U.S. Department of Labor

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

BRB No. 21-0523 BLA

RUSSELL T. FRIDLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	
	)	
and	)	
	)	
ARCH RESOURCES	)	DATE ISSUED: 03/10/2023
	)	
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 Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

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

Kathleen H. Kim (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: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2018-BLA-05623) 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 miner's subsequent claim filed on March 6, 2017.[1]

The ALJ found Hobet Mining, Incorporated (Hobet) is the responsible operator and Arch Coal Company, Incorporated, now Arch Resources (Arch), is the responsible carrier. He credited Claimant with 18.54 years of surface coal mine employment in conditions substantially similar to those in an underground mine and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore determined 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),[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.305, 725.309. He further found Employer did not rebut the presumption and awarded benefits.

[1] ALJ Richard A. Morgan denied Claimant's prior claim on June 7, 2001, because he failed to establish that he suffered from pneumoconiosis or that he was totally disabled. Director's Exhibit 1.

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

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because ALJ Morgan denied Claimant's prior claim for failure to establish pneumoconiosis and total disability, Claimant had to submit new evidence establishing

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because the removal provisions applicable to the ALJ rendered his appointment unconstitutional. Employer also argues the ALJ erred in finding Arch is the liable carrier. On the merits, it argues the ALJ erred in finding Claimant established that his coal mine employment occurred in conditions substantially similar to those in an underground mine. It further asserts the ALJ erred in finding Claimant was totally disabled from a respiratory or pulmonary impairment and in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds urging the Benefits Review Board to reject Employer's constitutional challenge and its arguments regarding its discovery requests and to affirm the ALJ's determination that Arch is liable for benefits. Employer replied to Claimant's and Director's briefs, reiterating its contentions on appeal.[4]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 12-17; Employer's Reply Brief at 14-17. 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 v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 16. In addition, it relies on the United States Supreme

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either element of entitlement to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 18.54 years of surface coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as 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 15; Director's Exhibit 4.

[6] *Lucia* involved an Appointments Clause challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court

Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010), *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and *Arthrex, Inc. v. Smith & Nephew, Inc.*, 594 U.S. , 141 S. Ct. 1970 (2021). *Id*. For the reasons set forth in *Howard v. Apogee Coal Co*., BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Hobet is the correct responsible operator, and it was self-insured by Arch on the last day Hobet employed Claimant; thus, we affirm these findings.[7] *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 12-15. 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 Trust Fund (Trust Fund). Employer's Brief at 32-41; Employer's Reply Brief at 8-14.

In 2005, after Claimant ceased his employment with Hobet, Arch sold Hobet to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot. Employer's Brief at 37-39; Director's Brief at 2; Director's Exhibit 18 at 1-2. On March 4, 2011 the Department of Labor (DOL) authorized Patriot to insure itself and its subsidiaries, retroactive to 1973. Director's Brief at 15; Director's Exhibit 18 at 1-2. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Hobet, Patriot later went bankrupt and can no longer provide for those benefits. Decision and Order at 13; Director's Brief at 15; Director's Exhibit 18 at 1-2. Nothing, however, relieved Arch of liability for paying benefits to miners last employed by Hobet when Arch owned and provided self-insurance to that company. Decision and Order at 15-18.

held, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

[7] Employer argues there is no insurance policy or self-insurance agreement establishing Arch's liability. Employer's Brief at 34. However, the Notice of Claim specifically identifies Arch as Hobet's insurance carrier, Director's Exhibit 15, and Employer's other arguments tend to acknowledge that Arch Coal was the self-insurer of Hobet at the time of Claimant's last date of employment. *See, e.g.*, Employer's Cross-Appeal Brief at 35-38 (framing the decision to name Arch liable instead of Patriot as involving a choice between Hobet's last insurer or its insurer on the date of Claimant's last exposure to coal mine dust).

Employer raises several arguments to support its contention that Arch was improperly designated the responsible carrier in this claim and thus the Trust Fund, not Arch, is responsible for the payment of benefits following Patriot's bankruptcy:[8] (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[9] (2) the ALJ erroneously excluded its liability evidence;[10] (3) he evaluated Arch's

[8] Employer argues 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act (Longshore Act) and the APA, 5 U.S.C. §556(d), because it divests the ALJ of authority under those Acts to receive evidence and adjudicate issues de novo. Employer's Brief at 17-22. We reject this argument because 30 U.S.C. §932(a) incorporates the provisions of the Longshore Act and the APA into the Black Lung Benefits Act (BLBA) "except as otherwise provided . . . by regulations of the Secretary." 30 U.S.C. §932(a). Thus, even if we were to accept Employer's interpretation of the regulation, the Secretary of Labor has the authority to adopt regulations that differ from the APA and the Longshore Act. *Nat'l Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001), *rev'd in part on other grounds*, *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 869 (D.C. Cir. 2002).

[9] Employer first contested the district director's appointment in its brief before the Board. Employer's Brief at 21-23.

[10] On November 6, 2018, Employer submitted a request for subpoenas to obtain deposition testimony and documents from Michael Chance and Kim Kasmeier related to various liability-related topics, including BLBA Bulletin No. 16-01 and the DOL's authorization of Arch to self-insure. *See* November 6, 2018 Subpoena Requests. ALJ Patricia J. Daum, who was previously assigned this case, denied Employer's request, finding it failed to establish extraordinary circumstances for excusing its failure to timely designate liability witnesses or submit liability evidence to the district director. ALJ Daum's April 29, 2019 Order Denying Request for Subpoena; *see* 20 C.F.R. §§725.414(c), 725.456(b)(1). Subsequently, the case was reassigned to the ALJ. Decision and Order at 2 n.2. On August 12, 2019, Employer filed a motion to compel discovery responses related, in part, to BLBA Bulletin No. 16-01. The ALJ denied Employer's motion, concluding extraordinary circumstances did not exist to excuse its failure to timely submit liability evidence to the district director and because Employer failed to "establish[] that discovery regarding the Bulletin is relevant to the adjudication of this claim." August 16, 2019 Order Granting Director's Motion for Protective Order and Order Denying Employer's Motion to Compel. For the reasons set forth in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 11-13 (Oct. 25, 2022) (en banc); *Howard*, BRB No. 20-0229 BLA, slip op. at 10-12; and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-294-95 (2022), we affirm both ALJs' evidentiary rulings.

liability for the claim as a responsible operator or commercial insurance carrier rather than as a self-insurer; (4) the district director improperly "attempt[ed] to pierce Arch's corporate veil to hold it responsible" for the benefits of Hobet's employee, Claimant; (5) the Director did not prove that Arch's self-insurance covered Hobet for this claim; (6) the sale of Hobet to Magnum released Arch from liability for the claims of miners who worked for Hobet, and the DOL authorized Patriot to retroactively self-insure Hobet's liabilities; (7) the DOL's issuance of Black Lung Benefits Act (BLBA) Bulletin No. 16-01[11] reflects a change in policy where the DOL began to retroactively impose new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the APA;[12] and (8) the United States Court of Appeals for the District of Columbia Circuit permitted discovery to challenge Bulletin No. 16-01 in *Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018) and that the ALJ's failure to allow discovery was a violation of its due process.[13] Employer's Brief at 17-41; Employer's Reply Brief at 4-14.

The Board has previously considered and rejected these and similar arguments under the same determinative facts related to the Patriot bankruptcy in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard*, BRB No. 20-0229 BLA, slip op. at 5-17; 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*,

[11] BLBA Bulletin No. 16-01 is a memorandum the Director of the Division of Coal Mine Workers' Compensation issued on November 12, 2015 to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

[12] Employer argues the DOL's policy is a retroactive change that amounts to an unlawful taking of its property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 28-29, 40-41. As the Director correctly points out, a private contract did not release Employer from liability and requiring Employer to pay benefits under the Act does not constitute an unconstitutional taking of property. Director's Brief at 16, *citing W. Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011) ("the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause").

[13] Employer asserts neither ALJ Daum nor the current ALJ fully addressed all of its challenges to BLBA Bulletin No. 16-01. Employer's Brief at 17, 17 n.5, 24-25; Employer's Reply Brief at 8; Employer's Post-Hearing Brief at 25-34; *see* Decision and Order at 18 n.11; April 29, 2019 Order Denying Request for Subpoena. Even if true, we consider any error to be harmless because the Board rejected similar challenges to the bulletin in *Howard*, BRB No. 20-0229 BLA, slip op. at 10-12, 15-16. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

we reject Employer's arguments. Thus we affirm the ALJ's determination that Hobet and Arch are the responsible operator and carrier, respectively, and are liable for this claim.

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 in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that [he] was regularly exposed to coal[]mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001).

The ALJ noted Claimant's testimony that all of his coal mine employment was at surface or strip mines, he worked as a drill helper and drill operator, and his last coal mine job was a rock truck driver in very dusty conditions. Decision and Order at 4-6; Hearing Transcript at 15-23. The ALJ found Claimant's 18.54 years of coal mine employment qualifies for the Section 411(c)(4) presumption because it was in "conditions substantially similar to underground coal mine employment." *Id.* at 6.

Employer asserts that Claimant's testimony establishes he was exposed to stone and overburden dust and dirt but that he did not specifically mention coal dust. Employer's Brief at 42-43. Employer also asserts there is no evidence establishing the working conditions of Claimant's surface work were comparable to underground mining conditions. Employer's Brief at 41-42. Employer's arguments are unpersuasive.

Contrary to Employer's contention, regular exposure to any kind of coal mine dust may constitute qualifying coal mine employment, as the definition of coal mine dust is not limited to dust that is generated during the extraction or preparation of coal but encompasses "the various dusts around a coal mine." *See Pershina v. Consolidation Coal Co.*, 14 BLR 1-55, 1-57 (1990); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 665-66 (6th Cir. 2015) (rejecting distinction between coal dust and rock dust for invoking the Section 411(c)(4) presumption); *Garrett v. Cowin & Co., Inc.*, 16 BLR 1-77, 1-81 (1990). Thus the ALJ was not required to determine whether Claimant was exposed to "coal dust" specifically, as opposed to "coal[]mine dust," including stone, overburden, and dust from the road. *Id.*

Additionally, the ALJ is not required to analyze the conditions of an underground mine in comparison to Claimant's work conditions in surface mining. *See* 78 Fed. Reg.

59,102, 59,105 (Sept. 25, 2013) (unnecessary for a claimant to prove anything about dust conditions existing at an underground mine; claimant need only develop evidence addressing the dust conditions at the non-underground mine). Here, it is sufficient that the ALJ found Claimant's uncontradicted testimony regarding his dust exposure sufficient to show that he was regularly exposed to coal mine dust.[14] *See Kennard*, 790 F.3d at 664 (claimant's "uncontested lay testimony" regarding the dust conditions he experienced "easily supports a finding" of regular dust exposure); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (testimony that the conditions throughout his employment were very dusty met claimant's burden to establish regular exposure to coal mine dust); Decision and Order at 6.

Because the ALJ acted within his discretion, we affirm his crediting of Claimant's uncontradicted testimony. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); Decision and Order at 6. As it is supported by substantial evidence, we further affirm his conclusion that Claimant established he worked in conditions substantially similar to those in an underground mine. *See* 20 C.F.R. §718.305(b)(2); *see Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied if the reviewing court can discern what the ALJ did and why he did it).

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

[14] Claimant testified that his work as a drill helper and operator for King Knob Coal Company was in "an open cab" and was dusty because he was "drilling overburden and it blows the shavings with air pressure." Hearing Transcript at 16-17. He similarly stated his work as a drill operator for Bridgeport Mining was dusty and it was also an open cab. *Id*. at 17. Claimant worked for Kelso Coal Company as a drill operator and truck driver and testified both positions were dusty with the "same pattern [of dust] as all the other [previous] jobs. *Id*. at 18-20. Claimant noted that his work as a drill operator at Heartland Coal Company was in a closed cab but stated it was still dusty as "[a]nytime you're drilling overburden, there has to be dust" and indicated he was "[i]n and out of the cab a lot" laying out the pattern for his drill. *Id*. at 20-21. In his most recent position as a rock truck driver for Hobet, Claimant described the working conditions at the mine as "always dust[y]." *Id*. at 22-23. He explained that "any time you're on dirt roads and lifting overburden . . . . there is always dust." *Id*. at 23.

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.[16] 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).

Employer challenges the ALJ's finding that Claimant established total disability based on the medical opinions and the evidence as a whole.[17] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 23.[18]

The ALJ considered four medical opinions. Decision and Order at 8-11, 21-22. Dr. Ranavaya conducted the DOL's complete pulmonary evaluation of Claimant on April 20, 2017 and obtained qualifying pulmonary function study results and non-qualifying blood gas study results. Director's Exhibit 12. He diagnosed Claimant with a moderately severe pulmonary impairment based on his pulmonary function study results and opined he is totally disabled from performing his last coal mine work as a rock truck driver. *Id.* at 2, 5.

[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 neither of the blood gas studies submitted in the current claim are qualifying and there is 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 21. The ALJ also found no evidence of complicated pneumoconiosis. Decision and Order at 26.

[17] We affirm, as unchallenged on appeal, the ALJ's finding that the pulmonary function study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(i). *See Skrack*, 6 BLR at 1-711; Decision and Order at 20-21.

[18] The ALJ permissibly found evidence submitted with Claimant's current claim is more probative of his condition than evidence submitted in his prior claim. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc) (more recent medical evidence may be accorded greater probative value than medical evidence submitted with a prior claim because of the progressive nature of pneumoconiosis); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982); Decision and Order at 20-23.

Dr. Rosenberg examined Claimant on January 15, 2018 and reviewed his medical records. Employer's Exhibit 2. He diagnosed a moderate airflow obstruction with "near normalization" after the administration of bronchodilators and noted that his gas exchange is mildly impaired. *Id.* at 3. Dr. Rosenberg concluded Claimant "would not be disabled" with "appropriate therapies for [his] hyperreactive airways" based on his post-bronchodilator results. *Id.* In his December 20, 2018 and October 16, 2019 supplemental reports, Dr. Rosenberg reiterated his conclusion that Claimant would not be totally disabled with appropriate therapies. Employer's Exhibits 3 at 6, 19 at 2.

Dr. Klayton prepared a report based on his review of Claimant's medical records and occupational history. Claimant's Exhibit 1. He noted Claimant worked as a rock truck driver and had to climb twelve rungs to enter the truck. *Id.* at 1-2. He also noted the pulmonary function study results showed a moderately severe to "severe partially reversible obstructive lung disease." *Id.* at 2. Dr. Klayton concluded that Claimant is totally disabled based on his pulmonary function study results and because he can only walk 100 feet on level ground. *Id.* at 4.

Dr. Tuteur prepared a report based on his review of Claimant's medical records. Employer's Exhibit 4. He observed a moderate obstructive ventilatory defect that improved after the administration of bronchodilators and stated Claimant's blood gas results were normal. *Id.* at 6. Dr. Tuteur opined that Claimant could sufficiently perform his last work as a truck driver with "proper treatment and compliance." *Id.* at 9-10.

The ALJ found the opinions of Drs. Ranavaya and Klayton well-documented and reasoned and the opinions of Drs. Rosenberg and Tuteur not well-reasoned. Decision and Order at 22. Thus, he found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer contends the ALJ did not provide sufficient reasons for discrediting the opinions of Drs. Rosenberg and Tuteur. Employer's Brief at 46. Employer also contends the opinions of Drs. Ranavaya and Klayton are not credible and that the ALJ failed to address "material flaws" in their conclusions. Thus, Employer asserts the ALJ's credibility determinations do not satisfy the APA.[19] *Id.* at 44-46. We disagree.

Contrary to Employer's contention, the ALJ permissibly found Drs. Rosenberg's and Tuteur's opinions unpersuasive because they relied on Claimant's respiratory capacity

[19] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, 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).

after administration of a bronchodilator to conclude he is not totally disabled.[20] 20 C.F.R. §718.204(b)(1); *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (The DOL has cautioned against reliance on post-bronchodilator results in determining total disability: "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis."); Decision and Order at 22. Therefore, we affirm the ALJ's discrediting of Drs. Rosenberg's and Tuteur's opinions.[21]

The ALJ also permissibly credited the opinions of Drs. Ranavaya and Klayton that Claimant is totally disabled, as supported by the qualifying pulmonary function studies and their understanding of the exertional requirements of Claimant's usual coal mine work. *See 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); *see also Owens*, 724 F.3d at 557; Decision and Order at 22. Moreover, to the extent Employer asserts Dr. Klayton misunderstood Claimant's blood gas study results, it has not explained why that undercuts his opinion that Claimant has a disabling impairment based on the pulmonary function study results which measure a different type of impairment than blood gas studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984); Employer's Brief at 45.

[20] As the ALJ accurately stated, the relevant question in assessing total disability "is whether a miner is able to perform his job from a respiratory standpoint, not whether he is able to perform his job after he takes medication." *Baird v. Westmoreland Coal Co.*, BRB No. 10-0254 BLA, slip op. at 9 (Dec. 23, 2010) (unpub.); *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980); *see also Lamb v. Brody Mining, LLC*, BRB No.20-0155 BLA, slip op. at 8 (June 29, 2021) (unpub.); *Robinson v. Rum Creek Coal Sales, Inc.*, BRB No. 20-0208, slip op. at 5 (Apr. 28, 2021) (unpub.); *Miles v. 17 West Mining, Inc.*, BRB No. 20-0007 BLA, slip op. at 10 (Jan. 5, 2021) (unpub.); Decision and Order at 22.

[21] Employer asserts Claimant could continue his last coal mine work because he worked as a van driver at the time of the hearing and had referenced digging a ditch as recent as 2014. Employer's Brief at 45-46; Employer's Exhibit 15 at 27. It further asserts the ALJ was required to examine whether the "skills and abilities" utilized by Claimant while driving a van and digging a ditch are "similar" or "equivalent" to those used when driving the rock truck at the mine. Employer's Brief at 45-46. As Employer's arguments are premised on Claimant's physical abilities while taking a variety of breathing medications multiple times per day, we reject Employer's arguments for the reasons stated above. 20 C.F.R. §718.204(b)(1); *see* 45 Fed. Reg. at 13,682; Decision and Order at 4, 22; Hearing Transcript at 25-26, 32, 34.

Employer's arguments regarding the medical opinions are 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). Because the ALJ acted within his discretion and explained his credibility determinations as the APA requires, we affirm his findings that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole.[22] Decision and Order at 22.

Consequently, we affirm the ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption and established a change in applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018) 20 C.F.R. §725.309 We further affirm, as unchallenged, the ALJ's determination that Employer did not rebut the presumption.[23] *See Skrack*, 6 BLR at 1-711; Decision and Order at 31-34.

[22] Even if we agreed with Employer that the ALJ erred in crediting the opinions of Drs. Ranavaya and Klayton, remand is not required as substantial evidence nonetheless supports the ALJ's conclusion that Claimant is totally disabled based on the qualifying pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). *See* 20 C.F.R. §718.204(b)(2) (valid and qualifying objective testing "shall establish" total disability "[i]n the absence of contrary probative evidence"); *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni*, 6 BLR at 1-1278.

[23] Employer generally asserts the ALJ erred in crediting the opinions of Drs. Ranavaya and Klayton that Claimant is totally disabled due to legal pneumoconiosis. Employer's Brief at 44-45. But Employer has the burden of proof on rebuttal and does not allege any error by the ALJ in rejecting the opinions of its experts relevant to rebuttal. 20 C.F.R. §718.305(d)(1); *Shinseki*, 556 U.S. at 413.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge