U.S. Department of Labor

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

BRB No. 21-0550 BLA

VESTER M. LESTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
C&R COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 02/22/2023
	)	
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 Susan Hoffman, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Awarding Benefits (2018-BLA-06253) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on March 27, 2015.[1]

The ALJ found Employer is the properly designated responsible operator. She also found Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus she found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309. She 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 ALJs violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It also argues the ALJ erred in finding it is the responsible operator. Alternatively, it asserts the ALJ erred in finding Claimant established

[1] Claimant filed his first claim on February 25, 1993. The district director denied this claim because Claimant failed to establish any element of entitlement. Director's Exhibit 1.

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

[3] 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.

total disability thereby invoking the Section 411(c)(4) presumption. Finally, it argues the ALJ erred in finding it did not rebut the presumption.[4]

Claimant has not filed a response in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional arguments and to affirm the ALJ's responsible operator determination. Employer has 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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded Department of Labor (DOL) ALJs. Employer's Brief at 28-33. Employer 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 v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). *Id.* It also relies on the United States Supreme Court's holdings in *Free Enterprise 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). Employer's Brief at 30-32. 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, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). To meet the regulatory definition of a "potentially liable operator," the

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

[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 16.

coal mine operator must have employed the miner for a cumulative period of not less than one year and be financially capable of assuming liability for the payment of benefits.[6] 20 C.F.R. §725.494(c). 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 responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director properly identifies a potentially liable 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 operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

Employer does not dispute it is a potentially liable operator,[7] but argues the ALJ erred in finding it did not establish two other operators that employed Claimant more recently, Lescox Coal and Shirl Coal, are financially capable of assuming liability. Employer's Brief at 10-21. We disagree.

In designating the responsible operator, the district director acknowledged Claimant worked for Employer as a miner from February 1982 to April 1983. Director's Exhibits 47, 54. She also determined he subsequently worked for Lescox Coal from 1983 until July 1987. Director's Exhibits 18-19, 47, 54. Because Lescox Coal was uninsured in July 1987, she found it could not be named the responsible operator as it is financially incapable of assuming liability for the payment of benefits. *Id*. She then noted Claimant also worked for Shirl Coal after working for Employer and did so until December 1987, but she concluded Shirl Coal's federal black lung claim liabilities were covered by the Virginia Independent Coal Operators Group (VICOG), a self-insured entity that became insolvent in 2004. *Id*. Thus she determined Shirl Coal is also financially incapable of assuming liability. *Id*. Because the district director's reasons for not designating Lescox Coal and Shirl Coal included their inability to assume liability for the payment of benefits, she

[6] For a coal mine operator to meet the regulatory definition of a "potentially liable operator": 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).

[7] The ALJ found Employer meets the regulatory definition of a potentially liable operator. 20 C.F.R. §725.494(a)-(e); Decision and Order at 39-40. We affirm this finding as Employer does not challenge it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

submitted a statement pursuant to 20 C.F.R. §725.495(d) that the Office of Workers' Compensation Programs (OWCP) has no record of insurance coverage or of an authorization to self-insure on Claimant's last day of employment for either operator.[8] *Id*.

The ALJ found the district director's statements submitted in accordance with 20 C.F.R. §725.495(d) constitute prima facie evidence that Lescox Coal and Shirl Coal are not financially capable of assuming liability for the claim, and thus she determined Employer bears the burden to establish either company is, in fact, financially capable of paying benefits. Decision and Order at 38-40; *see* 20 C.F.R. §725.495(c), (d). She rejected Employer's argument that the Virginia Property and Casualty Insurance Guaranty Association (VPCIGA), a state guaranty fund, or the Virginia Uninsured Employers Fund (VUEF), a state uninsured fund, are obligated to pay benefits on the claim as a guarantors of VICOG. *Id*. Furthermore, she concluded Employer has not provided any evidence to establish that either Lescox Coal or Shirl Coal are capable of assuming liability. *Id*. Thus she found Employer is the responsible operator. *Id*.

In challenging this determination, Employer first argues there is no evidence in the record to establish Claimant last worked for Lescox Coal in July 1987, the month in which the district director determined it was uninsured. Employer's Brief at 10-11. Employer asserts Claimant worked for Lescox Coal "only through February 25, 1987," a month in which "Lescox maintained commercial insurance." *Id*. at 11 n.2.

Employer forfeited this argument by not raising it before the ALJ. 20 C.F.R. §802.301(a) (Board's review authority limited to "findings of fact and conclusions of law on which the decision or order appealed from was based"); *see Joseph Forrester Trucking v. Director, OWCP* [*Mabe*], 987 F.3d 581, 588 (6th Cir. 2021) (black lung regulations require that an issue be "raised before the ALJ to preserve issue for the Board's review"); *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 4-10 (Oct. 25, 2022).

[8] If the responsible operator that the district director designates is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs (OWCP) has no record of insurance coverage for that employer or of its authorization to self-insure. *Id*. Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim. *Id*.

Nonetheless, we conclude that even if Employer did not forfeit it, the argument is unpersuasive. Contrary to Employer's contention, the record supports the ALJ's determination that Claimant last worked for Lescox Coal in July 1987. Claimant specifically indicated on his employment history form CM-911a that he worked for Lescox Coal until July 1987, and his statement is uncontradicted. Director's Exhibit 4. Moreover, the Director correctly argues that the evidence Employer cites to support its contention that Claimant last worked for Lescox in February 1987 does not actually support this argument. Director's Brief at 8. Employer cites to a state workers' compensation award to Claimant from the Industrial Commission of Virginia which states Dr. Sutherland had diagnosed coal workers' pneumoconiosis based on a February 25, 1987 x-ray. Employer's Brief at 11, *citing* Director's Exhibit 9. There is no indication, however, that Claimant last worked for Lescox Coal in February 1987. Director's Exhibit 9. Because there was no basis for the ALJ to find Claimant last worked for Lescox Coal in February 1987, and the uncontradicted evidence establishes he last worked for it in July 1987, we reject Employer's argument that the ALJ erred in failing to resolve any alleged conflict in the evidence. Employer's Brief at 11. Further, the ALJ accurately found, and Employer does not dispute, that it has not provided any evidence to establish Lescox Coal is capable of assuming liability based on the finding that Claimant last worked for this operator in July 1987. Decision and Order at 38-40; 20 C.F.R. §725.495(c), (d).

Employer next argues the DOL was required to notify VPCIGA and VUEF and have them participate in the proceedings before the district director. Employer's Brief at 10-15. It asserts the ALJ erred to the extent she did not dismiss it as responsible operator and transfer liability to the Black Lung Disability Trust Fund (Trust Fund) based on the DOL's failure to do so. *Id*. We disagree. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, rejected this same argument in *RB & F Coal, Inc. v. Mullins,* 842 F.3d 279, 283, 286-287 n.9 (4th Cir. 2016). In that case, the Fourth Circuit affirmed the ALJ's and the Board's holding that "the district director had no duty to notify the [VPCIGA] or name it as a party" for claims that "the Guaranty Association is not liable" for.[9] *Id*. at 283. The court further explained that because the designated responsible operator had "an opportunity to be heard," due process did not require the DOL to "provide notice first to the VPCIGA, regardless of whether it was liable for the claim [as a guarantor] under state law." *Id*. at 286-287 n.9. Thus, contrary to Employer's argument, the DOL's failure to investigate or notify a state guarantee fund of a federal black lung claim that would have been paid by an insolvent insurer or uninsured

[9] The Fourth Circuit's rationale in *RB & F Coal, Inc. v. Mullins,* 842 F.3d 279, 283, 286-87 n.9 (4th Cir. 2016), is equally applicable to the Virginia Uninsured Employers Fund (VUEF). As discussed below, there is no basis to conclude that the VUEF is a guarantor of federal black lung claims insofar as this fund only covers claims arising out of Virginia's state workers' compensation law.

operator is not a basis to dismiss a designated responsible operator where that operator has otherwise failed to meet its burden of establishing the guaranty fund is liable for the payment of benefits. *Mullins,* 842 F.3d at 283, 286-287 n.9. As discussed below, Employer has not met its burden in this case.[10]

Employer specifically contends liability for this claim should transfer to the Trust Fund because it maintains VPCIGA and VUEF are, in fact, guarantors of VICOG and thus Shirl Coal is capable of paying benefits. Employer's Brief at 10-18; Employer's Reply Brief at 4-11. This argument is also unpersuasive.

VPCIGA is a non-profit association established by the Virginia Property and Casualty Insurance Guaranty Association Act (Guaranty Act) to pay "covered claims to reduce financial loss to claimants or policyholders resulting from the insolvency of an insurer." Va. Code Ann. §38.2-1600; *see Mullins,* 842 F.3d at 282. The VPCIGA is only required to pay "covered claims" as that term is defined in the Guaranty Act. Va. Code Ann. §§38.2-1603, 1606.

A "covered claim" is defined, in relevant part, as "an unpaid" insurance claim "submitted by a claimant, that arises out of and is within the coverage and is subject to the applicable limits of [an insurance] policy covered by" the Guaranty Act. Va. Code Ann. §38.2-1603. Insurance policies covered by the Guaranty Act are those that provide "direct insurance." Va. Code Ann. §§38.2-1601, 1603. Moreover, the Guaranty Act specifies that VPIGA is funded by assessments from member insurers, and a member insurer is "any person who (i) writes any class of insurance to which [the Guaranty Act] applies under [Va. Code Ann.] §38.2-1601 . . . and (ii) is licensed to transact the business of insurance in the Commonwealth." Va. Code Ann. §38.2-1603. Further, the covered claim must come from a policy "issued by an insurer who has been declared to be an *insolvent insurer*." Va. Code Ann. §§38.2-1601, 1603 (emphasis added). An "insolvent insurer" is one that is "licensed to transact the business of insurance in" Virginia and "against whom an order of liquidation with a finding of insolvency has been entered after July 1, 1987 . . . by a court of competent jurisdiction."[11] Va. Code Ann. §38.2-1601, 1603.

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[10] Although Employer cites regulatory provisions to support its argument that the Department of Labor (DOL) may seek to hold a guarantor fund liable, it has not established that VPCIGA and VUEF are guarantors of VICOG based on applicable state law. Employer's Brief at 12.

[11] VPCIGA must "pay covered claims that existed prior to the determination of insolvency and which arose before the earliest of (i) ninety-one days after the determination of insolvency, (ii) the policy expiration date, or (iii) the date the insured replaces or cancels the policy." Va. Code Ann. §38.2-1606.

Insofar as VICOG is a self-insurance entity, the ALJ found it did not qualify as an "insurer" under the Guaranty Act. Decision and Order at 39-40; *see Farmers Insurance Exchange v. Enterprise Leasing Co*., 708 S.E.2d 852, 856-57 (Va. 2011). She also found "the individual members of [VICOG do not meet], nor [does VIGOG] itself [meet], the definition of 'member insurer,' [as] none of them contributed to VPCIGA."[12] Decision and Order at 39-40. Employer generally argues that VICOG is a "member insurer" "licensed to provide workers' compensation coverage and employer's liability" in Virginia. Employer's Brief at 19. As Employer bears the burden of proof in establishing Shirl Coal is capable of assuming liability through VPCIGA, and it has not set forth any evidence or legal authority to support its contention that VICOG is a member insurer of VPCIGA or otherwise establish that VICOG claims are "covered claims" under the Guaranty Act, we reject this argument.[13] *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b). Moreover, as the Director correctly argues, Employer has not submitted an "order of liquidation with a finding of insolvency" that "has been entered . . . by a court of competent jurisdiction." Va. Code Ann. §38.2-1601, 1603; *see* Director's Brief 10. Absent this evidence, Employer cannot establish, as a matter of law, that VPCIGA is a guarantor of VICOG.

[12] We reject Employer's argument that the ALJ did not adequately explain her determination that VICOG claims are not "covered claims" under the Guaranty Act and thus VPCIGA is not responsible for the payment of benefits. Employer's Brief at 9-13. The ALJ set forth the legal arguments from VPCIGA's counsel pertaining to the Guaranty Act and held that the district director properly relied on that legal rationale. Decision and Order at 39-40. As we can discern the ALJ's basis for her pertinent finding, we reject Employer's argument. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why she did it, the duty of explanation under the Administrative Procedure Act is satisfied). Nonetheless, because we conclude Employer has not set forth any legal or factual basis to establish VICOG claims are "covered claims" under the Guaranty Act, even if the ALJ had failed to adequately explain her finding, that error would be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[13] Employer generally argued before the ALJ that the DOL did not properly investigate the responsible operator issue by putting VPCIGA and VUEF on notice. Employer's Post-Hearing Brief at 10-13. It made no attempt to argue that VICOG claims are "covered claims" under the Guaranty Act. As discussed above, the Fourth Circuit has rejected this argument. *RB & F Coal, Inc. v. Mullins*, 842 F.3d 279, 283, 286-87 n.9 (4th Cir. 2016).

Employer also argues the ALJ erred in failing to consider cases involving "facts identical to those at bar" raised in its post-hearing brief. Employer's Brief at 13. But the authority Employer relies on, *Mullins* and *Boyd and Stevenson Coal Co. v. Director, OWCP* [*Slone*], 407 F.3d 663 (4th Cir. 2005), do not support its argument. Both cases involved Rockwood Insurance Company, an entity that a "Pennsylvania court [had] declared . . . insolvent" and had given notice to the public "requiring all claims against Rockwood to be filed with the liquidator by August 26, 1992." *Slone*, 407 F.3d at 665; *see also Mullins*, 842 F.3d at 282. Because Rockwood was a member insurer and the record in both cases included an "order of liquidation with a finding of insolvency" that "has been entered . . . by a court of competent jurisdiction," Va. Code Ann. §38.2-1601, 1603, VPCIGA "assumed responsibility for insurance claims against [] Rockwood." *Slone*, 407 F.3d at 665.

Neither *Mullins* nor *Slone* involved VICOG and thus do not support Employer's argument. And unlike the parties in those cases, Employer has not submitted "an order of liquidation with a finding of insolvency" that "has been entered . . . by a court of competent jurisdiction."[14] Va. Code Ann. §38.2-1601, 1603. Because Employer has not established that VICOG claims are "covered claims" under the Guaranty Act, we affirm the ALJ's finding VPCIGA cannot be held liable. Decision and Order at 39-40.

Nor are we persuaded by Employer's arguments with respect to the VUEF. The VUEF was created to ensure "the payment of [workers'] compensation benefits owed by an uninsured employer" in the state of Virginia "that fails to pay benefits ordered by the" Virginia Workers' Compensation Commission. *Redifer v. Chester*, 720 S.E.2d 66, 69 n.4 (Va. 2012); *see* VA Code Ann. §65.2-1203. The Virginia law that created the VUEF clearly states that the Virginia Workers' Compensation Commission may order a payment from the VUEF only for benefits awarded "in accordance with the provisions of this chapter and all applicable provisions of this title." Va. Code §65.2-1203(A)(1); *see also* Va. Code §65.2-1203(A)(2) (Virginia Workers' Compensation Commission shall order payment from the VUEF only "[a]fter an award has been entered against an employer for compensation benefits under any provision of this chapter"). Thus, contrary to Employer's argument, there was no basis for the ALJ to conclude that the VUEF could be a guarantor for VICOG for a federal black lung claim arising under the Act, as the Virginia Workers'

[14] Employer also cites a number of decisions from the Office of Administrative Law Judges, along with cases where it alleges the DOL accepted liability, to support its argument with respect to VPCIGA. The Board is not bound by these decisions, particularly to the extent they are inconsistent with applicable law. *Briggs v. Pennsylvania R.R.*, 334 U.S. 304 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993).

Compensation Commission could not order a payment of such a claim.[15] We therefore conclude that as a matter of law the VUEF cannot be held liable for the payment of this claim.

As we conclude neither VPCIGA nor VUEF can be responsible for the payment of benefits in this claim, and Employer has not submitted any evidence or otherwise argued Shirl Coal is capable of assuming liability, we affirm the ALJ's responsible operator determination.[16] Decision and Order at 38-40; 20 C.F.R. §725.495(c), (d).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.[17] 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale

[15] Employer argues the ALJ erred in failing to address its argument that the VUEF is a guarantor of VICOG. Employer's Brief at 12-13. However, Employer identified no evidence before the ALJ establishing that VICOG claims fall within the coverage of the VUEF. Employer's Post-Hearing Brief at 9-13. It generally argued that the DOL must put VUEF on notice, but it did not explain why such notice is necessary if VICOG claims are not payable by the VUEF. *Mullins*, 842 F.3d at 283, 286-87 n.9. Employer cited two Virginia state cases to support its argument that the VUEF could be responsible for this claim. Employer's Post-Hearing Brief at 9-13. Specifically, it cited *Uninsured Employer's Fund v. Mounts*, 484 S.E.2d 140 (Va. Ct. App. 1997), *aff'd*, 497 S.E.2d 464 (Va. 1988) and *Uninsured Employer's Fund v. Flanary*, 497 S.E.2d 913 (Va. Ct. App. 1998), *aff'd*, 257 Va. 237 (Va. 1999). Neither case supports Employer's argument because they both involved Virginia state workers' compensation claims, not federal black lung claims. *Id.*

[16] We also reject Employer's argument that the guaranty funds are liable because the Act's "requirement for full and complete coverage preempts any state limitation on liability." Employer's Brief at 20, *citing* 30 U.S.C. §933(b)(1). The Fourth Circuit rejected this argument in *Mullins*, 842 F.3d at 284-85 (Even though the Act requires an insurer to pay all of an insured employer's obligations notwithstanding any state law that purports to limit the insurer's liability, VPCIGA "is not an insurer . . . and is thus not covered by the [Act].").

[17] The ALJ found Claimant's usual coal mine employment as a scoop operator required "heavy and very heavy labor." Decision and Order at 9. We affirm this finding as Employer does not challenge it. *See Skrack*, 6 BLR at 1-711.

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 study evidence, the medical opinion evidence, and the evidence as a whole.[18] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 11-25. Employer argues the ALJ erred in weighing the pulmonary function study and medical opinion evidence. Employer's Brief at 21-25.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies dated April 6, 2015, April 21, 2016, August 31, 2017, and November 1, 2017. Decision and Order at 12-14. She found all the studies produced qualifying[19] values pre-bronchodilator, the April 6, 2015 and August 31, 2017 studies produced qualifying values post-bronchodilator, and the April 21, 2016 study produced non-qualifying values post-bronchodilator.[20] *Id.*; Director's Exhibit 30, 34; Employer's Exhibit 8; Claimant's Exhibit 4. Specifically, she found the April 21, 2016 and August 31, 2017 studies invalid, but the April 6, 2015 and November 1, 2017 studies valid. Decision and Order at 13-14. Crediting the pre-bronchodilator results over the post-bronchodilator results, she concluded the pulmonary function study evidence establishes total disability. *Id.*

Employer argues the ALJ erred in finding the April 6, 2015 and November 1, 2017 pulmonary function studies valid. Employer's Brief at 21-24. We disagree.

[18] The ALJ found the arterial blood gas studies do not establish total disability and there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 14-15.

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

[20] The November 1, 2017 study did not include post-bronchodilator results. Claimant's Exhibit 4.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards.[21] 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, App. B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see also* 20 C.F.R. Part 718, Appendix B. If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ must then, in her role as fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable).

The ALJ acknowledged that the November 1, 2017 study does not precisely conform to the quality standards because it lacked the three "acceptable flow volume curves, and thus [is] technical [invalid]," but she permissibly found it supports finding total disability because "the [two] highest FVCs and FEV1s [results] were matching, and the time volume curves appeared to be reasonably well performed." Decision and Order at 13; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); *Orek*, 10 BLR at 1-54-55; *Vivian*, 7 BLR at 1-361.

Further, we disagree with Employer that remand is necessary for the ALJ to reconsider the validity of the April 6, 2015 pulmonary function study. Employer's Brief at 22-23. Dr. Fino opined the April 6, 2015 pulmonary function study is invalid because Claimant "stopped exhaling before he got all of the air out of his lungs." Employer's Exhibit 13 at 17. Dr. Michos reviewed the study for the DOL and opined the "vents are acceptable." Director's Exhibit 28. The ALJ has discretion to weigh the evidence, draw appropriate inferences, and determine credibility. *See Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40. She permissibly found this study valid because the doctor who reviewed it for the DOL[22] validated it and the administering technician

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

[22] Although the ALJ indicated Dr. Gaziano had reviewed the study for the DOL, we consider her misstatement to be harmless, as it is clear the ALJ found this study valid based on the findings of the doctor who reviewed it for DOL – Dr. Michos. *See Youghiogheny*

indicated Claimant exhibited "good effort," and she found this evidence outweighed Dr. Fino's contrary opinion.[23] Decision and Order at 13; *see Mays*, 176 F.3d at 756; *Orek*, 10 BLR at 1-54-55; *Vivian*, 7 BLR at 1-361.

Finally, citing *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008), Employer contends the ALJ did not properly consider Dr. Fino's opinion that the April 6, 2015 and November 1, 2017 pulmonary function studies are not qualifying because they do not show "an FEV1/FVC ratio of 68% [ ] normal for a man 72 years of age." Employer's Exhibit 8 at 8; *see* Employer's Brief at 23-24. However, both studies produced qualifying FEV1 and FVC values. Director's Exhibit 13; Claimant's Exhibit 4. To meet disability standards a pulmonary function study must yield an FEV1 value qualifying "for an individual of the miner's age, sex, and height," and either an FVC or an MVV value that is qualifying, or an FEV1/FVC ratio of 55 percent or less. 20 C.F.R. §718.204(b)(2)(i). Thus Employer has not explained how the "error to which [it] points could have made any difference." *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). As Employer raises no additional argument, we affirm the ALJ's determination that the pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

The ALJ found Claimant established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). She specifically found Dr. Ajjarapu's opinion that Claimant has a totally disabling respiratory or pulmonary impairment is well-reasoned and documented, and entitled to great weight. Decision and Order at 24-25; *see* Director's Exhibits 30, 35. She also found the contrary opinions of Drs. Fino and Jarboe entitled to diminished weight because their explanations are unpersuasive and contrary to the

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& 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."); *Larioni*, 6 BLR at 1-1278; Decision and Order at 13; Director's Exhibit 28.

[23] The ALJ's decision to find this study valid is buttressed by additional evidence of record. Dr. Jarboe reviewed the April 6, 2015 test and opined "[t]he only valid spirogram in the record is that performed under the direction of Dr. Ajjarapu on [April 6, 2015]." Employer's Exhibit 8 at 10. He noted this study demonstrated a mild to moderate restrictive ventilatory defect and a "marked response to bronchodilating agents indicating the presence of bronchial asthma." *Id.* In a supplemental report, Dr. Ajjarapu, the administering physician of the April 6, 2015 pulmonary function study, opined this test is valid, notwithstanding suboptimal MVV results, because it demonstrated reproducibility and showed no evidence of early termination. Director's Exhibit 35.

objective testing results. Decision and Order at 24-25; Director's Exhibit 24; Employer's Exhibits 8, 10, 12, 13.

Employer argues the ALJ erred in crediting Dr. Ajjarapu's opinion and discrediting Dr. Fino's opinion.[24] Employer's Brief at 24-25. We disagree.

Dr. Ajjarapu observed that Claimant's April 6, 2015 pulmonary function study, which produced qualifying values, demonstrates a "severe pulmonary impairment." Director's Exhibit 30 at 8. Further, she noted Claimant has symptoms of wheezing, dyspnea, sputum production, orthopnea at night, and coughing. *Id*. at 3. Based on her overall evaluation, she opined Claimant "is totally and completely disabled" and does "not have the pulmonary capacity to do his previous coal mine employment." *Id*. at 9.

After reviewing the physical examination findings and the objective test results from the studies that Dr. Fino administered on April 21, 2016, Dr. Ajjarapu disagreed with Dr. Fino's findings. Director's Exhibit 35. She explained that "all three spirometric tests showed [a] decline in spirometric parameters." *Id*. Contrary to Dr. Fino's assessment, she noted that the April 2015 pulmonary function study is valid, notwithstanding suboptimal MVV results, because it demonstrated reproducibility and showed no evidence of early termination. *Id*. Because Claimant continues to exhibit severe pulmonary impairment, she reiterated her original opinion that he does not have the pulmonary capacity to perform his usual coal mine employment. *Id*. Contrary to Employer's argument, the ALJ permissibly found Dr. Ajjarapu's opinion reasoned and documented. *See Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; Decision and Order at 24-25.

The ALJ also permissibly discredited Dr. Fino's opinion because he assumed there are no valid objective studies of record, contrary to her finding that the April 6, 2015 and November 1, 2017 pulmonary function studies are valid and support a finding of total disability. *See Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; Decision and Order at 24-25. Because it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence. Decision and Order at 24-25; 20 C.F.R. §718.204(b)(2)(iv).

We further affirm the ALJ's finding that substantial evidence in the record as a whole establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 25. Thus, we affirm her determinations that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305, 725.309; Decision and Order at 25, 41.

[24] Employer does not challenge the ALJ's discrediting of Dr. Jarboe's opinion. Thus we affirm this finding. *See Skrack*, 6 BLR at 1-711; Decision and Order at 24-25.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[25] or "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 rebut the presumption by either method.

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." *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ considered the opinions of Drs. Fino and Jarboe that Claimant does not have legal pneumoconiosis. Decision and Order at 29-33. Dr. Fino opined Claimant does not have a lung disease or impairment because his objective testing is invalid. Director's Exhibit 34; Employer's Exhibits 10, 13. The ALJ permissibly discredited Dr. Fino's opinion because he assumed there are no valid objective studies of record, contrary to her finding that the April 6, 2015 and November 1, 2017 pulmonary function studies are valid.[26] *See Mays*, 176 F.3d at 756; *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; Decision and Order at 31.

Dr. Jarboe diagnosed bronchial asthma unrelated to coal mine dust exposure, and opined Claimant does not have a totally disabling respiratory impairment. Employer's Exhibits 8, 12. The ALJ found Dr. Jarboe's opinion not well reasoned, inconsistent with the preamble to the 2001 revised regulations, and inadequately explained. Decision and Order at 31-33. Employer does not allege any specific error in the ALJ's discrediting of

[25] "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). "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).

[26] Because the ALJ provided a valid reason for discrediting Dr. Fino's opinion on the issue of legal pneumoconiosis, we need not address Employer's remaining arguments regarding the weight accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 28.

Dr. Jarboe's opinion. Thus we affirm it. *See Cox*, 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109; 20 C.F.R. §802.211(b).

We therefore affirm the ALJ's finding that Employer failed to disprove legal pneumoconiosis.[27] 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[28] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ also found Employer failed to establish "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); *see* Decision and Order at 37-38. As Employer does not separately challenge this finding, we affirm it. *See Skrack*, 6 BLR at 1-711. Because Employer did not rebut the Section 411(c)(4) presumption, we affirm the award of benefits.

[27] Employer contests the ALJ's crediting of Dr. Ajjarapu's opinion on the issue of legal pneumoconiosis. Employer's Brief at 27-28. Because Dr. Ajjarapu diagnosed legal pneumoconiosis, her opinion does not assist Employer in rebutting legal pneumoconiosis. Decision and Order at 30; Director's Exhibits 30, 35. Thus we need not address Employer's arguments regarding Dr. Ajjarapu's opinion. *See Larioni*, 6 BLR at 1-1278.

[28] Consequently, we need not address Employer's challenge to the ALJ's finding that it failed to establish Claimant does not have clinical pneumoconiosis. *Larioni*, 6 BLR at 1-1278; Employer's Brief at 26-27.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge