U.S. Department of Labor

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

BRB No. 22-0044 BLA

EDDIE E. HOLBROOK Claimant-Respondent v. SUN GLO COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 7/21/2023 DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

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

Ann Marie Scarpino (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: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Monica Markley's Decision and Order Awarding Benefits (2016-BLA-05399) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim[1] filed on May 1, 2013.

The ALJ found Claimant established 24.90 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, she found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309(c). 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 she was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2.[3] It also argues the removal provisions applicable to ALJs rendered her appointment unconstitutional. It next asserts the ALJ erred

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[1] This is Claimant's third claim for benefits. The district director denied Claimant's initial claim on January 2, 1991, because he failed to establish any element of entitlement. Director's Exhibit 1. He withdrew his second claim, which therefore is considered not to have been filed. *See* 20 C.F.R. §725.306; Director's Exhibit 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability was due to pneumoconiosis if he had 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.

in admitting Dr. Alam's supplemental opinions under the Department of Labor's (DOL) pilot program. On the merits, Employer contends the ALJ erred in finding Claimant established he is totally disabled, thereby invoking the Section 411(c)(4) presumption, and in finding Employer did not rebut it.[4] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging rejection of Employer's challenges to the ALJ's appointment, removal protections, and evidentiary findings.

The Benefits Review 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 & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the ALJ's 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 14-19; Employer's Reply Brief at 1-5. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 24.90 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 34.

[5] 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 12, 14; Hearing Transcript at 13-14.

[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 (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

the constitutional defect in the ALJ's prior appointment. Employer's Brief 15-17. It also challenges the constitutionality of the removal protections afforded DOL ALJs. *Id.* at 20-22. 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*. Employer's Brief at 19-24; Employer's Reply Brief at 2-5 (unpaginated). 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 19-24. For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , BRB No. 22-0022 BLA, slip op. at 3-5 (May 26, 2023) and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

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

To invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 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 he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A miner may establish total disability based on pulmonary function studies, 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).

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

Secretary's Dec. 21, 2017 Letter to ALJ Markley.

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinion evidence, and the evidence as a whole.[8] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 39.

Pulmonary Function Studies

The ALJ considered eight pulmonary function studies conducted on November 11, 2011; February 28, 2012; September 16, 2013; November 15, 2013; February 20, 2014; March 25, 2014; March 19, 2015; and August 4, 2015. Decision and Order at 16-19, 35-37; Director's Exhibits 2, 19, 28, 30, 32, 34, 37; Claimant's Exhibit 3; Employer's Exhibits 2, 3. She found only three studies are valid; those studies were administered on February 28, 2012; November 15, 2013; and February 20, 2014. Decision and Order at 35-37; *see* Director's Exhibits 2, 19, 32; Employer's Exhibit 3. Of these valid studies, she found the two conducted on November 15, 2013 and February 20, 2014 qualifying. Decision and Order at 35-37. She gave greatest weight to these two studies based on their recency and, thus, determined the pulmonary function studies support finding Claimant established total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 37.

Employer argues the ALJ erred in finding the two qualifying studies conducted on November 15, 2013 and February 20, 2014 valid and therefore, erred in finding the pulmonary function study evidence established total disability.[9] Employer's Brief at 32 n.7, 33-34. We are unpersuaded.

When considering pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). 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, as the fact-finder, must determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). "In the absence of evidence to the contrary, compliance with the [quality standards in] Appendix B shall be presumed." 20 C.F.R. §718.103(c). The party challenging the

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[8] The ALJ found the arterial blood gas studies do not establish total disability and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 37.

[9] We affirm as unchallenged the ALJ's finding that the February 28, 2012 pulmonary function study is valid. *Skrack*, 6 BLR 1-710, 711; Decision and Order at 35; Employer's Brief at 32-34.

validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

The November 15, 2013 pulmonary function study was conducted as part of the Claimant's complete pulmonary examination after Dr. Gaziano deemed the initial September 16, 2013 study invalid. Director's Exhibit 19. The technician who administered the test noted the following: Claimant "had a difficult time with the test due to being [short of breath]. Multiple trials were performed. I coached [Claimant] thoroughly but he had a difficult time exhaling the whole time to complete the loop. Best effort he could give at this time." *Id.* at 33. Dr. Alam noted the flow loop was incomplete. *Id.* Nevertheless, Dr. Gaziano conducted a quality review of the study and found it was acceptable. *Id.* at 31. Dr. Vuskovich stated the FVC, FEV_1, and MVV results were not acceptable. Employer's Exhibit 3. Dr. Rosenberg also opined the study was invalid based on the flow-volume shape, volume-time curve, and Claimant's variable effort. Employer's Exhibits 1, 5.

The ALJ found Dr. Vuskovich did not explain why he determined the study was invalid. Decision and Order at 36. She next noted Drs. Alam, Gaziano, and Rosenberg are Board certified in pulmonary medicine whereas Dr. Vuskovich is not. *Id.*; Director's Exhibits 19, 30, 32. Given these qualifications and the specificity of Dr. Alam's comments regarding the conditions of the test and Claimant's efforts and understanding, she credited the opinions of Drs. Alam and Gaziano that the study is valid. Decision and Order at 36.

The ALJ permissibly gave greater weight to the opinions of the physicians she found better qualified. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Although she did not fully analyze the bases for all the physicians' opinions with respect to the November 15, 2013 study, any error in this regard ultimately is harmless.[10] *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As discussed below, the ALJ properly found that the study Dr. Rosenberg conducted on February 20, 2014 was valid and qualifying and that thus the pulmonary function study evidence supported the establishment of total disability.

Dr. Rosenberg conducted the February 20, 2014 pulmonary function study. Director's Exhibit 32. The technician noted the following: Claimant "demonstrated fair effort and understanding during the forced vital capacity test. [Claimant] understood how

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[10] At best, Employer's argument would result in finding the November 15, 2013 study invalid, as opposed to showing Claimant was not disabled. 20 C.F.R. §718.103(c). Moreover, because the ALJ permissibly gave the greatest weight to the most recent, qualifying February 20, 2014 study, any error in determining the validity of the earlier study is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

to perform the plethysmography test; panting was gentle and uniform; breath holds and maximal effort were [performed] during the slow vital capacity. [Claimant] demonstrated fair effort and understanding while performing the diffusion capacity test." Director's Exhibit 32 at 12. Dr. Rosenberg's impression of the study was the following: "Possible obstruction, no restriction. Definite bronchodilator response. The diffusing capacity corrected for lung volumes is normal, indicating there is no loss of the alveolar capillary bed. Air trapping is not present. Decreased FVC and FEV_1 secondary to weight, body habitus and elevated lung hemidiaphragm." *Id.* at 11.

Contrary to Employer's contention, Dr. Rosenberg did not opine this study was invalid. Director's Exhibit 32; Employer's Exhibit 1; Employer's Brief at 33-34. He specifically and consistently found Claimant disabled from a pulmonary perspective based on it. Employer's Exhibits 1, 5, 6. No other physician rendered an opinion on the validity of this study. In the absence of evidence to the contrary, compliance with the quality standards set forth in the regulations is presumed. 20 C.F.R. §718.103(c); *see* Appendix B to 20 C.F.R. Part 718; *Vivian*, 7 BLR 1-360, 1-361 (party challenging the validity of a study has the burden to establish the results are suspect or unreliable); Employer's Brief at 33-34. We therefore affirm the ALJ's finding the February 20, 2014 study valid and qualifying.

In light of the latent and progressive nature of pneumoconiosis and because the most recent valid pulmonary function study is qualifying, the ALJ permissibly attributed great weight to this study, which Claimant performed on February 20, 2014. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (citing *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992)); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993); 20 C.F.R. §718.201(c); Decision and Order at 36-37. As it is supported by substantial evidence, we affirm the ALJ's finding that the pulmonary function study evidence supports a determination that Claimant suffers from a totally disabling respiratory or pulmonary impairment.[11] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 17-19.

Medical Opinions

Employer argues the ALJ erred in weighing the medical opinion evidence. Employer's Brief at 27-31. The ALJ considered the opinions of Drs. Habre, Alam, and

[11] As we affirm the ALJ's finding two studies valid, we need not address Employer's argument that its due process rights were violated because it was unable to develop its case due to the absence of any valid pulmonary function study. Employer's Brief at 34.

Rosenberg.[12] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 38-39; Director's Exhibits 1, 19, 21, 32; Employer's Exhibits 1, 5, 6. Drs. Alam and Rosenberg opined Claimant is totally disabled by a respiratory or pulmonary impairment. Director's Exhibits 19, 21, 32; Employer's Exhibits 1, 5, 6. The ALJ found their opinions credible. Decision and Order at 38-39. Dr. Habre opined Claimant is able to perform his usual coal mine work and does not have a respiratory or pulmonary impairment based on the objective testing administered during Claimant's November 11, 2011 examination conducted as part of his prior claim. Director's Exhibit 2. He further opined Claimant should avoid additional exposure to coal dust given his possible underlying asthma. *Id.* The ALJ discredited Dr. Habre's opinion as internally inconsistent and inadequately explained. Decision and Order at 38.

Employer initially argues the ALJ erred in finding Dr. Rosenberg's opinion supports total disability because he attributed Claimant's disabling restrictive respiratory impairment to what Employer alleges are non-respiratory causes and, thus, he did not diagnose an intrinsic disabling respiratory or pulmonary impairment. Employer's Brief at 28-30. We disagree.

The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption.[13] *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-

[12] We affirm as unchallenged the ALJ's finding Dr. Jarboe failed to offer an opinion on the issue of total disability. *Skrack*, 6 BLR 1-710, 1-711; Decision and Order at 39.

[13] We reject Employer's argument that the Board held otherwise in *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986). In that case, the Board concluded a physician's testimony, that a miner's "severe degenerative neuromuscular problem" affected his objective testing results, may be "relevant to the issue of the *reliability* of pulmonary function studies as indicators of a chronic respiratory or pulmonary disease" for purposes of invoking an interim presumption that is no longer in effect. *Id.* at 1-134 (emphasis added). The Board did not hold, however, that a doctor's opinion on the *cause* of a respiratory or pulmonary impairment reflected on an otherwise reliable objective test is relevant to whether the miner is disabled. Further, the relevant regulation applicable to this claim specifically states that if "a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled *due to pneumoconiosis*." 20 C.F.R. §718.204(a) (emphasis added). Employer does not argue Claimant's impairment was not chronic; rather, it argues that the

81 (10th Cir. 1989); 20 C.F.R. §718.305. Further, Dr. Rosenberg specifically described Claimant as being "disabled from a pulmonary perspective." Employer's Exhibit 6. Thus, we reject Employer's argument that the ALJ erred in finding Dr. Rosenberg diagnosed total disability.

Employer also generally argues the ALJ erred in discrediting Dr. Habre's opinion as internally inconsistent. Employer's Brief at 30-31. The ALJ discredited Dr. Habre's opinion as both inconsistent and inadequately explained. Decision and Order at 38. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Napier*, 301 F.3d at 712-14; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Crisp*, 866 F.2d at 185. Employer's argument is 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).

We therefore affirm the ALJ's finding Dr. Rosenberg's opinion is well-documented and reasoned and therefore establishes total disability.[14] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 39. Further, we affirm the ALJ's finding Claimant established total disability in consideration of the evidence as a whole, 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and invoked the Section 411(c)(4) presumption.[15] 20 C.F.R. §718.305(b)(1).

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cause of the impairment was nonrespiratory and nonpulmonary. Employer's Brief at 29-30.

[14] Because Claimant established total disability through Dr. Rosenberg's opinion, we need not address Employer's arguments that the ALJ erred in also crediting Dr. Alam's opinion. *See Larioni*, 6 BLR at 1-1278; 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 25-28; Employer's Reply Brief at 5-8. Moreover, for the reasons set forth in *Smith v. Kelly's Creek Resources*, BLR , BRB No. 21-0329 BLA, slip op. at 7-12 (June 27, 2023), we reject Employer's arguments that the DOL has no legal authority to request supplemental opinions under the pilot program, the pilot program reflects the district director's attempt to advocate for Claimant, and the issuance of the pilot program, without notice and comment, violates the Administrative Procedure Act. Employer's Brief at 25-28; Employer's Reply Brief at 5-8.

[15] We note the ALJ should have considered the evidence from the previous claim prior to finding invocation; Employer makes no challenge on that basis, however, and the ALJ ultimately took note of that evidence after finding Employer did not rebut the presumption.

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,[16] 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.[17]

Legal Pneumoconiosis

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

The ALJ considered the opinions of Drs. Rosenberg and Jarboe that Claimant does not have legal pneumoconiosis. Decision and Order at 46-47; Director's Exhibits 32, 37; Employer's Exhibits 1, 5, 6. Dr. Rosenberg opined Claimant's respiratory impairments are due to his elevated left diaphragm and unrelated to his coal dust exposure. Director's Exhibit 32; Employer's Exhibits 1, 5, 6. Dr. Jarboe opined Claimant does not suffer from legal pneumoconiosis based on the two invalid pulmonary function studies he reviewed

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[16] "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).

[17] The ALJ found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 44.

and the normal arterial blood gas studies. Director's Exhibit 37. The ALJ found both opinions not well-reasoned and therefore insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 46-47. Employer argues the ALJ erred. Employer's Brief at 34-36. We disagree.

Dr. Rosenberg initially opined Claimant's impairment seen on the pulmonary function testing is due to increased weight and an elevated diaphragm, not coal dust exposure. Director's Exhibit 32. He explained the symmetric reduction in the FEV_1 and FVC paired with the normal measurement of total lung capacity is not consistent with legal pneumoconiosis. *Id.* In his deposition, he focused on Claimant's elevated diaphragm as accounting for the sudden drop in FEV_1 and FVC seen when comparing results from pulmonary function studies conducted in 2012 and 2013. Employer's Exhibit 1. He also relied on Claimant's arterial blood gas studies showing "improving gas exchange with exercise" to support his conclusion that Claimant "does not have interstitial lung disease." Employer's Exhibits 5, 6.

The ALJ noted there were four arterial blood gas studies in the record, but that only one, conducted in 2011, included an exercise test. Director's Exhibits 2, 19, 32, 37. She further noted Claimant's treatment records indicate Claimant experienced a rapid desaturation to 88% while on ambulatory pulse oximetry. Claimant's Exhibit 7. She therefore permissibly found Dr. Rosenberg's reliance on Claimant's single exercise arterial blood gas study value from 2011 was undermined by the more recent treatment records. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Crisp*, 866 F.2d at 185; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 46.

Dr. Jarboe reviewed the DOL examination and pulmonary function study administered as part of that examination on September 16, 2013, but he did not review the remedial pulmonary function study conducted on November 15, 2013. Director's Exhibit 37. He also reviewed his own invalid pulmonary function study and valid arterial blood gas study conducted on March 19, 2015. *Id.* Based on the two invalid pulmonary function studies and normal arterial blood gas studies he reviewed, he determined Claimant did not have legal pneumoconiosis, but he was unable to opine as to whether Claimant has an impairment. *Id.*

As the record contained the valid, qualifying February 20, 2014 pulmonary function study, which the ALJ credited as the most probative evidence of Claimant's impairment and which Dr. Jarboe did not review, the ALJ permissibly found his opinion neither well-reasoned nor well-documented as it was based on limited information. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; 45 Fed. Reg. 13,677, 13,682 (Feb. 29, 1980); Decision and Order at 46; Director's Exhibits 19 at 583; 32 at 444; 37.

Employer generally argues the ALJ should have found the opinions of Drs. Rosenberg and Jarboe well-reasoned and documented. Employer's Brief at 35-37. We consider Employer's argument to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 35-38. Because the ALJ acted within her discretion in rejecting the opinions of Drs. Rosenberg and Jarboe,[18] the only opinions supportive of Employer's burden on rebuttal, we affirm her finding Employer did not disprove legal pneumoconiosis.[19] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "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). Contrary to Employer's contention, she permissibly discredited the opinions of Drs. Rosenberg and Jarboe regarding the cause of Claimant's total respiratory disability because they failed to diagnose legal pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); Employer's Brief at 37. Therefore, we affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

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[18] Because the ALJ gave valid reasons for discrediting Employer's experts, we need not address its contentions of error regarding the ALJ's additional reasons for finding Employer did not disprove legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 35-37.

[19] As Dr. Alam diagnosed legal pneumoconiosis, his opinion does not support Employer's burden to disprove the disease; we therefore need not address Employer's contentions regarding the ALJ's weighing of his opinion. *Larioni*, 6 BLR at 1-1278; Employer's Brief at 36-37.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge