U.S. Department of Labor

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

BRB No. 20-0427 BLA

JERRY R. PEAVYHOUSE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEST COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 12/14/2021
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Jeffrey S. Goldberg (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 and its Carrier (Employer) appeal Associate Chief Administrative Law Judge (ALJ) Paul R. Almanza's Decision and Order Awarding Benefits (2017-BLA-05002) rendered on a subsequent claim filed on May 14, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established fifteen and one-half years of underground and substantially similar surface coal mine employment. He also found Claimant has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] and established a change in an applicable condition of entitlement.[3]

[1] Claimant filed two previous claims. He withdrew his most recent prior claim; therefore, it is considered not to have been filed. *See* 20 C.F.R. §725.306(b); Director's Exhibit 2. The ALJ stated Claimant's first claim was "filed on January 1, 1970, but [the record] 'has essentially been destroyed,' and there is nothing . . . indicating the basis upon which the claim was denied." Decision and Order at 8, *quoting* Director's Exhibit 41. Thus he proceeded as if Claimant had not established any elements of entitlement.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "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); *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 the ALJ proceeded as if Claimant had not established any elements of entitlement in his first claim, he had to submit new evidence establishing at least one element of entitlement in order to obtain review of his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309. 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 Department of Labor (DOL) ALJs rendered his appointment unconstitutional. In addition, it contends the ALJ deprived it of due process by refusing to allow it to obtain discovery from the DOL regarding the scientific bases for the preamble to the 2001 regulatory revisions while relying on the preamble to weigh the evidence in this case. It further asserts the ALJ improperly invoked the Section 411(c)(4) presumption based on erroneous findings that Claimant had at least fifteen years of coal mine employment and is totally disabled. Finally, it argues he erred in finding it did not rebut the presumption.

Claimant responds in support of the award of benefits. 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 to the ALJ's appointment and its due process argument. Employer filed a combined reply brief to Claimant's and the Director's response briefs, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

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[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, 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 will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Tennessee. *See Shupe v.*

Appointments Clause Challenge

Employer urges the Board to vacate the award 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).[6] Employer's Brief at 15-19; Combined Reply Brief at 2-4. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.*

The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Response at 5-8. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* at 7-8. We agree with the Director's position.

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

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Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 2; 8; Hearing Transcript at 55-56.

[6] *Lucia* involved an Appointments Clause challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). 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)).

[7] The Secretary of Labor (the 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 Associate Chief [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] 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 Almanza.

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 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 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 Almanza and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Almanza. The Secretary further stated he was acting in his "capacity as head of [DOL]" when ratifying the appointment of Judge Almanza "as an Associate Chief [ALJ]." *Id.*

Employer does not assert the Secretary had no "knowledge of all the material facts," but generally speculates that he did not make a "genuine, let alone thoughtful, consideration" when he ratified Judge Almanza's appointment. Employer's Brief at 18. 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 properly ratified the ALJ's appointment.[8] *See Edmond v. United States*, 520 U.S. 651, 654-66 (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 at 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] While Employer notes correctly that the Secretary's ratification letter was signed by an "autopen," Employer's Brief at 18, 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").

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. Employer's Brief at 23. The Executive Order does not state the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of Judge Almanza's appointment, which we have held constituted a valid exercise of his authority, thereby bringing the ALJ's appointment into compliance with the Appointments Clause.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 20-23; Combined Reply Brief at 4-9. Employer generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* It also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010) and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (June 29, 2020), and 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 20-23; Combined Reply Brief at 5-6, 8-9.

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, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as [ALJs]" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to

oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[9] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. 1970. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. 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 that "[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 that 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 that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1137-38.

Due Process

While the case was before the ALJ, Employer sought discovery from the DOL related to its deliberative process underlying the preamble to the 2001 revised regulations. *See* West Coal Company's Interrogatories, Requests for Admissions and Requests for Documents to DOL. The Director filed a Motion for a Protective Order to block Employer from obtaining the requested discovery. *See* Director's Motion for Protective Order. Employer responded, urging the ALJ to deny the Director's request. *See* West Coal's Opposition to the Director's Motion for Protective Order. The ALJ rejected Employer's

[9] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the Consumer Financial Protection Bureau is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (June 29, 2020).

arguments and granted the protective order because the discovery Employer sought would not lead to relevant information that is not already available, as the preamble sets forth, at length, the scientific literature the DOL relied on and how it arrived at its conclusions. Order Granting Director's Motion for Protective Order at 3-4. The ALJ held Employer "is at liberty to challenge the scientific data and conclusions reached by the DOL and to offer expert opinions in support of its position." *Id*., *citing Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014) (a party is free to challenge the DOL's position in the preamble by submitting the type and quality of medical evidence that would invalidate the DOL's position in that scientific dispute).

Employer argues the ALJ violated its due process rights by preventing it from conducting discovery on the preamble and then discrediting its physicians as contrary to the scientific evidence cited in the preamble. We disagree.

Due process requires that Employer be given notice and an opportunity to mount a meaningful defense. *See Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). Employer had the opportunity to challenge the preamble by submitting evidence that proves the science that the DOL relied on in promulgating it is no longer valid. *See Sterling*, 762 F.3d at 490-91; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (parties may submit evidence of scientific innovations that archaize or invalidate the science underlying the preamble). It did not submit any such evidence. Because Employer was afforded the opportunity to submit evidence challenging the scientific findings contained in the preamble, it has failed to demonstrate how it was deprived of due process. *See Hatfield*, 556 F.3d at 478; *Holdman*, 202 F.3d at 883-84. As Employer does not otherwise argue the ALJ erred in granting the Director's motion for a protective order, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Invocation of the 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 mine employment, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in 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 an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

Employer argues the ALJ erred in finding at least fifteen years of qualifying coal mine employment. We disagree.

The ALJ considered Claimant's hearing testimony, employment history forms, and Social Security Administration (SSA) earnings records. Decision and Order at 3-5; Director's Exhibits 5-8; Hearing Transcript at 39, 41-42, 48, 55-56, 60-62. He permissibly found Claimant's SSA earnings records to be the most probative evidence. *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984) (ALJ may credit SSA records over testimony and other sworn statements); Decision and Order at 3-5.

Contrary to Employer's argument, for his pre-1978 employment, the ALJ permissibly credited Claimant with a full quarter of coal mine employment for each quarter in which his SSA records indicate he earned at least $50.00 from coal mine operators.[10] *See Shepherd v. Incoal, Inc*., 915 F.3d 392, 405-06 (6th Cir. 2019) (ALJ may apply the *Tackett* method unless "the miner was not employed by a coal mining company for a full calendar quarter"); *Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979); *Tackett*, 6 BLR at 1-841; Decision and Order at 5. Using this method, the ALJ rationally credited Claimant with a total of sixty-two quarters, or fifteen and one-half years, of coal mine employment. Decision and Order at 5. As Claimant's coal mine employment all occurred pre-1978, we affirm the ALJ's finding of fifteen and one-half years of coal mine employment.

Employer does not challenge the ALJ's finding that all of Claimant's coal mine employment is qualifying as underground coal mine employment or above ground coal mine employment in substantially similar conditions for purposes of invoking the Section 411(c)(4) presumption. Decision and Order at 22. We therefore also affirm this finding. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(b)(1)(i).

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.

[10] Unlike *Shepherd*, which involved specific evidence that the miner did not work all three months during some quarters, Employer's identification of Claimant's income as being lower in some quarters than others does not establish error by the ALJ in crediting him with full quarters of coal mine employment. *Shepherd v. Incoal, Inc*., 915 F.3d 392, 405-06 (6th Cir. 2019); Decision and Order at 5; Employer's Brief at 24-26.

§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). 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 arterial blood gas studies and medical opinions, and his weighing of the evidence as a whole.[11] 20 C.F.R. §718.204(b)(2)(ii), (iv).

Employer argues the ALJ erred in weighing the blood gas study and medical opinion evidence. Employer's Brief at 26, 27. We disagree.

The ALJ weighed six blood gas studies, all which were conducted only at rest, dated July 28, 2014, June 18, 2015, December 20, 2016, December 21, 2016, January 3, 2017, and March 10, 2017. Decision and Order at 12, 19. The July 28, 2014, December 21, 2016, January 3, 2017, and March 10, 2017 studies yielded qualifying[12] values, while the June 18, 2015 and December 20, 2016 studies yielded non-qualifying values. Director's Exhibits 12, 16; Claimant's Exhibits 1, 2, 6. The ALJ noted Dr. Gaziano validated the July 28, 2014 study as technically acceptable – thus the ALJ found it is valid. Decision and Order at 19; Director's Exhibit 12 at 19, 22. He also stated he would not consider the December 21, 2016 study in his total disability analysis because the administering doctor did not indicate "the altitude at which it was conducted." Decision and Order at 19; Claimant's Exhibit 6 at 75. Finding that there are three valid qualifying blood gas studies and two valid non-qualifying studies, the ALJ determined Claimant established total disability because the preponderance of the studies is qualifying. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 19; Director's Exhibits 12 at 22; 16 at 16; Claimant's Exhibits 1 at 12; 2 at 11; 6 at 202.

Employer argues the ALJ improperly based his finding of total disability on the numerical superiority of the qualifying arterial blood gas studies. Employer's Brief at 28. Contrary to Employer's assertion, the ALJ considered the validity of the blood gas studies,

[11] The ALJ found the pulmonary function 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)(i), (iii); Decision and Order at 19.

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

the date each was conducted, the altitude of the test sites, whether they were conducted at rest or during exercise, and the number of qualifying and non-qualifying studies. Decision and Order at 12, 19. He properly performed a qualitative and quantitative review of the arterial blood gas studies.[13] *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993). We therefore affirm the ALJ's finding that the preponderance of the arterial blood gas studies establish total disability. *See* 20 C.F.R. §718.204(b)(2)(ii); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); Decision and Order at 19.

With respect to the medical opinion evidence, the ALJ discredited Dr. Jarboe's opinion that Claimant is not totally disabled by a respiratory or pulmonary impairment because he found it not well-reasoned. Decision and Order at 20, 21; Director's Exhibit 16; Employer's Exhibit 4. He found Dr. Jarboe did not explain his conclusion "in the face of contradictory evidence," as "several of Claimant's [blood gas studies] were qualifying and demonstrated hypoxemia." Decision and Order at 20. Employer does not challenge this credibility finding. Thus we affirm it.[14] *See Jericol Mining, Inc. v. Napier*, 301 F.3d

[13] Employer argues that because Dr. Jarboe's determination that "the [blood gas study] results were normal for a 74-year old" is uncontradicted, "the ALJ is not free to reject it in favor of other opinions that relied on the test results without discussing the impact of [Claimant's] advanced age, a factor which is not compensable under the BLBA." Employer's Brief at 28. Dr. Jarboe observed both the December 20, 2016 and December 21, 2016 blood gas studies produced a pO2 of 74. Employer's Exhibit 4 at 11. He then stated "[a] pO2 of 74 in a 74-year-old man is within normal limits." *Id*. The ALJ determined the December 20, 2016 blood gas study yielded non-qualifying values and did not consider the December 21, 2016 blood gas study because it did not identify the altitude of the test site. Decision and Order at 12, 19; Claimant's Exhibit 6 at 75, 200. Employer does not identify other medical opinions that relied on these tests. Moreover, the disability standards in Appendix C of 20 C.F.R. Part 718 are already adjusted for age. *See Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1219 (10th Cir. 2019); *see also Cannelton Indus., Inc. v. Director, OWCP* [*Frye*], 93 F. App'x. 551 (4th Cir. 2004) (upholding the ALJ's discrediting of a physician's opinion that contradicted Appendix C). Thus Employer has not shown why the alleged error requires remand. *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).

[14] Employer also argues the ALJ erred in determining the exertional requirements of Claimant's usual coal mine employment. Employer's Brief at 27. Because the ALJ discredited Dr. Jarboe's opinion for a reason wholly unrelated to the physicians'

703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Skrack*, 6 BLR at 1-711.

We further affirm, as supported by substantial evidence, the ALJ's determination that the medical opinion evidence does not undermine the totally disabling results of the blood gas studies. Decision and Order at 21. Because there is no evidence undermining the qualifying arterial blood gas studies,[15] we further affirm the ALJ's finding that the evidence, when weighed together, establishes total disability.[16] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 21. Thus, we affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); *see* 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 he has neither legal nor clinical pneumoconiosis,[17] or that "no part

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understanding of the exertional requirements of Claimant's usual coal mine employment, any error he made related to this issue is harmless. *See Larioni*, 6 BLR at 1-1278.

[15] Employer further contends the ALJ erred in not explaining why he "credited the blood gas tests over the pulmonary function tests." Employer's Brief at 28. We disagree, as pulmonary function studies and blood gas studies measure different types of impairments. *See Larioni*, 6 BLR at 1-1278; *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984).

[16] The ALJ also considered Drs. Gallup's and Raj's opinions that Claimant is totally disabled by a respiratory or pulmonary impairment and Dr. Rosenberg's opinion that Claimant is potentially disabled from a pulmonary perspective. Decision and Order at 20-21; Director's Exhibits 12; 19; Claimant's Exhibits 1, 2; Employer's Exhibit 5. He credited Drs. Gallup's and Raj's opinions, and discredited Dr. Rosenberg's opinion because he found it equivocal. Decision and Order at 20-21. Because we affirm the ALJ's finding that Claimant established total disability based on the blood gas studies, we need not address Employer's assertions regarding Drs. Gallup's and Raj's opinions. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 27-28.

[17] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those

of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found that Employer failed to establish rebuttal by either method.[18]

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit holds this standard requires Employer to show the miner's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

The ALJ considered the opinions of Drs. Jarboe and Rosenberg that Claimant does not have legal pneumoconiosis. Decision and Order at 27-28. Dr. Jarboe diagnosed chronic bronchitis and pulmonary emphysema, and opined that any airflow obstruction is related to asthma and cigarette smoking, not coal dust exposure. Director's Exhibit 16; Employer's Exhibit 4. Dr. Rosenberg diagnosed diffuse emphysema related to cigarette smoking, not coal dust exposure. Employer's Exhibit 5. The ALJ found their opinions inadequately reasoned. Decision and Order at 27-28.

We reject Employer's argument that the ALJ erred in discrediting the opinions of Drs. Jarboe and Rosenberg.[19] Employer's Brief at 32-35.

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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).

[18] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 25.

[19] Contrary to Employer's argument, an ALJ may evaluate expert opinions in conjunction with the Department of Labor's discussion of the prevailing medical science set forth in the preamble. *See Sterling*, 762 F.3d at 491; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); Employer's Brief at 31-32.

Dr. Jarboe noted Claimant's smoking history of "approximately [eight pack-years]" and opined his "long history of very heavy smoking is the cause of any airflow obstruction he may have." Employer's Exhibit 4 at 13. He opined Claimant's respiratory impairment is not related to coal mine dust exposure based, in part, on medical studies showing "[s]urface miners are not likely to be exposed to levels of coal mine dust, which would be expected to cause airflow obstruction." Employer's Exhibit 4 at 13, 14. As discussed above, however, the ALJ found Claimant established at least fifteen years of coal mine employment either in underground coal mines or surface coal mines in conditions substantially similar to those in an underground coal mine. Decision and Order at 22, 27. Thus, contrary to Employer's contention, the ALJ permissibly found Dr. Jarboe's opinion unpersuasive because it is based on an inaccurate understanding of Claimant's history of coal mine dust exposure. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 27.

Further, Dr. Jarboe opined Claimant's respiratory impairment is unrelated to coal mine dust exposure because he did not have symptoms until he left the mines. Employer's Exhibit 4 at 13, 27. The ALJ permissibly discredited Dr. Jarboe's opinion as inconsistent with the regulations that state pneumoconiosis is "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 Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); Decision and Order at 27; Employer's Exhibit 4 at 13, 27.

Dr. Rosenberg opined Claimant has centrilobular emphysema due solely to smoking. Employer's Exhibit 5 at 12. He excluded coal mine dust exposure as a contributing cause of Claimant's disease based on his belief that smoking and coal mine dust cause tissue damage in different manners, centrilobular emphysema is the most common form of emphysema in smokers, and coal mine dust exposure causes a distinct form of emphysema. *Id.* at 10-12. The ALJ permissibly found Dr. Rosenberg's opinion inconsistent with the preamble, which states that "without qualification or limitation as to a particular form," coal mine dust can cause emphysema, and that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. Decision and Order at 27; *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). Moreover, he permissibly found Dr. Rosenberg "did not explain why Claimant's coal dust exposure did not contribute to or aggravate his emphysema." *See Young*, 947 F.3d at 405; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 28.

Thus we affirm the ALJ's finding that Employer failed to disprove Claimant has legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 28. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal

finding that Claimant does not have pneumoconiosis. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Employer may also rebut the presumption by establishing "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). The ALJ found the opinions of Drs. Jarboe and Rosenberg not credible to disprove disability causation because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove legal pneumoconiosis. Decision and Order at 28, *citing Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1061 (6th Cir. 2013); *Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989). Employer raises no specific allegations of error regarding the ALJ's findings on disability causation, other than its general contention that Claimant does not have legal pneumoconiosis, which we have rejected. We therefore affirm the ALJ's determination that Employer failed to establish rebuttal at 20 C.F.R. §718.305(d)(1)(ii). *Skrack*, 6 BLR at 1-711; Decision and Order at 28.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge