U.S. Department of Labor

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

BRB No. 21-0554 BLA

JAMES DAUGHERTY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COLQUEST ENERGY	)	
	)	DATE ISSUED: 04/06/2023
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 of Larry W. Price, Administrative Law Judge, United States Department of Labor.

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

David Casserly (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: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Larry W. Price's Decision and Order Awarding Benefits (2019-BLA-05444) rendered on a claim filed on December 11,

2017 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 13.37 years of coal mine employment, and thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018).[1] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant did not establish clinical pneumoconiosis, but did establish he is totally disabled due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2), (c). He therefore awarded benefits.

On appeal, Employer argues the ALJ lacked 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.[2] It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. Alternatively, Employer challenges the ALJ's findings that Claimant established legal pneumoconiosis and total disability due to pneumoconiosis. It also asserts the ALJ improperly relied on the preamble to the 2001 revised regulations to discredit the opinions of Drs. Rosenberg and Tuteur. Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenges and its argument that the ALJ erred in relying on the preamble to assess the evidence in this case. In a reply brief, Employer reiterates its contentions.

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

[2] 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 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.

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.[3] 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 Challenge

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[4] Employer's Brief at 9-14; Reply Brief at 1-3. Although the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[5] Employer maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[6] *Id.* We reject Employer's

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner 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.

[4] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States 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)).

[5] The Secretary of Labor 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 Price.

[6] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to the DOL's ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

argument, as the Secretary's ratification was a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.[7]

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 5 (quoting *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 the authority to take the action to be ratified at the time of ratification; 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 on the challenger to demonstrate 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. 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 Price and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Judge Price. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Price "as an [ALJ]." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts" but instead generally speculates "absent evidence of genuine consideration of the candidate's qualifications, summary ratification fails constitutional muster." Employer's Brief at 13. 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-

[7] The ALJ denied Employer's Motion for Reassignment and request to hold this claim in abeyance on August 18, 2020. Order Denying Employer's Motion for Reassignment and to Hold in Abeyance at 1.

66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" its earlier invalid actions was proper).[8]

Consequently, we reject Employer's argument that this case should be remanded 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 15-19; Reply Brief at 3-5. It generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion in *Lucia*. Employer's Brief at 17-19; Reply Brief at 3-4. Employer 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 opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 15-19; Reply Brief at 4-5. For the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (pneumoconiosis arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-

[8] While Employer correctly states Executive Order 13843, which removes ALJs from the competitive civil service, applied only to future appointments, Employer's Brief at 19-20, the Executive Order does not state that the Secretary's 2017 ratification of the ALJ's appointment was impermissible or invalid. Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Price's appointment, which we hold constituted a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Legal Pneumoconiosis[9]

Employer argues the ALJ erred in finding Claimant established legal pneumoconiosis.[10] To establish the disease, Claimant must demonstrate he has 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). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held a claimant satisfies this standard by establishing his lung disease or impairment was caused "in part" by coal mine employment. *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99, 600 (6th Cir. 2014).

The ALJ considered the medical opinions of Drs. Forehand, Rosenberg, and Tuteur. Dr. Forehand diagnosed legal pneumoconiosis in the form of obstructive lung disease with a restrictive component caused by both coal mine dust exposure and cigarette smoking. Director's Exhibits 13, 21. Dr. Rosenberg diagnosed chronic bronchitis and emphysema attributable to cigarette smoking, and completely unrelated to coal mine dust exposure. Director's Exhibit 16; Employer's Exhibit 1. Finally, Dr. Tuteur opined Claimant has chronic obstructive pulmonary disease (COPD) solely attributable to cigarette smoking, and unrelated to coal mine dust exposure. Employer's Exhibit 2.

The ALJ found Dr. Forehand's opinion well-reasoned, documented, and entitled to significant weight. Decision and Order at 21-22. Conversely, he found the opinions of Drs. Rosenberg and Tuteur inadequately explained and inconsistent with the medical science set forth in the preamble to the 2001 revised regulations. *Id.* at 23-26. Thus he determined the medical opinion evidence establishes legal pneumoconiosis. *Id*. at 26.

Employer contends the ALJ erred in finding Dr. Forehand's opinion sufficient to establish the existence of legal pneumoconiosis. Employer's Brief at 25-28. We disagree.

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[9] The ALJ found the evidence did not establish clinical pneumoconiosis. 20 C.F.R. §718.202(a); Decision and Order at 20-21.

[10] "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).

In his initial report, Dr. Forehand diagnosed Claimant with obstructive lung disease with a mixed restrictive and obstructive component due to coal mine dust exposure and cigarette smoking. Director's Exhibit 13. He explained the combined effects of Claimant's occupational exposure to coal mine dust and cigarette smoke "are additive because cigarette smoke interferes with the clearance of dust from his lungs." *Id*. He also diagnosed a totally disabling respiratory impairment based on an FEV1 value of 47% on pulmonary function testing. *Id*.

The district director subsequently requested Dr. Forehand review additional medical evidence[11] and reconsider his original opinion based on his evaluation of the new evidence. Director's Exhibit 19. In his supplemental report, Dr. Forehand disagreed with Dr. Vuskovich regarding the validity of the August 9, 2018 pulmonary function study noting he provided no explanation for his conclusion. He also disagreed with Dr. Rosenberg's conclusion that Claimant's coal mine dust exposure played no role in his ventilatory impairment or his totally disabling respiratory impairment. *Id.* He noted his original diagnosis of legal pneumoconiosis remained unchanged, and "stood by" his opinion that Claimant has totally disabling obstructive lung disease "substantially contributed" to by occupational exposure to coal mine dust. Director's Exhibit 21.

In weighing Dr. Forehand's opinion, the ALJ summarized the objective testing the physician relied on to diagnose legal pneumoconiosis. Decision and Order at 7-9, 21-22. As Dr. Forehand's opinion was supported by the objective testing he administered and based on his consideration of additional medical evidence, including Dr. Rosenberg's contrary opinion, the ALJ permissibly found Dr. Forehand's opinion reasoned and documented. *See Groves*, 761 F.3d at 598-99; *Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020); *see also Tennessee 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); Decision and Order at 22. He also permissibly found Dr. Forehand's opinion consistent with the DOL's recognition that the effects of smoking and coal dust exposure can be additive. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 21-22.

Employer's additional argument that Dr. Forehand relied on an "overstated work

[11] In her November 30, 2018 letter, the claims examiner asked Dr. Forehand to reconsider his original opinion in light of his review of additional medical evidence consisting of Dr. Rosenberg's examination findings and report and Dr. Vuskovich's invalidation report of the February 27, 2018 pulmonary function study. Director's Exhibit 19.

history" is unavailing.[12] Employer's Brief at 25. In his original February 27, 2018 report, Dr. Forehand indicated Claimant worked for seventeen years in coal mine employment. Director's Exhibit 13. Nevertheless, contrary to Employer's contention, on November 30, 2018, the district director notified Dr. Forehand "we have established 13 years of coal mine employment" when requesting he reconsider his original opinion based on his review of additional medical evidence. Director's Exhibit 19. Dr. Forehand, after considering a thirteen-year coal mine employment history and additional medical evidence, "did not find a single fact or set of facts that excluded or disproved the existence of [Claimant's] coal mine dust related lung disease." Director's Exhibit 21.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012). Because it is based on substantial evidence, we affirm the ALJ's determination that Dr. Forehand's opinion is well reasoned and documented, and sufficient to satisfy Claimant's burden of proof to establish legal pneumoconiosis. *See Groves*, 761 F.3d at 598-99; *Young*, 947 F.3d at 407; Decision and Order at 22.

We further reject Employer's contention that the ALJ's use of the preamble impermissibly shifted the burden of proof. Employer's Brief at 30-31. As part of the deliberative process, an ALJ may -- as a matter of black-letter law -- evaluate expert opinions in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830-31 (10th Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). Employer's argument is thus unpersuasive.

We also reject Employer's contention that the ALJ erred in discrediting Dr. Rosenberg's opinion. Employer's Brief at 28. Dr. Rosenberg observed, "when coal dust

[12] Moreover, given Dr. Forehand's account of Claimant's smoking history is identical to that relied upon by Dr. Rosenberg and to that found by the ALJ, Employer has not offered any support for its contention that Dr. Forehand relied on "an understated smoking history," nor has it explained how relying on such history undermines his opinion. Decision and Order at 5; Director's Exhibits 13, 16; Employer's Brief at 25. We, therefore, reject Employer's argument. *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).

exposure is below 2 mg/m^3, based on cohort studies of coal miners followed over time . . . , it is unlikely that a miner who has no impairment when he leaves coal mining will suddenly develop an obstruction related to coal dust years after the last exposure." Director's Exhibit 16 at 11. Based on this theory, he concluded "there is no scientific literature" demonstrating Claimant's lung disease represents "latent and progressive legal [coal workers' pneumoconiosis]." *Id*. The ALJ permissibly discredited Dr. Rosenberg's reasoning as contrary to the regulations recognizing pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); Decision and Order at 22-23, 24. He reasonably noted, "even if Dr. Rosenberg is correct that latent and progressive pneumoconiosis is rare," the physician did not explain why Claimant was not a "rare" case. *See Young*, 947 F.3d at 407; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); Decision and Order at 24. Because the ALJ permissibly relied on the preamble to discredit Dr. Rosenberg's opinion, we reject Employer's argument that the ALJ substituted his opinion for that of the physician. *See* Employer's Brief at 28.

Further, Dr. Rosenberg eliminated coal mine dust exposure as a source of Claimant's lung disease, in part, because he found the reduction in Claimant's FEV1/FVC ratio on pulmonary function testing to be incompatible with obstruction due to coal mine dust exposure. Director's Exhibit 16 at 7-8; Employer's Exhibit 1 at 4-6. The ALJ permissibly discredited his opinion as conflicting with the DOL's recognition set forth in the preamble that coal mine dust exposure can cause clinically significant obstructive disease as measured by a reduction in the FEV1/FVC ratio. *See Sterling*, 762 F.3d at 491; 65 Fed. Reg. at 79,943; Decision and Order at 23.

Nor is there merit to Employer's assertion that the ALJ erred in weighing Dr. Tuteur's opinion. Employer's Brief at 20-21, 25. In assessing the etiology of Claimant's COPD, Dr. Tuteur stated he used "statistically based studies for important clinical decision making." Employer's Exhibit 2 at 6. He explained cigarette smokers who have never mined coal develop the COPD phenotype about twenty percent of the time, while "never smoking miners develop COPD" about only one percent. *Id*. at 5. Thus, comparing the relative risk of COPD among smokers who never mined to the risk for non-smoking miners, and applying this statistical data to Claimant, he concluded Claimant's COPD "is due to the chronic inhalation of tobacco smoke," not coal mine dust. *Id*. The ALJ permissibly found Dr. Tuteur's opinion unpersuasive because he relied heavily on general statistics, not Claimant's specific case. *See Young*, 947 F.3d at 407; *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1345-46 (10th Cir. 2014); *Beeler*, 521 F.3d at 726; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); 65 Fed. Reg. at 79,940-41

(statistical averaging can hide the effect of coal mine dust exposure in individual miners); Decision and Order at 25-26.

Because the ALJ acted within his discretion in crediting Dr. Forehand's opinion and rejecting the opinions of Drs. Rosenberg and Tuteur, we affirm his finding that Claimant established the existence of legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); Decision and Order at 21-26.

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 and medical opinions.[13] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 26-28.

Pulmonary Function Studies

The ALJ considered two pulmonary function studies dated February 27, 2018, and August 17, 2018. Decision and Order at 6. He initially noted the studies produced qualifying[14] values before and after bronchodilation. *Id*.; Director's Exhibits 13, 16. Subsequently, he found the February 27, 2018 study invalid due to Claimant's less than maximal and incomplete effort, but found the August 17, 2018 study valid. Decision and Order at 13-14. As the only valid study of record produced qualifying values before

[13] The ALJ found the arterial blood gas studies 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), (iii); Decision and Order at 27.

[14] 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).

and after the administration of bronchodilators, the ALJ concluded the pulmonary function study evidence establishes total disability. *Id.*

Employer argues the ALJ erred in finding the August 17, 2018 pulmonary function study valid. Employer's Brief at 21-24. We disagree.

Dr. Rosenberg opined the August 17, 2018 pulmonary function tests were "performed with incomplete efforts and are not formally valid." Director's Exhibit 16. Nevertheless, he relied on the study to diagnose Claimant with severe, likely disabling airflow obstruction, and the technician who administered the studies observed Claimant exhibited "good effort" and indicated the spirometry was "acceptable and reproducible." *Id.* The ALJ has discretion to weigh the evidence, draw appropriate inferences, and determine credibility. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999)*; Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998)*; Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997). He permissibly found this study valid based on the administering technician's statements and found them more persuasive than Dr. Rosenberg's contrary opinion. Decision and Order at 5; *see Mays*, 176 F.3d at 756*; Hicks*, 138 F.3d at 530*; Akers*, 131 F.3d at 439-40. 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 27.

Medical Opinions

The ALJ found Claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 27-28. He specifically found Dr. Forehand's opinion that Claimant has a totally disabling respiratory or pulmonary impairment well-reasoned and documented and entitled to great weight. Decision and Order at 28. He also found the opinions of Drs. Rosenberg and Tuteur "support a conclusion that Claimant has a totally disabling respiratory impairment."[15] *Id.*

Employer argues the ALJ erred in crediting Dr. Forehand's opinion and in construing Dr. Tuteur's opinion as supporting a finding of total disability. Employer's Brief at 21-25. *Id.* We disagree.

We reject Employer's argument that Dr. Forehand impermissibly relied on an invalid pulmonary function study and had no knowledge of Claimant's job duties and

[15] Employer does not challenge the ALJ's finding that Dr. Rosenberg's opinion supports a finding of total disability. Thus, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983)

exertional requirements as inconsistent with the facts. Dr. Forehand conducted the DOL sponsored complete pulmonary evaluation of Claimant on February 27, 2018. Director's Exhibit 13. He listed Claimant's last coal mine job as an underground mechanic and noted Claimant "worked on belt head, shoveled belt line, [and] spread rock dust." *Id.* He observed Claimant's pulmonary function study -- which produced qualifying values before and after the administration of bronchodilators -- demonstrates a "significant, work-limiting respiratory impairment," leaving Claimant with insufficient residual ventilatory capacity to perform his usual coal mine employment. *Id.* Based on his overall evaluation, he opined Claimant is "[u]nable to work" and is "[t]otally and permanently disabled." *Id*.

Subsequently, Dr. Forehand reviewed the physical examination findings and objective test results from the studies Dr. Rosenberg administered on August 17, 2018, along with the work history and the description of the duties and exertional requirements of Claimant's usual coal mine employment Dr. Rosenberg acquired during his examination. Director's Exhibits 13, 16, 21. Dr. Forehand agreed with Dr. Rosenberg's finding that Claimant has a totally disabling respiratory impairment, which would prevent him from returning to his usual coal mine employment. Director's Exhibit 21. After noting the pulmonary function study administered during Dr. Rosenberg's examination produced qualifying values before and after the administration of bronchodilators, he reiterated his original opinion that Claimant does not have the pulmonary capacity to perform his usual coal mine employment. *Id*. Contrary to Employer's arguments, Dr. Forehand thus reviewed results from a valid pulmonary function study as well as a description of Claimant's job tasks and exertional demands when rendering his conclusions. Therefore, the ALJ permissibly found Dr. Forehand's opinion reasoned and documented. *See Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; Decision and Order at 28.

The ALJ also permissibly found Dr. Tuteur's opinion supported a finding of total disability. Decision and Order at 27-28. Dr. Tuteur opined "[b]ased on the totality of all available medical data, it is with reasonable medical certainty that [Claimant] is totally and permanently disabled from returning to work in the coal mines or engaging in work requiring similar effort." Employer's Exhibit 2. Employer argues the ALJ erred in finding Dr. Tuteur's opinion supports a finding Claimant is totally disabled because he opined that claimant's pulmonary function results can be attributed to heart disease.[16] Employer's Brief at 24-25. Employer's argument lacks merit.

[16] Employer also argues the ALJ erred in finding neither Dr. Rosenberg nor Dr. Tuteur directly addressed the issue of total disability because both physicians "declared [Claimant] disabled for work given his specific work demands." Employer's Brief at 21. Nevertheless, Employer does not challenge the ALJ's finding Dr. Rosenberg's opinion

The relevant inquiry at 20 C.F.R. §718.204(b) is whether the miner's respiratory or pulmonary impairment precludes the miner from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). The cause of the miner's pulmonary impairment relates to the issue of disability causation, which is addressed either at 20 C.F.R. §718.204(c), or in consideration of whether Employer is able to rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

We therefore affirm the ALJ's finding that the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 27-28. We further affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; Decision and Order at 28.

supports a finding of total disability and given our affirmance of the ALJ's finding that Dr. Tuteur's opinion also supports a finding of total disability, Employer has not explained how its argument would make a difference. *Shinseki*, 556 U.S. at 413.

As Employer does not challenge the ALJ's finding that Claimant established disability causation, we affirm the ALJ's determination that Claimant established his total respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.204(c); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 28-29. We therefore affirm the award of benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge