U.S. Department of Labor

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

BRB No. 20-0075 BLA

SHERRY JOHNSON, Administratrix of the Estate of IDA ADAMS, o/b/o IDA ADAMS, Widow of CLINITON ADAMS	)	
Claimant-Respondent	)	
v.	)	
PEABODY COAL COMPANY, c/o UNDERWRITERS SAFETY & CLAIMS	)	
and	)	DATE ISSUED: 11/14/2022
Self-Insured through PEABODY ENERGY CORPORATION	)	
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 Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Cynthia Liao (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

ROLFE and JONES, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Awarding Benefits (2018-BLA-05540) 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 survivor's claim filed on April 22, 2016.

The ALJ initially found Peabody Coal Company (Peabody Coal), self-insured through its parent company, Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. He also found Claimant established the Miner had at least twenty-nine years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the district director, the Department of Labor (DOL) official who initially processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It

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

[2] 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.

also asserts the district director's duties create an inherent conflict of interest that violates its due process rights. It further argues the ALJ erred in finding it liable for the payment of benefits. Additionally, Employer argues the ALJ erred in calculating the length of the Miner's coal mine employment and in finding the Miner was totally disabled at the time of his death, thereby invoking the Section 411(c)(4) presumption. Finally, it argues the ALJ erred in finding it did not rebut the presumption.

Claimant[3] 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 Appointments Clause and due process challenges. The Director also contends the ALJ properly determined Employer is responsible for the payment of benefits.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Responsible Operator/Carrier

Employer does not directly[5] challenge the ALJ's findings that Peabody Coal is the correct responsible operator and it was self-insured by Peabody Energy on the last day

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U.S. Const. art. II, § 2, cl. 2.

[3] The Miner's widow died on March 15, 2018, and her daughter is pursuing her survivor's claim on her behalf. Director's Exhibit 5. Thus her daughter is now the Claimant in this case.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky and Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Tr. at 15.

[5] Employer argues the record establishes "Claimant's employment occurred with Heritage Coal Company, LLC" (Heritage Coal) and not Peabody Coal Company (Peabody Coal). Employer's Brief at 27-28 (unpaginated). To the extent Employer argues Peabody Coal did not employ Claimant, we reject this argument. The ALJ acknowledged the Miner's Social Security Administration earnings records indicate Heritage Coal employed him from 1968 to 1986. Decision and Order at 4. He found, however, Peabody Coal had changed its name to Heritage Coal after the Miner retired. *Id.* at 4 n.12. Substantial evidence supports this finding. The Miner's employment history form and state workers'

Peabody Coal employed the Miner; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 5. Patriot Coal Corporation ("Patriot") was initially another Peabody Energy subsidiary. Director's Exhibits 3-6, 26, 41. In 2007, after the Miner ceased his coal mine employment with Peabody Coal, Peabody Energy transferred a number of its other subsidiaries, including Peabody Coal, to Patriot. *Id*. That same year, Patriot was spun off as an independent company. *Id*. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. Director's Exhibit 41 at 59-60. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Peabody Coal, Patriot later went bankrupt and can no longer provide for those benefits. Director's Exhibits 15, 41. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Peabody Coal when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 3-6.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund (the Trust Fund), not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 10-27 (unpaginated). It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[6] and (2) the regulatory scheme, whereby the district director must determine the liability of a responsible operator and its carrier when the DOL also administers the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing. The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (Oct. 25, 2022) (en banc); *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022); and

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compensation award list Peabody Coal as his former employer. Director's Exhibits 3, 26 at 2-3. Moreover, Peabody Energy Company's (Peabody Energy) 2013 SEC filing referenced Heritage Coal, formerly known as Peabody Coal, and the U.S. Bankruptcy Court for the Eastern District of Missouri's order in Patriot Coal Corporation's (Patriot) bankruptcy proceedings referred to a 2007 Memorandum of Understanding Regarding Job Opportunities between the United Mine Workers of America and Peabody Coal, now known as Heritage Coal. Director's Exhibits 13 at 6, 14 at 3. For the purposes of this decision, we will refer to the responsible operator as Peabody Coal.

[6] Employer raised this argument for the first time in this claim in its appeal to the Board.

Graham v. E. Assoc. Coal Co., BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments.

Further, in support of its assertion that Peabody Energy is not the liable insurance carrier, Employer submitted documentary evidence to the ALJ identified as Employer's Exhibits 1 through 7 that the ALJ excluded. October 3, 2018 Order. Employer argues the ALJ erred in excluding some liability evidence from the record. Employer's Brief at 22-26 (unpaginated). It only identifies three specific pieces of evidence that it alleges the ALJ improperly excluded: an October 22, 2007 Separation Agreement between Peabody Energy and Patriot; a March 4, 2011 Decision granting Patriot authority to act as self-insurer; and a March 4, 2011 letter from the DOL to Patriot acknowledging Patriot's authority to act as self-insurer. Employer's Brief at 25 (unpaginated); *see* Director's Exhibit 41; Employer's Exhibits 1, 2. As the Director correctly argues, the ALJ admitted these three specific exhibits insofar as he admitted Director's Exhibits 1-50, and Director's Exhibit 41 includes these three pieces of evidence. Director's Brief at 4, 6, 9; Hearing Tr. at 8-9. Thus Employer's evidentiary arguments are moot.[7] *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

The ALJ correctly found Employer did not present any evidence that Peabody Energy is unable to assume liability for the Miner's benefits.[8] Decision and Order at 5-6;

[7] As Employer does not specifically challenge the ALJ's exclusion of Employer's Exhibits 3 through 7, we affirm his evidentiary ruling with respect to this evidence. *See Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.456(b)(1), 802.211(b); October 3, 2018 Order.

[8] Employer asserts the ALJ erred in finding Peabody Energy is the liable carrier because the ALJ "analyzed the Patriot and Peabody Energy issue like a traditional prior/successor operator situation." Employer's Brief at 26-27 (unpaginated). As the Director correctly asserts, the ALJ did not render any findings regarding a prior/successor operator relationship in holding Employer liable for benefits. Director's Brief at 8. The ALJ acknowledged Employer's argument that Patriot is now the proper responsible operator because it assumed all of Peabody Coal's assets and liabilities. Decision and Order at 5. He set forth the applicable regulations defining a successor operator, including that a successor operator is created if a prior operator ceases to exist by reason of a sale of substantially all its assets, or as a result of merger, consolidation, or division. *Id.*, *citing* 20 C.F.R. § 725.492. He correctly noted, however, that "the regulations clearly state that the creation of a successive operator does not relieve a prior operator of liability if the prior operator meets the conditions set forth in [20 C.F.R. §725.494]." *Id.* Employer does not

20 C.F.R. §§725.494(e), 725.495(a)(3). As Employer raises no additional arguments, we affirm the ALJ's determination that Employer is liable for this claim.

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

Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner 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). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination on length of coal mine employment if it is based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Employer argues the ALJ erred by rendering indefinite and inconsistent coal mine employment findings. Employer's Brief at 2-3 (unpaginated). It contends the ALJ first stated the Miner had "at least" twenty-nine years of coal mine employment, but then found he had "over" twenty-nine years of coal mine employment. *Id*. Employer does not, however, challenge the ALJ's finding that the Miner had at least fifteen years of underground coal mine employment; thus, we affirm this finding. *Skrack*, 6 BLR at 1-711; Decision and Order at 15. Employer has therefore failed to demonstrate how a more definite length of coal mine employment finding would have made any difference to the ALJ's decision to find the Miner's more than fifteen years of coal mine employment was sufficient to invoke the Section 411(c)(4) presumption. *See Shinseki*, 556 U.S. at 413; *see also Muncy*, 25 BLR at 1-27-28.

Total Disability

A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented 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.*

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dispute that Peabody Coal meets the criteria of a potentially liable operator under 20 C.F.R. §725.494.

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 medical opinions and the evidence as a whole.[9] 20 C.F.R. §718.204(b)(2); Decision and Order at 19.

Employer argues the ALJ erred in finding the medical opinions establish total disability. Employer's Brief at 3-7 (unpaginated).

The ALJ considered the medical opinions of Drs. Alam, Broudy, and Rosenberg. Dr. Alam treated the Miner for ten years and opined he had a disabling pulmonary impairment. Director's Exhibit 9. Dr. Broudy opined that if the Miner's pulmonary function studies were valid, he would have been disabled from a respiratory standpoint. Employer's Exhibit 11 at 3. But Dr. Broudy stated that he could not "corroborate that the studies are indeed valid." *Id*. Dr. Rosenberg stated he was not provided any valid pulmonary function studies to review, and therefore the Miner "may have been disabled from a respiratory perspective" but the objective testing cannot "substantiate this." Employer's Exhibit 10 at 6.

The ALJ found Drs. Broudy's and Rosenberg's opinions inconclusive and thus entitled to "less weight." Decision and Order at 17. Conversely, he determined Dr. Alam was the Miner's treating physician in accordance with 20 C.F.R. §718.104(d)[10] and found the doctor's opinion well-reasoned and documented. Decision and Order at 17-19. Thus he found Dr. Alam's opinion entitled to "substantial weight over the other physicians of record" and Claimant established total disability based on Dr. Alam's opinion. *Id*.

Employer argues the ALJ erred in finding Dr. Alam's opinion reasoned and documented because it is "contrary to [his] finding" that the pulmonary function and arterial blood gas studies "are, by themselves, insufficient to form the basis of a finding of disability." Employer's Brief at 4-5 (unpaginated). We disagree.

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[9] The ALJ found the pulmonary function and arterial blood gas studies do not establish total disability and there is no evidence the Miner had cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 16.

[10] In weighing the medical evidence of record relevant to whether a miner was totally disabled due to pneumoconiosis, the adjudicator "must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the adjudicator shall take into consideration the following factors: nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4).

Dr. Alam noted the Miner "had significant abnormality in his lungs evident by his chronic pulmonary symptoms with chronic bronchitis and shortness of breath, [a] positive x-ray and [pulmonary function studies] meeting the disability criteria." Director's Exhibit 9. He further noted the Miner "suffered from cor pulmonale[11] with significant elevated PA pressures because of the poor lung function" and "also was on home oxygen." *Id*. In addition, he stated the Miner's "[pulmonary function studies] show[] no bronchodilator response" and "[h]is blood gas [studies] show[] severe hypoxemia requiring oxygen treatment." *Id*. He concluded the pulmonary function studies and arterial blood gas studies from the Miner's treatment records support "pulmonary disability," as they met "the criteria for it." *Id*.

In addition, the ALJ noted Dr. Alam treated the Miner "over a decade, from September 14, 2006 through 2015," for "his [chronic obstructive pulmonary disease (COPD)], chronic bronchitis, emphysema, dyspnea, recurrent pneumonias and acute upper respiratory infections, all of which are respiratory or pulmonary conditions." Decision and Order at 18. He also noted "the records document that the (sic) Dr. Alam saw the Miner frequently throughout a year, usually every 1-2 months." *Id*. He further stated that while "the [pulmonary function studies] and [arterial blood gas studies] are, by themselves, insufficient to form the basis of a finding of disability" because they did not conform to the quality standards, "they do indicate that the Miner suffered from some level of respiratory insufficiency." *Id*. at 19. Additionally, he determined the lack of arterial blood gas studies in the treatment records did not "significantly detract[] from Dr. Alam's opinion given the quantity of other objective testing in the record."[12] *Id*. at 18.

Contrary to Employer's argument, the ALJ permissibly found Dr. Alam's disability opinion well-reasoned and well-documented because it is "based upon relevant work and medical histories, multiple physical examinations over many years, and numerous objective tests." Decision and Order at 19; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th

[11] We reject Employer's argument that the ALJ erred in failing to consider whether Dr. Alam's opinion that the Miner had cor pulmonale is undermined by the ALJ's finding at 20 C.F.R. §718.204(b)(2)(iii). The ALJ specifically emphasized that there is no evidence in the record to show the Miner "suffered from cor pulmonale *with right-sided congestive heart failure*," Decision and Order at 16 n.46 (emphasis in original), and thus Dr. Alam's opinion is not contrary to the ALJ's finding. Employer's Brief at 5 (unpaginated).

[12] The ALJ noted the treatment records "contain no formal [arterial blood gas studies]," but stated these records "repeatedly indicate the Miner suffered from hypoxemia and qualified for home oxygen use." Decision and Order at 18.

Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Moreover, the ALJ permissibly found Dr. Alam's "long-term relationship with the Miner as his treating pulmonologist gave him a greater understanding of the Miner's respiratory and pulmonary capabilities." *Id.* at 19; *see* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians get "the deference they deserve based on their power to persuade").

Employer also argues the ALJ erred in crediting Dr. Alam's opinion because the doctor's conclusion is contrary to his finding that the objective testing is insufficient to establish total disability. Employer's Brief at 4-5. We disagree. The fact that the ALJ found the pulmonary function study and blood gas study evidence insufficient to establish total disability does not preclude a finding of total disability based on a reasoned medical opinion. The regulations specifically provide total disability may be established based on a physician's reasoned opinion that a miner could not perform his usual coal mine employment, even when the pulmonary function and arterial blood gas studies are non-qualifying.[13] 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997).

Further, the ALJ noted the qualifying August 31, 2006 and December 21, 2006 pulmonary function studies in Dr. Alam's treatment records "were non-conforming to the regulations" because the August 31, 2006 study had "insufficient tracing" and the spirometry of the December 21, 2006 study "was not reproducible or acceptable," but stated both studies "demonstrate his ongoing treatment and testing of the Miner." Decision and Order at 16-18. A lack of tracings by itself, however, is not reason enough to invalidate a pulmonary function study. *See DeFore*, 12 BLR at 1-28-29. Moreover, as Claimant asserts, the quality standards do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing conducted as part of a miner's treatment); Claimant's Brief at 15. And even if that was not the case, the ALJ's incorrect finding the tests cannot establish disability *on their own* does not undermine his finding that Dr. Alam's disability opinion is well-reasoned and well-documented based on relevant work and medical histories, numerous objective tests, and

[13] Employer argues Dr. Alam considered medical records not contained in the record in rendering his opinion. Employer's Brief at 5 (unpaginated). It thus contends Dr. Alam's opinion "should be rendered poorly documented." *Id.* Because Employer makes this argument for the first time to the Board and did not raise it to the ALJ, we decline to consider it. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021).

multiple physical examinations he conducted over many years as the Miner's treating physician. *See Larioni*, 6 BLR at 1-1278; *see also Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; Decision and Order at 19.

We also reject Employer's argument that the ALJ erred in discrediting the opinions of Drs. Broudy and Rosenberg. Employer's Brief at 3-4. Dr. Broudy opined that "[i]f the pulmonary function studies were valid[,] then clearly he did not have the capacity to do such work." Employer's Exhibit 11. Dr. Rosenberg stated "[the Miner] may have been disabled from a respiratory perspective." Employer's Exhibit 10. He further stated "[he] cannot state for certain that [the Miner] was disabled." *Id*. The ALJ noted Drs. Broudy and Rosenberg "indicated the Miner may have been disabled from a pulmonary or respiratory condition but found the [pulmonary function study] evidence they reviewed to be insufficient to make a definitive determination." Decision and Order at 17. He further stated "they were unable to conclusively state whether or not the Miner was totally disabled from a respiratory or pulmonary impairment." *Id*. Thus, the ALJ permissibly found their disability opinions inconclusive. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

We therefore affirm the ALJ's finding that Claimant established total disability based on Dr. Alam's medical opinion, 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 19.[14]

[14] Our dissenting colleague asserts the ALJ did not satisfy the Administrative Procedure Act (APA) in finding the medical opinions establish disability because Dr. Alam referenced pulmonary function and arterial blood good tests that the ALJ determined, *on their own*, are not sufficiently reliable to support disability. We disagree. The regulations specifically mandate that medical opinions can establish disability "even when the pulmonary function and arterial blood gas studies are non-qualifying." 20 C.F.R. §718.204(b)(2)(iv). Here, there is not even a question of whether the tests were qualifying (they all met the disability criteria); the sole question is whether they were reliable enough to establish disability *as a separate category* under 20 C.F.R. §718.204(b)(2). And Employer's and our colleague's insistence that the tests were completely invalid for not conforming to the quality standards misses the point in that inquiry: the tests were done during the Miner's treatment, not for the purposes of litigation, so they cannot be completely invalidated simply by pointing to the quality standards. 20 C.F.R. §§718.101, 718.103, 718.105; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment). The ALJ's decision

As substantial evidence supports the ALJ's findings that Claimant established the Miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death, we affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[15] or "no

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not to credit the August 2006 study solely for not containing three tracings is similarly flawed. *Id.*

Regardless, after determining the tests did not establish disability on their own, the ALJ was well within his authority to find "they do indicate the Miner suffered from some level of respiratory disability," and that they also "demonstrate the ongoing testing and treatment of the Miner." Decision and Order at 19. Indeed, the ALJ spent the majority of his disability analysis explaining why the medical opinions and treatment records establish disability even though the tests do not do it on their own. *Id.*, at 17-19. Among those reasons were Dr. Alam's notations in the over 600 pages of records he generated in treating the Miner's respiratory condition for over a decade that the Miner suffered from "chronic respiratory failure, cor pulmonale, significantly elevated PA pressures, multiple bouts of pneumonia, and was on home oxygen." *Id.* at 18-19. The ALJ reasonably concluded that under these circumstances the non-conforming nature of the tests did "not significantly detract from [Dr. Alam's] opinion given the quantity of other objective tests in the record." *Id.*, at 18. His explanation for crediting Dr. Alam's opinion both accounted for what he considered flaws in some of the objective tests and was eminently reasonable, as was his discrediting of Drs. Broudy and Rosenberg for failing to account for anything beyond the fact that the tests -- which are not subject to the quality standards -- did not satisfy them. No more is required. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002) (APA satisfied where ALJ properly addressed the relevant evidence and provided a sufficient rationale for his findings); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why he did it, the duty of explanation under the APA is satisfied).

[15] "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

part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[16]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, whose law applies to this claim, requires Employer to establish the Miner's "coal mine employment 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).

Employer relies on Drs. Broudy's and Rosenberg's opinions to disprove legal pneumoconiosis. Employer's Exhibits 10, 11. The ALJ found their opinions not well-reasoned, conclusory, speculative, and thus do not rebut the presumption. Decision and Order at 24.

Employer does not specifically challenge the ALJ's credibility findings with respect to Dr. Broudy. Thus we affirm the ALJ's rejection of his opinion. *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Skrack*, 6 BLR at 1-711; Decision and Order at 24.

With respect to Dr. Rosenberg, Employer argues the ALJ erred in discrediting his opinion. Employer's Brief at 8-9. We disagree. Dr. Rosenberg noted "over the years" the Miner "was treated for [COPD]." Employer's Exhibit 10 at 6. He also noted the Miner

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impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[16] The ALJ found Employer failed to disprove the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i)(B); Decision and Order at 23.

"may have been disabled from a respiratory perspective," but he could not "state for certain that [the Miner] was disabled or in fact that such a disability was related to past coal mine dust exposure." *Id*. at 6, 7. The ALJ stated Dr. Rosenberg noted "the Miner received frequent treatment for bronchitis and COPD but never attributed these conditions to any cause." Decision and Order at 24. He permissibly found Dr. Rosenberg did not adequately explain why the Miner's twenty-nine years of coal mine dust exposure did not contribute, at least in part, to his obstructive lung disease. *See* 20 C.F.R. §718.201(a)(2); *Young*, 947 F.3d at 403-07; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 24.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012). Employer's arguments on legal pneumoconiosis are a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ acted within his discretion in discrediting Drs. Broudy's and Rosenberg's opinions, we affirm his finding that Employer did not disprove legal pneumoconiosis.[17] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); Decision and Order at 24. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[18] Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(2)(i).

Death Causation

The ALJ next considered whether Employer established "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); Decision and Order at 25. Contrary to Employer's argument, the ALJ

[17] Employer asserts the ALJ's error in rendering indefinite and inconsistent coal mine employment findings could affect whether Dr. Alam's medical opinion that the Miner had legal pneumoconiosis is credible. Employer's Brief at 2-3 (unpaginated). Dr. Alam's opinion is not supportive of Employer's burden to rebut the presumed fact of legal pneumoconiosis. Consequently, we need not address Employer's assertion regarding the credibility of Dr. Alam's opinion at 20 C.F.R. §718.305(d)(2)(i)(A). *Larioni*, 6 BLR at 1-1278.

[18] Because we affirm the ALJ's finding that Employer failed to disprove legal pneumoconiosis, we need not address Employer's challenges to his finding that it also failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 23; Employer's Brief at 7-8 (unpaginated).

permissibly discredited Drs. Broudy's and Rosenberg's death causation opinions because the doctors failed to diagnose legal pneumoconiosis, contrary to his finding that Employer did not disprove the existence of the disease. *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); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 25; Employer's Brief at 9-10 (unpaginated). Thus we affirm the ALJ's finding that Employer failed to establish no part of the Miner's death was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

I concur in my colleague's decision to affirm the ALJ's liability determination. However, while I agree with the decision to affirm the ALJ's unchallenged finding that the Miner had at least fifteen years of underground coal mine employment, I respectfully dissent as to affirming his findings that Claimant established total disability and thus invoked the presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018). Because the ALJ did not adequately set forth the bases for his credibility determinations, I would vacate his findings that the medical opinions established total disability and that the evidence when weighed together as a whole established total disability.

The ALJ considered Dr. Alam's treatment relationship with the Miner in accordance with 20 C.F.R. §718.104(d) and concluded the doctor's opinion that the Miner had a

disabling pulmonary impairment is well-reasoned and documented. Decision and Order at 17-19. He also concluded Drs. Broudy's and Rosenberg's contrary opinions are inconclusive. *Id*. at 17. Because the ALJ found Dr. Alam's opinion entitled to "significant and substantial weight as he provided the Miner with consistent treatment of his pulmonary conditions for over ten years and administered and reviewed more objective testing than the other physicians of record," he concluded Claimant established total disability based on Dr. Alam's opinion. *Id*. at 19. However, while the ALJ analyzed in detail Dr. Alam's status as the Miner's treating physician, the weight given to a treating physician's opinion "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians get "the deference they deserve based on their power to persuade").

Employer's argument that the ALJ erred in finding Dr. Alam's opinion reasoned and documented because it is "contrary to [his] finding" that the pulmonary function and arterial blood gas studies "are, by themselves, insufficient to form the basis of a finding of disability" has merit. Employer's Brief at 4-5 (unpaginated).

Dr. Alam noted the Miner "had significant abnormality in his lungs evident by his chronic pulmonary symptoms with chronic bronchitis and shortness of breath, [a] positive x-ray and [pulmonary function studies] *meeting the disability criteria*." Director's Exhibit 9 (emphasis added). He further noted the Miner "suffered from cor pulmonale with significant elevated PA pressures because of the poor lung function" and "also was on home oxygen." *Id*. In addition, he stated the Miner's "[pulmonary function studies] show[] no bronchodilator response" and "[h]is blood gas [studies] show[] severe hypoxemia requiring oxygen treatment." *Id*. He concluded the pulmonary function studies and arterial blood gas studies from the Miner's treatment records support "pulmonary disability," as they met "*the criteria for it*." *Id*. (emphasis added).

The ALJ determined, however, that the qualifying August 31, 2006 and December 21, 2006 pulmonary function studies and qualifying May 9, 2011, July 24, 2012, and April 30, 2015 arterial blood gas studies contained in the treatment records are invalid.[19] Decision and Order at 17-18. He specifically found the invalid pulmonary function studies "cannot be used in determining the Miner's pulmonary condition" and the invalid blood

[19] These pulmonary function and arterial blood gas studies are contained in treatment records from Mountain Comprehensive Healthcare Center and Whitesburg ARH. Director's Exhibit 10; Employer's Exhibit 12.

gas studies "are not an accurate representation of the Miner's respiratory capacity and cannot be used to establish total disability." *Id.*

Thus, contrary to the majority's assertion, it is not apparent the ALJ's determination that Dr. Alam's opinion is credible satisfies the explanatory requirements of the Administrative Procedure Act (APA).[20] *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Although the opinion of a treating physician can be given additional weight, it must first qualify as a reasoned and documented opinion. *See Williams*, 338 F.3d at 513; *see also Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). I would therefore remand for the ALJ to provide an adequate explanation for his determination that Dr. Alam's opinion is reasoned and documented notwithstanding that the doctor relied, in part, on invalid objective testing that the ALJ found cannot be used to assess pulmonary disability and the physician's explanation for finding total disability cited that testing heavily.[21]

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[20] The Administrative Procedure Act 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).

[21] A non-qualifying objective test differs from an invalid objective test. A non-qualifying test is one on which the miner fails to meet the standard the Department of Labor set forth for establishing total disability. 20 C.F.R. §718.204(b)(2)(i), (ii). A validly conducted non-qualifying test is an accurate representation of the individual's capability. *Director, OWCP v. Siwiec*, 894 F.2d 635, 639-40 (3d Cir. 1990). A miner may be found totally disabled based on a non-qualifying test when the non-qualifying test indicates a level of capability that is insufficient to meet the exertional requirements of his or her last coal mining job. *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 578 (6th Cir. 2000). An invalid test is just that – not valid. Absent adequate explanation, it cannot be accepted as an accurate representation of the individual's capability. *Siwiec*, 894 F.2d at 639-40, *citing Director, OWCP v. Mangifest*, 826 F.2d 1318, 1319 (3d Cir. 1987). Thus, without proper explanation, an invalid test cannot constitute the basis for a valid judgment that a miner was totally disabled. *Id.* The ALJ acknowledged the pulmonary function and blood gas studies "by themselves, [are] insufficient to form the basis of a finding of disability, [but] they do indicate that the Miner suffered from some level of respiratory insufficiency." Decision and Order at 19. Because the ALJ did not identify any medical evidence to support that finding, I would hold he substituted his opinion for that of a medical expert. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Further, Employer's argument that the ALJ erred in discounting Drs. Broudy's and Rosenberg's opinions as they agreed with his finding that the objective tests were not reliable has merit. Employer's Brief at 3-4 (unpaginated). Dr. Broudy noted "the pulmonary function studies in 2006 showed improvement, [but] there were not sufficient tracings to determine the validity of the stud[ies]." Employer's Exhibit 11 at 2. He stated that "[i]f the pulmonary function studies were valid then clearly [the Miner] did not have the capacity to do [his job duties of running equipment and general inside labor in underground coal mining]." *Id*. at 3. Dr. Rosenberg stated "the objective information in the file cannot substantiate" the Miner was "disabled from a respiratory perspective" because "[t]here are no valid pulmonary function studies." Employer's Exhibit 10 at 6. The ALJ found Drs. Broudy's and Rosenberg's opinions entitled to "less weight" because they found the pulmonary function studies "insufficient to make a definitive determination" regarding whether the Miner had a total pulmonary disability. Decision and Order at 17. As discussed above, however, the ALJ found the August 31, 2006 and December 21, 2006 pulmonary function studies and the May 9, 2011, July 24, 2012, and April 30, 2015 arterial blood gas studies invalid. *Id*. at 16-17. Further, while Drs. Broudy and Rosenberg may not have made conclusive statements as to whether the Miner was disabled, they rendered conclusive statements as to whether a reasonable medical opinion, based on the evidence cited in their reports, could be rendered. Employer's Exhibits 10 at 6-7, 11 at 2, 3. Specifically, they concluded that because the objective evidence was invalid, disability could not be established. *Id*. Thus, because the ALJ's rationale for assigning less weight to Drs. Broudy's and Rosenberg's opinions does not comply with the APA, I would remand for the ALJ to provide an adequate explanation for his weighing of these opinions. *Wojtowicz*, 12 BLR at 1-165.

Thus, I would vacate the award and remand the case for further consideration of whether Claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2).

On remand, I would instruct the ALJ to first determine the Miner's usual coal mine employment[22] and the exertional requirements of that job, a finding the ALJ failed to render in this case. *Cornett v. Benham Coal Co.*, 227 F.3d 569, 578 (6th Cir. 2000); *Rowe*, 710 F.2d at 255. He should then consider the Miner's treatment records and the medical opinions in light of those requirements. *Id.* In reconsidering whether the medical opinions establish total disability, the ALJ should address the explanations the physicians have

[22] The Miner's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

provided for their diagnoses, the documentation underlying their medical judgments,[23] and the sophistication of, and bases for, their conclusions. *See Rowe*, 710 F.2d at 255; 20 C.F.R. §718.204(b)(2)(iv). If the ALJ finds total disability established by the medical opinions and treatment records, considered in isolation, he should determine whether the Miner was totally disabled considering the relevant evidence of record in its entirety.[24] *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). He should set forth his findings, including the underlying rationale, in compliance with the APA. *Wojtowicz*, 12 BLR at 1-165. I would further instruct the ALJ that if he finds Claimant established the Miner was totally disabled at the time of his death, he should find she has invoked the Section 411(c)(4) presumption. As I agree with the majority's decision to affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption, I would instruct the ALJ that if he finds disability established he may reinstate the award.

Finally, I would instruct the ALJ that if he finds the evidence does not establish total disability, he should consider whether the evidence establishes the Miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis.[25] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205; *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817 (6th Cir. 1993); *Neeley v. Director, OWCP*, 11 BLR

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[23] I would also instruct the ALJ to address whether Dr. Alam's opinion is based on evidence outside of the record. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004); Employer's Brief at 7 (unpaginated).

[24] An ALJ may compare the physicians' assessments of respiratory impairment with the exertional requirements of the Miner's usual coal mine employment in order to assess whether he was totally disabled. *See Cornett*, 277 F.3d at 578; *Black Diamond Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985).

[25] If the ALJ finds Claimant has not established the Miner was totally disabled and thus could not invoke the Section 411(c)(4) presumption that his death was due to pneumoconiosis, it becomes Claimant's burden to establish the Miner had pneumoconiosis and his death was due to pneumoconiosis. 20 C.F.R. §§718.202, 718.203, 718.205. Consequently, the ALJ must consider the accuracy of the length of the Miner's coal mine employment history each physician recorded, and then determine if it affects the credibility of the relevant medical opinions regarding the existence of legal pneumoconiosis and death causation. Thus I would instruct the ALJ to consider whether Dr. Alam overstated the length of the Miner's coal mine employment history when addressing these issues.

1-85, 1-86 (1988). In cases where the statutory presumptions cannot be invoked, the Miner's death will be considered due to pneumoconiosis if it caused his death or was a substantially contributing cause that hastened his death. 20 C.F.R. §718.205(b).

Accordingly, I concur in part and dissent in part from the opinion of the majority.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge