U.S. Department of Labor

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

BRB No. 21-0555 BLA

DENNIS PHILLIPS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIXIE FUEL COMPANY, LLC	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 03/16/2023
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (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 Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2019-BLA-05961) 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 subsequent claim filed on May 31, 2018.[1]

The ALJ found Claimant established twenty years of underground coal mine employment or surface coal mine employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found that Employer did not rebut the presumption and that Claimant established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309. Therefore he awarded benefits.

[1] Claimant filed two prior claims. Director's Exhibits 1, 2, 43. ALJ Joseph E. Kane denied his first claim on October 14, 2008, and the Board subsequently affirmed ALJ Kane's finding that Claimant failed to establish the existence of pneumoconiosis and, therefore, the denial of benefits. *D.P.* [*Phillips*] *v. Dixie Fuel Co., LLC*, BRB No. 09-0196 BLA (Oct. 26, 2009) (unpub.); Director's Exhibits 1, 43. Claimant filed a second claim, but later withdrew it. Director's Exhibits 2, 43. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also 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)(1); *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 Claimant did not establish the existence of pneumoconiosis in

On appeal, Employer argues the ALJ lacked the 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.[4] It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. Alternatively, it asserts the ALJ erred in finding Claimant established total disability and thus erred in invoking the Section 411(c)(4) presumption. Finally, it argues the ALJ erred in finding it did not rebut the presumption.[5]

Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenges, its argument that Claimant's pre-existing, non-respiratory disability due to a back injury precludes entitlement under the Act, and its challenge to the disability causation rebuttal standard.

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

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his prior claim, he had to submit new evidence establishing that element of entitlement to obtain review of the merits of his current claim. *Id.*

[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

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).[7] Employer's Brief at 14-18. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor ALJs on December 21, 2017, but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[8] *Id.*

The Director responds, asserting the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Brief at 4-7. He also maintains Employer failed to demonstrate the Secretary's actions

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[6] 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 5; Hearing Transcript at 10.

[7] *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 of the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor has conceded the Supreme Court's holding in *Lucia* applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] The Secretary of Labor (Secretary) 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 an 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 Morris.

ratifying the appointment were improper. *Id.* at 5-6. We agree with the Director's argument.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Id.* at 5 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, 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). Ratification 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 Hosp. Co.*, 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). Moreover, under the "presumption of regularity," courts presume public officers have 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 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 Morris and gave "due consideration" to his appointment in his December 21, 2017 letter to ALJ Morris. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Morris "as an Administrative Law Judge." *Id.* In so doing, the Secretary unequivocally accepted responsibility for the ALJ's prior appointment.[9]

Employer does not assert the Secretary had no "knowledge of all the material facts" but generally speculates he did not make a "detached and considered affirmation" when he ratified ALJ Morris's appointment. Employer's Brief at 16. It therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also*

[9] Employer's assertion that the Secretary, in his December 21, 2017 letter to ALJ Morris, "did not approve the appointment as his own" ignores that the Secretary explicitly approved the ALJ's prior appointment "in [his] capacity as head of the Department of Labor." Employer's Brief at 16; *c.f.* Secretary's December 21, 2017 Letter to ALJ Morris.

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 were valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier actions was proper).

Employer next argues the Secretary of Labor's ratification of ALJ Morris's appointment was a change in policy that is subject to the notice and comment provisions of the Administrative Procedure Act (APA). Employer's Brief at 16-17, *citing* 5 U.S.C. §553(b). However, Employer does not cite any authority to support its position that the APA requires the Secretary to provide the opportunity for notice and comment before ratifying the appointment of an inferior office. *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Lucia*, 138 S. Ct. at 2056 (the Appointments Clause provides the exclusive process for appointing inferior officers, who may be appointed by the President, a court of law, or the head of a department). Additionally, as the Director correctly points out, the APA contains an express exception for certain personnel matters. 5 U.S.C. §553(a)(2) ("This section applies, according to the provisions thereof, except to the extent that there is involved . . . a matter relating to agency management or personnel[.]"); Director's Brief at 6-7.

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clauses argument because incumbent ALJs remain in the competitive service. Employer's Brief at 22-23. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Morris's appointment, which we have held constituted a valid exercise of his authority, thereby bringing the ALJ's appointment into compliance with the Appointments Clause.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded to ALJs. Employer's Brief at 18-22. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* In addition, it relies on the United States Supreme Court's holding 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.* 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) the Board rejects Employer's arguments.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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, medical opinions, and the evidence as a whole.[10] 20 C.F.R. §718.204(b)(i), (iv); Decision and Order at 7-17.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies dated May 7, 2018, June 18, 2018, May 14, 2019, and November 6, 2019. Decision and Order at 8-10. All of the studies produced qualifying values,[11] but the ALJ found only the June 18, 2018 study is valid. *Id.* at 9-10; Director's Exhibits 14, 18; Claimant's Exhibit 3; Employer's Exhibit 2. Because

[10] The ALJ found the arterial blood gas studies do not establish total disability, and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 11.

[11] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

the study had both qualifying pre-bronchodilator and post-bronchodilator values,[12] the ALJ found the pulmonary function study evidence establishes total disability. Decision and Order at 10.

Employer argues the ALJ did not adequately consider Dr. Vuskovich's opinion that the June 18, 2018 study is invalid. Employer's Brief at 27-28. We disagree.

When considering pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co*., 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ, as the fact-finder, must determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

The ALJ considered Dr. Vuskovich's opinion that Claimant gave insufficient effort to produce a valid FEV1 or FVC result, that "[n]ot taking an initial deepest breath possibl[y] artificially lowered his FVC and FEV1 results," and that his respiratory rate and tidal volume were not sufficient to generate valid MVV results. Employer's Exhibit 5 at 7-8; *see* Decision and Order at 9-10. He also observed the technician that administered the study noted Claimant's effort and understanding were good, and that Dr. Gaziano validated the study. Decision and Order at 10; Director's Exhibits 11, 14.

The ALJ then permissibly found Dr. Vuskovich's statements unpersuasive given the technician's firsthand observations and Dr. Gaziano's subsequent validation. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7

[12] Employer generally contends the ALJ erroneously rejected the opinions of Drs. Rosenberg and Vuskovich that the pulmonary function testing is not qualifying when the values are adjusted for Claimant's age. Employer's Brief at 24-25. It does not identify any statement from either doctor opining that the June 18, 2018 study is not qualifying when accounting for Claimant's age. *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); 20 C.F.R. §802.211(b). Nor does the record support a finding that Dr. Rosenberg or Dr. Vuskovich opined that the June 18, 2018 study is non-qualifying. Employer's Exhibits 4-5, 9.

(1985); Decision and Order at 10. He further found that, because the variation between the two largest MVV results was less than ten percent, the MVV results meet the quality standards and further undermine Dr. Vuskovich's opinion. 20 C.F.R. Appendix B to Part 718; Decision and Order at 10. Thus, contrary to Employer's argument, the ALJ adequately addressed Dr. Vuskovich's opinion and explained why he was not persuaded by it. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 9-10.

Because the ALJ conducted a qualitative and quantitative review of the pulmonary function tests, and as Employer raises no further argument, we affirm the ALJ's finding the pulmonary function study evidence establishes total disability. *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740 (6th Cir. 2014); 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10.

Medical Opinion Evidence

Employer argues the ALJ erred in finding the medical opinion evidence establishes total disability. Employer's Brief at 26-29.

The ALJ considered the opinions of Drs. Ajjarapu, Rosenberg, and Vuskovich. Decision and Order at 12-17. Dr. Ajjarapu opined Claimant is totally disabled based on his pulmonary function and blood gas studies. Director's Exhibit 14. Drs. Rosenberg and Vuskovich opined Claimant is not totally disabled. Employer's Exhibits 4, 5, 8, 9. The ALJ found Dr. Ajjarapu's opinion is well-reasoned and documented and establishes total disability. Decision and Order at 16-17. He further discredited the opinions of Drs. Rosenberg and Vuskovich as not reasoned or documented. *Id.*

We reject Employer's assertion that the ALJ erred in discrediting Dr. Rosenberg's and Dr. Vuskovich's opinions. Employer's Brief at 26-27. Dr. Rosenberg generally opined Claimant is not totally disabled because the objective testing is not qualifying. Employer's Exhibits 4, 9. The ALJ permissibly discredited this opinion because the doctor failed to address the specific June 18, 2018 valid and qualifying study that establishes total disability. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 17. He also permissibly discredited Dr. Rosenberg's opinion because the doctor excluded total disability based on the November 6, 2019 pulmonary function study that the ALJ found is invalid. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *see also* 20 C.F.R. §718.103(c) (no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the regulatory quality standards).[13] With respect to Dr. Vuskovich, the

[13] Employer's reliance on the Board's decision in *Crapp v. U.S. Steel Corp.*, 6 BLR 1-476 (1983) is misplaced. Employer's Brief at 26-27. The regulation in effect at the time

ALJ noted the doctor excluded total disability because he assumed there are no valid pulmonary function studies. Decision and Order at 16; Employer's Exhibits 5, 8. The ALJ permissibly discredited Dr. Vuskovich's opinion as contrary to his finding the June 18, 2018 study is both valid and qualifying. *See Crisp,* 866 F.2d at 185; *Rowe,* 710 F.2d at 255; Decision and Order at 16-17.

Finally, citing *Peabody Coal Co. v. Vigna,* 22 F.3d 1388 (7th Cir. 1994), Employer argues the ALJ failed to consider that Claimant is totally disabled from working as a coal miner due a back injury and thus is not entitled to benefits. Employer's Brief at 30-31. For the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 17 (Oct. 18, 2022) we reject Employer's argument.

Thus, we affirm, as supported by substantial evidence, the ALJ's determination that the contrary medical opinion evidence does not undermine his finding that Claimant established total disability based on the pulmonary function study evidence.[14] 20 C.F.R.

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of that decision prohibited crediting invalid testing as evidence of an "impairment." 20 C.F.R. §718.103(c) (1980). Specifically, the prior regulation at issue stated: "no results of pulmonary function tests shall constitute evidence of a respiratory or pulmonary impairment unless such tests are conducted and reported in substantial compliance with this section and Appendix B." 20 C.F.R. §718.103(c) (1980). But the current version of the regulation clearly prohibits such testing from being credited as proof of the "presence or absence" of an impairment, 20 C.F.R. §718.103(c), rendering the Board's prior holding outdated and irrelevant. Further, in addressing comments "questioning the need for a statement regarding the cooperation of the patient from the supervising physician or technician conducting pulmonary function tests," the Department of Labor explained:

> [This information] serves to benefit the [miner] who gives maximum cooperation, but, because of the severity of his or her ailment, produces tracings which appear to be invalid. This can occur, for example, when an attempt at maximal expiration produces a fit of coughing; while the result of the pulmonary function test itself is invalid, the fact that an attempt at a forced expiratory maneuver produced uncontrolled coughing may be considered as evidence of a pulmonary impairment.

45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980).

[14] 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 Vuskovich do not undermine the pulmonary function study evidence, any error in finding total disability established through Dr.

§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. Because there is no evidence undermining the pulmonary function study evidence, we further affirm the ALJ's conclusionthat Claimant established total disability,[15] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and thus invoked the Section 411(c)(4) presumption.[16]

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

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Ajjarapu's medical opinion at 20 C.F.R. §718.204(b)(2)(iv) is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[15] Employer asserts the ALJ failed to give proper consideration to the non-qualifying arterial blood gas studies as contrary probative evidence. Employer's Brief at 29-30. Because they measure different types of impairment, non-qualifying blood gas studies do not necessarily call into question valid and qualifying pulmonary function 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).

[16] Employer generally argues the Affordable Care Act, which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 31 n.5. As Employer has offered no explanation or argument to support this assertion, we decline to address this issue, as it is inadequately briefed. *See* 20 C.F.R. §802.211(b); *Cox*, 791 F.2d at 446-47.

[17] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

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.[18]

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, 1-154-56 (2015). The Sixth Circuit holds this standard requires Employer to show Claimant's coal mine dust exposure "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a de minimis impact on the miner's lung impairment." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

The ALJ considered the opinions of Drs. Rosenberg and Vuskovich that Claimant does not have legal pneumoconiosis but has asthma unrelated to coal mine dust exposure. Decision and Order at 25-26; Employer's Exhibits 4, 5, 8, 9.

Employer argues the ALJ erred in discrediting the opinions of Drs. Rosenberg and Vuskovich. Employer's Brief at 32-34. We disagree.

Dr. Rosenberg excluded coal mine dust exposure as a causative factor for Claimant's airflow obstruction because he did not seek medical attention for respiratory complaints when he left the coal mines. Employer's Exhibit 4 at 7. He opined this means Claimant's "current respiratory complaints are of recent onset and are not representative of legal [pneumoconiosis]." *Id.* Dr. Vuskovich stated Claimant's asthma was not caused or aggravated by coal mine dust because his asthma symptoms were not severe when he was in the mines and may not have developed until after he left. Employer's Exhibit 5 at 20.

The ALJ permissibly rejected this reasoning as inconsistent with the regulations, which recognize that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[19] 20 C.F.R.

[18] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 19-24.

[19] Because the ALJ provided a valid reason for discrediting Dr. Rosenberg's opinion, we need not address Employer's additional arguments regarding the weight the

§718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP* [*Ray*], 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014) (affirming an ALJ's decision to discredit, as inconsistent with the Act, the opinion of a physician who eliminated coal mine dust as a cause of the miner's disease because "bronchitis associated with coal dust exposure usually ceases with cessation of exposure"); 65 Fed. Reg. at 79,971 ("[I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period."); Decision and Order at 25.

Moreover, Dr. Vuskovich opined Claimant does not have legal pneumoconiosis because coal dust does not cause or aggravate asthma. Employer's Exhibit 5 at 20. The ALJ noted the preamble to the revised 2001 regulations[20] recognizes asthma as a form of chronic obstructive pulmonary disease that can constitute legal pneumoconiosis if it is caused or aggravated by coal mine dust exposure. Decision and Order at 25, *citing* 65 Fed. Reg. at 79,920, 79,939. Thus, the ALJ permissibly found Dr. Vuskovich's opinion inadequately reasoned because he did not sufficiently explain why coal mine dust exposure did not significantly contribute to, or substantially aggravate, Claimant's impairment. *See Groves*, 761 F.3d at 601; *A& E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 25.

Because the ALJ permissibly discredited the opinions of Drs. Rosenberg and Vuskovich, we affirm his finding Employer did not disprove legal pneumoconiosis.[21] Decision and Order at 25-26. 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).

ALJ assigned his opinion. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 33-34.

[20] Contrary to Employer's argument, an ALJ may evaluate expert opinions in conjunction with the Department of Labor's discussion of the prevailing medical science set forth in the preamble. *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012).

[21] Dr. Ajjarapu diagnosed legal pneumoconiosis, and therefore the ALJ correctly found her opinion does not aid Employer on rebuttal. Decision and Order at 26 n.26; Director's Exhibit 14. Thus we need not address Employer's argument that her opinion is not credible. *Larioni*, 6 BLR at 1-1278; Employer's Brief at 34-35.

Disability Causation

The ALJ also found Employer failed to establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201."[22] 20 C.F.R. §718.305(d)(1)(ii); *see* Decision and Order at 26. He permissibly discredited the opinions of Drs. Rosenberg and Vuskovich on the cause of Claimant's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to his determination. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 27. We therefore affirm the ALJ's finding that Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption[23] and the award of benefits.

[22] Contrary to Employer's argument, the ALJ set forth the correct rebuttal standard and addressed whether Employer rebutted the presumption by establishing "that pneumoconiosis caused 'no part' of Claimant's respiratory total disability." Decision and Order at 26, *citing* 20 C.F.R. §718.305(d)(1)(ii); Employer's Brief at 35-36

[23] Thus, we also affirm the ALJ's finding that Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

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