U.S. Department of Labor

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

BRB No. 21-0255 BLA

LEE E. PACK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 03/08/2023
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, 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, ROLFE and JONES, Administrative Appeals Judges.

ROLFE and JONES, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2019-BLA-05077) rendered on a miner's claim filed on September 22, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Eastern Associated Coal, LLC (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. She also found Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked the presumption that his total disability was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier. It further argues the ALJ erred in finding Claimant established a totally disabling respiratory or pulmonary impairment and therefore invoked the Section 411(c)(4) presumption. Alternatively, it argues the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption.[2] Claimant responds, urging rejection of Employer's challenge to the designation of the responsible carrier and affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's determination that Employer is liable for benefits.

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §92l(c)(4) (2018); 20 C.F.R. §718.305(b).

[2] 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); 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.204, 718.305; Decision and Order at 2.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Eastern is the correct responsible operator and it was self-insured by Peabody Energy on the last day Eastern employed Claimant; thus we affirm these findings.[4] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 11. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Fund (the Trust Fund).

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 35; Employer's Exhibit 6-7, 10. In 2007, after Claimant ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Eastern, to Patriot. *Id*. That same year, Patriot was spun off as an independent company. *Id*. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. *Id.* Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Eastern, Patriot later went bankrupt and can no longer provide for those benefits. *Id*. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for

[3] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 33.

[4] Employer argues there is no evidence of record that Peabody Energy was the insurer of Eastern. Employer's Brief at 29-30. However, the Notice of Claim specifically identifies Peabody Energy as Eastern's self-insurer, Director's Exhibit 20, and Employer's other arguments acknowledge Peabody Energy was the self-insurer of Eastern on the Miner's last date of employment with it. *See, e.g.*, Employer's Brief at 30-32 (e.g., arguing Peabody Energy "put the DOL on notice that it was not the insurer of Eastern employees for this claim since it was filed after March 4, 2011, the date on which the DOL made Patriot Coal the insurer of future claims of past Eastern employees" and the "insurer is not the insurer on the actual date of last employment but rather the insurer that the DOL made the insurer" for the applicable period).

paying benefits to miners last employed by Eastern when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 11-12.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim, and thus the Trust Fund, not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy: (1) the Department of Labor (the DOL) released Peabody Energy from liability; (2) the ALJ erred in finding the responsible self-insurer is the insurer on the date of Claimant's last coal mine employment with the responsible operator; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (5) the Director is equitably estopped from imposing liability on Peabody Energy; and (6) because Patriot cannot pay benefits, Black Lung Benefits Act Bulletin Nos. 12-07 and 14-02 place liability on the Trust Fund. Employer's Brief at 29-41. Employer maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure.[5] *Id*.

The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022); and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard* and *Graham*, we reject Employer's arguments.

[5] Employer also alleges the ALJ erred in failing to require the Director to name the Trust Fund as a party to this claim, and that the district director failed to act on its request for reconsideration of the Proposed Decision and Order (PDO). Employer's Brief at 29-31. The Director represents the Trust Fund's interests and is a party to all claims under the Act. 30 U.S.C. §932(k); *see also Boggs v. Falcon Coal Co.*, 17 BLR 1-62, 1-65-66 (1992); *Truitt v. N. Am. Coal Corp.*, 2 BLR 1-199, 1-202 (1979). Further, while Employer requested reconsideration of Peabody Energy's designation as the responsible carrier in the district director's PDO, it also requested that the district director forward the claim for a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibit 39. The district director forwarded the claim to the OALJ as Employer requested. Director's Exhibit 47. Moreover, the district director responded, specifically notifying Employer that Peabody Energy would not be dismissed as the self-insurer but that its "objections will be included on the list of contested issues when this claim is sent to the Office of Administrative Law Judges for a hearing." August 17, 2018 Letter from Claims Examiner to Employer.

Thus, we affirm the ALJ's determination that Eastern and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

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

A miner is considered totally disabled if he has a respiratory or pulmonary impairment that, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.[6] 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, total disability is established by 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). If the ALJ finds that total disability has been established under one or more subsections, she must weigh the evidence supportive of a finding of total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Employer contends the ALJ erred in finding Claimant established total disability based on the arterial blood gas studies and medical opinions and in consideration of the evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 16-29; Employer's Brief at 2-9. We disagree.

Arterial Blood Gas Studies

The ALJ considered the results of four arterial blood gas studies. Decision and Order at 16-19. Dr. Habre's November 2, 2017 study had qualifying values at rest and non-qualifying values during exercise.[8] Director's Exhibit 12. The ALJ observed correctly

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant's last coal mine employment required heavy exertion. *See Skrack*, 6 BLR at 1-711; Decision and Order at 7.

[7] The ALJ found that none of the pulmonary function studies were qualifying and there was no evidence of cor pulmonale with right-sided congestive heart failure or complicated pneumoconiosis. Decision and Order at 15-16, 19, 30-31 n.31. She therefore determined Claimant did not establish total disability at 20 C.F.R. §718.204(b)(1), (2)(i), (iii). *Id*.

[8] A "qualifying" blood gas study yields results equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

that Claimant was not required under the regulations to obtain an exercise study because the resting values were qualifying. 20 C.F.R. §718.105(b); Decision and Order at 16-17. She further noted "Dr. Habre employed the single-stick method of extraction" and found that "[b]ecause he did not use an in-dwelling catheter, the exercise blood gas sample Dr. Habre administered does not substantially comply with the regulatory requirements." Decision and Order at 17. Therefore, she accorded little weight to this study. *Id*.

Dr. Green's January 24, 2019 study had qualifying values at rest and an exercise test was not performed. Claimant's Exhibit 1. Dr. Green also conducted a second resting study that was non-qualifying. *Id*. The ALJ credited only the initial qualifying study because Dr. Green specifically observed the second study demonstrated significant resting hypoxemia and that the results were only slightly above the disability standards and thus were "not significantly different than the [qualifying] results initially obtained." Decision and Order at 17. Further finding that Dr. Green's initial resting study complied with the quality standards at 20 C.F.R. §718.107, the ALJ gave it probative weight. *Id*.

The June 14, 2019 blood gas study was obtained at Charleston Area Medical Center. Employer's Exhibit 3. It had non-qualifying values at rest and no exercise study was conducted. *Id*. The ALJ found that the study failed to comply with multiple quality standards at 20 C.F.R. §718.107 and gave it little weight. Decision and Order at 17-18.

Finally, the ALJ noted that Dr. Raj's June 21, 2019 blood gas study had non-qualifying values at rest and no exercise test was performed. Claimant's Exhibit 3. The ALJ found the study valid and entitled to probative weight. Decision and Order at 19.

Weighing the blood gas study evidence as a whole, the ALJ gave little weight to the one non-qualifying exercise study; she found three of the four resting studies were valid and that two of the three valid resting studies were qualifying for total disability. Decision and Order at 19. Thus, the ALJ concluded that Claimant established total disability by a preponderance of the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii). *Id*.

Employer generally contends the ALJ erred in giving little weight to Dr. Habre's non-qualifying exercise study. Contrary to Employer's contentions, the ALJ is tasked with considering whether a study substantially complies with the regulatory requirements of 20 C.F.R. §718.105(b). While the regulations do not mandate an indwelling catheter as the ALJ suggested, his finding that the study does not substantially comply with the regulations was permissible as the regulations require that blood oxygen levels be measured during exercise. Decision and Order at 17, *citing* 20 C.F.R. §718.105(b) ("If an exercise blood gas [study] is administered, blood shall be drawn during exercise."). Here we have no

information the single stick was used during exercise. Significantly, however, the blood gas study report, under comments, plainly states "After Exercise." Director's Exhibit 12.[9]

Regardless, the ALJ further correctly noted an exercise study was not required in these circumstances because the resting test was qualifying. 20 C.F.R. §718.105(b). Thus, we affirm the ALJ's discrediting of Dr. Habre's exercise blood gas study as supported by substantial evidence.

Alternatively, Employer contends that even if Dr. Habre's exercise study fails to satisfy the quality standards, it should nonetheless be accepted as a valid resting study. We disagree. The regulations state that a blood gas study "shall initially be administered at rest and in a sitting position." 20 C.F.R. §718.105(b). Dr. Habre's exercise study cannot qualify as a resting study since Claimant was in fact exercised for three minutes before the test was conducted; and we have no information as to whether Claimant was standing or sitting when the blood sample was drawn. Director's Exhibit 12. Moreover, Employer did not raise this argument before the ALJ and therefore has failed to preserve it. *See Gollie*

[9] Our dissenting colleague's response that "the Board has previously approved stick testing for exercise blood gas studies in any number of instances where the evidence supported that it was performed while the miner was exercising" is puzzling -- precisely because in this instance it is indisputable there is no indication whatsoever the stick testing was performed while Claimant was exercising (and very persuasive evidence it was not). The two unpublished cases our colleague cites thus support the ALJ's finding the exercise study does not comply with the quality standards regarding the timing of blood draws. *See Mullins v. Consol. Coal Co*., BRB No. 21-0055 (Oct. 26, 2021 (unpub.) (Claimant presented no evidence of when blood was drawn to question test); *Shepherd v. Consol of Kentucky, Inc*., BRB No. 20-0092 (Jan 28, 2021) (unpub.) (Employer mischaracterized testimony regarding when blood was drawn). Regardless, contrary to our colleague, Employer does not primarily argue the exercise test was valid; it instead explicitly admits that while the test may "not conform for an exercise test, it does as a resting blood gas [sic]" and the "error of the ALJ was that she used that as an excuse for not considering the blood gas test at all." Employer's Brief at 4. The problem, of course, is Employer did not present the test to the ALJ as a resting study and it has failed to preserve its argument for our review. *Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003). But even if we could consider its argument, Employer has not alleged that the ALJ did not consider the test, or committed legal error in discussing it -- it merely says the test should have been considered in a different way. Employer's Brief at 4-5. That amounts to a simple request to reweigh the evidence, which we are not empowered to do. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999).

v. Elkay Mining Co., 22 BLR 1-306, 1-312 (2003); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003). As Employer raises no other challenges with respect to the ALJ's rejection of the November 2, 2017 exercise study, we affirm her determination.[10] 20 C.F.R. §718.105(b); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Mays*, 176 F.3d at 756; Decision and Order at 16-17.

Employer further argues the ALJ erred in giving no weight to the June 14, 2019 blood gas study because 20 C.F.R §718.107 "does not provide that a valid test cannot be considered if it does not have the information specified."[11] Employer's Brief at 5-6. We disagree. The ALJ permissibly found the June 14, 2019 study was unreliable because it "does not substantially comply with the regulatory criteria" set forth at 20 C.F.R. §718.105. Decision and Order at 17. Specifically, the ALJ accurately noted the study contains only the date and time of the test, the recorded PO2 and PCO2 values, and "of special importance" it does not include "the time between drawing the blood sample and the sample's analysis, or whether the equipment was calibrated before and after the test." Decision and Order at 18; Employer's Exhibit 3.

We also consider Employer's general contention that the June 14, 2019 study is "valid" to be both unexplained and 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); Employer's Brief at 5-6. We therefore affirm the ALJ's determination to give little weight to the June 14, 2019, non-qualifying resting study. 20 C.F.R. §718.105(b),(c); *Underwood*, 105 F.3d at 949; Decision and Order at 18.

[10] The ALJ found that remand to the district director for additional testing pursuant to 20 C.F.R. §725.406 is not required as the resting study substantially complied with 20 C.F.R. §718.105 and the regulation did not require Dr. Habre to conduct an exercise study. *See* 20 C.F.R. §718.105(b) (requiring physician to provide an exercise blood gas study only when the resting study does not produce qualifying results and an exercise study is not medically contraindicated); Decision and Order at 17 n.22.

[11] Employer argues that if the information at 20 C.F.R. §718.105(c) is required for all blood gas testing then blood gas studies contained in treatment records could never be considered because they often do not include this information. Employer's Brief at 5. However, contrary to Employer's assertion, the quality standards contained in 20 C.F.R. §718.105(c) do not apply to objective tests contained in treatment notes. *See* 20 C.F.R. §718.101(b). Here, the June 14, 2019 study was obtained by Employer in the course of litigation and therefore the quality standards are applicable.

Finally, Employer contends the ALJ erred in relying solely on the numerical weight of the qualifying studies in finding Claimant established total disability.[12] Employer's Brief at 8-9. Contrary to Employer's characterization, and as explained above, the ALJ conducted both a quantitative and qualitative analysis of the blood gas studies. Decision and Order at 16-19. As the ALJ fully explained her rationale for finding some of the studies unreliable, and for how she resolved the conflict in the evidence, we affirm her conclusion that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii).[13] *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 19.

Medical Opinion Evidence

The ALJ considered five medical opinions. Decision and Order at 19-29. Dr. Habre, who performed the evaluation on behalf of the DOL, opined that Claimant could not perform the duties required by his last coal mine job based on the resting arterial blood gas study he obtained, which showed significant hypoxemia. Director's Exhibit 12. Dr. Green examined Claimant and likewise opined he is totally disabled due to the "significant resting hypoxemia," evident on his blood gas study, that would prevent him from performing his previous coal mine employment duties which required heavy exertion. Claimant's Exhibit 1. Dr. Raj, who conducted the most recent June 21, 2019 blood gas study, noted that although Claimant's resting blood gas study was non-qualifying, it showed "significant hypoxemia" that would prevent Claimant from performing the exertional requirements of his last coal mine job. Claimant's Exhibit 3.

[12] Employer further asserts that because Dr. Green's January 24, 2019 resting studies were "essentially done at the same time on the same date," the Board should consider this as one non-qualifying study. Employer's Brief at 3-4 n.1. We decline Employer's request as the ALJ acted within her discretion in giving little weight to the second non-qualifying resting study Dr. Green obtained. *Looney*, 678 F.3d at 316-17; Decision and Order at 17.

[13] Employer contends that the ALJ erred in failing to consider Drs. Tuteur's and Rosenberg's opinions concerning use of the A-a gradient when weighing the validity of the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii). Employer's Brief at 6-8. Even if true, the ALJ's error is harmless as she discussed the entirety of the evidence in concluding that Claimant is totally disabled and explained why she found their rationale unpersuasive in view of Appendix C to 20 C.F.R Part 718. *See Big Horn v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055 (10th Cir. 1990); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Dr. Tuteur prepared a consultative report based on his review of the medical record. He opined that Claimant has normal pulmonary function studies and the blood gas studies were "well within normal limits" for a man in his seventies when adjusted for barometric pressure. Employer's Exhibit 4. During his deposition, Dr. Tuteur explained that Claimant's blood gas testing showed normal differences between alveolar and arterial oxygen (A-a gradient), so "there was no inefficiency of gas exchange measured." Employer's Exhibit 11 at 10. He further explained that the A-a gradient allows a doctor to "normalize the dataset and compare the efficiency of oxygen gas exchange from one study to another." *Id.* Dr. Tuteur opined that Claimant's blood gas studies merited this type of analysis because of the barometric pressure at the locations where the testing occurred. *Id.* at 9-10. Dr. Tuteur concluded that Claimant "had no demonstrated impairment of oxygen gas exchange at rest or during exercise." *Id.* at 10. Thus, Dr. Tuteur opined Claimant did not have a disabling respiratory impairment, although he considered Claimant to be "totally and permanently disabled to such an extent that he is unable to work in the coal mines" based on his reported symptoms showing a "degree of exercise intolerance" attributable to "impaired cardiac function." Employer's Exhibit 4; *see* Employer's Exhibit 11.

Dr. Rosenberg also prepared a consultative report based on his review of the medical record. He opined Claimant had a "mild reduction" of his oxygen (pO2 level) during Drs. Habre's and Green's blood gas testing, which was non-qualifying when corrected for altitude (barometric pressure).[14] Employer's Exhibit 5. He therefore concluded Claimant "is not disabled from a pulmonary perspective." *Id.* During his deposition, Dr. Rosenberg testified that the A-a gradient is "a better measurement of V/Q [ventilation/perfusion] matching" and included calculations supporting his reasoning that the qualifying blood gas studies were "essentially normal" based on calculation of the A-a gradient. Employer's Exhibit 12 at 8, 9-13. In addition, he stated that based on the results of Dr. Habre's non-qualifying exercise blood gas test, Claimant could still perform his last coal mine work, explaining that the "exercise blood gases obviously trump the resting blood gases for determining exercise capacity." Employer's Exhibit 12 at 12.

The ALJ found the opinions of Drs. Habre, Green, and Raj that Claimant is totally disabled were reasoned and consistent with the qualifying resting blood gas study results. Decision and Order at 27-28. In contrast she found the opinions of Drs. Tuteur and Rosenberg were not well-reasoned because their analysis of the blood gas study evidence

[14] Dr. Rosenberg hypothesized that if Dr. Raj's test had been conducted at sea level, Claimant's PO2 value "would have been much higher in magnitude." Employer's Exhibit 5. Dr. Rosenberg included calculations to demonstrate his reasoning, which involved "a normal A-a gradient" and the fact that twenty-one percent of the Earth's atmosphere is composed of oxygen. *Id.* Dr. Rosenberg opined that the same type of blood gas analysis would apply to the results that Dr. Green obtained. *Id.*

is inconsistent with the regulations, which already account for barometric pressure. *Id*. at 28-29. Therefore, the ALJ found that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).

Employer asserts the ALJ erred in discounting the opinions of Drs. Tuteur and Rosenberg because the DOL's altitude adjustment "does not adjust for barometric pressure on a given day or in a particular location." *Id*. at 11-12. It also asserts the ALJ failed to fully consider Dr. Rosenberg's additional explanation that assessing for the A-a gradient is necessary in Claimant's case to also account for obesity affecting his test results. *Id*. at 15. Employer's arguments are unpersuasive.

Contrary to Employer's contentions, the ALJ accurately noted that "the qualifying values set out in the regulations do not ignore the effects of altitude, as Dr. Rosenberg [or Employer in this appeal] suggests; the Department specifically adopted a three-tiered approach to deal with the effect of barometric pressure differences on arterial blood gas test results." Decision and Order at 29. The regulations provided three ranges of altitudes by which blood gas testing is assessed. 20 C.F.R. Part 718, Appendix C. Because the ALJ fully considered the opinions of Drs. Tuteur and Rosenberg, and acted within her discretion in finding their reliance on the A-a gradient unpersuasive, we affirm her credibility determinations.[15] S*ee Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Underwood*, 105 F.3d at 951; Decision and Order at 28-29.[16]

Additionally, we reject Employer's assertion that the ALJ erred in crediting the opinions of Drs. Habre, Green, and Raj that Claimant is totally disabled because they "cherry picked" the blood gas data they relied upon. Employer's Brief at 16-21. The ALJ permissibly found the opinions of Drs. Habre, Green, and Raj reasoned and documented because they understood Claimant's last coal mine employment required heavy exertion

[15] In the preamble to the 1980 revised regulations, DOL declined to use the calculation of the A-a gradient as a measure of disability because it was laborious, difficult to administer, few laboratories were equipped to perform it, and because "the arterial blood oxygen tension measures the overall ability of the lung to properly provide oxygen for body metabolism and thus provides a more useful measurement in order to determine the overall ability of the individual to function." 42 Fed. Reg. 13,678, 13,683 (Feb. 29, 1980).

[16] Because the ALJ provided a valid reason to discredit the opinions of Drs. Tuteur and Rosenberg, we need not address Employer's remaining arguments regarding the additional reasons she gave for rejecting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 9-16.

and concluded the qualifying blood gas studies showed significant hypoxemia at rest that would preclude Claimant from performing the duties of his usual coal mine work. *Looney*, 678 F.3d at 316-17; *Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991); *Underwood*, 105 F.3d at 951; Decision and Order at 27-28. Thus, we affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv)[17] and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2). Consequently, we further affirm her conclusion that Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 29.

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,[18] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in

[17] Employer contends that the ALJ erred in finding Dr. Tuteur's opinion supportive of a finding of total disability since he attributed Claimant's exercise tolerance to cardiac issues. Employer's Brief at 10-11; *see* Decision and Order at 28-29. We consider the ALJ's error, if any, to be harmless as she ultimately found all aspects of Dr. Tuteur's opinion on total disability not well-reasoned, and thus did not rely on it to find Claimant totally disabled. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni*, 6 BLR at 1-1278; Decision and Order at 29.

[18] "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). "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).

[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.[19]

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).

Employer relies on Drs. Tuteur's and Rosenberg's opinions that Claimant did not have legal pneumoconiosis. Employer's Exhibits 4-5, 11-12. The ALJ found that their opinions are not well reasoned and merit little weight. Decision and Order at 35. Employer contends the ALJ erred in discounting their opinions. We disagree.

Dr. Tuteur opined that Claimant does not have legal pneumoconiosis because Claimant's pulmonary function test results do not show an obstructive or restrictive impairment and his arterial blood gas studies reflect normal lung function. Employer's Exhibits 4, 11 at 21-23, 26-28. Dr. Rosenberg opined that Claimant does not have legal pneumoconiosis because he has no evidence of airflow obstruction or disabling oxygenation "when you take into account barometric pressure and A[-]a gradient." Employer's Exhibit 12 at 13-14, 21-22; *see also* Employer's Exhibit 5. He also pointed to the reversibility of Claimant's arterial blood gas testing after exercise to exclude legal pneumoconiosis. Employer's Exhibit 12 at 14, 21-22. The ALJ permissibly discounted their opinions because they were based, in part, on their findings with respect to the arterial blood gas studies, which contradict her findings.[20] *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 34-35.

[19] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 38.

[20] At legal pneumoconiosis, Employer raises the same arguments regarding the ALJ's weighing of the blood gas studies that we previously rejected. Employer's Brief at 21-26. As the ALJ provided a valid reason for discrediting the opinions of Drs. Tuteur and Rosenberg at legal pneumoconiosis, we need not address Employer's challenges to the ALJ's additional reasons for finding their opinions unpersuasive. *Kozele*, 6 BLR at 1-382 n.4; Employer's Brief at 21-26. Further, because Employer bears the burden of proof on rebuttal, we need not address Employer's arguments concerning the ALJ's weighing of the opinions of Drs. Habre, Green, and Raj diagnosing legal pneumoconiosis. Decision and

Because the ALJ's credibility findings are supported by substantial evidence, we affirm her determination that Employer did not disprove legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 37. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established that no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 38-40. The ALJ permissibly discounted the opinions of Drs. Tuteur and Rosenberg regarding the cause of Claimant's pulmonary disability because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the existence of the disease.[21] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 39-40. We, therefore, affirm the

Order at 36-37; Employer's Brief at 27-29; Director's Exhibit 12; Claimant's Exhibits 1, 3.

[21] Drs. Tuteur and Rosenberg did not address whether legal pneumoconiosis caused Claimant's total respiratory disability independent of their conclusions that he did not have the disease or a totally disabling respiratory or pulmonary impairment. Employer's Exhibit 4, 5, 11, 12.

ALJ's finding that Employer failed to establish no part of the Miner's pulmonary disability was caused by legal pneumoconiosis.[22] 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

Although I concur in the majority's holding concerning Employer's liability for this claim, I respectfully dissent from the majority's affirmance of the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2) and therefore also dissent from their affirmance of the award of benefits. In weighing the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii), the ALJ incorrectly stated that the regulations require an indwelling catheter as the basis for rejecting Dr. Habre's qualifying exercise study. Decision and Order at 16. However, the regulations only require that "[i]f an exercise blood gas [study] is administered, blood shall be drawn during exercise." 20 C.F.R. §718.105(b). Moreover, the Board has previously approved stick testing for exercise blood gas studies in any number of instances where the evidence supported that it was performed while the miner was exercising. *See generally Mullins v. Consol. Coal Co.*, BRB No. 21-

[22] As the ALJ provided a valid reason for discrediting the opinions of Drs. Tuteur and Rosenberg, it is not necessary to address Employer's other arguments concerning the ALJ's weighing of their opinions, including its contention that the ALJ erred in finding that they relied on an inaccurate smoking history. *Kozele*, 6 BLR at 1-382 n.4; Employer's Brief at 26-27. Further, as the opinions of Drs. Habre, Green and Raj do not aid Employer's burden on rebuttal, we need not address Employer's contention that the ALJ erred in weighing their opinions at causation.

0055 (Oct. 26, 2021 (unpub.); *Shepherd v. Consol of Kentucky, Inc*., BRB No. 20-0092 (Jan 28, 2021) (unpub.).[23]

The majority has provided an alternative explanation to affirm the ALJ's discrediting of Dr. Habre's November 2, 2017 exercise study, which the ALJ did not provide. *See infra* at 6-7. Further, no party challenged the validity of this test before the ALJ; consequently, the parties had no notice that its validity could be in question. *See* Claimant's Closing Arguments in Support of an Award of Benefits; Closing Argument on Behalf of Easter Associated Coal/Peabody Energy Corporation in Support of Denial of Benefits and Dismissal of Peabody Energy Corporation. Consequently, I would vacate the ALJ's determination that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii) and remand for the ALJ to consider the study or to provide an adequate explanation of the basis upon which she determined that the regulatory requirements were not substantially met. 20 C.F.R. §718.105(b); *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) (providing that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record"); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv) and the evidence as a whole, the ALJ relied on her blood gas study findings. Decision and Order at 27-29. Thus, I would also vacate the ALJ's finding that Claimant established total disability based on the medical opinion evidence and as a whole at 20 C.F.R. §718.204(b)(2) and her award of benefits and remand for additional consideration.

JUDITH S. BOGGS
Administrative Appeals Judge

[23] Employer argues that it was error for the ALJ to find invalid a test which two physicians – Drs. Forehand and Habre – both considered valid. Employer's Brief at 7.