**U.S. Department of Labor**

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

BRB No. 21-0218 BLA

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| JOHNNY E. GREENE (deceased) | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| TROJAN MINING | ) | |
| | ) | |
| and | ) | DATE ISSUED: 12/21/2022 |
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| OLD REPUBLIC INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-<br>Petitioners | ) | |
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| 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 C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

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

William M. Bush (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, BUZZARD, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2019-BLA-05293) rendered on a claim filed on June 12, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[2]

The ALJ initially found Employer is the responsible operator. He further determined Claimant established 18.43 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2,[4] and the removal provisions applicable to the ALJ rendered his appointment unconstitutional. It also challenges its designation as the responsible

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[1] Claimant filed two prior claims, but both were withdrawn. Director's Exhibits 1-2. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] The Director indicates in his brief that Claimant died on January 12, 2021. Director's Response Brief at 4.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner was total 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.

[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.

operator. On the merits, Employer argues the ALJ erred in finding Claimant was totally disabled and therefore erred in finding he invoked the Section 411(c)(4) presumption. Finally, Employer assets the ALJ erred in finding it did not rebut the presumption.[5] Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response asserting the ALJ had authority to decide the case and urges the Benefits Review Board to affirm the ALJ's finding that Employer is the responsible operator. Employer filed a reply brief 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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

**Appointments Clause**

Employer requests that the Board vacate the ALJ's Decision and Order and remand this case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[7] Employer's Brief at 12-15; Employer's Reply Brief at 1-5.[8] It acknowledges the Secretary of Labor (the Secretary) ratified the prior

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[5] We affirm, as unchallenged on appeal, the ALJ's finding that the Claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4-5; Hearing Transcript at 17-18, 24-25.

[7] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to the Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018), *citing Freytag v. Comm'r*, 501 U.S. 868 (1991). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] Employer raised this issue for the first time to the ALJ in a Motion for Reassignment and to Hold in Abeyance filed on April 3, 2019.

appointment of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[9] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.* The Director responds that the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Brief at 5-7. We agree with the Director.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary." *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Johnson and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Johnson. The Secretary further stated he was acting in his "capacity as head of the [DOL]" when

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[9] 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 a District Chief Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

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

ratifying the appointment of Judge Johnson "as a District Chief Administrative Law Judge." *Id.*

Employer does not assert the Secretary had no "knowledge of all the material facts" but generally speculates that there was no "genuine consideration" of the ALJ's qualifications when he ratified his appointment. Employer's Brief at 15. Thus, Employer has not overcome the presumption of regularity.[10] *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. We therefore hold the Secretary properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions was proper).

We further reject Employer's allegation that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive civil service. Employer's Brief at 20. The Executive Order does not state that 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 ALJ Johnson'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.

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

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[10] While Employer asserts that the Secretary's ratification letter was signed by a "robo-pen," Employer's Reply Brief at 3, 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").

## Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 16-20; Employer's Reply Brief at 5-8. It generally argues the removal provisions 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*. Employer's Brief at 14-16; Employer's Reply Brief at 5-8. It also relies on the 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 United States Court of Appeals for the Federal Circuit's holding in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). *See* Employer's Brief at 14-20; Employer's Reply Brief at 5-8. For the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

## Responsible Operator

The responsible operator is the potentially liable operator that most recently employed Claimant.[11] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the designated responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it shows either that it is financially incapable of assuming liability for benefits or that another potentially liable operator that is financially capable of assuming liability more recently employed Claimant for at least one year. 20 C.F.R. §725.495(c)(2); *RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016).

[11] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the Claimant's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the Claimant for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

Claimant most recently worked in coal mine employment for Trojan Mining in 1990.[12] Director's Exhibit 4. On Sept 1, 2016, the district director identified Trojan Mining as the potentially liable operator and gave it thirty days from receipt of the Notice of Claim to file a response. Director's Exhibit 24. According to the district director's records, Beth Elkhorn sold its coal mines to Sun Glo Company in October 1988, which became Trojan Mining on April 26, 1990. *Id.* As Claimant worked for Beth Elkhorn from 1978 to 1982, the district director combined the time Claimant worked at Beth Elkhorn and Trojan Mining to determine Trojan Mining was the responsible operator that most recently employed Claimant as a miner for at least one year. *Id.* Employer timely responded, contesting its liability on the grounds that it was not the operator who most recently employed Claimant for a cumulative period of one year. Director's Exhibit 27. Employer moved to be dismissed as the responsible operator, stating that Claimant's Social Security Administration Earnings Record (SSER) only established six months of employment with Employer. Director's Exhibit 29.

In his Decision and Order, the ALJ found the district director's reliance on information provided by the Division of Coal Mine Workers' Compensation (DCMWC) regarding the sale of Beth Elkhorn and Sun Glo Company was reasonable. Decision and Order at 7. He further determined Claimant's credible testimony corroborated this information that Trojan Mining was located at the same place as the Beth Elkhorn mine, with many of the same employees. Decision and Order at 7; Hearing Transcript at 32-39. Thus the ALJ found Trojan Mining was a successor operator to Beth Elkhorn and employed Claimant for at least one year. Decision and Order at 8. As Employer submitted no other evidence in support of its position that it is not the responsible operator, the ALJ found it was properly designated as the responsible operator. Decision and Order at 8; 20 C.F.R. §725.494(c).

Employer argues it should be dismissed as the responsible operator because it employed Claimant for less than a calendar year, contending the ALJ erred in adopting the district director's findings which relied on the DCMWC statements regarding the sale of the mines when there is no objective evidence in the record of these sales. Employer's Brief at 21-22. The Director responds that, regardless of the ALJ's reliance on the district director's findings, Trojan Mining employed Claimant for at least one year under the Sixth Circuit's holding in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019). Director's

[12] The ALJ found Claimant's employment as a mine inspector for the state of Kentucky from November 1990 to December 2012 did not constitute coal mine employment under the Act. *See Navistar, Inc. v. Forester*, 767 F.3d 638, 645-47 (6th Cir. 2014); *Spatafore v. Consolidation Coal Co.*, 25 BLR 1-181, 1-188 (2016); Decision and Order at 7.

Response Brief at 12. Employer replies that the Director's reliance on *Shepherd* is misplaced as the relevant discussion cited by the Director is dicta. Employer's Reply at 10-11. We agree with the Director.

Contrary to Employer's assertion, the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) in *Shepherd*, holding that 125 days may constitute a year of coal mine employment even if the miner did not have a calendar year employment relationship, is not dicta. Employer's Reply at 10-11. The Sixth Circuit held a miner is entitled to credit for a full year of coal mine employment if he establishes 125 working days in a calendar year, "regardless of how long the miner actually was employed by the mining company in any one calendar year or partial periods totaling one year." 915 F.3d at 401-02. Thus, a miner need not have a full 365-day employment relationship with Employer for it to be held liable. *Id.* The court in *Shepherd* expressly instructed the ALJ to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)," including Section 725.101(a)(32)(i) which states 125 working days comprises a year of coal mine employment for all purposes under the Act. *Id.* at 407.

In this case, because there is no evidence of the beginning and ending dates of Claimant's employment with Trojan Mining, the ALJ used the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine Claimant had a combined one year of coal mine employment for two coal mine employers, Golden Oak Mining, Incorporated (Golden Oak), and Trojan Mining in 1990. Decision and Order at 7; Director's Exhibit 7. As the Director notes, Claimant earned $22,570 from Trojan Mining alone in 1990, and therefore worked for Trojan Mining for 169 days.[13] Director's Response Brief at 13; 20 C.F.R. §725.101(a)(32)(iii); Director's Exhibit 7. Consequently, under the Sixth Circuit's holding in *Shepherd*, Claimant had at least 125 working days for Trojan Mining in 1990 and therefore was employed by it for at least one year. *Shepherd,* 915 F.3d at 401-02; 20 C.F.R. §725.101(a)(32)(iii); Director's Response Brief at 13.

Consequently, any error in the ALJ's determination that Trojan Mining is a successor to Beth Elkhorn is harmless. *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 (1984); Decision and Order at 8.

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[13] Claimant earned $858.68 from Golden Oak Mining (Golden Oak) and $2,160.46 from the Kentucky mine safety agency in 1990. Director's Exhibit 7. Based on the formula at 20 C.F.R. §725.101(a)(32)(iii), Claimant worked for Golden Oak for seven days and for the Kentucky mine safety agency for seventeen days in 1990. 20 C.F.R. §725.101(a)(32)(iii); Director's Response Brief at 14.

**Invocation of the Section 411(c)(4) Presumption-Total Disability**

To invoke the Section 411(c)(4) presumption, Claimant had to establish 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. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,[14] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinions, and in consideration of the evidence as a whole.[15] Decision and Order at 21-22.

**Pulmonary Function Study Evidence**

The ALJ considered the results of five pulmonary function studies, dated February 9, 2016, July 19, 2016, October 13, 2016, August 22, 2017 and October 8, 2018. Decision and Order at 10-11, 19; Director's Exhibits 11, 17, 19, 20; Claimant's Exhibit 5. The ALJ found each of the studies produced qualifying values for total disability, but the February 9, 2016, July 19, 2016, October 13, 2016 and October 8, 2018 studies were invalid.[16] *Id.*

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[14] A "qualifying" pulmonary function study or arterial 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).

[15] The ALJ found none of the arterial blood gas studies qualifying for total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 21.

[16] Because the studies reported varying heights for Claimant, the ALJ permissibly calculated an average height of 67 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 19. He then used the closest greater table height at Appendix B of 20 C.F.R. Part 718 of 67.3 inches in determining whether each study was

As the only valid study of record, dated August 22, 2017, produced qualifying values before and after the administration of bronchodilators, he found Claimant established total disability based on the pulmonary function study evidence. Decision and Order at 21; 20 C.F.R. §718.204(b)(2)(i).

Employer contends the ALJ erred in finding the August 22, 2017 pulmonary function study valid and. therefore, erred in finding the pulmonary function study evidence established total disability. Employer's Brief at 24-27. We disagree.

The August 22, 2017 pulmonary function study was conducted as part of Dr. Rosenberg's evaluation of Claimant.[17] Director's Exhibit 19. The technician who conducted the test noted good effort and opined the study was acceptable and reproducible. *Id.* However, Dr. Rosenberg opined Claimant's effort was poor and found the spirometry invalid. *Id.* Dr. Forehand reviewed the study and opined it was valid. Director's Exhibit 41. He further stated that Dr. Rosenberg did not provide a rationale for finding the study invalid, but his own review of the study indicates "no evidence of a delay in reaching peak flow, premature termination of expiration or significant variability between each effort." *Id.* In addition, he opined the study was consistent with prior testing, and concluded it was reproducible and acceptable for determining total disability. *Id.* The ALJ credited Dr. Forehand's more detailed evaluation of the study over the summary conclusion of Dr. Rosenberg and therefore accorded it greater weight. Decision and Order at 2.

Contrary to Employer's arguments, the ALJ did not credit the technician's statements over those of the physicians who reviewed the study. Employer's Brief at 24. Rather, he noted the technician's findings when setting forth the evidence and ultimately gave Dr. Forehand's explanation of the study's validity greater weight than Dr. Rosenberg's contrary opinion. Decision and Order at 20. Nor do we see any error in the ALJ's crediting of Dr. Forehand's opinion over Dr. Rosenberg's. Decision and Order at 20-21. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). The ALJ permissibly found Dr. Forehand's more detailed explanation (which specifically assessed compliance with

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qualifying. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); Decision and Order at 19.

[17] Dr. Rosenberg stated in the narrative portion of his medical report that he examined Claimant on August 18, 2017; Claimant's objective tests from that examination, however, are dated August 22, 2017. Director's Exhibit 19.

required criteria) for why he found the August 22, 2017 pulmonary function study valid to be better reasoned than the summary conclusion of Dr. Rosenberg that it was not.[18] *Napier*, 301 F.3d at 712-14; *Banks*, 690 F.3d at 482-83; *Crisp*, 866 F.2d at 185; Decision and Order at 20-21.

Consequently, we affirm the ALJ's determination that the August 22, 2017 pulmonary function study is valid and sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 21.

**Medical Opinion Evidence**

The ALJ considered the medical opinions of Drs. Forehand, Rosenberg, and Tuteur. Decision and Order at 21-22. Dr. Forehand opined that Claimant was totally disabled from a respiratory impairment based on his symptoms of shortness of breath and coughing, as well as his qualifying pulmonary function testing. Director's Exhibits 11, 42. Dr. Rosenberg opined that there is no objective evidence to indicate whether Claimant had a totally disabling respiratory impairment as there are no valid pulmonary function studies. Director's Exhibit 19; Employer's Exhibit 5. Similarly, Dr. Tuteur opined there are no valid pulmonary function studies and that Claimant was not totally and permanently disabled, but instead had intermittent and non-persistent exercise intolerance. Employer's Exhibit 6. The ALJ found the opinions of Drs. Rosenberg and Tuteur unpersuasive in light of the valid and qualifying August 22, 2017 pulmonary function study, and credited the opinion of Dr. Forehand as well-reasoned and documented. Decision and Order at 21-22. He therefore determined the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 22.

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[18] Although Employer asserts the ALJ failed to address Dr. Tuteur's opinion that the August 22, 2017 pulmonary function study was invalid, any potential error is harmless. *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 (1984); Employer's Brief at 24; Employer's Exhibit 6. While Dr. Tuteur stated none of the pulmonary function studies are valid, he offered no explanation for his determination. Employer's Exhibit 6. The same reason the ALJ credited Dr. Forehand's detailed explanation over the summary conclusion of Dr. Rosenberg would equally apply to the summary conclusion of Dr. Tuteur. *See Youghiogheny & Ohio Coal Co. v. Webb,* 49 F.3d 244, 249 (6th Cir. 1995) ("If the outcome of a remand is foreordained, we need not order one."); *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 558 (7th Cir. 1991).

Employer contends the ALJ erred in his weighing of the medical opinion evidence. Employer's Brief at 26-27. We disagree. Contrary to Employer's arguments, as discussed above, Dr. Forehand relied on the August 22, 2017 valid and qualifying pulmonary function study in addition to Claimant's symptoms to find he was totally disabled from "meet[ing] the physical demands of" his last coal mining job.[19] Director's Exhibits 11, 42. Employer's Brief at 25-27. The ALJ permissibly found Dr. Forehand provided a well-reasoned and well-documented opinion that was supported by his understanding of the exertional requirement of Claimant's usual coal mine employment, symptoms, and valid objective testing. *Napier*, 301 F.3d at 712-14; *Banks*, 690 F.3d at 482-83; *Crisp*, 866 F.2d at 185; Decision and Order at 21.

Moreover, as we have affirmed the ALJ's weighing of the pulmonary function study evidence, we further reject Employer's argument that the ALJ erred in discrediting the opinions of Drs. Rosenberg and Tuteur based on his analysis of the pulmonary function studies. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (en banc); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 21-22. As Employer raises no other challenges to the weighing of the opinions of Drs. Rosenberg and Tuteur, we affirm the ALJ's determination that their opinions are entitled to little weight. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Consequently, we affirm the ALJ's determination that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 22.

**Evidence As A Whole**

Employer finally contends the ALJ did not resolve the conflicts between the non-qualifying arterial blood gas studies and the qualifying pulmonary function study evidence

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[19] Employer contends the ALJ erred in not identifying Claimant's usual coal mine employment and the exertional requirements of that job, and therefore erred in crediting Dr. Forehand's opinion which did not adequately address these requirements. Employer's Brief at 26-27. However, the ALJ repeatedly noted Claimant last worked in coal mine employment as a longwall shield operator and previously worked as a heavy equipment operator. Decision and Order at 3, 12; Director's Exhibits 5, 11, 19; Hearing Transcript at 18-23. Drs. Forehand and Rosenberg also reported the same employment history. Director's Exhibit 11, 19. As Dr. Forehand relied on the correct job title and on qualifying objective testing, Employer has failed to establish how the ALJ's failure to determine the exertional requirements of Claimant's coal mine work would make any difference in this case. *See Cornett v. Benham Coal Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-303 (2003); *Shinseki,* 556 U.S. at 413.

and medical opinions. Employer's Brief at 25-26. We disagree. The ALJ found the pulmonary function studies and medical opinion evidence established total disability. Decision and Order at 21-22. While the ALJ found the arterial blood gas studies do not support total disability, they measure a different form of impairment and thus do not necessarily call into question the qualifying pulmonary function studies and medical opinions based on those studies. *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). The ALJ both separately considered the pulmonary function study and blood gas study results pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and integrated his consideration of the objective test results into his consideration of the medical opinions. Decision and Order at 21-22. Therefore, he adequately considered all contrary probative evidence. *See Shedlock*, 9 BLR at 1-198.

Because it is supported by substantial evidence, we affirm the ALJ's findings that Claimant established total disability and therefore invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §725.309; Decision and Order at 22.

**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 Claimant had neither legal nor clinical pneumoconiosis,[20] or that "no part 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 Employer failed to establish rebuttal by either method.[21] Decision and Order at 23-30.

[20] "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).

[21] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 24-25.

**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 v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit requires Employer to establish Claimant'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)).

Employer relies on the opinions of Drs. Rosenberg and Tuteur to disprove legal pneumoconiosis. Director's Exhibit 19; Employer's Exhibits 5, 6. Dr. Rosenberg opined Claimant did not have legal pneumoconiosis as there are no valid pulmonary function studies to assess whether he had an impairment. Director's Exhibit 19; Employer's Exhibit 5. Assuming an impairment was present, Dr. Rosenberg opined it would not be due to coal mine dust exposure as Claimant did not have changes on his x-rays and his coal mine dust exposure was remote. *Id.* Dr. Tuteur similarly opined Claimant did not have legal pneumoconiosis as there is no evidence he had a pulmonary impairment. Employer's Exhibit 6. He further attributed Claimant's exertional intolerance to poor dietary habits and gastroesophageal reflux, with recurrent aspiration. *Id.* The ALJ found their opinions not well-reasoned or documented and therefore Employer did not rebut the existence of legal pneumoconiosis. Decision and Order at 27-29.

Initially we reject Employer's argument that the ALJ applied the wrong standard when addressing rebuttal. Employer's Brief at 27-28. To rebut legal pneumoconiosis, the ALJ required Employer to establish that Claimant's totally disabling respiratory impairment was not "significantly related to or significantly aggravated by dust exposure in coal mine employment." Decision and Order at 25. He then properly applied the "rule out standard" when determining if Employer rebutted the presumption that Claimant's disability was due to his pneumoconiosis. *Id.* at 29.

We also reject Employer's arguments that the ALJ's reasons for discrediting Drs. Rosenberg and Tuteur were improper. Employer's Brief at 28-32.

The ALJ permissibly discredited their opinions that Claimant did not have legal pneumoconiosis because they based their opinions on the belief that there are no valid pulmonary function studies showing a respiratory impairment, contrary to the ALJ's determination that the August 22, 2017 pulmonary function study is valid and qualifying.

*See Furgerson*, 22 BLR at 1-226; *Winters,* 6 BLR at 1-881 n.4; Decision and Order at 28-29; Director's Exhibit 19; Employer's Exhibit 5, 6.

The ALJ further permissibly discredited Dr. Rosenberg's opinion, that Claimant's chronic bronchitis does not constitute legal pneumoconiosis because his exposure to coal mine dust ended in 2012, as inconsistent with the regulations which recognize that legal 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 Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding an ALJ's decision to discredit a physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that pneumoconiosis is a latent and progressive disease); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012) (same); Decision and Order at 27-28; Directors' Exhibit 19; Employer's Exhibit 5. In addition, the ALJ permissibly discredited Dr. Rosenberg's opinion, that any restrictive impairment would not be due to Claimant's coal mine employment because there was no evidence of clinical pneumoconiosis, as inconsistent with the regulation's provision that legal pneumoconiosis can exist in the absence of positive x-ray evidence. 20 C.F.R. §718.202(a)(4), (b); *see* 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); Decision and Order at 28; Director's Exhibit 19; Employer's Exhibit 5.

Employer's arguments 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 failed to disprove Claimant had legal pneumoconiosis.[22] 20 C.F.R. §718.305(d)(1)(i).

**Disability Causation**

The ALJ also found Employer failed to establish that "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); Decision and Order at 29-30. As Employer does not challenge this finding, we affirm it and therefore affirm the award of benefits. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 29.

[22] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (B).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge