U.S. Department of Labor

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

BRB No. 21-0453 BLA

JAMES C. KEEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JEWELL SMOKELESS COAL CORPORATION	)	
	)	
	)	DATE ISSUED: 02/27/2023
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

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

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

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: GRESH, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Awarding Benefits (2018-BLA-05904) rendered on a subsequent claim[1] filed on January 30, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer is the properly designated responsible operator. He credited Claimant with at least thirty-three years of coal mine employment but found he did not establish at least fifteen years were in underground coal mines or surface coal mines in conditions substantially similar to underground mines. 20 C.F.R. §718.305(b)(1), (2). Thus, he found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018).[2]

The ALJ next considered whether Claimant established entitlement to benefits pursuant to 20 C.F.R. Part 718 without benefit of the presumption. He found Claimant established a totally disabling respiratory or pulmonary impairment, and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309(c). Furthermore, he found Claimant did not establish clinical pneumoconiosis, but established legal pneumoconiosis[3] and that his total disability is due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(c). Thus he awarded benefits.

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[1] On November 19, 2003, the district director denied Claimant's prior claim, filed on February 20, 2003, for failure to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant was therefore required to establish total disability to obtain review of his subsequent claim on the merits. *White*, 23 BLR at 1-3.

[2] Section 411(c)(4) of the Act 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.

[3] "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.

On appeal, Employer argues the ALJ lacked authority to preside over the case because he has not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2, and the removal provisions applicable to the ALJ render his appointment unconstitutional.[4] Employer also argues the ALJ erred finding it is the responsible operator. On the merits of entitlement, Employer challenges the ALJ's findings on legal pneumoconiosis, total disability, and disability causation. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Benefits Review Board to reject Employer's constitutional arguments. The Director also urges the Board to reject Employer's argument that it is not the responsible operator. Claimant responds in support of the award of benefits. Employer filed a reply to the Director's response reiterating its arguments.

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

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§718.201(a)(1). "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).

[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1; Hearing Transcript at 20.

Appointments Clause

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 10-15; Employer's Reply Brief at 1-5. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 14-15; Employer's Reply Brief at 1-4.

The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance with the Appointments Clause. Director's Brief at 5-7. We agree with the Director's argument.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 6 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, 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). Ratification 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 Hosp. Co.*, 857 F.3d at 372; *Advanced*

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[6] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) 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.

[7] The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

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

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). Moreover, 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 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 McGrath and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ McGrath. The Secretary further acted in his "capacity as head of the [DOL]" when ratifying the appointment of ALJ McGrath "as an Administrative Law Judge." *Id*.

Employer generally asserts there is "no indication" that the Secretary "conducted the personal vetting process that is expected in a constitutionally authorized selection of an inferior officer" but it does not allege the Secretary had no "knowledge of all the material facts," when he ratified ALJ McGrath's appointment. Employer's Brief at 15. Thus, Employer has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary therefore properly ratified the ALJ's appointment.[8] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals were valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier invalid actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. Employer's Brief at 11-13. The Executive Order does not state that the prior appointment procedures were

[8] While Employer states the Secretary's ratification letter was "signed in autopen[,]" Employer's Brief at 14, 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").

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 McGrath's appointment, which we have held constituted a valid exercise of his authority, thereby bringing his appointment into compliance with the Appointments Clause.

Thus, we reject Employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 16-18; Employer's Reply Brief at 5-10. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act, 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). Employer's Brief at 16-17. 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 United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 16-18; Employer's Reply Brief at 5-10. 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 the miner.[9] 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

[9] 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 miner'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 miner 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).

the "potentially liable operator" that is the 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 proves 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 the miner for at least one year. 20 C.F.R. §725.495(c)(2).

Before the ALJ, Employer argued Claimant worked in coal mine employment with Four K Trucking, Inc. (Four K) for a cumulative period of at least one year after working for Employer, and thus Four K should have been named the responsible operator. Employer's Post-Hearing Brief at 10-11. The ALJ rejected Employer's argument. Decision and Order at 30. He credited Claimant's Social Security Administration (SSA) earnings record over his testimony and found that, even assuming all of Claimant's employment with Four K involved hauling coal, Claimant's SSA earnings record establishes less than one year of employment with Four K and thus it cannot be a potentially liable operator. *Id*. at 30. Specifically, the ALJ found Four K did not regularly employ Claimant in coal mining, notwithstanding whether it employed him for a calendar year, because his "total earnings for the entire period" he worked for Four K "would not equate to at least 125" working days. *Id*. at 30 n. 75.

Employer argues the ALJ erred by failing to provide a rationale for relying on Claimant's SSA earnings record over his testimony regarding his employment with Four K. Employer's Brief at 20-21. We disagree.

The ALJ evaluates the credibility and weight of the evidence, including witness testimony. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). The Board will not disturb an ALJ's credibility findings unless they are inherently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc)

The ALJ found Claimant's testimony "somewhat vague and confusing on specific dates of [Claimant's] employment with Four K." Decision and Order at 30 n.74. He thus permissibly gave more weight to Claimant's SSA earnings record. *See Stallard*, 876 F.3d at 670; *Tackett*, 6 BLR at 1-841 (ALJ may credit SSA earnings record over testimony and other sworn statements); Decision and Order at 30 n.74.

Employer does not challenge the ALJ's finding that Claimant's SSA earnings record establishes less than one year of coal mine employment with Four K. 20 C.F.R. §725.101(a)(32); Decision and Order at 30 n. 75. Thus we affirm it. *See Skrack v. Island*

Creek Coal Co., 6 BLR 1-710, 1-711 (1983). We therefore affirm his finding Employer is the correctly designated responsible operator.

Entitlement – 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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.[10] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying[11] pulmonary function studies or 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).

[10] We address the issue of total disability at the outset because it is relevant to whether Claimant has established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

[11] 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).

Employer challenges the ALJ's determination Claimant established total disability based upon the medical opinion evidence.[12] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 22-23; Employer's Brief at 21-27.

The ALJ considered the opinions of Drs. Raj, Nader, Fino and Jarboe.[13] Decision and Order at 20; Director's Exhibits 14, 15; Claimant's Exhibit 1; Employer's Exhibits 6, 9. He found Drs. Raj's and Nader's opinions that Claimant is totally disabled by a respiratory impairment reasoned and documented. Decision and Order at 20-22; Director's Exhibit 14; Claimant's Exhibit 1 at 3. He found Dr. Jarboe's contrary opinion entitled to less weight because he failed to consider the exertional requirements of Claimant's usual coal mine work.[14] Decision and Order at 20-22; Employer Exhibit 6. Finally, he concluded Dr. Fino was ambiguous in a supplemental opinion after reviewing additional objective testing, undermining his original opinion Claimant is not disabled. Decision and Order at 22; Employer's Exhibit 9. Weighing the medical opinions together, he found the preponderance of the evidence supports the conclusion Claimant is totally disabled. Decision and Order at 22.

Employer argues the ALJ erred in crediting Dr. Raj's opinion. Employer's Brief at 25-26. We disagree.

Dr. Raj noted Claimant's usual coal mine employment required him to lift "50-100 pounds at any given time" and he had a "heavy level of exertion in this job." Claimant's Exhibit 1 at 1. He also noted Claimant "has history of shortness of breath" and "gets short of breath on walking 50-100 feet of distance uphill." *Id*. at 2. He opined September 3, 2019 resting and exercise arterial blood gas testing evidences hypoxemia and pulmonary function testing demonstrates a moderate obstructive impairment. *Id*. at 3-4. In addition,

[12] The ALJ found the pulmonary function and arterial blood gas study evidence does not establish total disability, and there is no evidence of cor pulmonale with right-sided heart failure in the record. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 12-14.

[13] The ALJ found Claimant's usual coal mine work included driving trucks to haul coal, operating drills and cranes, and opening new mines. Decision and Order at 10. After considering Claimant's testimony and the medical opinion evidence regarding his usual coal mine work, the ALJ found Claimant's work required heavy labor, including the need to "lift weights exceeding 50 pounds." *Id*. at 11. As Employer does not challenge the ALJ's findings, we affirm them. *See Skrack*, 6 BLR at 1-711.

[14] Employer has not challenged the ALJ's discrediting of Dr. Jarboe's opinion on total disability. We therefore affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 21.

he noted that March 24, 2017 and July 22, 2017 blood gas studies further demonstrate hypoxemia. *Id*. He diagnosed total disability as follows:

> [Claimant] has [a] pulmonary impairment resulting from his diagnosis of chronic obstructive pulmonary disease [(COPD)] which is caused by exposure to coal and rock dust for a total of 36 years in coal mine employment. Thus, coal and rock dust exposure is a substantial and significant cause for the patients (sic) pulmonary impairment. This gentleman (sic) physical capacity is greatly diminished due to total disability resulting from the pulmonary impairment. The patient gets short of breath on walking 50-100 feet of distance uphill. With such a reduced physical capacity in light of above mentioned evidence of pulmonary impairment, in my medical opinion this patient cannot perform the exertion requirement of his last coal mine employment job.

Id. at 3-4. The ALJ found Dr. Raj's opinion reasoned and documented. *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 22.

Employer argues the ALJ erred in failing to consider Dr. Raj's discussion of evidence outside of the record. Employer's Brief at 25-26. We are not persuaded.

The regulations are silent as to what an ALJ should do when evidence not admitted in the record is referenced in an otherwise admissible medical opinion. 20 C.F.R. §725.414(a)(2)(i), (3)(i). Thus, the disposition of these types of evidentiary issues are committed to an ALJ's discretion. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004). Even if an ALJ finds a medical opinion is tainted by reliance on evidence outside of the record, he is not required to exclude the report or testimony in its entirety. *Id*. Rather, he may redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance on the inadmissible evidence when deciding the weight to give to the physician's opinion. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67.

In this case, the ALJ acknowledged that Dr. Raj "reviewed the results of an arterial blood gas test dated [July 22, 2017] which is not otherwise of record." Decision and Order at 21 n. 53. He also found, however, that Dr. Raj's diagnosis of hypoxemia is based on blood gas test results dated March 24, 2017 and September 3, 2017 which are in the record. Decision and Order at 22. Thus, contrary to Employer's argument, the ALJ permissibly found Dr. Raj's opinion credible notwithstanding the doctor's reference to the July 22, 2017 arterial blood gas study. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-67.

We are also not persuaded by Employer's argument that the ALJ erred in crediting Dr. Nader's opinion. Employer's Brief at 21-27.

In his initial report, Dr. Nader noted that in performing his usual coal mine work, Claimant "operated a construction drill. . . tractor-trailer and crane[], built roofs, opened new mines, [and worked as a] truck driver[.]" Director's Exhibit 14 at 1. He further noted the exertional requirements of his work included "climb[ing] 3-12 steps to get into and out of equipment several times daily[,]" and "[l]if[ing] 120 pounds at any given time." *Id*. Further, he stated Claimant experiences "shortness of breath mainly with exertion." *Id*. at 2.

Dr. Nader opined Claimant is totally disabled due to hypoxemia demonstrated by his March 24, 2017 arterial blood gas study, as supported by a pulmonary function study administered the same day which evidences "pulmonary impairment and ventilatory insufficiency." *Id*. at 3-4. He concluded that "given [Claimant's] hypoxemia level[,]" he "could not meet the exertional demands of his previous coal mine employment due to his significant hypoxemia at rest." *Id*.

In his supplemental report, Dr. Nader stated he reviewed the results of Claimant's October 19, 2017 objective testing and evaluation performed by Dr. Fino. Director's Exhibit 27. He noted Dr. Fino conducted a resting blood gas study and an exercise pulse oximetry test, with the results recorded after six minutes of walking. *Id*.; *see* Director's Exhibit 28. Although Dr. Fino opined the exercise pulse oximetry was normal, Director's Exhibit 28, Dr. Nader disagreed, explaining that an "SPO2 of 91%" on pulse oximetry "corresponds to a "pO2 [of] 59-60" on blood gas testing "according to oxyhemoglobin curve." Director's Exhibit 27 at 2-3. Thus he opined "Dr. Fino's evaluation regarding hypoxemia not valid." *Id*. He thereafter reiterated his opinion that Claimant is totally disabled by hypoxemia. *Id*.

The ALJ noted the conflicting conclusions of Drs. Fino and Nader , but permissibly credited Dr. Nader's opinion that the October 19, 2017 exercise pulse oximetry test supports a finding of disabling hypoxemia because Dr. Nader's opinion was "buttressed by other evidence of hypoxemia . . . and [Dr. Nader] stressed the medical evidence of hypoxemia was 'consistently demonstrated.'" Decision and Order at 22 n.54; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Thus, contrary to Employer's argument, the ALJ permissibly credited Dr. Nader's opinion as reasoned and documented on the issue of total disability. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 22.

Employer finally argues the ALJ erred in finding Dr. Fino's supplemental opinion ambiguous on the issue of Claimant's total disability thereby undermining his opinion. Employer's Brief at 24-25. We disagree.

The United States Court of Appeals for the Fourth Circuit, within his jurisdiction this case arises, has recognized that because pneumoconiosis is a chronic condition, a miner's functional ability on an objective test may vary, and thus could measure higher on any given day than its typical level. *Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991). In his supplemental report, Dr. Fino considered Claimant's non-qualifying September 3, 2019 and qualifying October 7, 2019 arterial blood gas studies, and opined:

> There has been marked variability in the blood gases. Blood gases on [September 3, 2019] were *not* qualifying, but blood gases from that same laboratory on [October 7, 2019] *were* qualifying. All I can say is that I would not expect such variability in arterial blood gases if they were abnormal due to coal mine dust.
>
> Hence, I do not find any evidence of disability. Blood gases have been abnormal at times. However, they are not consistently abnormal. If this gentleman were found to be disabled based on the blood gases, any such disability would be unrelated to coal mine dust inhalation.

Employer's Exhibit 9 at 4. Thus Dr. Fino merely cited variability in Claimant's blood gas testing to find no "evidence of disability" because the "blood gases have been abnormal at times" although "not consistently abnormal," but if found disabling "any such disability would be unrelated to coal mine dust inhalation." *Id.* Contrary to Employer's argument, the ALJ permissibly found Dr. Fino's rationale unpersuasive because the doctor was ambiguous on whether Claimant has a totally disabling respiratory or pulmonary impairment in light of the new studies he reviewed. *Greer*, 940 F.2d at 90-91; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Bosco v. Twin Pines Coal Co.*, 892 F.3d 1473, 1480-81 (10th Cir. 1989).

We therefore affirm the ALJ's finding that the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 22. We further affirm the ALJ's conclusion that the evidence, weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 22-23. Additionally, we therefore affirm the ALJ's finding that Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); Decision and Order at 7.

Legal Pneumoconiosis

We next address Employer's challenge to the ALJ's finding that Claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

To establish legal pneumoconiosis, Claimant must demonstrate he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust

exposure in coal mine employment." 20 C.F.R. §718.201(b). The Fourth Circuit has held a miner can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to his respiratory or pulmonary impairment. *See Westmoreland Coal Co., Inc. v. Cochran*, 718 F.3d 319, 322-23 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311 (4th Cir. 2012); *see also Arch on the Green v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014) (A miner can establish a lung impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment.").

Dr. Nader diagnosed legal pneumoconiosis in the form of restrictive lung disease significantly related to, or substantially aggravated by, coal mine dust exposure, and totally disabling hypoxemia significantly related to, or substantially aggravated by, coal mine dust exposure. Director's Exhibits 14, 17. Dr. Raj diagnosed COPD significantly related to, or substantially aggravated by, coal mine dust exposure. Claimant's Exhibit 1. Drs. Fino and Jarboe opined Claimant does not have a lung disease or impairment arising out of coal mine employment. Employer's Exhibits 6, 9. The ALJ found Dr. Nader's opinion reasoned and documented and the opinions of Drs. Raj, Fino, and Jarboe unpersuasive. Decision and Order at 26-27.

Employer argues the ALJ erred in crediting Dr. Nader's opinion because it alleges the doctor misunderstood the nature of Claimant's coal mine employment.[15] Employer's Brief at 21-23. Specifically, it notes that in his initial report, Dr. Nader indicated Claimant worked in both underground and surface coal mine employment and his total length of coal mine employment was thirty years. *Id*.; *see* Director's Exhibit 14. Employer contends the ALJ found Claimant had no underground coal mine employment. Employer's Brief at 21-23. Thus it contends the ALJ erred in crediting Dr. Nader's opinions. *Id*. We disagree.

The ALJ acknowledged Dr. Nader "noted that Claimant reported some underground coal mine work," Decision and Order at 10, but nonetheless permissibly found his opinion reasoned and documented because the doctor relied on a history of thirty years of coal mine employment, comparable to the ALJ's finding of thirty-three years, Decision and Order at 25 n.63; addressed why other non-coal-mining-related risk factors do not account for the lung diseases or impairments he diagnosed; and his opinion "is based on objective evidence (specifically, the evaluations of [March 24, 2017] and [October 19, 2017] and the associated medical tests)."[16] *Id*. at 25-26; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at

[15] Employer does not challenge the ALJ's discrediting of the opinions of Drs. Fino and Jarboe on the issue of legal pneumoconiosis. Decision and Order at 26-27. Thus we affirm these findings. *Skrack*, 6 BLR at 1-711.

[16] We note the ALJ rendered conflicting findings on whether Claimant had any underground coal mine employment. He initially stated that, other than the opinions of

441; *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). Thus we affirm the ALJ's finding that Claimant established legal pneumoconiosis through Dr. Nader's opinion. 20 C.F.R. §718.202(a)(4).

Disability Causation

To prove total disability due to pneumoconiosis, Claimant must establish pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). Pneumoconiosis is a substantially contributing if it has a "material adverse effect on the miner's respiratory or pulmonary condition" or it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

Employer argues the ALJ did not set forth his basis for finding total disability causation established in this case. Employer's Brief at 26-27. We disagree.

The ALJ correctly found Dr. Nader's opinion on legal pneumoconiosis is sufficient to establish disability causation.

As discussed above, Dr. Nader opined Claimant is totally disabled by a lung impairment evidenced by hypoxemia on arterial blood gas testing, and concluded the hypoxemia constitutes legal pneumoconiosis because Claimant's thirty year "occupational history of exposure to respirable coal and rock dust is considered in part [a] contributing factor for his diagnosis." Director's Exhibit 27 at 2-3. The ALJ reiterated his finding that Dr. Nader's opinion is reasoned and documented on the etiology of Claimant's hypoxemia. Decision and Order at 25-26. Thus Dr. Nader's opinion establishes Claimant's disabling lung impairment constitutes legal pneumoconiosis, and therefore establishes legal pneumoconiosis was a substantially contributing cause of Claimant's total

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Drs. Nader and Jarboe, "there is no other evidence of record about Claimant working underground." Decision and Order at 10. He further acknowledged, however, that Claimant testified he worked in underground coal mines. *Id.*; *see* Hearing Tr. at 32, 36. Insofar as Claimant's testimony is unrebutted, the ALJ erred to the extent he found Claimant had no underground coal mine employment. Thus Dr. Nader accurately indicated Claimant had a combination of underground and surface coal mining. Director's Exhibit 14. However, because the ALJ ultimately found Dr. Nader's opinion reasoned and documented on the issue of legal pneumoconiosis, the ALJ's error is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

disability.[17] *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014) (death causation satisfied where the court found the miner's COPD constituted legal pneumoconiosis and all medical experts agreed COPD contributed to the miner's death); *see Energy West Mining Co. v. Dir., OWCP*, 49 F.4th 1362, 1369 (10th Cir. 2022); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (where all the medical experts agreed COPD caused the miner's total disability, the legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability"); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 255-56 (2019); 20 C.F.R. §718.204(c).

Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability due to pneumoconiosis through Dr. Nader's opinion. 20 C.F.R. §718.204(c). Consequently, we affirm the ALJ's finding that Claimant established entitlement under 20 C.F.R. Part 718 and affirm the award of benefits.

[17] Employer does not challenge the ALJ's finding the opinions of Drs. Fino, and Jarboe are not credible on disability causation because they were not reasoned and documented and failed to diagnose pneumoconiosis, contrary to the ALJ's finding Claimant has the disease. Decision and Order at 27-28, 28 n.69. We therefore affirm these credibility findings. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge