U.S. Department of Labor

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

BRB Nos. 20-0268 BLA
and 20-0268 BLA-A

GARRY T. CAVINEE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	
c/o UNDERWRITERS SAFETY & CLAIMS	)	DATE ISSUED: 12/14/2022
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Michelle S. Gerdano (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal, and Claimant cross-appeals, Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2018-BLA-05323) rendered on a claim filed on April 14, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Heritage Coal Company (Heritage) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. He found Claimant has more than fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] He further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the district director, the Department of Labor (DOL) official who initially processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It

[1] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 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.

also asserts the duties performed by the district director create an inherent conflict of interest that violates its due process rights. It further argues the ALJ erred in finding it liable for the payment of benefits. On the merits, Employer argues the ALJ erred in invoking the Section 411(c)(4) presumption by finding at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, and in finding the presumption unrebutted. Claimant filed a response brief, urging the Benefits Review Board to affirm the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also filed a response brief, urging the Board to reject Employer's Appointments Clause, conflict of interest, and liability arguments but declined to address the merits of entitlement.

Claimant filed a cross-appeal, requesting that the Board remand the case to the district director for additional pulmonary function testing if the Board vacates the ALJ's finding that the existing tests of record are valid. Employer responds, asserting additional testing is not required and the ALJ need only reweigh the existing pulmonary function studies if the case is remanded to the ALJ for reconsideration of their validity. The Director did not respond to Claimant's cross-appeal.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[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).

Employer does not challenge the ALJ's findings that Heritage is the correct responsible operator and it was self-insured by Peabody Energy on the last day Heritage employed Claimant; thus we affirm these findings.[4] *See Skrack v. Island Creek Coal Co.*,

---

U.S. Const. art. II, § 2, cl. 2.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 7; Hearing Transcript at 11, 23.

[4] Employer also states it intends to "preserve" its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule. Employer's Brief at 77. Employer generally argues Bulletin No. 16-01 contradicts liability rules under the Act, was issued without notice and comment, violates the Administrative Procedure Act, and the DOL has acted arbitrarily and capriciously by not following its own self-insurance regulations. *Id.* Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of these issues. *See* 20

6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 8-9. Patriot Coal Corporation (Patriot) was initially another Peabody Energy subsidiary. Director's Exhibits 22, 40. In 2007, after Claimant ceased his coal mine employment with Heritage, Peabody Energy transferred a number of its other subsidiaries, including Heritage, to Patriot. Director's Exhibits 26, 28. That same year, Patriot was spun off as an independent company. *Id*. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. Director's Exhibit 26 at 59, 60. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Heritage, Patriot later went bankrupt and can no longer provide for those benefits. Director's Exhibits 27, 30; Director's Brief at 5. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Heritage when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 9.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated as the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund (the Trust Fund), not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy: (1) the district director is an inferior officer not properly appointed under the Appointments Clause[5]; (2) the DOL released Peabody Energy from liability; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (5) the Director is equitably estopped from imposing liability on the company; and (6) the regulatory scheme whereby the district director determines the liability of a responsible carrier and its operator, while also administering the Trust Fund, creates a conflict of

---

C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

[5] Employer first challenged the district director's authority in its Post-Hearing Brief, two years after the claim had already been transferred to the Office of Administrative Law Judges, and only after the ALJ had issued an order denying its request to subpoena Steven Breeskin and David Benedict, two former Department of Labor (DOL) Division of Coal Mine Workers' Compensation officials, Michael Chance, the Director of the DCMWC, and an unidentified DOL employee or former employee about their knowledge of Employer's claims and defenses concerning its liability. *See* Order Denying Employer's Request for Subpoenas dated December 4, 2018; Employer's Post-Hearing Brief dated January 10, 2020, at 61-67.

interest that violates its due process right to a fair hearing. Employer's Brief at 41-70, 72-77, 79-85. Employer further maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. Employer's Brief at 52, 55-56.

The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022); and *Graham v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments.[6] Thus, we affirm the ALJ's determination that Heritage and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.[7]

[6] Contrary to Employer's additional argument, the ALJ did not rely on 20 C.F.R. §725.493(b)(2) to determine Peabody Energy is liable. Rather, he determined Peabody Energy is liable for this claim as Heritage's self-insurer, and not as the responsible operator. *Howard*, BLR , BRB No. 20-0229 BLA, slip op. at 14 n.19; Decision and Order at 8-9; Employer's Brief at 70-71.

[7] Employer also challenges the ALJ's exclusion of the depositions of Mr. Benedict and Mr. Breeskin and asserts his reading of 20 C.F.R. §725.456(b)(1) divested it of "any control over the discovery and development of the record on the liability issue." Employer's Brief at 30-40, 78. The ALJ excluded the depositions of Mr. Benedict and Mr. Breeskin because, although Employer timely identified these witnesses before the district director, Employer did not depose them at that level. December 4, 2018 Order Denying Employer's Request for Subpoenas at 6-7; Decision and Order at 2 n.1. However, any error in the ALJ's exclusion of the depositions is harmless as Employer does not point to any testimony by either witness which would support Employer's theory that the DOL relieved Peabody Energy of liability, that Patriot is still capable of paying benefits, or that Peabody Energy was released of liability if Patriot's self-insurance failed. *Bailey*, BLR , BRB No. 20-0094 BLA, slip op. at 15, 16 nn. 17 and 18; Director's Brief at 7-8; *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).

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

Length of Coal Mine Employment

Claimant bears the burden to establish the number of years he worked in coal mine employment. *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 and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

Claimant testified that he worked continuously with Employer from July 14, 1975, through December 12, 1990, except for a few months in 1975 when he was laid off, and in 1998 when he worked for another coal operator during a layoff from Employer. Hearing Transcript at 18-19, 22-24, 32.

The ALJ applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine the number of days Claimant worked in coal mine employment from 1975 to 1991. Decision and Order at 6-7. He divided Claimant's yearly earnings as reported in his Social Security Earnings Statement (SSES) by the coal mine industry's average yearly earnings for 125 days as reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual. Id*. For each year in which Claimant's earnings met or exceeded the Exhibit 610 average yearly earnings, the ALJ credited him with a full year of coal mine employment (1976 through 1990). *Id*. For the years in which Claimant's earnings fell short, the ALJ credited him with a fractional year, calculated by dividing his annual earnings by the average yearly earnings for 125 days in Exhibit 610 (1975 and 1991). *Id*. Applying this method, the ALJ credited Claimant with fifteen years of coal mine employment between 1976 and 1990, and .26 partial years in 1975 and 1991; therefore, he found Claimant established 15.26 years of coal mine employment.[8] *Id.* Employer argues that when comparing Claimant's earnings in 1975 and 1988 with his other years of coal mine work, the higher earnings from the other years reflect that Claimant did not work a complete year in either 1975 or 1988. Employer's Brief at 9-13. Contrary to Employer's argument, a year of coal mine employment is established if Claimant worked 125 days, as in 1988, and a partial year is based on a divisor of 125 days, as in 1975. *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019).

[8] The ALJ's calculation (fifteen full years and .26 partial years) actually yields 15.26 years and not the 15.2 years that the ALJ found. Decision and Order at 6-7.

Because the exact beginning and end dates for Claimant's coal mine employment in 1975 and 1988 were unclear, the ALJ permissibly compared Claimant's actual earnings for each of those years with the yearly earnings set forth in Exhibit 610 for a miner who worked 125 days. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019); *Muncy*, 25 BLR at 1-27; Decision and Order at 4-7; Director's Exhibits 2, 5, 6; Hearing Transcript at 18-19, 32. We thus affirm the ALJ's findings that Claimant's 1975 earnings of $1,406.59 equates to .19 of a year of coal mine employment, as a fraction of the yearly earnings for 125 days from Exhibit 610 of $7,405, and that Claimant's 1988 earnings of $17,038.55 equates to one year of coal mine employment because it exceeds the yearly earnings of $15,490 in Exhibit 610. *See Shepherd*, 915 F.3d at 402; *Muncy*, 25 BLR at 1-27; Decision and Order at 6; Director's Exhibit 5.

Employer's additional contention that the ALJ erred by including Claimant's earnings with Interstate Fabricators & Constructors, Incorporated (Interstate Fabricators) in his 1988 calculation is without merit. *See* Employer's Brief at 10. While Employer asserts Interstate Fabricators was a "non-mining" employer, the very evidence it cites belies its argument. As the ALJ accurately observed, Claimant specifically testified that his employment with Interstate Fabricators during his layoff with Employer in 1988 was coal mine employment, working in dusty conditions at a preparation plant for a strip mine. Decision and Order at 4; Hearing Transcript at 18-19, 22-23, 32.

Based on our affirmance of the ALJ's finding Claimant had .19 year of coal mine employment in 1975 and a full year in 1988, we affirm the ALJ's finding that Claimant established 15.19 years of coal mine employment from 1975-1990. As Claimant established at least fifteen years of coal mine employment, we need not address Employer's assertion that the ALJ erred in crediting Claimant with an additional .07 year of coal mine employment in 1991.[9] *See Larioni*, 6 BLR at 1-1278; Decision and Order at 4-7; Hearing Transcript at 18, 22; Employer's Brief at 11.

[9] Additionally, we affirm, as supported by substantial evidence, the ALJ's alternate finding of at least fifteen years of coal mine employment based on Claimant's testimony establishing the specific beginning and ending dates of his employment, i.e., he worked continuously with Employer from July 14, 1975, through December 12, 1990, except for a few months in 1975, when he was laid off, and in 1998 when he worked for another coal operator during a layoff from Employer. *See Muncy*, 25 BLR at 1-27; Decision and Order at 5-6; Hearing Transcript at 18-19, 22-24, 32. Claimant's testimony is supported by his Employment History form documenting his coal mine employment with Employer from 1975 until December 12, 1990, and by his SSES documenting earnings from 1975 through 1990. Director's Exhibits 3, 5-6.

Nature of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or surface coal mines in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2018); *Muncy*, 25 BLR at 1-29. The conditions in a surface mine are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich American Insurance Group v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015).

Employer asserts Claimant testified to only working eight years in underground coal mine employment and did not establish he was regularly exposed to coal mine dust in the remaining years he worked above ground at the tipple. Employer's Brief at 13-14. Contrary to Employer's contention, the ALJ properly noted that "[w]ork performed aboveground while at an underground mine constitutes qualifying coal mine work regardless of whether the conditions are substantially similar to those of an underground mine." Decision and Order at 20, citing *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1057-1059 (6th Cir. 2013) (no showing of comparability of conditions is necessary for an aboveground employee at an underground coal mine); *Muncy*, 25 BLR at 1-29. The ALJ determined Claimant's aboveground work was performed at underground mines and Employer raises no challenge to this specific determination. *See Ramage*, 737 F.3d at 1057-59; *Muncy*, 25 BLR at 1-29; Decision and Order at 20; Hearing Transcript at 21-22.

Additionally, we affirm the ALJ's finding that Claimant's brief aboveground employment with Interstate Fabricators in 1988 constituted qualifying coal mine employment. Aside from its rejected argument that this employment did not constitute coal mining work, Employer does not raise any specific error with regard to the ALJ's substantial similarity finding. As it is supported by Claimant's testimony that he was exposed daily to dust there, "his clothes were dirty every day, his face was black, and he inhaled coal dust during his employment . . .," we affirm the ALJ's determination that Claimant was regularly exposed to coal mine dust in this job. 20 C.F.R. §718.305(b)(2); *Duncan*, 889 F.3d at 304; *Kennard*, 790 F.3d at 663; *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014); *Bonner v. Apex Coal Corp.*, 25 BLR 1-279, 1-282-84 (Jan. 24, 2022), *recon. denied* (May 24, 2022)(unpub. Order) (credible testimony regarding a miner's appearance and the dust on his clothes when he returned home from work may be sufficient to establish the miner was regularly exposed to coal mine dust); Decision and Order at 20; Hearing Transcript at 19-22. We therefore

affirm the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment necessary for invoking the Section 411(c)(4) presumption.

Total Disability

To invoke the presumption, a claimant must also establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on qualifying[10] pulmonary function studies and 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). The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and in consideration of the evidence as a whole.[11] Decision and Order at 19.

Pulmonary Function Studies

The ALJ considered the two pulmonary function studies of record. The May 17, 2016 pulmonary function study yielded qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. Director's Exhibit 13. The February 20, 2019 pulmonary function study yielded qualifying values before and after the administration of a bronchodilator. Employer's Exhibit 1. The ALJ found both studies valid and gave greatest weight to the pre-bronchodilator values of the 2019 study to find Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 10-14.

Employer argues the ALJ erred in finding both studies valid. Employer's Brief at 14-19. We disagree. When addressing a pulmonary function study conducted in

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

[11] The ALJ found Claimant did not establish total disability based on the blood gas studies and there is no evidence of cor pulmonale with right-sided congestive heart failure or complicated pneumoconiosis. 20 C.F.R. §§718.204(b)(2)(ii), (iii), 718.304; Decision and Order at 10, 14.

anticipation of litigation, an ALJ must determine whether it is in substantial compliance with the regulatory quality standards.[12] 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, App. B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see also* 20 C.F.R. Part 718, Appendix B. If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ must then, in his role as fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable).

May 17, 2016 Pulmonary Function Study

Employer contends the ALJ failed to properly credit the opinions of Drs. Grodner, Cohen, and Broudy that the study was invalid because the tracings suggest Claimant coughed during the study.[13] Employer's Brief at 15, 18-19. We disagree. The ALJ discussed the opinions of Employer's doctors at length but permissibly credited the first-hand observations of the administering technician and Dr. Feicht, who validated the study, along with the opinions of Drs. Gaziano and Go who indicated it was reproducible.[14] *See*

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

[13] The quality standards applicable to pulmonary function studies are set forth at 20 C.F.R. §718.103 and Appendix B of 20 C.F.R. Part 718. Section 718.103 states, in pertinent part, that "no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B to this part." 20 C.F.R. §718.103(c). Among other provisions, Appendix B requires a minimum of three flow-volume loops and derived spirometric tracings, and states that effort shall be judged unacceptable when the patient has not used maximal effort during the entire forced expiration or has coughed or closed his glottis. *See* 20 C.F.R. Part 718, Appendix B(2)(ii).

[14] As the ALJ found, the administering technician observed that Claimant gave good effort and Dr. Feicht, the administering physician, and Drs. Gaziano and Go, who reviewed the tracings, indicated it was valid and reproducible. Decision and Order at 11-12;

Jonida Trucking, Inc. v. Hunt, 124 F.3d 739, 744 (6th Cir. 1997) (an ALJ may rely on the opinion of the physician who administered a ventilatory study over those who only reviewed the results); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231 (6th Cir. 1994); *see also Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-149 (1990) (an ALJ must provide a rationale to credit a consultant's opinion over the opinion of a physician or technician who observed the test); Decision and Order at 11-12; Director's Exhibits 13 at 5, 14-15; 18; Claimant's Exhibit 1 at 3.

The ALJ reasonably questioned Dr. Grodner's opinion because the physician reviewed the study in his initial report without invalidating it, but later testified at his deposition that the study was invalid without discussing the comments of the administering physician and technician who conducted the study. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 11-12; Employer's Exhibits 1; 7 at 10-11. Similarly, the ALJ rationally questioned Dr. Cohen's opinion that the study is invalid because Dr. Cohen did not review the entire study and did not reconcile his opinion that the study is invalid with the administering technician's observation of good effort and Dr. Gaziano's validation of the study. *Rowe*, 710 F.2d at 255; Decision and Order at 11-12; Claimant's Exhibit 2 at 9-10, 23-24. Finally, the ALJ acted within his discretion in discounting Dr. Broudy's opinion because he initially stated that the study was valid, but subsequently testified a cough might have affected the results, never actually stated the results were invalid, and did not reconcile his two different opinions. *Rowe*, 710 F.2d at 255; *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12, 1-14 (1984); Decision and Order at 11-12; Director's Exhibit 37 at 3; Employer's Exhibit 8 at 12-14. Consequently, we affirm the ALJ's finding that the May 17, 2016 pulmonary function study is valid.

February 20, 2019 Pulmonary Function Study

Employer next argues that, regarding the February 20, 2019 pulmonary function study, the ALJ "rejected the argument that variability on the FVC tracings rendered the entire study invalid." Employer's Brief at 19. Because Employer's argument is inadequately briefed, we decline to consider it. *Cox*, 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109. Moreover, Employer's argument lacks legal support as the quality standards do not require the FVC tracings to be within five percent. Appendix B to 20 C.F.R. Part 718(2)(ii)(G). We therefore affirm the ALJ's finding that the February 20, 2019 pulmonary function study is valid.[15] As Employer makes no other argument

---

Director's Exhibits 13 at 5, 14-15; 18; 37 at 3; Claimant's Exhibits 1 at 3; 2 at 9, 23-24; Employer's Exhibits 1; 7 at 10; 8 at 13, 14.

[15] Because we affirm the ALJ's findings regarding the pulmonary function study evidence, Claimant's arguments regarding the pulmonary function study evidence in his

regarding the pulmonary function studies, we affirm the ALJ's finding Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 14.

Medical Opinions/Weight of All Evidence

The ALJ considered the medical opinions of Drs. Cohen, Feicht, Go, Grodner, and Broudy in determining whether Claimant is totally disabled. Decision and Order at 14-19. The ALJ permissibly found the opinions of Drs. Cohen, Feicht, and Go persuasive that Claimant is totally disabled as their conclusions are supported by the weight of qualifying pulmonary function studies.[16] *See Rowe*, 710 F.2d at 255; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985) (an ALJ may properly credit medical opinions that are consistent with the objective evidence); Decision and Order at 15, 17-19; Director's Exhibits 13 at 11; 15 at 2-3; 39 at 2; Claimant's Exhibits 1 at 3, 6; 2 at 15.

The ALJ also acted within his discretion in discrediting Dr. Broudy's opinion because he relied on the non-qualifying post-bronchodilator results of the 2016 pulmonary function study which the ALJ gave no weight, and the doctor conceded he could not determine Claimant's actual respiratory capacity. *See Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 561 (6th Cir. 2002) (an ALJ may permissibly discredit a medical opinion that a claimant is not totally disabled when the physician is unable to determine the claimant's level of obstruction); Decision and Order at 15-17; Employer's Exhibit 8 at 14-15, 22-23. Further, we see no error in the ALJ's finding that Dr. Grodner's ultimate conclusion that he could not provide an opinion on total disability, while initially stating Claimant is totally disabled, is equivocal and entitled to no probative weight. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-87 (6th Cir. 1995) (an ALJ may properly discredit an equivocal opinion); Decision and Order at 18; Employer's Exhibits 1 at 7; 7 at 10, 19.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole. *See* 20 C.F.R. §718.204(b)(2); Decision and Order at 19. Consequently, we affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption.

---

cross-appeal are moot and we need not address them. Claimant's Cross-Appeal at 21-22 (requesting remand to the district director for an additional pulmonary function study if the Board vacates the ALJ's finding that the pulmonary function studies of record are valid).

[16] Having affirmed the ALJ's finding that both pulmonary function studies of record are valid, we reject Employer's argument that Drs. Feicht, Go, and Cohen could not credibly diagnose total disability based on that evidence.

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 of the miner'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)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 n.14 (2015). The ALJ found Employer did not rebut the presumption by either method.[18]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, holds this standard requires an employer show that the miner's coal mine dust exposure "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 403-06 (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, 597-99, 600 (6th Cir. 2014)).

Employer relies on the opinions of Drs. Grodner and Broudy to establish that Claimant does not have legal pneumoconiosis. They each diagnosed chronic obstructive pulmonary disease (COPD) related to smoking and asthma. Employer's Exhibit 1 at 5-6;

[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 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 clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 21-23; Employer's Brief at 21-22.

Employer's Exhibit 8 at 15, 19-20. Employer argues the ALJ erred in finding their opinions inadequately reasoned. Employer's Brief at 22-29. We disagree.

The ALJ reasonably discredited Dr. Grodner's and Broudy's opinions to the extent they relied on the partial reversibility of Claimant's obstruction with bronchodilators to exclude coal mine dust exposure as a causative factor for Claimant's respiratory impairment. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 24, 25-26; Director's Exhibit 37 at 2-3; Employer's Exhibits 1 at 6; 8 at 16-18. Moreover, given the DOL's recognition that the effects of smoking and coal mine dust exposure are additive, the ALJ permissibly found neither physician adequately explained why coal mine dust exposure did not substantially aggravate Claimant's obstructive lung disease, even if it was due primarily to smoking. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Barrett*, 478 F.3d at 356 (affirming an ALJ's decision to discredit an opinion of a physician who failed to adequately explain it); *Rowe*, 710 F.2d at 255; Decision and Order at 24-26; Director's Exhibit 37 at 2-3; Employer's Exhibits 1 at 5-6; 8 at 15-20.

The ALJ further accurately noted Dr. Grodner relied on Claimant's markedly reduced FEV1/FVC ratio on pulmonary function testing in attributing his impairment solely to smoking. Employer's Exhibit 1 at 5-6. The ALJ permissibly discredited this rationale as inconsistent with the scientific studies that the DOL credited in the preamble to the 2001 revised regulations that coal dust exposure may cause COPD with associated decrements in the FEV1 and FEV1/FVC ratio. *See* 65 Fed. Reg. at 79,943; *Sterling*, 762 F.3d at 491 (Decreased-ratio analysis "plainly contradicts the DOL's position that [legal pneumoconiosis] . . . may be associated with decrements in the FEV1/FVC ratio."); *see also Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-73 (4th Cir. 2017); Decision and Order at 25.

Employer's arguments regarding legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis.[19] *See* 20 C.F.R. §718.305(d)(1)(i); *Rowe*, 710 F.2d at 255; Decision and Order at 23-27. Employer's failure

[19] Because Employer has the burden of proof, we need not address its challenges to the ALJ's weighing of the opinions by Drs. Feicht (who Employer inaccurately refers to as "Dr. Rutledge"), Go, and Cohen that Claimant has legal pneumoconiosis. Decision and Order at 26-27; Employer's Brief at 25-28; Director's Exhibits 13 at 11; 39 at 2; Claimant's Exhibits 1 at 5; 2 at 7.

to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer failed to establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii). He permissibly discredited the opinions of Drs. Grodner and Broudy because they did not diagnose legal pneumoconiosis, contrary to his finding that Claimant has the disease, and for the same reasons he discredited them regarding legal pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 27-28. Employer raises no specific allegations of error as to the ALJ's findings other than its assertions that Claimant does not have legal pneumoconiosis and is not totally disabled, which we have rejected. Employer's Brief at 29. We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27-28. Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption, and the award of benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge