U.S. Department of Labor

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

BRB Nos. 21-0095 BLA
and 21-0095 BLA-A

TEDDY ALVIN ROBINETTE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
BEVINS ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	DATE ISSUED: 5/16/2022
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for Claimant.

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

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal and Claimant cross-appeals Administrative Law Judge (ALJ) Peter B. Silvain, Jr's Decision and Order Awarding Benefits (2013-BLA-05378) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).[1] This case involves a subsequent claim filed on April 9, 2012.[2] Director's Exhibit 3.

The ALJ found Claimant established 13.81 years of coal mine employment and therefore could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). However, he found Claimant

[1] ALJ Alan L. Bergstrom issued a Decision and Order Awarding Benefits in this case on August 2, 2017. Pursuant to Employer's appeal, the Benefits Review Board remanded the case to ALJ Bergstrom, directing him to "reconsider the substantive and procedural actions taken and to issue a decision accordingly," because he took actions in the case before his appointment was ratified on December 21, 2017. *Robinette v. Bevins Energy, Inc.*, BRB Nos. 17-0626 BLA/A (May 13, 2018) (Order) (unpub.). ALJ Bergstrom subsequently issued a Decision and Order on Remand reaffirming his prior decision. Employer again appealed, and the Board again vacated his decision, this time remanding the claim for a hearing before a different, properly appointed ALJ in light of the decision in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). *Robinette v. Bevins Energy, Inc.*, BRB Nos. 18-0465 BLA/A (May 24, 2019) (unpub.). ALJ Silvain was then assigned the case.

[2] Claimant filed two prior claims. Director's Exhibit 1. The district director denied his most recent prior claim on August 15, 2002, for failure to establish any element of entitlement. *Id*. An ALJ dismissed this claim on June 17, 2003, for failure to appear at the hearing and respond to an order to show cause. *Id*.

[3] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground or

established the presence of complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. The ALJ further found Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b). Alternatively, considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established a totally disabling respiratory impairment due to simple clinical pneumoconiosis. 20 C.F.R. §§718.201(a), 718.204. He therefore found a change in an applicable condition of entitlement[4] established and awarded benefits. 20 C.F.R. §725.309(c).

On appeal, Employer argues the ALJ lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution.[5] It also argues the removal provisions applicable to ALJs render his appointment unconstitutional. On the merits, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis. It further argues the ALJ erred

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

[4] 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); *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's most recent prior claim was denied for failure to establish any element of entitlement, Claimant had to establish at least one element of entitlement in order to obtain review of the merits of the current claim. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.409; Director's Exhibit 1.

[5] 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.

in finding Claimant established he is totally disabled due to simple clinical pneumoconiosis. Claimant has filed a response, urging affirmance of the award of benefits. On cross-appeal, Claimant argues the ALJ erred in finding the evidence did not establish the existence of legal pneumoconiosis.[6] The Director, Office of Workers' Compensation Programs (the Director), filed a response to Employer's appeal, urging rejection of its constitutional challenges to the ALJ's appointment and removal protections.[7] Employer filed a reply to the Director's response 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.[8] 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).[9] Employer's Brief at 12; Employer's Reply at 8. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[10] but maintains the

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 13.81 years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[7] While the Director filed a Consolidated Response to Employer's Petition for Review and Brief and Claimant's Petition for Review and Brief on Cross-Appeal, his response addresses only arguments Employer raises in its appeal.

[8] 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); Claimant's Exhibit 9 at 15.

[9] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). 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 Appointments Clause. *Lucia*, 138 S. Ct. at 2055 (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

[10] The Secretary issued a letter to ALJ Silvain on December 21, 2017, stating:

ratification was insufficient to cure the constitutional defect in ALJ Silvain's prior appointment. Employer's Brief at 12-16; Employer's Reply at 1-5.

The Director responds that the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Response at 3-5. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* at 5-6. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 4 (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 properly discharged their official duties, with "the burden shifting to the attacker to show 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

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> 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 Silvain. ALJ Silvain issued no orders in this case until his November 7, 2019 Notice of Assignment, Notice of Hearing, and Pre-Hearing Order.

603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter but rather specifically identified ALJ Silvain and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Silvain. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Silvain "as an Administrative Law Judge." *Id.*

Employer does not assert the Secretary had no "knowledge of all material facts," but instead argues he "failed to comply with the instructions provided by the Solicitor General for proper ratification" when he ratified the ALJ's appointment. Employer's Brief at 14. Employer therefore has not overcome the presumption of regularity.[11] *Advanced Disposal,* 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient 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 valid where the 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" all its earlier actions was proper).[12] Consequently, we reject Employer's argument that this case should again be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded to ALJs. Employer's Brief at 16-21. Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice

[11] While Employer notes the Secretary signed the ratification letter "with an autopen," Employer's Brief at 14, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

[12] While Employer correctly states Executive Order 13843, which removes ALJs from the competitive civil service, applied only to future appointments, Employer's Brief at 20-21, 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 Silvain's appointment, which we hold is a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 19-20; Employer's Reply at 6. It also relies on the 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), and 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). Employer's Brief at 17-18; Employer's Reply at 6-8.

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-1138 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Moreover, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[13] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

[13] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1137-1138.

Entitlement – 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Clinical Pneumoconiosis

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). Claimant may establish the existence of pneumoconiosis by x-rays, autopsies or biopsies, operation of one the presumptions described in 20 C.F.R. §§718.304-306, or a physician's opinion. 20 C.F.R. §718.202(a)(1)-(4). The ALJ must consider all relevant evidence and weigh the evidence as a whole to determine if it establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[14]

[14] The ALJ found Claimant failed to establish the presence of legal pneumoconiosis. Decision and Order at 17-18.

Chest X-rays

The ALJ considered seven interpretations of four chest x-rays dated May 10, 2012, September 12, 2012, September 26, 2013, and May 8, 2019.[15] Decision and Order at 8-9; Director's Exhibits 11, 13-14; Claimant's Exhibits 1, 5; Employer's Exhibits 1-2, 13 at 230-31. The May 10, 2012 x-ray was read as positive for pneumoconiosis by Dr. Miller, a dually-qualified B reader and Board-certified radiologist, and Dr. Baker, a B reader. Director's Exhibits 11, 14. Conversely, Dr. Meyer, who is also dually-qualified, found the x-ray negative for the disease. Director's Exhibit 13. Dually-qualified physicians Drs. Poulos and Meyer opined the September 12, 2012 x-ray was positive for pneumoconiosis. Employer's Exhibit 2; Claimant's Exhibit 4. The September 26, 2013 x-ray was read as positive for pneumoconiosis by dually-qualified Dr. Kendall. Claimant's Exhibit 1; Employers Exhibit 1. The March 8, 2019 x-ray was read as positive for pneumoconiosis by Dr. Crum, who is also dually-qualified. Employer's Exhibit 13 at 230-31.

The ALJ found the May 10, 2012 x-ray positive for pneumoconiosis based upon a preponderance of the readings by well-qualified physicians. Decision and Order at 8. The ALJ further found the September 12, 2012, September 26, 2013,[16] and May 8, 2019 x-rays positive for pneumoconiosis based on the uncontradicted interpretations of the dually-qualified radiologists. Decision and Order at 8-9. The ALJ also noted a number of x-ray interpretations in Claimant's treatment records reported "abnormalities," but found they did not support or exclude a diagnosis of pneumoconiosis. *Id.* at 9-10. Thus, the ALJ found the x-ray evidence supported a finding of simple clinical pneumoconiosis. Decision and Order at 10.

Employer argues the ALJ impermissibly re-designated x-ray evidence without providing prior notice to the parties. Employer's Brief at 21-22. Specifically, it argues

[15] The May 8, 2019 x-ray interpretation by Dr. Crum was not designated by any of the parties as affirmative evidence, but was contained in Claimant's treatment records that Employer submitted. Employer's Evidence Summary Form; Claimant's Evidence Summary Form; Employer's Exhibit 13 at 230-31. Nonetheless, the ALJ considered it as affirmative evidence and considered the reading by Dr. Meyer of the September 12, 2012 x-ray as rebuttal evidence rather than affirmative evidence as Claimant designated it on his evidence summary form. Decision and Order at 9 n.24.

[16] Employer does not challenge the ALJ's finding that the September 26, 2013 x-ray is positive for simple clinical pneumoconiosis. Decision and Order at 9; Claimant's Exhibit 1; Employer's Exhibit 1. Accordingly, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

that re-designating the May 8, 2019 x-ray as Claimant's affirmative evidence without providing Employer an opportunity to rebut the x-ray's positive interpretation violates the principles of fairness underlying the evidentiary limitations and notions of due process.[17] *Id.*

While the Board has stated an ALJ "should" issue evidentiary rulings prior to rendering a decision on the merits of entitlement, *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc), error in failing to do so was harmless in this case. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1277 (1984). First, unlike the ALJ in *Preston*, the ALJ in this case did not exclude evidence from the record; he considered all of the evidence each party submitted, and Employer does not explain how its due process rights were violated by an inability to rebut a treatment record x-ray *it submitted*. Employer's Evidence Summary Form; *J.V.S. v. Arch of West Virginia/Apogee Co.*, 24 BLR 1-78, 1-86-1-87 (2008) (under plain language of the regulation, records generated as part of a miner's treatment "do not count against" claimants' affirmative and rebuttal evidence). Second, although the ALJ purported to consider the May 8, 2019 treatment x-ray as Claimant's affirmative evidence, the outcome regarding simple clinical pneumoconiosis would be the same had he considered the x-rays as the parties designated: all of the other films were positive for the disease, and he was required to consider the May 8, 2019 treatment x-ray regardless of the parties' designations. *Id.*; *Larioni*, 6 BLR at 1-1277.[18] Thus, we decline to vacate the ALJ's decision on this basis.[19]

Employer further contends the ALJ erred in his weighing of the May 10, 2012 and September 12, 2012 x-rays. Employer's Brief at 25-26. Employer's arguments lack merit.

In resolving the conflict in the interpretations of the May 10, 2012 x-ray, the ALJ found Drs. Miller and Meyer equally qualified and therefore accorded their interpretations equal weight. Decision and Order at 8. Contrary to Employer's arguments, the ALJ was

[17] While Employer directs this argument to the ALJ's weighing of the evidence regarding complicated pneumoconiosis, because this allegation of error also applies to his findings regarding simple clinical pneumoconiosis, we address the issue here. Employer's Brief at 21-22.

[18] We note that Employer raises no issue concerning the quality of the x-ray or the credentials and credibility of the reader.

[19] Because, as discussed in detail below, we affirm the ALJ's findings and conclusions with respect to simple clinical pneumoconiosis, any error with respect to complicated pneumoconiosis is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1277 (1984).

not required to credit Dr. Meyer based on his qualifications as a professor of radiology. *See Melnick v. Consol. Coal Co.*16 BLR 1-31, 1-36-37 (1991) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989) (en banc); Employer's Brief at 25. Moreover, Employer did not raise this issue below. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-4-7 (1995) (cannot raise argument before the Board for the first time on appeal); *Prater v. Director, OWCP*, 8 BLR 1-461, 1-462 (1986). Nor did the ALJ rely on an impermissible headcount of the x-ray interpretations in resolving the contrary readings. Employer's Brief at 25-26. Rather, he provided a quantitative and qualitative review of the x-ray interpretations, considering each physician's respective readings and credentials. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993).

Nor is there any merit to Employer's argument that the ALJ erred in finding the May 10, 2012 x-ray positive for pneumoconiosis when it was of low quality. Employer's Brief at 25. The regulations do not require x-rays to be of optimal quality; rather, they must "be of suitable quality for proper classification of pneumoconiosis." 20 C.F.R. §718.102(a). As no physician opined the May 10, 2012 x-ray was unreadable or unsuitable for classification of the disease,[20] the ALJ properly considered the May 10, 2012 x-ray. *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214, 1-1216 (1984). We therefore affirm the ALJ's determination that the May 10, 2012 x-ray is positive for pneumoconiosis. Decision and Order at 8.

We further reject Employer's argument that the ALJ erred in finding the September 12, 2012 x-ray positive for pneumoconiosis because Dr. Meyer's reading was speculative. Employer's Brief at 26. While Dr. Meyer noted respiratory bronchiolitis "may" have a similar appearance to "mild simple coal workers' pneumoconiosis," he nevertheless classified the x-ray as consistent with simple coal workers' pneumoconiosis, and recorded a profusion of 1/0 on the ILO x-ray form. Claimant's Exhibit 5; *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1271 (6th Cir. 1989) (ILO x-ray form a physician completes indicating the presence of pneumoconiosis is sufficient to support an ALJ's finding of pneumoconiosis); *Melnick*, 16 BLR at 1-37. Moreover, as the only other reading of this x-ray was positive for pneumoconiosis and all of the other x-rays were found to be positive for the disease, Employer has failed to explain why a determination that Dr. Meyer's interpretation is speculative would make any difference in the case. *Shinseki v. Sanders*,

[20] While Dr. Meyer classified the film as having a grade 3 quality due to underexposure and poor contrast, he did not indicate the film was unreadable or unsuitable for classification of disease. Director's Exhibit 13. Further, Drs. Forehand and Miller classified the film as grade 1 quality and Dr. Barrett, who provided a quality re-reading for the Director, opined it was a grade 2 quality film. Director's Exhibits 11, 14.

556 U.S. 396, 413 (2009) (dismissing error as harmless when appellant fails to explain how "error to which he points could have made any difference"); Employer's Exhibit 2. We therefore affirm the ALJ's determination that the September 12, 2012 x-ray is positive for pneumoconiosis.[21] Decision and Order at 8-9.

Finally, Employer argues the ALJ mischaracterized the x-ray interpretations within Claimant's treatment records in determining the treating physicians' notations of "abnormalities" supported a finding of pneumoconiosis. Employer's Brief at 27. Contrary to Employer's arguments, the ALJ did not find these treatment records support a diagnosis of pneumoconiosis. Employer's Brief at 27-28. Rather, the ALJ accurately noted the treatment records contain no diagnoses of pneumoconiosis but included numerous reports of abnormalities such as nodules, infiltrates, and chronic interstitial changes, with no specific causes identified. Decision and Order at 9-10; Employer's Exhibit 12-13. The ALJ rationally found these films neither established nor refuted the existence of pneumoconiosis. [22] *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (ALJ has discretion to determine the weight to accord an x-ray that is silent on the existence of pneumoconiosis).

Thus, we affirm the ALJ's finding that the x-ray evidence supports a finding of simple clinical pneumoconiosis. 20 C.F.R. § 718.201(a); Decision and Order at 10.

[21] We reject Employer's argument that the ALJ erred in finding the September 12, 2012 x-ray supports a finding of pneumoconiosis without considering Dr. Kendall's interpretation of a CT scan, performed the same day, which he opined was negative for pneumoconiosis. Employer's Brief at 26. The ALJ properly considered the x-rays at 20 C.F.R. §718.202(a)(1) and the CT scans at 20 C.F.R. §718.202(a)(3), and then weighed the evidence as a whole to determine if it established pneumoconiosis. Moreover, as discussed below, the ALJ permissibly found the interpretations of the September 12, 2012 CT scan in equipoise based on the conflicting interpretations of Drs. Meyer and Kendall. Decision and Order at 10-11.

[22] In the ALJ's later weighing of the x-ray evidence together, he again indicated the treatment record x-rays show abnormalities. Decision and Order at 10. While he indicates these x-rays would support his finding that the designated x-rays are positive for simple pneumoconiosis, he does not indicate the treatment records themselves establish pneumoconiosis. *Id*.

CT Scans

The ALJ also considered three CT scans, dated September 12, 2012, May 6, 2016 and July 1, 2019. Decision and Order at 10-11. He found this evidence, as a whole, inconclusive as to the presence of simple clinical pneumoconiosis. *Id.* at 11.

The ALJ first addressed two conflicting interpretations of the September 12, 2012 CT scan. Decision and Order at 10-11. Dr. Meyer interpreted the CT scan as showing "[t]iny centrilobular lung nodules with associated centrilobular emphysema," consistent with "possible mild simple coal workers' pneumoconiosis." Claimant's Exhibit 6. Conversely, Dr. Kendall opined the CT scan showed changes of emphysema/chronic obstructive pulmonary disease and no evidence of pneumoconiosis. Employer's Exhibit 12 at 248. The ALJ found the interpretations of the CT scan inconclusive for the presence of pneumoconiosis based on the conflicting interpretations of equally-qualified physicians. Decision and Order at 11.

The ALJ also noted interpretations of treatment record CT scans, dated May 6, 2016 and July 1, 2019, in which the radiologists did not diagnose pneumoconiosis but also noted abnormalities in the lungs for unspecified causes. Decision and Order at 10-11. The ALJ found these films neither supported nor disproved the existence of pneumoconiosis. *Id*. Therefore, the ALJ found the CT scan evidence neither established nor refuted the existence of pneumoconiosis. *Id.* at 14.

Contrary to the Employer's arguments, the ALJ did not mischaracterize Dr. Meyer's interpretation of the September 12, 2012 CT scan or substitute his judgement for that of the experts to find the CT scan positive for pneumoconiosis. Employer's Brief at 26. Given Dr. Meyer's finding of "upper lobe nodules" and his statement that he "must classify this as possible mild simple coal workers' pneumoconiosis," the ALJ's determination that his interpretation was positive for simple clinical pneumoconiosis is supported by substantial evidence. *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 11; Claimant's Exhibit 6. Thus, the ALJ permissibly found the two conflicting interpretations by equally-qualified radiologists, Dr. Meyer and Dr. Kendall, rendered the CT scan inconclusive for the presence of pneumoconiosis. *Staton*, 65 F.3d at 59; *Woodward*, 991 F.2d at 321; Decision and Order at 11.

Nor was the ALJ required to conclude treatment record CT scans that are silent on the existence of pneumoconiosis demonstrate an absence of the disease. *Marra*, 7 BLR at 1-218-19; Employer's Brief at 27. Rather, the ALJ permissibly found they neither support nor refute a diagnosis of pneumoconiosis as they merely report various unexplained abnormalities. *Marra*, 7 BLR at 1-218-19; Decision and Order at 11. We therefore affirm

the ALJ's finding that the CT scan evidence neither weighs for nor against the presence of simple clinical pneumoconiosis.[23] Decision and Order at 11.

Medical Opinions

Finally, the ALJ considered the opinion of Dr. Forehand, who found the presence of simple clinical pneumoconiosis, and the conflicting opinions of Drs. Jarboe and Rosenberg, who opined clinical pneumoconiosis was not present. Decision and Order at 11-14; Director's Exhibit 11; Claimant's Exhibit 8; Employer's Exhibits 3-5, 17-18, 20. The ALJ credited Dr. Forehand's opinion as well reasoned and documented and consistent with the radiographic evidence, and discredited the opinions of Drs. Jarboe and Rosenberg as inconsistent with this evidence. Decision and Order at 12-14.

Employer contends the ALJ's errors in weighing the x-ray evidence and CT scan evidence affected his consideration of the medical opinion evidence. Employer's Brief at 29. Because we have affirmed the ALJ's determination that the x-ray evidence supports a finding of simple clinical pneumoconiosis and the CT scan evidence is inconclusive, we reject Employer's arguments. As Employer raises no other challenges to the ALJ's weighing of Drs. Jarboe's and Rosenberg's opinions, we affirm his determination that they are entitled to little weight. Decision and Order 12-14.

We further reject Employer's argument that the ALJ erred in crediting Dr. Forehand's opinion. Employer's Brief at 29. The ALJ accurately noted Dr. Forehand's diagnosis of clinical pneumoconiosis was based on his examination of Claimant and his own interpretation of the May 10, 2012 x-ray. Decision and Order at 12. The ALJ permissibly credited his opinion because it was consistent with the underlying objective testing he considered, as well as the ALJ's weighing of the May 10, 2012 x-ray and the x-ray evidence as a whole. *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); Decision and Order at 14.

Because it is supported by substantial evidence, we affirm the ALJ's determination that the medical opinion evidence supports a finding of simple clinical pneumoconiosis. 20 C.F.R. §§ 718.201(a)(2), 718.202(a)(4); Decision and Order at 14. We therefore affirm the ALJ's finding that the evidence as a whole establishes the presence of simple clinical

[23] We need not address Employer's argument that the ALJ erred in finding CT scan evidence is not sufficiently reliable to undermine a finding of pneumoconiosis, as the ALJ nevertheless considered and found the CT scan evidence inconclusive. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 28-29.

pneumoconiosis; consequently, Claimant has established a change in an applicable condition of entitlement.[24] 20 C.F.R. §§718.202(a), 725.309(c)(3); Decision and Order at 14-15.

Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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 pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Employer challenges the ALJ's findings that Claimant established total disability based on the arterial blood gas studies and medical opinions, and in consideration of the evidence as a whole.[25]

Arterial Blood Gas Studies

The ALJ considered three arterial blood gas studies conducted on May 10, 2012, September 12, 2012, and September 26, 2013. Decision and Order at 20-21. The May 10, 2012 study was qualifying[26] at rest and with exercise. Director's Exhibit 11. The September 12, 2012 and September 26, 2013 studies were non-qualifying at rest. Employer's Exhibits 3, 5. The ALJ found the May 10, 2012 qualifying exercise study more relevant than the resting blood gas studies, as an exercise test is a better predictor of Claimant's level of disability. Decision and Order at 21. He therefore found the arterial

[24] We further affirm, as unchallenged on appeal, the ALJ's determination that Claimant's simple clinical pneumoconiosis arose out of his coal mine employment. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.203(b); Decision and Order at 15.

[25] The ALJ found the pulmonary function studies did not establish total disability and there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(i), (iii). Decision and Order at 19-20.

[26] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

blood gas studies support a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 21.

Employer argues the ALJ failed to consider evidence that the abnormal May 10, 2012 exercise blood gas study reflected a "transient" condition. Employer's Brief at 30-31. We disagree.

Employer does not contend the May 10, 2012 exercise blood gas study is invalid. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. Part 718, Appendix C. Rather, Employer argues it is not sufficient to show a totally disabling respiratory impairment due to a chronic disease. Employer's Brief at 30-31. The ALJ accurately noted Dr. Rosenberg opined that Claimant's allegedly "acute" disease could be a number of conditions, such as congestive heart failure, pulmonary emboli or clot of the lungs, diffuse emphysema with pneumonia, pulmonary hypertension, and high blood pressure. *Id*. The ALJ permissibly found his opinion unpersuasive because Dr. Rosenberg stated he was not aware of Claimant having any of these diseases and the record is devoid of any evidence of such diseases,[27] and there is no subsequent non-qualifying exercise study from which the ALJ could conclude Claimant's disabling impairment was temporary and had resolved. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 22-23.

The ALJ considered each arterial blood gas study and permissibly found the exercise study warranted more weight than the resting blood gas studies, as it is a better predictor of Claimant's ability to work in the mines. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co*., 2 BLR 1-972, 1-977 (1980); Decision and Order at 21. Accordingly, we affirm the ALJ's finding that the arterial blood gas study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(ii); Decision and Order at 21.

Medical Opinions

The ALJ next weighed the medical opinions of Drs. Forehand and Jarboe that Claimant is totally disabled and Dr. Rosenberg's contrary opinion that he is not. Decision and Order at 21-23; Director's Exhibit 11; Claimant's Exhibits 3, 8; Employer's Exhibits 3, 5, 17-18, 20. The ALJ found Dr. Forehand's opinion well documented and reasoned, and consistent with the underlying objective evidence and the ALJ's determination that the

[27] Contrary to Employer's arguments, while Drs. Rosenberg and Jarboe both opined Claimant has diffuse emphysema, the ALJ accurately noted that Dr. Rosenberg opined "diffuse emphysema with pneumonia on top of that," and not diffuse emphysema alone, could have caused the reduction in the blood gas study results. Decision and Order at 22; Employer's Exhibit 20 at 27; Employer's Brief at 31.

arterial blood gas studies establish total disability. Decision and Order at 21-22. Similarly, the ALJ found Dr. Jarboe's opinion consistent with the ALJ's determination that the arterial blood gas studies establish total disability. *Id.* at 22. Conversely, the ALJ found Dr. Rosenberg's opinion entitled to less weight because it was not well reasoned or documented and his opinion that the arterial blood gas studies do not support a diagnosis of total disability was contrary to the ALJ's determination. *Id.* at 22-23. The ALJ therefore found the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 23.

Employer contends the ALJ failed to address Dr. Rosenberg's opinion that subsequent resting blood gas study testing demonstrated Claimant was not totally disabled and that the exercise blood gas study was due to a transient or acute condition which later resolved. Employer's Brief at 30-32. Employer's contentions are without merit.

Dr. Rosenberg initially opined Claimant is totally disabled based upon the moderate reduction of his diffusing capacity with significant exercise-induced oxygenation abnormalities. Employer's Exhibit 5. He subsequently opined Claimant was not disabled based on his subsequent pulmonary function studies and resting arterial blood gas studies. Employer's Exhibits 17, 20. However, the ALJ permissibly found his rationale unpersuasive as he found the exercise study to be a more accurate assessment of Claimant's ability to perform his usual coal mine employment, and there is no subsequent exercise study showing an improvement in Claimant's condition. *See Coen*, 7 BLR at 1-31-32; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 22-23. As discussed above, the ALJ further permissibly found Dr. Rosenberg's opinion unpersuasive because the physician stated he was not aware of Claimant having any of the potential conditions he attributed the "acute" disease to, and the record is devoid of any evidence Claimant suffered from those conditions at the time of the study. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 22-23.

Thus, the ALJ permissibly found Dr. Rosenberg's opinion entitled to less weight because it was speculative and based on a premise contrary to the ALJ's determination that the arterial blood gas studies support a finding of total disability. *See Rowe*, 710 F.2d at 255; *Crisp*, 866 F.2d at 185. As Employer raises no other challenges to the ALJ's weighing of the medical opinion evidence, we affirm the ALJ's determination that the medical opinion evidence supports a finding of total disability.[28] 20 C.F.R. §718.204(b)(iv); Decision and Order at 23.

[28] Employer argues the ALJ relied solely upon the exercise blood gas study and Dr. Forehand's opinion to find total disability. Employer's Brief at 30. However, the ALJ also

Consequently, we also affirm the ALJ's determination that Claimant established total disability based on the evidence as a whole.[29] 20 C.F.R. §§718.204(b), 725.309.

Disability Causation

To establish disability causation, Claimant must prove his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

The ALJ considered the medical opinion evidence regarding the cause of Claimant's disabling impairment. Decision and Order at 22-24. Dr. Forehand opined Claimant's pneumoconiosis substantially contributed to his blood gas exchange abnormality with exercise. Director's Exhibit 11; Claimant's Exhibit 8. Dr. Rosenberg opined that the disabling exercise blood gas study was due to a temporary condition that later resolved, and therefore was not due to pneumoconiosis. Employer's Exhibit 5 at 19; Employer's Exhibit 17 at 10; Employer's Exhibit 20 at 28-30. Dr. Jarboe opined Claimant's totally disabling impairment is due to emphysema caused by smoking and not to pneumoconiosis, as Claimant did not suffer from the disease. Employer's Exhibit 18 at 10. The ALJ found Dr. Forehand's opinion persuasive. Decision and Order at 23. Conversely, he found the opinions of Drs. Rosenberg and Jarboe unpersuasive as Dr. Rosenberg did not diagnose total disability and neither physician diagnosed clinical pneumoconiosis. *Id*.

Employer contends the ALJ failed to consider the opinions of Drs. Rosenberg and Jarboe that Claimant's impairment is due to diffuse emphysema. Employer's Brief at 31. Contrary to Employer's arguments, the ALJ considered these opinions and permissibly

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credited the opinion of Dr. Jarboe, who agreed Claimant is totally disabled from a respiratory impairment. Decision and Order at 22; Employer's Exhibit at 18 at 10.

[29] We further reject Employer's argument that Claimant is precluded from receiving benefits under the Act because he was previously disabled from a back injury. Employer's Brief at 32-22. The regulations state that a non-pulmonary condition that causes an independent disability unrelated to a miner's pulmonary impairment "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a); *see also Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 216-17 (6th Cir. 1996); *Youghiogheny & Ohio Coal Co. v. McAngues*, 996 F.2d 130 (6th Cir.1993), *cert. denied*, 510 U.S. 1040 (1994).

found them undermined because they did not diagnose clinical pneumoconiosis and Dr. Rosenberg did not diagnose total disability, contrary to the ALJ's findings. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997) (ALJ may discount the opinion of a physician as to disability causation because he did not diagnose pneumoconiosis); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 24. Further, as discussed above, the ALJ accurately noted Dr. Rosenberg opined that Claimant's allegedly "acute" disease could be a number of conditions such as congestive heart failure, pulmonary emboli or clot of the lungs, diffuse emphysema with pneumonia, pulmonary hypertension, and high blood pressure. Decision and Order at 22-23. The ALJ permissibly found this opinion unpersuasive because Dr. Rosenberg stated he was not aware of Claimant having any of these diseases and the record is devoid of any evidence of such diseases. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 22-23.

As Employer raises no further allegations of error in the ALJ's weighing of the medical opinion evidence, we affirm the ALJ's finding that the medical opinion evidence establishes Claimant's totally disabling respiratory impairment was due to clinical pneumoconiosis, and therefore the award of benefits.[30] 20 C.F.R. §718.204(c); Decision and Order at 24-25.

[30] Because we affirm the ALJ's findings that Claimant established his entitlement to benefits by establishing total disability due to clinical pneumoconiosis under Part 718 of the Act, we need not address Employer's allegations of error regarding the ALJ's findings that complicated pneumoconiosis was established under Section 411(c)(3). *Larioni*, 6 BLR at 1-1277; Employer's Brief at 21-24. Moreover, because we affirm the award of benefits, we need not address Claimant's arguments on cross-appeal.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge