.S. Department of Labor

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

BRB No. 21-0088 BLA

JAMES M. VANOVER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIAMOND MAY COAL COMPANY	)	
	)	DATE ISSUED: 4/27/2022
Employer-Petitioner	)	
	)	
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 in a Subsequent Claim of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy and Lois A. Kitts (Baird and Baird, P. S. C.), Pikeville, Kentucky, for Employer.

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, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Christopher Larsen's Decision and Order Awarding Benefits in a Subsequent Claim (2017-BLA-05180) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on July 30, 2015.[1]

The ALJ found Claimant established at least fifteen years of qualifying coal mine employment and 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, 30 U.S.C. §921(c)(4) (2018),[2] and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.[3] He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues 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.[4] It also argues the removal provisions applicable to

[1] Claimant filed an initial claim on July 6, 2006, which ALJ Larry W. Price denied because Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); Director's Exhibit 1.

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the denial of a previous claim, the ALJ must also deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish total disability in his prior claim, he had to submit evidence establishing this element to obtain review of the merits of his current claim. *Id.*

[4] 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,

ALJs rendered his appointment unconstitutional. Furthermore, it challenges the constitutionality of the Section 411(c)(4) presumption. On the merits, Employer argues the ALJ erred in finding Claimant is totally disabled and thus erred in finding he invoked the Section 411(c)(4) presumption.[5]

Claimant responds in support of the award of benefits.[6] The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's constitutional challenges.

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.[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).

Appointments Clause

Employer challenges ALJ Larsen's authority to adjudicate this case and urges the Board to vacate the Decision and Order and remand the case to be heard by a constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044

> whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment 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.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14, 45-46.

[6] Claimant filed a Motion to File Out of Time and brief on May 17, 2021, requesting the Board accept the late filing of his response brief. By Order, the Board accepted Claimant's brief and allowed replies to be filed within twenty days from its receipt. *Vanover v. Diamond May Coal Co.*, BRB No. 21-0088 BLA (July 9, 2021) (Order) (unpub.).

[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 17, 20.

(2018).[8] Employer's Brief at 5-8. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017, but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[9] *Id.*

We agree with the Director's position that Employer forfeited its Appointments Clause argument by failing to raise it when the case was before the ALJ.[10] Director's Brief at 3-4. The Appointments Clause issue is "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted).

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[8] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held, 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 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.

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

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Larsen.

[10] "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 n.1, U.S. (2017), *citing United States v. Olano*, 507 U. S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Employer initially requested the ALJ hold this case in abeyance pending the outcome of *Lucia*. Employer Motion To Cancel Formal Hearing and Place Claim in Abeyance. Subsequent to *Lucia* being decided, however, it did not request the case be reassigned. Had Employer raised the argument before the ALJ, he could have addressed it and, if appropriate, taken steps to have the case assigned for a new hearing before a different ALJ. *Kiyuna v. Matson Terminals Inc.*, 53 BRBS 9, 11 (2019). Instead, Employer waited to raise the issue until after the ALJ issued an adverse decision. Because Employer has not raised any basis for excusing its forfeiture of the issue, we reject its argument that this case should be remanded to the Office of Administrative Law Judges (OALJ) for a new hearing before a different ALJ. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging); *Davis*, 987 F.3d at 588; *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018); *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019).

Notwithstanding Employer's forfeiture, we also conclude there is no merit to its argument that the Secretary's ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 7-8. An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Thus, at the time he ratified the ALJ's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Larsen

and gave "due consideration" to his appointment.[11] Secretary's December 21, 2017 Letter to ALJ Larsen. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Larsen "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts" or did not make a "detached and considered judgement" when he ratified ALJ Larsen's appointment. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal,* 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal,* 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions was proper).

Thus, we reject Employer's argument that this case should be remanded to the OALJ for a new hearing before a different ALJ.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 8. Employer 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*. *Id.*

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs). Further, the majority in *Lucia* declined to address the removal provisions for ALJs, and Employer has not explained how or why Justice Breyer's concurring opinion should apply to DOL ALJs, or otherwise undermine the ALJ's ability to hear and decide this case. *Lucia*, 138 S. Ct. at 2050 n.1. Finally, in *Arthrex, Inc. v. Smith & Nephew, Inc*., 594 U.S. , 141 S. Ct. 1970, 1985 (2021) (emphasis added), the

[11] While Employer correctly notes the Secretary's ratification letter was signed with an autopen, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act"); Employer Brief at 7-8.

Supreme Court explained "the *unreviewable authority* wielded by [Administrative Patent Judges] during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1137-38.

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 16-18. 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).

Invocation of the 411(c)(4) Presumption – Total Disability

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. *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 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). Qualifying evidence in any of the four categories

establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant established total disability based on the newly submitted arterial blood gas studies and medical opinions, and the evidence as a whole. 20 C.F.R. §718.204(b)(2); Decision and Order at 43. Employer argues the ALJ erred in finding the arterial blood gas studies and medical opinion evidence establish total disability. Employer's Brief at 9-16.

Arterial Blood Gas Studies

The ALJ reviewed the results of four arterial blood gas studies: two studies Claimant performed on August 25, 2015,[12] a study he performed on April 20, 2016, and a study he performed on May 10, 2018. Decision and Order at 23-28; Director's Exhibits 10 at 21, 23; 12 at 19; Employer's Exhibit 1 at 10. Both August 25, 2015 studies produced qualifying values,[13] the April 20, 2016 study produced qualifying values, and the May 10, 2018 study produced non-qualifying values.[14] *Id.* The ALJ declined to assign more weight to the 2018 study based on its recency because it would be inconsistent with the principle that pneumoconiosis is a latent and progressive disease. Decision and Order at 28. He found Claimant established total disability because a preponderance of the blood gas testing is qualifying. *Id.*

[12] Claimant underwent a blood gas study on August 25, 2015, as part of his DOL-sponsored complete pulmonary evaluation. Director's Exhibit 10 at 21-22. He performed a second study twenty-eight minutes later. *Id.* at 23. Dr. Everhart indicated the second blood gas study was conducted to "confirm" the first. *Id.* at 30.

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

[14] Employer incorrectly states the April 20, 2016 blood gas study is non-qualifying. Employer's Brief at 9, 11. The ALJ correctly identified Claimant's pCO2 value of 51 is qualifying under the table at Appendix C to 20 C.F.R. Part 718 for the applicable altitude of 1,050 feet. Director's Exhibit 12 at 19.

Employer argues the ALJ erred in considering the second arterial blood gas study Claimant performed on August 25, 2015, because no party designated the study and it exceeds the evidentiary limitations.[15] Employer's Brief at 9-14. We disagree.

Although the ALJ did not render a specific finding on how the second August 25, 2015 blood gas study should be classified, the record reveals it must be considered either part of the DOL complete pulmonary evaluation or a treatment record. Claimant underwent the second blood gas study approximately twenty-eight minutes after the first study conducted as part of his DOL evaluation. *See* Director's Exhibit 10. Dr. Everhart, the DOL examining physician, indicated the second blood gas study was administered "to confirm" the results of the first, and attached the results from the second study to the DOL medical report that was admitted into evidence. *Id*. Meanwhile, Claimant testified he was admitted to the hospital for six to seven hours following administration of the first blood gas study because "[t]hey said I was having a heart attack." Director's Exhibit 20. Whether considered part of Claimant's DOL evaluation, or his subsequent hospitalization, the results of the study are admissible even though Claimant did not specifically designate it as affirmative evidence. *See* 20 C.F.R. §§725.406(b), 725.421(b)(4) (results of DOL examination automatically become part of the record before the ALJ and do not count as Claimant's affirmative or rebuttal evidence under the evidentiary limitations); 20 C.F.R. §725.414(a)(4) (treatment records may be received into evidence regardless of the numerical limitations on affirmative and rebuttal evidence).[16]

Regardless, any alleged error by the ALJ in weighing the second blood gas study conducted on August 25, 2015,[17] is harmless. Even if excluded, the record still contains

[15] Employer does not argue the ALJ improperly admitted the initial arterial blood gas study as part of the DOL -sponsored complete pulmonary evaluation.

[16] We also note Claimant did not fill all his available slots for affirmative blood gas evidence at 20 C.F.R. §725.414(a)(2)(i).

[17] To the extent Employer argues the ALJ erred in rejecting Dr. Jarboe's opinion that the initial August 25, 2015 blood gas study is unreliable due to Claimant having a heart attack, we disagree. Decision and Order at 13. Dr. Jarboe acknowledged it is not clear Claimant suffered a heart attack. Employer's Exhibit 2 at 10-11. Dr. Everhart reviewed Claimant's electrocardiogram (EKG) results from August 25, 2015, and opined he did not "see anything that really looks like an acute myocardial infarction." Director's Exhibit 10 at 30. The ALJ found no medical records indicating why Claimant was sent to the emergency room that day, and Dr. Marantz did not indicate there were any issues with the blood gas study. Decision and Order at 26. The ALJ permissibly found this evidence insufficient to establish Claimant suffered a cardiac event which affected the probative

two qualifying blood gas studies and one non-qualifying study; the ALJ's finding that the preponderance of the arterial blood gas testing is qualifying remains supported by substantial evidence. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993). Thus, Employer has failed to explain how the error it alleges 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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer argues the ALJ erred in rejecting Dr. Jarboe's opinion that the non-qualifying May 10, 2018 blood gas study is more probative of Claimant's condition than the earlier blood gas testing. Employer's Brief at 12-13. Dr. Jarboe stated Claimant was taking methadone at the time of his April 20, 2016 study, which is "a potent preparation which will depress the respiratory center." Employer's Exhibits 1 at 8. He opined the May 10, 2018 study better reflects Claimant's true respiratory condition because he was no longer taking methadone at the time of that study. Employer's Exhibit 2 at 17-18.

The ALJ observed the premise of Dr. Jarboe's opinion is "[i]t is not uncommon to see mild increases in the pCO2 in individuals who are taking modest-to-large doses of narcotics," but Dr. Jarboe did not state whether Claimant was taking a "modest-to-large dose" of methadone. Decision and Order at 27, *quoting* Employer's Exhibit 1 at 8. The ALJ permissibly found Dr. Jarboe's opinion unpersuasive and thus not a basis to assign greater weight to the May 10, 2018 study. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 27.[18]

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value of the August 25, 2015 blood gas study. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); 20 C.F.R. Part 718, Appendix C ("Tests must not be performed during or soon after an acute respiratory or cardiac illness."); Decision and Order at 26.

[18] Furthermore, Dr. Jarboe's opinion that Claimant's methadone use caused him to produce qualifying blood gas studies is not a basis on which to find Claimant is not totally disabled. Employer's Brief at 12-13. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant's respiratory or pulmonary condition precludes the performance of his usual coal mine work. The etiology of Claimant's pulmonary condition concerns the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or on rebuttal of the Section 411(c)(4) presumption. *See* 20 C.F.R. §§718.204(a), (c), 718.305(d)(1); *Bosco v. Twin Pines Coal Co.*, 892 F.3d 1473, 1480-81 (10th Cir. 1989).

Employer further contends the May 10, 2018 blood gas study is the most probative because it is the most recent and the ALJ therefore erred in finding it outweighed by the August 25, 2015 and April 20, 2016 qualifying blood gas studies. Employer's Brief at 10-14. This argument has no merit. 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 when a miner's condition improves. *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, 719 (4th Cir. 1993). In explaining the rationale behind the "later evidence rule," the court reasoned "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. *Adkins*, 958 F.2d at 51-52. As the test results do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's condition." *Id*. at 52. But if "the tests or exams" show the miner's condition has improved, the reasoning "simply cannot apply" because one must be incorrect -- "and it is just as likely that the later evidence is faulty as the earlier." *Id*. Thus, the ALJ properly declined to find the May 10, 2018 study more probative solely because it was the most recent. Having found all the results qualitatively valid and that the majority of them were qualifying quantitatively the ALJ permissibly found the blood gas study established total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id.*; *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); Decision and Order at 28.

Because it is supported by substantial evidence, we affirm the ALJ's finding that the August 25, 2015 and April 20, 2016 arterial blood gas studies establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinion Evidence

Employer also challenges the ALJ's weighing of the medical opinions. He discredited Drs. Fino's and Jarboe's opinions that Claimant is not totally disabled as not reasoned or documented. Decision and Order at 43. Conversely, he credited Dr. Everhart's opinion that Claimant is totally disabled, finding it reasoned, documented, and sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer argues the ALJ's errors in weighing the blood gas study evidence caused him to erroneously discredit the contrary medical opinions of Drs. Fino and Jarboe. Employer's Brief at 15-16. Because we discern no error in the ALJ's weighing of the blood

gas study evidence, we reject Employer's argument.[19] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Thus, we affirm, as supported by substantial evidence, the ALJ's determination that the contrary medical opinion evidence does not undermine the disabling blood gas study evidence. *See 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); Decision and Order at 24. Because there is no evidence undermining the arterial blood gas study evidence, we further affirm the ALJ's conclusion that Claimant established total disability, 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and thus invoked the Section 411(c)(4) presumption. Decision and Order at 44, 46. Because Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm the award of benefits. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 55.

[19] Because Dr. Everhart's opinion is not contrary to the arterial blood gas evidence, we need not address Employer's arguments that the ALJ erred in crediting it. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge