U.S. Department of Labor

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

BRB No. 21-0642 BLA

DOUGLAS DAN STINNETTE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY POWDER RIVER MINING, LLC	)	
	)	
	)	DATE ISSUED: 6/26/2023
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for Claimant.

Paul E. Frampton (Bowles Rice, LLP), Charleston, West Virginia, for Employer.

David Casserly (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, BUZZARD and JONES, Administrative Appeals Judges.

Claimant appeals Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order – Denying Benefits (2018-BLA-05980) 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 claim filed on May 2, 2016.

The ALJ found Claimant established at least fifteen years of surface coal mine employment in conditions substantially similar to those in an underground coal mine and a totally disabling respiratory or pulmonary impairment. 20 C.F.R §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018). However, he found Employer rebutted the presumption by establishing Claimant has neither clinical nor legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus he denied benefits.

On appeal, Claimant challenges the ALJ's finding Employer rebutted the Section 411(c)(4) presumption. Employer responds in support of the ALJ's finding it rebutted the presumption. However, it also argues the ALJ erred in finding Claimant had at least fifteen years of qualifying coal mine employment and is totally disabled and thereby invoked the presumption.[2] The Director, Office of Workers' Compensation Programs (the Director), has filed a response urging the Benefits Review Board to vacate the ALJ's finding on rebuttal and remand the matter for the ALJ to apply the correct legal standard.

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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[1] Section 411(c)(4) of the Act 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] Employer's arguments in its response brief are in support of another method by which the ALJ may reach the same result and deny benefits. Employer's Brief at 9-16. Therefore, these arguments are properly before the Board and no cross-appeal is required. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370 (4th Cir., 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133 (3d Cir. 1987); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit because Claimant performed his coal mine employment in Wyoming.

Invocation of the Section 411(c)(4) Presumption—Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1). The conditions in a surface mine are "substantially similar" to those in an underground mine if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Spring Creek Coal Company v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018); *Antelope Coal Co. v. Director, OWCP* [*Goodin*], 743 F.3d 1331, 1341-43 (10th Cir. 2014).

The ALJ found Claimant was regularly exposed to coal mine dust during his job as a heavy equipment operator for Employer and, based on that finding, concluded Claimant established at least fifteen years of qualifying coal mine employment. Decision and Order at 32-33. Employer argues the ALJ erred in finding Claimant was regularly exposed to coal mine dust while working for Employer. Employer's Brief at 15-16. We disagree.

Claimant testified he worked at a strip mine as a heavy equipment operator for Employer from 1992 to 2015, primarily alternating between positions as a shovel operator and as an oiler supporting the work of the shovel. Hearing Transcript at 41-43. During his first six years, he worked in the coal pit; after that, he began working with overburden. *Id*. at 43-44, 59-60. He stated that while supporting a shovel, he "work[ed] in the dust and the dirt" and along roadways that "consist[] of the coal that's left . . . as the shovel has dug past." *Id*. at 46, 49. The coal was "crushed into a fine powder" by passing trucks and support equipment, causing the "air [to be] just always dirty," with reduced visibility "because of the dust." *Id*. at 49. At the end of a typical shift, he was "covered in coal dust[,]" had coal dust in his hair, ears, and sinuses, and had black mucus lasting several days. *Id*. at 50. While operating a shovel, he mostly stayed in the shovel's cab, but dust fell into the cab which had to be constantly cleaned while operating; it was "unbelievably difficult to try to get out of dust." *Id*. at 52-53, 55-56. After a shift operating a shovel, he "would still look grubby[,]" with coal dust on his clothing and in his ears, and black mucus that persisted for roughly a day after his shift. *Id*. at 56. Further, the dust conditions while working with overburden were "very comparable to the conditions down in the coal pit." *Id*. at 60. Contrary to Employer's argument, the ALJ permissibly found Claimant's uncontradicted testimony establishes he was regularly exposed to coal mine dust while

See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 7, 8.

working for Employer. *McLean*, 881 F.3d at 1220; *Goodin*, 743 F.3d at 1342; Decision and Order at 32-33.

As Employer raises no further argument, we affirm the ALJ's finding Claimant established at least fifteen years of qualifying coal mine employment. 20 C.F.R. §718.305(b)(1)(i).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant 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 -195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant did not establish total disability based on the pulmonary function and arterial blood gas studies, and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 15-17. However, he found Claimant established total disability based on the medical opinion evidence. Decision and Order at 30.

Employer contends the ALJ erred in his consideration of the medical opinions of Drs. Sood, James, and Tuteur. Employer's Brief at 9-15. We disagree.

Dr. Sood noted Claimant's coal mine work involved heavy physical labor and opined that he is totally disabled due to exercise hypoxemia and reduced exercise capacity. Claimant's Exhibits 6 at 8; 13 at 5-6, 11. He opined Claimant's exercise arterial blood gas studies demonstrated oxygen desaturation that would require Claimant to use supplemental oxygen to perform the exertional requirements of his previous coal mine employment. *Id.* In addition, he noted Claimant's exercise testing demonstrated a peak exercise capacity of 7.9 metabolic equivalents (METS) and opined this level was below what would be required to perform the heavy physical labor of Claimant's prior employment.

Dr. James opined Claimant is totally disabled due to chronic obstructive pulmonary disease (COPD) and hypoxemia at rest.[4] Claimant's Exhibit 7 at 2. He noted Claimant's exercise arterial blood gas studies were disabling based on the regulatory criteria, but opined the tests were within normal limits when adjusted for altitude and atmospheric pressure. *Id.* Further, he opined Claimant's use of cardiac medication could be a significant factor in his reduced exercise tolerance. *Id.*

Dr. Tuteur opined Claimant is not disabled and his exercise arterial blood gas study results showed normal oxygen consumption and work output. Employer's Exhibit 5 at 29-32. He opined that Claimant's exercise arterial blood gas study results were normal when corrected for barometric pressure based on the altitude of the testing locations and that Claimant's reduced exercise capacity is explained by his use of cardiac medications. *Id.* at 25-29.

The ALJ found Dr. Tuteur's opinion entitled to lesser weight than those of Drs. Sood and James. Decision and Order at 30. He then found the opinions of Drs. Sood and James establish total disability, noting that both physicians conducted and analyzed exercise stress tests demonstrating "a maximum exercise capacity less than that required [for Claimant to perform] his last coal mine employment." *Id.*

Employer argues the ALJ erred in discrediting Dr. Tuteur's opinion that Claimant's arterial blood gas studies are within normal limits and that he therefore erred in crediting Dr. Sood's contrary opinion. Employer's Brief at 10-13. We disagree. The ALJ permissibly found Dr. Tuteur's explanation that Claimant's blood gas studies do not demonstrate impairment when adjusted for altitude and atmospheric pressure unpersuasive and contrary to the regulations which already account for the effects of elevation on test results at Appendix C to Part 718.[5] *See Big Horn v. Director, OWCP [Alley]*, 987 F.2d

[4] Dr. James opined Claimant's exposure to coal mine dust was a significant contributing factor to the development of his chronic obstructive pulmonary disease (COPD). Claimant's Exhibit 7 at 2. He could not be certain as to the cause of Claimant's hypoxemia at rest. *Id.*

[5] We also reject Employer's argument that the ALJ erred by failing to consider portions of Dr. James' opinion indicating Claimant's exercise arterial blood gas study results were within normal limits when adjusted to account for altitude and atmospheric pressure. Employer's Brief at 14. Because the ALJ permissibly found Dr. Tuteur's opinion to the same effect unpersuasive, and the ALJ's finding the medical opinion evidence establishes total disability is otherwise supported by the opinion of Dr. Sood, Employer

1052, 1055 (10th Cir. 1990); Decision and Order at 16-17, 29-30. We therefore see no error in the weight he afforded both opinions.

Employer additionally argues the ALJ erred by failing to consider portions of Drs. James' and Tuteur's opinions that Claimant's reduced exercise capacity could be caused by cardiac medications. Employer's Brief at 12-13. Again, we disagree. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment exists; the underlying cause of the impairment is a separate issue. *See* 20 C.F.R. §§718.204(a), 718.305(d); *see also Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). Both Drs. James and Tuteur opined Claimant demonstrated impaired oxygen saturation and exercise capacity on exercise blood gas studies. Claimant's Exhibit 7 at 2; Employer's Exhibit 5 at 30-32. The ALJ properly considered their opinions in this light, regardless of whether they further opined these respiratory impairments were caused by cardiac medications rather than underlying pulmonary or respiratory disease.

As Employer raises no further arguments, we affirm the ALJ's finding that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish that he has neither clinical nor legal pneumoconiosis[6] 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); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). Once Claimant invokes the Section 411(c)(4) presumption, "there is no need for [him] to prove the existence of pneumoconiosis; instead, pneumoconiosis arising from coal mine employment is presumed, subject only to rebuttal

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has not explained how such an error would make a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

[6] "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). "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 that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

by [Employer]." *W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018). The inquiry at rebuttal is "whether [Employer] has come forward with affirmative proof that [Claimant] does not have [pneumoconiosis]," *id.*; the burden of persuasion is thus on Employer. *See Minich*, 25 BLR at 1-159 n.14.

As argued by Claimant and the Director, in his evaluation of whether Employer rebutted the presumptions of both clinical and legal pneumoconiosis, the ALJ erroneously placed the burden of proof on Claimant to establish he has either form of the disease. Director's Brief at 1-3; Claimant's Brief at 11-12. In his consideration of clinical pneumoconiosis, the ALJ found the x-ray evidence to be in equipoise "at best" and the biopsy reports did not establish clinical pneumoconiosis. Decision and Order at 35. Noting that when "the evidence is in equipoise, the party with the burden of persuasion must loose [sic]," the ALJ found "the evidence does not establish by a preponderance of the evidence that Claimant suffers from clinical pneumoconiosis." Decision and Order at 35. This was error. The ALJ was tasked with evaluating whether Employer disproved the existence of clinical pneumoconiosis by a preponderance of the evidence, not whether Claimant had proved the existence of the disease. *Smith*, 880 F.3d at 699. Because the burden is on Employer to establish rebuttal, a finding that the evidence is in equipoise must weigh against rebuttal.

Then, with respect to legal pneumoconiosis, the ALJ considered the opinions of Drs. James, Sood, and Gottschall that Claimant has legal pneumoconiosis and Dr. Tuteur's opinion that he does not. Claimant's Exhibits 6, 7, 13, 14; Employer's Exhibits 2, 5; Director's Exhibit 13. The ALJ found Dr. Tuteur's opinion entitled to the greatest probative weight, but found the opinions of Drs. James, Sood, and Gottschall entitled to at least some probative weight. Decision and Order at 35, 37, 39. Ultimately, the ALJ found "the evidence does not establish that Claimant suffers from legal pneumoconiosis[.]" *Id.* at 39. Again, this was error. Because legal pneumoconiosis is presumed, the ALJ should have considered whether Dr. Tuteur's opinion, the only opinion weighing against legal pneumoconiosis, was sufficient to affirmatively disprove the existence of the disease.

Because the ALJ applied an incorrect standard, we vacate the ALJ's finding that Employer established rebuttal of the Section 411(c)(4) presumption via the first prong, disproving the existence of pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

In the interest of judicial economy, we will address Claimant's and Employer's remaining arguments regarding the ALJ's consideration of the evidence on clinical and legal pneumoconiosis.

Clinical Pneumoconiosis

We first address Claimant's argument that the ALJ's credibility findings on the issue of clinical pneumoconiosis are erroneous.

To disprove clinical pneumoconiosis, Employer must establish Claimant does not have any of the 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. §§718.305(d)(1)(i)(B), 718.201(a)(1). The ALJ considered x-ray, computed tomography (CT) scan, and biopsy evidence.

The ALJ first weighed four readings of two x-rays dated October 5, 2016, and May 28, 2019. Decision and Order at 34-35. Drs. Lynch and Meyer, both dually-qualified as Board-certified radiologists and B readers, read the October 5, 2016 x-ray as negative for pneumoconiosis. Director's Exhibits 13, 20. Dr. Alexander, also dually-qualified, read the May 28, 2019 x-ray as positive for pneumoconiosis, profusion 1/1, while Dr. Godwin read it as negative for the disease. Claimant's Exhibit 1; Employer's Exhibit 1.

The ALJ also considered one reading of a pre-biopsy chest CT scan dated October 27, 2015, which Dr. Godwin read as negative for pneumoconiosis. Director's Exhibit 31. Further, the ALJ considered two biopsy reports produced when lung tissue was removed and analyzed as part of a right lower lobe wedge resection and right upper lobectomy performed on Claimant's right lung (a December 30, 2015 surgical pathology report by Dr. Moran and an October 2, 2019 microscopic biopsy report by Dr. Cool) neither of which diagnosed coal workers' pneumoconiosis in the sampled tissues. Claimant's Exhibits 8, 9 at 3-7.

The ALJ gave less weight to Dr. Alexander's reading of the May 29, 2019 x-ray because he found it is undermined by the biopsy evidence. Decision and Order at 35. Even if he had not discredited Dr. Alexander's x-ray reading on this basis, he found Dr. Alexander's and Dr. Godwin's conflicting readings entitled to equal weight based on their credentials and thus found the x-ray to be in equipoise. Decision and Order at 35. He further found neither of the biopsy reports established the presence of clinical pneumoconiosis. Decision and Order at 34-35.

Claimant initially contends the ALJ erred in discrediting Dr. Alexander's reading of the May 28, 2019 x-ray.[7] We agree.

Dr. Alexander read the May 28, 2019 x-ray as positive for pneumoconiosis, profusion 1/1, with bilateral small opacities in the left and right lung consistent with pneumoconiosis and a six millimeter round nodule in the right upper lung zone. Claimant's Exhibit 1 at 1. He further noted that the right lung volume was decreased, the right costophrenic angle was blunted, and the right diaphragm was elevated and ill-defined; he opined these conditions were likely due to post-surgical changes. *Id*.

The ALJ discredited Dr. Alexander's reading of the May 28, 2019 x-ray because he found Claimant's right upper lung and a wedge of his right lower lung had been removed in December of 2015 and accompanying pathology reports identified non-pneumoconiosis nodules in the tissue. Decision and Order at 34-35. Thus, the ALJ found Dr. Alexander's identification of pneumoconiosis in the right upper lung in 2019 undermined by the fact that the lobe had been removed in 2015, and his identification of small round opacities was undermined by the presence of nodules unrelated to pneumoconiosis. *Id*.

In reaching this credibility finding, the ALJ erred by failing to adequately consider relevant evidence. 30 U.S.C. §923(b) (the ALJ must consider all relevant evidence); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253-54 (4th Cir. 2016); *Wensel v. Director, OWCP*, 888 F.2d 14, 17 (3d Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998

[7] Claimant additionally argues the ALJ should have found Dr. Alexander's reading of the May 28, 2019 x-ray entitled to greater weight than Dr. Godwin's January 11, 2020 reading of that x-ray, on the grounds that there is no record of Dr. Godwin's credentials as of the date he read the x-ray. Claimant's Brief at 10-11; Employer's Exhibit 1. Employer notes that Dr. Godwin's curriculum vitae and B reader certificate were entered into the record alongside his August 2, 2017 reading of the October 27, 2015 CT scan. Director's Exhibit 21 at 3, 26; Employer's Brief at 3-4. However, Claimant correctly contends Dr. Godwin's B-reader certificate included as part of that exhibit expired on July 31, 2019, approximately six months before his January 11, 2020 reading of the x-ray. Director's Exhibit 21 at 26. On remand, the ALJ must consider the radiological qualifications of the interpreting physicians. 20 C.F.R. §718.202(a)(1). In doing so, he may—but is not required to—give greater weight to the readings of dually-qualified physicians over those of B readers so long as he adequately explains the basis for his determination. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003).

(1984). Specifically, Dr. Tuteur opined that, in response to the removal of Claimant's right upper lobe in 2015, Claimant's remaining lung tissue would stretch to partially fill the space, resulting in elevation of the right hemidiaphragm. Employer's Exhibit 5 at 14-17. Dr. Alexander made findings consistent with Dr. Tuteur's opinion in his reading of the May 28, 2019 x-ray, noting reduced right lung volume and an elevated right diaphragm, which he opined was likely due to post-surgical changes. Claimant's Exhibit 1 at 1. Although the ALJ acknowledged Dr. Tuteur's testimony, he did not render credibility findings regarding the testimony or explain how the probative value of Dr. Alexander's identification of pneumoconiosis in the right upper lung zone was undermined given Dr. Tuteur's assessment that Claimant's remaining lung tissue would have expanded to fill the space caused by the right upper lobe's removal. Decision and Order at 34. Thus his findings do not satisfy the explanatory requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In addition, the ALJ failed to consider that Dr. Godwin also identified a "right upper lung nodule" in his reading of the May 28, 2019 x-ray. Employer's Exhibit 1 at 1. An ALJ must consider all of the relevant evidence and apply the same level of scrutiny in determining the credibility of the medical opinion evidence. 30 U.S.C. §923(b); *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc). The ALJ failed to apply equal scrutiny to the readings of Drs. Alexander and Godwin.

Further, the ALJ erred in discrediting Dr. Alexander's May 28, 2019 x-ray reading on the basis that he could not have seen small round opacities of pneumoconiosis in the 2019 x-ray because "the stellate nodule . . . had been removed in December 2015 by wedge resection." The Department of Labor recognizes that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000). The absence of identified pneumoconiosis and presence of other nodules in tissue removed from Claimant in 2015 is not a rational basis to discredit Dr. Alexander's finding of pneumoconiosis in an x-ray conducted over three years later. The ALJ's credibility finding is further irrational insofar as Dr. Alexander diagnosed pneumoconiosis in all of Claimant's remaining lung zones, bilaterally. Claimant's Exhibit 1 at 1. The ALJ has not explained why the presence of non-pneumoconiosis nodules in tissue removed from Claimant's right lung undermines Dr. Alexander's finding pneumoconiosis in the left lung.

Additionally, we reject Employer's argument that the ALJ's findings should be affirmed because the preponderance of the x-ray and CT-scan evidence does not establish the presence of clinical pneumoconiosis. Employer's Brief at 4-5. It is the ALJ's

responsibility in the first instance to weigh all relevant evidence, applying the proper burden of proof.[8] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Legal Pneumoconiosis

Finally, we address Claimant's arguments that the ALJ's credibility findings on the issue of legal pneumoconiosis are also erroneous. To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8.

The ALJ considered the opinions of Drs. Gottschall, James, and Sood that Claimant has legal pneumoconiosis and the contrary opinion of Dr. Tuteur. Director's Exhibit 13; Claimant's Exhibits 6, 7, 13, 14; Employer's Exhibits 2, 5; Decision and Order at 35-39. Dr. Gottschall opined Claimant has legal pneumoconiosis based on his exercise hypoxemia and emphysema "substantially contributed to by his work as a surface coal miner for 23 years." Director's Exhibit 13 at 12. Dr. James opined Claimant has legal pneumoconiosis based on his COPD, which he attributed to Claimant's never smoking while being exposed to coal mine dust for over 24 years of coal mine employment, along with "other types of dust" at uranium surface mines and general construction sites for 15 to 20 years. Claimant's Exhibits 7 at 1-2, 14 at 1. Dr. Sood opined that Claimant has legal pneumoconiosis based on his COPD, which he identified as chronic bronchitis and that coal mine dust was a substantial contributing factor because it was of an adequate duration of 23 years, of adequate intensity, and of adequate latency; he also identified Claimant's "work in other dusty trades, including uranium mines" as a substantial contributing factor. Claimant's Exhibits 6 at 8, 13 at 9-10. Dr. Tuteur opined that Claimant does not have legal pneumoconiosis as he has no respiratory or pulmonary impairment. Employer's Exhibits 2 at 4, 5 at 39.

The ALJ found Dr. Gottschall's opinion documented but not well-reasoned, and therefore entitled to limited weight. Decision and Order at 35. He found that Claimant's medical treatment records undermined Dr. James' diagnosis of COPD based on a 10-year history of chronic cough and that Dr. James failed to explain what impact "the chest x-ray

[8] Employer's argument also overlooks the ALJ's application of an incorrect burden of proof. Because Claimant invoked the rebuttable presumption at Section 411(c)(4), as noted above, the proper inquiry for the ALJ is whether Employer disproved the existence of pneumoconiosis by a preponderance of the evidence, not whether Claimant proved the existence of the disease. *Supra* at p. 11.

showing hyperlucency in the upper lung zones may have had in his diagnosis of COPD," but still found Dr. James' opinion well-documented and reasoned and entitled to greater weight than the opinion of Dr. Gottschall.[9] Decision and Order at 37. In addition, the ALJ found the Claimant's treatment records undermined Dr. Sood's diagnosis of chronic bronchitis based on 2.5-year history of chronic phlegmatic cough; Dr. Sood's reliance on an informal pathology review provided by Dr. Gottschall, which was not admitted into the record, further undermined his opinion. *Id*. at 37-38. He thus found Dr. Sood's opinion well-documented but not well-reasoned. *Id*. Finally, the ALJ found Dr. Tuteur's opinion persuasive, well-reasoned and documented, and entitled to greater probative weight than the opinions of Drs. Gottschall and Sood. *Id*. at 38-39.

Claimant contends the ALJ's consideration of the evidence on legal pneumoconiosis fails to satisfy the explanatory requirements of the Administrative Procedure Act (APA).[10] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We agree.

Exercise Hypoxemia

Claimant initially argues that, in addressing the issue of legal pneumoconiosis, the ALJ erred by failing to address the physicians' conflicting opinions and the ALJ's own credibility findings on whether Claimant has hypoxemia and a disabling impairment on blood gas testing. Claimant's Brief at 20-21.

The inquiry for the ALJ on rebuttal is whether Employer has come forward with affirmative proof that Claimant does not have legal pneumoconiosis, i.e., 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); *see Smith*, 880 F.3d at 699. Dr. Gottschall diagnosed Claimant with exercise hypoxemia and opined that Claimant's coal mine dust exposure substantially contributed to the disease. Director's

[9] We agree with Claimant that the ALJ erred to the extent he discredited Dr. James' opinion based on his note regarding hyperlucency. Although Dr. James' report did note "[h]yperlucency in upper lung zones" in reference to a March 26, 2019 x-ray under the heading "Database," the ALJ did not explain how this note relates to Dr. James' diagnosis of chronic obstructive pulmonary disease (COPD) or the rest of his opinion, if at all. Claimant's Exhibit 7 at 6.

[10] The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Exhibit 13 at 11—12. Drs. James and Sood opined Claimant has legal pneumoconiosis based on their diagnoses of COPD, and each noted Claimant demonstrated impaired oxygen saturation during exercise as an indication of his COPD. Claimant's Exhibits 6 at 8; 7 at 1-2; 13 at 4, 8-10; 14 at 1. Dr. Tuteur opined Claimant's blood gas studies demonstrate hypoxemia but it was "normal" because "he was at altitude." Employer's Exhibit 5 at 26, 29-34.

As discussed above, the ALJ found Claimant has a totally disabling respiratory or pulmonary impairment, and specifically discredited the opinion of Dr. Tuteur and credited the opinions of Drs. Gottschall, Sood, and James that Claimant is totally disabled based on the results of his exercise arterial blood gas studies and exercise stress tests. Decision and Order at 29-30. On the issue of legal pneumoconiosis, however, the ALJ erred by failing to address whether Dr. Tuteur's opinion persuasively establishes that Claimant's impairment of exercise hypoxemia is not significantly related to, or substantially aggravated by, his coal mine dust exposure. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR at 1-165.

In addition, we agree with Claimant's argument that the ALJ did not adequately explain his rationale for discrediting Dr. Gottschall's opinion. Claimant's Brief at 17, 20-21. Dr. Gottschall diagnosed Claimant with emphysema and exercise hypoxemia, which she opined were substantially related to coal mine dust exposure. Director's Exhibit 13 at 11-12. Although the ALJ found Dr. Gottschall's diagnosis of emphysema unpersuasive due to her reliance on evidence not admitted into the record, the ALJ erred by failing to address Dr. Gottschall's diagnosis of legal pneumoconiosis based on Claimant's exercise hypoxemia and instead summarily discredited her opinion as not reasoned. *See Wojtowicz*, 12 BLR at 1-165; Decision and Order at 35.

Chronic Obstructive Pulmonary Disease

Further, we agree with Claimant's argument that the ALJ's weighing of the evidence regarding whether Claimant has a chronic cough and COPD fails to satisfy the explanatory requirements of the APA. Claimant's Brief at 13-19. There is disagreement in the record with regards to whether Claimant has a chronic cough and COPD, which must be reconciled.

Dr. Tuteur opined Claimant has only an intermittent cough and "most of the time, no cough[,]" which does not meet his criteria for chronic bronchitis, consisting of "cough present most days, three months out of the year, two successive years, and no other explanation for that cough." Employer's Exhibit 5 at 47, 49. However, Dr. Sood diagnosed Claimant with chronic bronchitis based on chronic productive cough since 2016, using the same diagnostic criteria as Dr. Tuteur. Claimant's Exhibit 13 at 4. Dr. Gottschall noted

Claimant has a persistent cough, and Dr. James diagnosed Claimant with COPD based on a 10-year history of chronic productive cough. Director's Exhibit 13 at 11-12; Claimant's Exhibits 7 at 1; 14 at 1. The ALJ credited Dr. Tuteur's opinion over those of the other doctors but did not adequately explain his basis for doing so.[11] *See Wojctowicz,* 12 BLR at 1-165.

We also agree with Claimant's position that the ALJ erred in discrediting Dr. Sood's opinion that Claimant has legal pneumoconiosis based on the physician's consideration of Claimant's treatment records.[12] Claimant's Brief at 19. Dr. Sood considered the January 18, 2019 and February 18, 2019 treatment records from Dr. Jorge Ramirez Romero and noted they included "no complaints of cough[.]" Claimant's Exhibit 13 at 5. However, Dr. Sood reiterated his opinion that Claimant's symptoms meet the definition of chronic bronchitis. *Id*. at 4. The ALJ discredited Dr. Sood's opinion on the basis that Dr. Sood reviewed but did not consider the treatment records. Decision and Order at 37. This was error. Because Dr. Sood considered the evidence and opined that it nonetheless merits a diagnosis of chronic bronchitis, the ALJ improperly substituted his opinion for that of a medical expert by concluding that the treatment records undermined Dr. Sood's diagnosis. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986).

[11] The ALJ found Dr. Tuteur's opinion consistent with Claimant's testimony that his cough eased after the removal of his tumor in 2015. Decision and Order at 39. However, Claimant reported to Drs. Gottschall and Sood that his cough became productive beginning in 2016, after his surgery in December of 2015, and on June 5, 2019, he reported to Dr. Rose that he had a productive cough since his exam with Dr. Gottschall on October 7, 2016. Director's Exhibit 13 at 7; Claimant's Exhibits 6 at 2; 11 at 2; 13 at 4.

[12] To the extent Claimant alleges the same error in the ALJ's weighing of Dr. James' opinion, we decline to address this argument in light of our specifically instructing the ALJ to explain whether the medical record evidence supports a finding that Claimant has a chronic cough and COPD. Claimant's Brief at 19. Given our remand instructions to the ALJ, even if Dr. James didn't look at Claimant's treatment records, his opinion can still be reasoned and documented if based on an accurate recitation of that history by Claimant or another doctor.

Remand Instructions

On remand, the ALJ must reconsider his finding that Employer rebutted the Section 411(c)(4) presumption.[13] He must consider and weigh all relevant evidence and adequately explain his findings. *Wojtowicz*, 12 BLR at 1-165. If Employer establishes Claimant has neither clinical nor legal pneumoconiosis, it will have rebutted the presumption, and the ALJ can reinstate the denial of benefits. However, if Employer does not disprove both forms of the disease, a rebuttal finding that Claimant does not have pneumoconiosis is precluded. The ALJ must then specifically address the second rebuttal method and render a finding as to whether Employer established that no part of Claimant's respiratory disability is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[13] When considering the issue of legal pneumoconiosis, the ALJ should address Dr. Tuteur's opinion that emphysematous changes in Claimant's lungs were caused by stretching of lung tissue secondary to Claimant's right upper lobectomy. Claimant's Exhibit 5 at 15-17. We note Dr. Cool's microscopic biopsy report, conducted on a wedge resected from Claimant's right lower lobe as part of the same procedure as the lobectomy, also notes emphysematous changes which could not have arisen due to post-surgical changes. Claimant's Exhibit 8 at 1-2.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge