U.S. Department of Labor

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

BRB No. 2021-0374 BLA

MICHAEL G. CASH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH OF KENTUCKY/APOGEE COAL COMPANY	)	
	)	
and	)	
	)	
ARCH COAL, INCORPORATED	)	DATE ISSUED: 03/17/2023
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2019-BLA-05363) rendered on a claim filed on August 17, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Arch of Kentucky/Apogee Coal Company (Apogee)[1] is the responsible operator and Arch Coal, Inc. (Arch) is the responsible carrier because it self-insured Apogee on the last day of Claimant's coal mine employment with Apogee. He determined Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus he concluded Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Further, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It also argues the removal provisions applicable to ALJs

[1] When Claimant worked for the responsible operator, its name was Arch of Kentucky. It later changed its name to Apogee Coal Company. Employer's Brief at 3 n.1.

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

[3] 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

rendered his appointment unconstitutional. Employer further argues the ALJ erred in finding Arch is the liable insurance carrier. On the merits, it contends he erred in finding Claimant established at least fifteen years of underground coal mine employment and total disability and thus improperly invoked the Section 411(c)(4) presumption. Finally, it argues he erred in determining it did not rebut the presumption. Claimant has not filed a response brief.

The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's constitutional challenge. Further, the Director urges the Board to remand the matter so that the ALJ can fully consider Employer's arguments regarding whether Apogee is the responsible operator and Arch is liable for the payment of benefits. Finally, the Director contends Employer's arguments on the merits with respect to the ALJ's reliance on the preamble to the 2001 revised regulations and the denial of Employer's discovery requests are not persuasive. Employer has filed a reply brief reiterating its arguments.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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 Challenge

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[5] Employer's Brief at 9-14; Reply Brief at 1-3. Although

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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.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 18.

[5] *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

the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[6] Employer maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[7] *Id.* We reject Employer's argument, as the Secretary's ratification was a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.[8]

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 5 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have

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Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

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

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

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

[7] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to the DOL's ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] The ALJ denied Employer's Motion for Reassignment and request to hold this claim in abeyance on August 18, 2020. Order Denying Employer's Motion for Reassignment and to Hold in Abeyance at 1.

properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Johnson and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Judge Johnson. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Johnson "as a District Chief [ALJ]." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts" but instead generally speculates "absent evidence of genuine consideration of the candidate's qualifications, summary ratification fails constitutional muster." Employer's Brief at 13. It therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" its earlier invalid actions was proper).[9]

Consequently, we reject Employer's argument this case should be remanded for a new hearing before a different ALJ.

[9] While Employer correctly states Executive Order 13843, which removes ALJs from the competitive civil service, applied only to future appointments, Employer's Brief at 22-23, the Executive Order does not state that the Secretary's 2017 ratification of the ALJ's appointment was impermissible or invalid. Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Johnson's appointment, which we hold constituted a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 13-23. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia, supra*. *Id.* 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). *Id.* The Board has previously addressed and rejected these arguments in *Howard v. Apogee Coal Co*., BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022). For the reasons set forth in *Howard*, we reject them here.

Responsible Insurance Carrier

Employer does not directly challenge the ALJ's findings that Apogee is the correct responsible operator and was self-insured by Arch[10] on the last day Apogee employed Claimant; thus we affirm these findings. *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 36. In 2005, after Claimant ceased his employment with Apogee, Arch sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Director's Brief at 2; Employer's Brief at 44. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Brief at 23. In 2015, Patriot went bankrupt. *Id*.; Director's Exhibit 24 at 2. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch Coal of liability for paying benefits to miners last employed by Apogee when Arch owned that company and provided self-insurance to it. Director's Brief at 16-17.

[10] Employer argues the ALJ improperly named Arch Coal as the responsible operator. Employer's Brief at 40. Contrary to Employer's argument, the ALJ clearly found that Apogee is the responsible operator and it is "[s]elf-[i]nsured through Arch Coal, Inc." Decision and Order at 1. Thus he did not find "Arch Coal Inc." employed Claimant, but rather is liable as the responsible carrier. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why he did it, the duty of explanation under the APA is satisfied).

Employer raises several arguments to support its contention that Arch was improperly designated the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund, not Arch, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 40-53; Employer's Reply Brief at 11-25. It argues the ALJ erred in finding Arch liable for benefits because: (1) the district director improperly "pierce[d] Arch's corporate veil [to] hold it responsible for" Apogee's employee, Claimant; (2) he evaluated Arch's liability for the claim as a responsible operator or commercial insurance carrier rather than a self-insurer; (3) the sale of Apogee to Magnum released Arch from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability; (4) no evidence establishes Arch's self-insurance covered Apogee for this claim; (5) the Director changed its policy in naming Arch as the responsible carrier; (6) retroactive application of the policy reflected in Black Lung Benefits Act (BLBA) Bulletin No. 16-01[11] imposes new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the APA; and (7) the ALJ abused his discretion and deprived it of procedural due process by denying its request for discovery regarding BLBA Bulletin No. 16-01 as "irrelevant" because this discovery is relevant to its argument that the Bulletin violates the APA.[12] *Id.*

Remand is not required because the Board has previously considered and rejected the same and similar arguments under the same dispositive material facts in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 10-19 (Oct. 25, 2022) (en banc); *Howard*, BRB No. 20-0229 BLA, slip op. at 5-17; and *Graham v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). *Bailey*, *Howard*, and *Graham* control this case and establish -- as a matter of law -- that Apogee and Arch are the responsible operator and carrier, respectively, and are liable for this claim.

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

In order to invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground or substantially similar surface coal mine

[11] The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum the Department of Labor issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" which Patriot's bankruptcy has affected.

[12] The ALJ denied discovery regarding BLBA Bulletin No. 16-018 because Employer failed to establish the relevance of the material it sought. July 16, 2019 Order at 5. Employer has not adequately set forth how the ALJ has abused his discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

employment and has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

Length of Coal Mine Employment

Claimant bears the burden of establishing the length of coal mine employment. *See Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

The ALJ credited Claimant's "Hours Verification for Pension Eligibility" from the United Mine Workers of America showing the beginning and ending dates of Claimant's coal mine employment in 1977 and 1978 as establishing five months (0.42 years) and ten months (0.83 years) of coal mine employment, respectively, for those years. Decision and Order at 20-21; Director's Exhibit 10. He found Claimant's Social Security Earnings Statement (SSES) and testimony establish full calendar years of coal mine employment in 1979, 1980, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1991, and 1992. Decision and Order at 21-22. Further finding Claimant's testimony and SSES establish partial calendar years of coal mine employment in 1981, 1989, 1990, and 1993, the ALJ applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine the number of days Claimant worked in coal mine employment during these years.[13] *Id*. He divided Claimant's yearly earnings as reported in his SSES by the coal mine industry's average yearly earnings for 125 days of employment, as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. Decision and Order at 22. When his earnings met or exceeded the average "yearly" earnings for 125 working days as reported in Exhibit 610 for that year, the ALJ credited Claimant with a full year of coal mine employment. *Id*. For the years in which Claimant earned less than the Exhibit 610 average yearly earnings (1981, 1990, and 1993), the ALJ credited him with a fraction of a

[13] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides, in pertinent part:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii).

year based on the ratio of days worked up to 125 working days. *Id*. In total, the ALJ credited Claimant with an additional 3.07 partial years of coal mine employment. *Id.* Adding this sum to Claimant's twelve full calendar years of coal mine employment in 1979-1980, 1982-1988, and 1991-1992, the ALJ found Claimant established 15.07 years of coal mine employment between 1972 and 1992. *Id*. at 11-12.

Employer contends the ALJ improperly ignored the beginning and ending dates of Claimant's employment and thus erred in relying on a 125-day divisor to credit Claimant with full and partial years of coal mine employment in 1977 and 1993. Employer's Brief at 23-24. Its arguments are without merit as this case arises with the jurisdiction of the Sixth Circuit, where *Shepherd v. Incoal, Inc*., 915 F.3d 392 (6th Cir. 2019) controls such that the ALJ's analysis is consistent with the definition of a "year" at 20 C.F.R. §725.101(a)(32):

> [I]f the beginning and ending dates of the miner's employment cannot be determined *or* – even if such dates are ascertainable – if the miner was employed by the mining company for "less than a calendar year," the adjudicator may determine the length of coal mine employment by the average daily earnings of an employee in the coal mining industry. If the quotient from that calculation yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year. If the calculation shows that the miner worked fewer than 125 days in the calendar year, the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125. 20 C.F.R. §725.101(a)(32)(i).

Shepherd, 915 F.3d at 402 (emphasis in original).

We also reject Employer's assertion that the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) constitutes dicta. The court in *Shepherd* expressly remanded that case for the ALJ to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)" when evaluating the miner's length of coal mine employment. *Shepherd*, 915 F.3d at 407. Thus, regardless of Employer's disagreement with *Shepherd*, the court's interpretation of the regulation constitutes controlling law in this case.[14] *See Briggs v.*

[14] It is well-settled that a lower court is required to give full effect to the execution of an appellate court's mandate, both express and implied, without altering or amending the mandate. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-15 (4th Cir. 2005); *Piambino v. Bailey*, 757 F.2d 1112, 1119-20 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). As the Board stated in *Hall v. Director, OWCP*, 12 BLR 1-80 (1988), "the United States judicial system relies on the

Pennsylvania R.R., 334 U.S. 304, 306 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7, 1-8 (1993).

As Employer raises no further challenge to the ALJ's length of coal mine employment calculation, we affirm her finding that Claimant established 15.07 years of qualifying coal mine employment. *See* 20 C.F.R. §725.101(a)(32); *Shepherd*, 915 F.3d at 402.

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). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying arterial blood gas studies,[15] 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). The ALJ found Claimant established total disability based on the pulmonary function studies, the medical opinions, and the evidence as a whole.[16] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 21. Employer alleges the ALJ erred in finding the pulmonary function and medical opinion

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most basic of principles, that a lower forum must not deviate from the orders of a superior forum, regardless of the lower forum's view of the instructions given it." *Hall*, 12 BLR at 1-82; *see Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7, 1-8 (1993).

[15] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[16] The ALJ found none of the blood gas studies were qualifying and no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 8-9, 18-20. In addition, the ALJ found no evidence of complicated pneumoconiosis and, thus, Claimant could not invoke the irrebuttable presumption that he is totally disabled due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 18, 27-28.

evidence establish total disability at 20 C.F.R §718.204(b)(2)(i), (iv), and on the record as a whole.

Pulmonary Function Studies

The ALJ considered the results of four pulmonary function studies, dated June 6, 2016, October 6, 2017, August 16, 2018,[17] and September 28, 2018. Decision and Order at 26-27; Director's Exhibit 17; Employer's Exhibits 17, 20, 21; Claimant's Exhibit 1. He found the June 6, 2016 study produced non-qualifying values, the October 6, 2017 study produced qualifying values before the administration of bronchodilators, and the August 16, 2018 study produced qualifying values both before and after bronchodilators. Decision and Order at 8, 26-27. The ALJ did not consider the results of the September 28, 2018 study results as he found they were neither an accurate nor reliable measure of Claimant's true pulmonary function based on the technician's observation of a "suboptimal test" and Dr. Rosenberg's opinion that the measurements were "so low that the findings are not physiologically possible." *Id*. at 27.

Based on the qualifying pre-bronchodilator values from the October 6, 2017 study and the qualifying values before and after the administration of bronchodilators of the August 16, 2018 study, the ALJ found Claimant established total disability based on the pulmonary function study evidence. Decision and Order at 21; 20 C.F.R. §718.204(b)(2)(i).

Employer contends the ALJ erred in finding the August 16, 2018 pulmonary function study valid and therefore erred in finding the pulmonary function study evidence establishes total disability. Employer's Brief at 24-27. We disagree.

The August 16, 2018 pulmonary function study was conducted as part of Dr. Rosenberg's evaluation of Claimant. Employer's Exhibit 17. The technician who conducted the test noted good effort and opined the study was acceptable and reproducible. *Id.* However, Dr. Rosenberg concluded Claimant's effort was poor, opined the study did not meet American Thoracic Society (ATS) criteria for a valid pulmonary function study, and found the spirometry invalid. *Id*. The ALJ noted Dr. Rosenberg "failed to identify the specific data which demonstrate an invalid study" and merely checked a box on a pre-prepared form indicating the test did not meet ATS criteria. Decision and Order at 27. Thus, he found Dr. Rosenberger "failed to provide a cogent explanation for finding

[17] The ALJ refers to an August 6, 2018 pulmonary function study, but this appears to be a scrivener's error. *See generally* Decision and Order. There is no pulmonary function study dated August 6, 2018, in the record although there is an August 16, 2018 pulmonary function study, with the values noted by the ALJ. Employer's Exhibit 17.

the study invalid." *Id.* The ALJ credited the comments of the technician who witnessed the Claimant's performance on the test over the summary conclusion of Dr. Rosenberg and therefore accorded it greater weight. *Id.*

Contrary to Employer's arguments, Employer's Brief at 33-34, the ALJ did not summarily credit the technician's comments over a medical professional; he found Dr. Rosenberg's opinion unpersuasive for a rational reason -- Dr. Rosenberg did not adequately explain the basis for his conclusion. It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). As Employer identifies no error in the ALJ's discrediting of Dr. Rosenberg's opinion, we affirm it. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Napier*, 301 F.3d at 712-14; *Banks*, 690 F.3d at 482-83; *Crisp*, 866 F.2d at 185; Decision and Order at 27.

Consequently, we affirm the ALJ's determination that the qualifying August 16, 2018 pulmonary function study is valid. As Employer asserts no other error in the ALJ's weighing of the pulmonary function study evidence, we affirm his finding that it establishes total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 27.

Medical Opinions

The ALJ considered the medical opinions of Drs. Forehand, Tuteur, and Rosenberg.[18] Director's Exhibits 17, 25; Employer's Exhibits 17, 19. Dr. Rosenberg opined Claimant is not totally disabled by a respiratory or pulmonary impairment, whereas Dr. Forehand opined he is. *Id.*

The ALJ found Dr. Rosenberg's opinion poorly reasoned because he relied too heavily on the August 16, 2018 pulmonary function test post-bronchodilator values and failed to adequately explain how Claimant retained the ability to perform his previous coal mine work with disabling level pre-bronchodilator results. Decision and Order at 29-30. He also found Dr. Rosenberg failed to adequately explain his reasons for dismissing this

[18] The ALJ declined to give Dr. Tuteur's opinion any weight on the issue of total disability. Decision and Order at 30; Employer's Exhibit 18. He noted Dr. Tuteur's opinion was confusing and internally inconsistent. Decision and Order at 30. Further, the ALJ found that, to the extent Dr. Tuteur's opinion may be read to support finding Claimant totally disabled, it is poorly documented and, thus, cannot be reasonably credited. *Id.* at 31. He also found that, to the extent it may be read to refute a finding of total disability, it is poorly reasoned and, thus, deserves little probative weight. *Id.*

test as invalid, contrary to his own finding that the test was valid. *Id.* Employer does not specifically challenge the ALJ's findings that Drs. Rosenberg's and Tuteur's medical opinions are poorly-reasoned, and not entitled to any weight. Thus, we affirm them.[19] *See Cox*, 791 F.2d at 446-47; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *Skrack*, 6 BLR at 1-711; 20 C.F.R. §802.211(b).

Thus, the ALJ's finding that the contrary medical opinion evidence does not undermine that Claimant established total disability based on the pulmonary function study evidence is supported by substantial evidence.[20] *See Balsavage*, 295 F.3d at 396; 20 C.F.R. §718.204(b)(2) (qualifying pulmonary function studies "shall establish" total disability "[i]n the absence of contrary probative evidence"); Decision and Order at 17-18. And because there is no other evidence undermining the pulmonary function study evidence, we therefore affirm the ALJ's conclusion that Claimant established total disability, 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and thus invoked the Section 411(c)(4) presumption.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[21] or "no part of [his] respiratory or pulmonary total disability was

[19] As we have affirmed the ALJ's finding regarding the validity of the August 16, 2018 pulmonary function study, we further reject Employer's argument that the ALJ's finding the study valid tainted his consideration of the opinions of Drs. Forehand, Rosenberg, and Tuteur. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (en banc); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Employer's Brief at 34.

[20] Because we affirm the ALJ's finding that Claimant established total disability through pulmonary function testing at 20 C.F.R. §718.204(b)(2)(i), and the contrary medical opinions of Drs. Rosenberg and Tuteur do not undermine the pulmonary function study evidence, we need not address Employer's argument that the ALJ erred in considering Dr. Forehand's medical opinion, as any error in finding total disability established through Dr. Forehand's medical opinion is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[21] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as

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. Decision and Order at 36.

To the extent Employer argues the ALJ erred in considering the preamble to the 2001 revised regulations in order to discredit Dr. Rosenberg's opinions supporting rebuttal, we find no merit in this argument. Employer's Brief at 35-39. An ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the scientific evidence the DOL found credible in drafting the regulations. *See* 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008).

Employer also argues the ALJ violated its due process rights by preventing it from conducting discovery on the preamble and then discrediting its physicians as contrary to the scientific evidence cited in the preamble. Employer's Brief at 38-39. We disagree.

Due process requires that Employer be given notice and an opportunity to mount a meaningful defense. *See Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). Employer had the opportunity to challenge the preamble by submitting evidence that proves the science that the DOL relied on in promulgating it is no longer valid. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014) (a party is free to challenge the DOL's position in the preamble by submitting the type and quality of medical evidence that would invalidate the DOL's position in that scientific dispute); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (parties may submit evidence of scientific innovations that archaize or invalidate the science underlying the preamble). It did not submit any such evidence. Because Employer was afforded the opportunity to submit evidence challenging the scientific findings contained in the preamble, it has failed to demonstrate how it was deprived of due process. *See Hatfield*, 556 F.3d at 478; *Holdman*, 202 F.3d at 883-84.

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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).

Employer makes no further argument challenging the ALJ's finding that it failed to rebut the presumption by disproving legal pneumoconiosis or establishing no part of Claimant's total disability was caused by legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), Decision and Order at 36. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits. 20 C.F.R. §718.305(d)(1)(i),(ii); Decision and Order at 23-24.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge