U.S. Department of Labor

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

BRB No. 20-0491 BLA

DANNY R. HOOVER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	
	)	
and	)	
	)	
ARCH RESOURCES	)	DATE ISSUED: 12/20/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Sean M. Ramaley, 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 and Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Sarah M. Hurley (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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2018-BLA-05589) on a claim filed on April 28, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Hobet Mining, Incorporated (Hobet) is the responsible operator and Arch Coal, Incorporated[1] (Arch) is the responsible carrier. He credited Claimant with 21.76 years of surface coal mine employment in conditions substantially similar to those in an underground mine and found he had 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] 30 U.S.C. §921(c)(4) (2018). 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 the removal provisions applicable to the ALJ rendered his appointment unconstitutional. Employer also argues the ALJ erred in finding Arch is the liable carrier. On the merits, it argues the ALJ erred in finding Claimant established that his coal mine employment occurred in conditions that were substantially similar to those in an underground mine. It further asserts the ALJ erred in finding Claimant was totally disabled from a respiratory or pulmonary impairment and 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), responds urging the Benefits Review Board to reject Employer's constitutional challenge, its contention that a pre-existing non-pulmonary injury precludes entitlement, and its argument regarding its discovery requests

[1] Employer asserts Arch Coal, Incorporated is now known as Arch Resources. Employer's Petition for Review and Brief in Support of Petition for Review (Employer's Brief) at 2 (unpaginated).

[2] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had 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.

and to affirm the ALJ's determination that Arch is liable for benefits. Employer replied to Claimant's and Director's briefs, reiterating its contentions on appeal.[3]

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.[4] 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).

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs.[5] Employer's Brief at 19-22 (unpaginated); Employer's Reply Brief at 2-5. It 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 v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] *Id.* In addition, it 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

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 21.76 years of surface coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 24; Director's Exhibit 3.

[5] Employer also alleges the district director failed to take any action on its request for reconsideration of his Proposed Decision and Order (PDO) and thus the proceedings before the ALJ were premature. Employer's Brief at 19 (unpaginated). While Employer requested reconsideration of the district director's PDO, it also requested that the district director forward the claim for a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibit 40 at 3. The district director forwarded the claim to the OALJ as Employer requested. Director's Exhibit 43.

[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, 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)).

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). *Id.* The Board has previously addressed and rejected these arguments in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022). For the reasons set forth in *Howard*, we reject them here.

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Hobet is the correct responsible operator, and it was self-insured by Arch on the last day Hobet employed Claimant; thus we affirm these findings. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 33-34. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (Trust Fund). Employer's Brief at 22-37 (unpaginated); Employer's Reply Brief at 5-14.

In 2005, Arch sold Hobet to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot. Employer's Brief at 24 (unpaginated); Director's Brief at 2; Director's Exhibit 28 at 1-2. In 2011 Patriot was authorized to insure itself and its subsidiaries. Director's Brief at 2; Director's Exhibits 28 at 1-2. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Hobet, Patriot later went bankrupt and can no longer provide for those benefits. Decision and Order at 34; Director's Brief at 2; Director's Exhibits 28 at 1-2. Nothing, however, relieved Arch of liability for paying benefits to miners last employed by Hobet when Arch owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 33-34.

Employer raises several arguments to support its contention that Arch was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Arch, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 22-37 (unpaginated); Employer's Reply Brief at 5-14. It argues the ALJ erred in finding Arch liable for benefits because: (1) the DOL failed to identify Arch as the potential responsible operator in the notice of claim or PDO; (2) no evidence establishes Arch's self-insurance covered Hobet for this claim; (3) it was entitled to discovery to establish Black Lung Benefits Act Bulletin No. 16-01[7] was an arbitrary and

[7] Bulletin No. 16-01 is a memorandum the Director of the Division of Coal Mine Workers' Compensation issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

capricious change in policy; and that (4) the Bulletin is invalid. Employer's Brief at 22-37 (unpaginated).

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 10-19 (Oct. 25, 2022) (en banc); *Howard*, BRB No. 20-0229 BLA, slip op. at 5-17; 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. Thus we affirm the ALJ's determination that Hobet and Arch are the responsible operator and carrier, respectively, and are liable for this claim.

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

Qualifying 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 in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i).[8] The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001).

The ALJ noted Claimant testified that all of his coal mine employment was at a surface mine. Decision and Order at 7. He found Claimant "credibly testified about the dusty conditions [of his job], including his time operating equipment with poorly sealed enclosed cabs." *Id*. Therefore, the ALJ found "all of Claimant's 21.76 years of post-1969 coal mine employment was in conditions substantially similar to those in an underground mine." *Id*.

Employer asserts the ALJ's analysis fails to satisfy the Administrative Procedure Act (APA),[9] that he failed to consider whether Claimant's testimony established his

[8] Employer's assertion that "this case should be held in abeyance pending a finding on the constitutionality of the Affordable Care Act" is moot. Employer's Brief 40 n.14; *see California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

[9] The APA provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or

exposure was regular and failed to explain why he found Claimant's working conditions were comparable to underground mining conditions. Employer's Brief at 40-42 (unpaginated), *citing Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988); see also Employer's Reply Brief at 16-17. Employer's arguments are unpersuasive.

The ALJ is not required to analyze the conditions of an underground mine in comparison to Claimant's work conditions in surface mining. *See* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013) (unnecessary for a claimant to prove anything about dust conditions existing at an underground mine; claimant need only develop evidence addressing the dust conditions at the non-underground mine). Here, it is sufficient that the ALJ found Claimant's uncontradicted testimony regarding his dust exposure sufficient to show that he was regularly exposed to coal mine dust.[10] *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (a claimant's testimony that the conditions throughout his employment were "very dusty" met claimant's burden to establish he was regularly exposed to coal mine dust).[11]

Because the ALJ acted within his discretion, we affirm his crediting of Claimant's uncontradicted testimony. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 7. As it is supported by substantial evidence, we further affirm his conclusion that Claimant established he worked in conditions substantially

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discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[10] Claimant explained the working conditions at the mine were dusty and that he performed a variety of jobs at the mine, including driving heavy equipment, maintenance work, loading coal, and working as a ground man on the dragline. Hearing Transcript at 18-19, 24-26. He testified he drove closed-cab equipment for twelve years and explained that the cabs did not seal properly because of the vibrations, allowing dust to enter the cab, that the windows were almost always down, and that there was no "getting away from the dust." *Id.* at 26, 41. Further, he explained there was no dust control on the dragline and when it was operated, there was a "haze of dust on the whole job." *Id*. at 19.

[11] Employer notes Dr. Raj, who conducted Claimant's DOL sponsored complete pulmonary evaluation, agreed that surface coal mines are less dusty than underground mines. Employer's Brief at 42 (unpaginated); *see* Employer's Exhibit 16 at 46. But Dr. Raj's general assertion fails to directly dispute Claimant's specific testimony about his work conditions.

similar to those of an underground mine. *See* 20 C.F.R. §718.305(b)(2); *see Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied if the reviewing court can discern what the ALJ did and why he did it).

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 qualifying pulmonary function studies, qualifying arterial blood gas studies,[12] 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 blood gas studies, the medical opinions, and the evidence as a whole.[13] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 21.

We first address Employer's overall contention that the ALJ failed to consider Claimant's non-pulmonary or non-respiratory conditions in evaluating the evidence regarding total disability. Citing *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994), a decision interpreting a prior version of 20 C.F.R. §718.204 (1999), Employer argues that because the Miner suffered from a disabling back injury that forced him to retire from his usual coal mine employment, he cannot be awarded benefits. Employer's Brief at 37-39 (unpaginated); Employer's Reply Brief at 14-16. However, the Board has declined to apply *Vigna* to cases, like this one, arising in jurisdictions outside of the Seventh Circuit. *See Bateman v. E. Assoc. Coal Corp.*, 22 BLR 1-255, 1-267 (2003); *see also Howard*, BRB No. 20-0229 BLA, slip op. at 16-17. Moreover, the DOL explicitly rejected the premise

[12] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[13] The ALJ found none of the pulmonary function studies were qualifying and no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 8-9, 18-20. The ALJ also found no evidence of complicated pneumoconiosis and, thus, Claimant could not invoke the irrebuttable presumption that he is totally disabled due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 23 n.14.

that a non-pulmonary disability precludes entitlement when it promulgated the 2001 revised regulations.[14] 20 C.F.R. §718.204(a) ("any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis"); 65 Fed. Reg. 79,920, 79,923, 79,946 (Dec. 20, 2000) ("This change emphasized the Department's disagreement with [*Vigna*]"). For these reasons, we reject Employer's argument.

Blood Gas Studies

The ALJ considered the results of four arterial blood gas studies. Decision and Order at 10, 19-20. Dr. Raj's August 7, 2017 study produced qualifying values with exercise and non-qualifying values at rest. Director's Exhibit 18 at 17. Dr. Zaldivar's June 6, 2018[15] study produced non-qualifying values at rest and no exercise test was conducted. Employer's Exhibit 2 at 16-17. Dr. Green's September 11, 2018 study and Dr. Raj's October 16, 2018 study had qualifying values at rest.[16] Claimant's Exhibits 1 at 13-15 (unpaginated),2 at 12-15 (unpaginated). Based on the preponderance of the qualifying resting and exercise studies, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 19-20.

Employer contends the ALJ failed to properly address Dr. Rosenberg's opinion that Dr. Raj's and Green's qualifying studies are unreliable because they were not taken at sea level. Employer's Brief at 42-43 (unpaginated). Dr. Rosenberg assumed the regulatory baseline levels were established at sea level. He opined that altitude and barometric pressure likely impacted the qualifying test results, and suggested that if the August 7, 2017, September 16, 2018, and October 16, 2018 studies, taken in Norton, Virginia, were

[14] Employer provides no support for its general assertion that the revised regulations are invalid to the extent they "cannot be reconciled" with the Act. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (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).

[15] The ALJ incorrectly listed this study as occurring on June 8, 2018. Decision and Order at 10; Employer's Exhibit 2 at 16-17

[16] Employer correctly points out that the ALJ listed incorrect results for the September 11, 2018 study. Employer's Brief at 42 n15 (unpaginated). As the actual results of PCO2 of 37 and PO2 of 62 are still qualifying, this error is harmless. *See* 20 C.F.R. Part 718, Appendix C; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Claimant's Exhibit 1 at 4, 13-15 (unpaginated).

conducted at sea level or corrected for barometric pressure, they would be "well above the qualifying levels." Director's Exhibit 21 at 36; Employer's Exhibit 3 at 9. However, the ALJ correctly noted "all parties agree that the blood samples taken in this case were collected below 2,999 feet above sea level." Decision and Order at 19. He further correctly noted that the regulations and applicable table "identify qualifying pO_2 values for arterial blood gas studies performed at test sites up to 2,999 feet above sea level." *Id.*, *citing* 20 C.F.R. Part 718, Appendix C.

We see no error in the ALJ's permissible finding that Dr. Rosenberg's opinion is unpersuasive as the regulations address the cited elevation and Claimant's values were qualifying pursuant to 20 C.F.R. §718.204(b)(ii) and Appendix C to Part 718.[17] *Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], 93 Fed. App'x. 551, 560 (4th Cir. 2004) (upholding ALJ's discrediting an opinion that contradicts Appendix C); *Big Horn Coal Co. v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055-56 (10th Cir. 1990); Decision and Order at 19.

Contrary to Employer's contention, the ALJ also considered Dr. Zaldivar's opinion that the studies conducted at Norton Community Hospital are unreliable because he suspects the samples were not iced after collection.[18] Decision and Order at 19-20; Employer's Brief at 43-44 (unpaginated); Employer's Exhibit 2 at 34. The ALJ permissibly relied on the tests' compliance with the DOL requirements, Drs. Raj's and Green's explanations that their tests had been run within a 10-minute window which made the use of ice unnecessary and met professional standards, and the lack of evidence for and speculative nature of Dr. Zaldivar's assertions. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); Decision and Order at 19-20; Employer's Exhibits 16 at 99-105, 17 at 85-87. We therefore affirm the ALJ's determination to give little weight to Dr. Zaldivar's opinion discrediting the qualifying studies. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08, 211 (4th Cir. 2000) (it is the province of the ALJ to evaluate physician's opinions); *Underwood*, 105 F.3d at 949; *Tackett v. Cargo*

[17] Employer notes Dr. Raj agreed with Dr. Rosenberg that "if we recalculate PO2 by changing the pressures to sea level, [Claimant's] oxygenation should increase by [twelve] points and thus" would not be qualifying. Employer's Brief at 10 (unpaginated), *quoting* Director's Exhibit 23 at 4. But Employer fails to also note Dr. Raj's counter statement that Dr. Rosenberg's "rationale is not valid in this case." Director's Exhibit 23 at 4.

[18] Dr. Zaldivar stated he did not know whether the studies were "accurate or not" because Norton Community Hospital does not customarily ice their blood samples after they are collected. Employer's Exhibit 2 at 34.

Mining Co., 12 BLR 1-11, 1-14 (1988) ("The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable.") (citation omitted).

As Employer raises no other challenges to the reliability of the qualifying studies, we affirm the ALJ's finding that the preponderance of the blood gas study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(ii).

Medical Opinions

The ALJ considered four medical opinions. Decision and Order at 10-15, 20-21. Dr. Raj conducted the DOL's complete pulmonary evaluation of Claimant on August 7, 2017. Director's Exhibit 18. He diagnosed Claimant with severe hypoxemia based on his abnormal exercise blood gas study results and opined Claimant is totally disabled from performing his last coal mine work. *Id.* He also examined Claimant on October 16, 2018, and similarly concluded Claimant is totally disabled based on the qualifying blood gas study he obtained. Claimant's Exhibit 2 at 4 (unpaginated).

Dr. Rosenberg prepared a consultative report based on his review of the medical evidence. Director's Exhibit 21 at 35. He opined the pulmonary function study results showed no obstruction or restriction and disputed the reliability of Claimant's qualifying blood gas studies, as discussed supra. *Id.* at 36. Ultimately, he concluded Claimant would be unable to continue working at mines due to a number of health issues - back problems, obesity, sleep apnea, and heart disease – but is not totally disabled from a respiratory or pulmonary standpoint. Employer's Exhibit 18 at 14, 46-47.

Dr. Zaldivar examined Claimant on June 6, 2018. Employer's Exhibit 2. He diagnosed a mild restrictive impairment and mild resting hypoxemia but concluded Claimant is not disabled by a pulmonary impairment and could perform his usual work as a heavy equipment operator. *Id.* at 1-2.

Dr. Green examined Claimant on September 11, 2018. Claimant's Exhibit 1 at 5 (unpaginated). He concluded Claimant is totally disabled from returning to his last coal mine employment based on his blood gas study results which show significant hypoxemia at rest and with exercise.[19] *Id.*

[19] Dr. Green was deposed on February 25, 2019. Employer's Exhibit 17. He opined Claimant's pulmonary function study results were "fairly unremarkable" and his restriction could be related to his obesity. *Id.* at 45, 51. Further, he testified that Claimant has

The ALJ found the opinions of Drs. Raj and Green well-documented and reasoned and the opinions of Drs. Rosenberg and Zaldivar were not. Decision and Order at 20-21. Thus, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 21.

Employer argues the ALJ erred in crediting the opinions of Drs. Raj and Green that Claimant is totally disabled. Employer's Brief at 43-44 (unpaginated). It asserts neither physician had an adequate understanding of the exertional requirements of Claimant's usual coal mine work, they considered less evidence than Drs. Rosenberg and Zaldivar, and made "material concessions" in their depositions undermining the credibility of their conclusions.[20] *Id.* We disagree.

While Employer generally asserts Drs. Raj and Green overstated the exertional requirements of Claimant's last coal mine work, it offered no support for this assertion. *See* Employer's Brief at 43 (unpaginated). Drs. Raj and Green both noted Claimant operated heavy equipment, loaded coal, worked on the dragline, and lifted 100 pounds. Director's Exhibit 18 at 2; Claimant's Exhibit 1 at 3 (unpaginated). This is largely consistent with Claimant's own account of the exertional requirements of his work, which

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hypoxemia and concluded Claimant is totally disabled from continuing to operate heavy equipment based on his blood gas results. *Id.* at 45, 53-54, 60.

[20] To the extent Employer suggests Drs. Raj or Green conceded in their depositions that barometric pressure and altitude can affect blood gas studies, which undermines their opinions, Employer ignores that both physicians specifically concluded Claimant's blood gas study results, whether qualifying or not, establish his total disability. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); Employer's Brief at 10 (unpaginated); Employer's Exhibit 16 at 107; Employer's Exhibit 17 at 84. Moreover, Dr. Green's opinion that Claimant's restrictive impairment shown on pulmonary function testing may be due to obesity does not undercut his opinion that Claimant has a disabling blood gas impairment since pulmonary function studies and blood gas studies measure different types of impairments. *See 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). Additionally, Dr. Raj's discussion of the impact of cardiac problems on Claimant's respiratory impairment relates to the cause of his disability and not the issue of total disability alone. Employer's Exhibit 16 at 35, 67, 70-73, 77.

included operating heavy equipment, performing maintenance, loading coal, and lifting up to 100 pounds. Hearing Transcript at 16-20; Director's Exhibit 4 at 1-2.

We also reject Employer's assertion that the ALJ did not apply the same degree of scrutiny in weighing the medical opinions. Employer's Brief at 44 n.16 (unpaginated). The ALJ examined the reasoning of each physician to determine if the physician's opinion was adequately explained and permissibly credited the opinions of Drs. Raj and Green because their conclusions were consistent with the qualifying blood gas study evidence, while the opinions of Drs. Rosenberg and Zaldivar were not. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 10-15, 20-21.

Employer's arguments regarding the medical opinions 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); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Thus, we affirm the ALJ's findings that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv),[21] and in consideration of the evidence as a whole.[22] Decision and Order at 21. We therefore affirm the ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); *Id.*

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[23] or that "no part of [his] respiratory or pulmonary total disability

[21] Employer also generally asserts the ALJ erred by relying "in part" on Claimant's state claim award by the West Virginia Occupational Pneumoconiosis Board. Employer's Brief at 43-44 (unpaginated); Director's Exhibit 12. While the ALJ accorded "some weight to the state determination as it relates to the existence of pneumoconiosis," he did not rely on this award in his total disability analysis. Decision and Order at 17.

[22] Even if we were to conclude Claimant did not establish total disability based on the medical opinion evidence, Employer fails to persuasively explain why Claimant is not totally disabled based on the blood gas study evidence. *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).

[23] "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

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 Employer rebutted the presumption that Claimant suffers from clinical pneumoconiosis but did not rebut the presumption that he has legal pneumoconiosis or that no part of his total disability was caused by it. Decision and Order at 27-32.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Rosenberg and Zaldivar to disprove legal pneumoconiosis.[24] Both doctors disputed that Claimant had a blood gas impairment. They also each opined that because Claimant was a surface coal miner, he did not have sufficient coal mine dust exposure to support a diagnosis of legal pneumoconiosis. Employer's Exhibits 2 at 2; 18 at 21-23, 81-82. Given our affirmance of the ALJ's findings that Claimant has a disabling blood gas impairment and that his coal mine dust exposure was substantially similar to an underground miner, we see no error in the ALJ's discrediting of Dr. Rosenberg's and Dr. Zaldivar's opinions on the issue of the existence of legal pneumoconiosis.[25] Furthermore, the ALJ permissibly found neither physician adequately

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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).

[24] The ALJ also considered the opinions of Drs. Raj and Green. Decision and Order at 28-29. As their opinion do not aid Employer on rebuttal, we need not address Employer's argument that the ALJ erred in finding their opinions reasoned and documented. *Larioni*, 6 BLR at 1-1278; *see* Employer's Brief at 44-45.

[25] Dr. Rosenberg noted surface coal miners were generally exposed to less coal mine dust than underground coal miners, while acknowledging he did not know specific details about Claimant's dust exposure. Employer's Exhibit 18 at 21-23, 81-82. Dr. Zaldivar observed legal pneumoconiosis would be hard to justify "in the absence of any *other history that would implicate dust* or anything else in the mines as contributing to it." Employer's Exhibit 2 at 2.

addressed whether coal mine dust exposure substantially aggravated or was an additive factor to Claimant's impairment, even if it were true that Claimant had other exposures (asbestosis) or medical conditions that could account for his impairment. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 29. Dr. Zaldivar excluded a diagnosis of legal pneumoconiosis because Claimant's pulmonary fibrosis could be related to asbestos exposure, pneumonia, or a past chest injury. Employer's Exhibit 2 at 34-35. The ALJ found their opinions "inadequately assess[ed]" Claimant's specific history of coal dust exposure and were inconsistent with the Act, regulations, and relevant legal precedent and, therefore, insufficient to satisfy Employer's burden of proof.[26] Decision and Order at 25-26, 28-29.

Because the ALJ acted within his discretion in finding the opinions of Drs. Rosenberg and Zaldivar insufficient to satisfy Employer's burden of proof, we affirm his determination that Employer did not disprove legal pneumoconiosis.[27] *See Compton*, 211 F.3d at 207-208; Decision and Order at 28-29. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). We therefore affirm his conclusion that Employer did not rebut the Section 411(c)(4) presumption. Decision and Order at 30.

Disability Causation

The ALJ next considered whether Employer established "no part of the [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 30-32. Contrary to Employer's contention, the ALJ permissibly discredited Dr. Rosenberg's opinion on the cause of Claimant's disability because he did not diagnose legal pneumoconiosis, contrary to the ALJ's determination.[28] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th

[26] We affirm, as unchallenged, the ALJ's findings that the Miner's treatment records do not support Employer's burden of proof. *See Skrack*, 6 BLR at 1-711; Decision and Order at 29-30.

[27] Because the ALJ gave permissible reasons for rejecting the opinions of Drs. Rosenberg and Zaldivar, we need not address Employer's additional challenges to the ALJ's evaluation of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 28-29; Employer's Brief at 44-46.

[28] Dr. Rosenberg did not address whether legal pneumoconiosis caused Claimant's total respiratory disability independent of his conclusion that Claimant does not have the disease. Because Dr. Zaldivar did not conclude Claimant was totally disabled, the ALJ did not consider his opinion on disability causation. *See* Decision and Order at 31.

Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding the physician's view on disability causation is independent of his or her erroneous opinion on pneumoconiosis); Decision and Order at 31-32; Employer's Brief at 46 (unpaginated).[29] We therefore affirm the ALJ's finding that Employer failed to establish that no part of Claimant's pulmonary disability is caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[29] We reject Employer contention that 20 C.F.R. §718.305(d)(1)(ii) is inconsistent with 30 U.S.C. §921(c)(4). *See Minich*, 25 BLR at 1-154-56; *see also W. Va. CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge