U.S. Department of Labor

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

BRB No. 20-0350 BLA

ROGER DALE ISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH OF KENTUCKY/APOGEE COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 11/30/2022
ARCH COAL, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration and Amending Decision and Order of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

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

Evan B. Smith (AppalReD Legal Aid), Prestonsburg, Kentucky, for Claimant.

Jeffrey S. Goldberg (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, BUZZARD and GRESH, Administrative Appeals Judges.

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration and Amending Decision and Order (2017-BLA-05578) rendered on a miner's subsequent claim filed on January 29, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ initially found Apogee Coal Company doing business as Arch of Kentucky (Apogee) is the responsible operator and Arch Coal, Incorporated (Arch Coal) is the responsible carrier. On the merits, she found Claimant established 15.23 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Further, she concluded Employer did not rebut the presumption and awarded

[1] Claimant filed an initial claim on September 18, 1992, which was denied in a decision issued by ALJ Charles P. Rippey that the Benefits Review Board affirmed on January 29, 1997, for failure to establish total disability. Director's Exhibit 1 at 3-4; *see Ison v. Arch of Ky., Inc.*, BRB No. 96-1048 BLA (Jan. 29, 1997) (unpub.). Claimant took no further action on that claim. *See* Director's Exhibit 1.

[2] When 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 she 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 did not establish a totally disabling respiratory or pulmonary impairment in his prior claim, he had to submit evidence establishing this element in order to obtain review of the merits of his current claim. *Id*.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially

benefits commencing January 2016, the month in which Claimant filed his claim. However, after considering Claimant's Motion for Reconsideration, the ALJ amended her Decision and Order to reflect benefits commence in March 2015.

On appeal, Employer argues remand is required because removal provisions applicable to ALJs render her appointment unconstitutional. It further argues the ALJ erred in finding Arch Coal is the liable insurance carrier. On the merits, Employer argues the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption and that Employer did not rebut it. It further challenges the ALJ's finding on reconsideration that benefits commence in March 2015. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenge and her conclusion that Employer is the responsible operator. Employer filed a combined reply brief, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order and Order on reconsideration if they are 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).

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 17-21; Employer's Reply Brief at 5-8. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[5]

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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] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 22.

[5] *Lucia* involved an Appointments Clause challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior

Employer's Brief at 13-17; Reply at 1-4. Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the United States Court of Appeals for the Federal Circuit's holding 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 13-17; Reply at 1-4.

Employer's arguments are not persuasive, as the only circuit court to squarely address this precise issue with regard to Department of Labor (DOL) ALJs has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs). The Board also rejected this argument in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022).

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Apogee is the correct responsible operator and was self-insured by Arch Coal on the last day Apogee employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 39-44. In 2005, after Claimant ceased his employment with Apogee, Arch Coal sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Director's Brief at 2; Employer's Brief at 24, 31. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Brief at 16. In 2015, Patriot went bankrupt. *Id.*; Director's Exhibit 24 at 2. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch Coal of liability for paying benefits to miners last employed by Apogee when Arch Coal owned and provided self-insurance to that company, as the Director states. Director's Brief at 16-17.

Employer raises several arguments to support its contention that Arch Coal was improperly designated the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund (the Trust Fund), not Arch Coal, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 20-32. It maintains the DOL is estopped from holding it liable because the district director: (1) did not properly serve it with notice of the claim; and (2) did not identify it as the liable carrier in his Proposed Decision and Order (PDO), nor properly serve the PDO on the company. Employer's Brief at 20-22. Employer further maintains the ALJ erred in finding Arch Coal liable for benefits

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

because: (3) the district director is an inferior officer not properly appointed under the Appointments Clause;[6] (4) he evaluated Arch Coal's liability for the claim as a responsible operator or commercial insurance carrier rather than a self-insurer; (5) the sale of Apogee to Magnum released Arch Coal from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability; (6) the Director changed its policy in naming Arch Coal as the responsible carrier; (7) retroactive application of the policy reflected in Black Lung Benefits Act (BLBA) Bulletin No. 16-01[7] imposes new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the APA; and (8) the ALJ abused her discretion and deprived it of procedural due process by denying its request for discovery regarding BLBA Bulletin No. 16-01. *Id*. at 22-32.

The Board has previously addressed arguments (2) through (8) and rejected them in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-13 (Oct. 25, 2022) (en banc); *Howard*, BRB No. 20-0229 BLA, slip op. at 5-16; and *Graham v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0221 BLA, slip op. at 6-7 (June 23, 2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments with regard to arguments (3) through (7). We also reject Employer's argument (2) concerning the adequacy of the district director's service of the notice of the claim and the PDO, and argument (8) concerning the ALJ's denial of discovery. In order to establish the relevant factual context for those issues, we describe the relevant procedural history in this case below.

ALJ's Denial of Discovery

On March 15, 2016, the district director issued an Amended Notice of Claim, identifying Apogee, self-insured through Arch Coal, as the potentially liable operator and self-insurer for the claim.[8] Director's Exhibit 23. The Notice gave Employer thirty days

[6] Employer first contested the district director's appointment in its closing brief to the ALJ. Employer's Closing Brief at 32.

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

[8] The district director erroneously served the initial February 8, 2016 Notice of Claim to "Underwriters Safety & Claims," the wrong third-party claims administrator for Arch Coal. Director's Exhibits 22, 24, 25. On March 4, 2016, counsel for Arch Coal filed his combined appearance and response, notifying the district director of the error and identifying HealthSmart Casualty Claims Solutions as the correct claims administrator. Director's Exhibit 24. On March 15, 2016, the district director dismissed Underwriters as

to respond and ninety days to submit liability evidence. *Id.* Employer responded, denying liability and requesting the district director dismiss it, arguing Patriot was the proper self-insurer and the Trust Fund must assume Patriot's liability for this claim. Director's Exhibits 24, 28.

On June 29, 2016, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) designating Apogee, self-insured through Arch Coal, as the responsible operator. Director's Exhibit 29. The SSAE gave "any party that wishes to submit liability evidence or identify liability witnesses" until August 28, 2016, to submit evidence in support of their positions. *Id*. at 3. Moreover, the district director advised that, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the Office of Administrative Law Judges [(OALJ)]." *Id*. (citing 20 C.F.R. §§725.414(b),(c), 725.456(b)(1)). Employer responded on July 19, 2016, asserting that the district director had improperly designated Apogee and Arch Coal as parties to the claim, but it did not submit any liability evidence or designate any liability witnesses. Director's Exhibit 24, 28, 30.

On December 8, 2016, the district director issued a PDO awarding benefits and designating Apogee, self-insured through Arch Coal, as the responsible operator and carrier. Director's Exhibit 46. Further, the district director concluded Employer shall not be allowed to submit liability evidence in future proceedings because it did not submit any while the case was pending before her. *Id.* at 11.

On January 4, 2017, Employer requested reconsideration of the award or, in the alternative, a formal hearing before an ALJ. Director's Exhibit 46B. On January 17, 2017, the district director transferred the case to the OALJ for a hearing. Director's Exhibit 48.

On March 6, 2019, the ALJ issued a Notice of Assignment, Notice of Hearing, and Pre-Hearing Order which stated, in relevant part, that documentary evidence concerning the designation of the responsible operator not submitted to the district director will not be admitted, and witnesses not identified at the district director's level may not testify, absent extraordinary circumstances. Nevertheless, on April 25, 2019, Employer requested subpoenas to obtain deposition testimony and documents from Michael Chance and Kim Kasmeier, two DOL Office of Workers' Compensation Programs (OWCP) employees. *See* Apr. 25, 2019 Subpoena Requests. The discovery request related to various liability-related topics, including Employer's argument that the DOL improperly used BLBA

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a party to the claim and served an Amended Notice of Claim on Apogee and Arch Coal, both care of Healthsmart, and to counsel for Arch Coal. Director's Exhibits 26, 27.

Bulletin 16-01 to determine the responsible operator and carrier in this case. *Id*. The Director objected, and Employer responded to the Director's objection, reiterating its request.

The ALJ denied Employer's request, finding the requested liability documents and testimony inadmissible under the Act's regulations as extraordinary circumstances did not exist to excuse its failure to timely designate liability witnesses or submit liability evidence to the district director. May 24, 2019 Order Denying Request for Subpoenas (May 24, 2019 Order); *see* 20 C.F.R. §§725.414(c), 725.456(b)(1). The ALJ further found extraordinary circumstances did not exist for the admission of its requested discovery as Employer "fail[ed] to make any effort at seeking or presenting liability evidence before the district director." May 24, 2019 Order at 6; *see* 20 C.F.R. §§725.414(c), 725.456(b)(1).

Employer also submitted documentary evidence regarding its liability to the ALJ that it designated Employer's Exhibits 13-21.[9] Hearing Transcript at 10. The ALJ excluded this evidence because she again found extraordinary circumstances did not exist for failing to submit it to the district director. Hearing Transcript at 13 (referencing reasons for denying discovery contained in the ALJ's May 24, 2019 Order); *see* 20 C.F.R. §§725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). Subsequently, the ALJ rejected Employer's argument that Patriot is the liable carrier and concluded Apogee and Arch Coal are the properly designated responsible operator and carrier, respectively, pursuant to 20 C.F.R. §§725. 494, 725.495. Decision and Order at 44-46.

For the reasons set forth in *Bailey*, BRB No. 20-0094 BLA, slip op. at 11-13; *Howard*, BRB No. 20-0229 BLA, slip op. at 10-12; and *Graham*, BRB No. 20-0221 BLA, slip op. at 6-7, we affirm the ALJ's finding that extraordinary circumstances did not exist for Employer's failure to timely submit evidence regarding its liability or designate liability

[9] As provided on Employer's Summary of Exhibits, Employer offered the following evidence as Employer's Exhibits 13-21 at the hearing: Letter dated January 5, 2006, from Denise Hartling to James DeMarce; Arch Coal's Application to Review Self-Insurance Program dated July 21, 2011; October 26, 2012 OWCP Letter on Arch Coal's Application to Self-insure without Apogee; Arch Coal's January 19, 2015 Application to Renew Self-Insurance Program; Declaration of Tim Mullarkey, Director of Risk Management and Insurance at Arch Coal; Deposition of Robert Briscoe in *Burns v. Hobet Mining*; December 6, 2018 OWCP-employee Deposition Transcript, including portions from in-camera hearing; December 4, 2018 OWCP-employee Deposition Transcript, including portions from in-camera hearing; and Arch Coal's Discovery on Coverage Issue and the DOL's Responses.

witnesses before the district director, which precluded its requested discovery and admission of the evidence before the ALJ.[10]

District Director's Service of the Notice of Claim and PDO

Citing *Warner Coal Co. v. Director, OWCP* [*Saylor*], 804 F.2d 346, 347 (6th Cir. 1986) and *Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 950 (4th Cir. 1990), Employer contends Arch Coal should be dismissed from the case because the district director failed to adequately notify it of its potential liability for this claim. Employer's Brief at 21. We disagree.

In *Saylor* and *Osborne*, the DOL served notice of the claim to the potentially liable operator but did not provide notice to its separate and distinct insurance carrier; thus, the issue before the courts was whether notice to the carrier may be imputed from DOL's having served notice upon the employers. In rejecting the DOL's assertion that notice to a carrier may be imputed, both courts held that the Due Process Clause of the Constitution, as well as the Act at 33 U.S.C. §919(b) and its implementing regulations, require the DOL to directly notify both the employer and its carrier of their potential liability for a claim. *See Saylor*, 804 F.2d at 347; *Osborne*, 895 F.2d at 951.[11]

[10] We reject Employer's assertion that the time limitation governing the development of liability evidence at 20 C.F.R. §725.456(b)(1) "divest[s] the ALJ [of] her 'powers, duties, and responsibilities' including accepting and overseeing disputes concerning evidence," as conclusory and not adequately briefed. Employer's Brief at 28 n.9; *see* 20 C.F.R. §802.211(b); *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986). We also reject Employer's assertion that Employer's Exhibits 13-18 establish the DOL released Arch Coal as the self-insurer of Apogee's liabilities on December 31, 2005. Employer's Brief at 29-30 (citing Employer's Exhibits 13-18). As we have affirmed the ALJ's exclusion of those exhibits from the record, this evidence has no bearing on the ALJ's analysis at 20 C.F.R. §§725.494(e), 725.495(b), (c).

[11] In *Osborne*, the court rejected the DOL's assertion that "the insurance carrier is not entitled to separate notice of a claim if the coal mine operator has been notified." 895 F.2d at 950. The court held due process requires that all parties "receive notice" apprising them of the action and giving them an opportunity to present their objections. *Id*. Unlike the insurance carrier in *Osborne*, and contrary to Employer's arguments in this case, Arch Coal, the carrier designated liable as the self-insurer for Apogee, did receive notice of the claim and was given an opportunity to respond. Thus, due process was satisfied.

Here, unlike *Saylor* and *Osborne*, the DOL directly notified both the coal mine operator and its carrier of the claim on March 15, 2016, by serving, via certified mail, the Amended Notice of Claim on HealthSmart, Arch Coal's third-party administrator for this claim.[12] Director's Exhibits 23 at 3, 6-7; 24 at 1-2. The district director further directly notified Arch Coal's designated attorney representative of the claim by mailing, via regular mail on March 15, 2016, the Amended Notice of Claim to him at his office. Director's Exhibit 26. Regardless of any alleged deficiency in the district director's service of the notice of claim by regular mail, Employer's counsel's March 29, 2016 timely response confirms actual, and therefore adequate, notice was given. *See Dominion Coal Corp. v. Honaker*, 33 F.3d 401, 404 (4th Cir. 1994) ("When the record establishes actual notice, the purpose of the statutory certified mail requirement has been met"); *Howard*, 20-0229 BLA, slip op at 9 (the employer's timely response confirms adequate service of the PDO); Director's Exhibits 26, 28. Therefore, as Arch Coal hired HealthSmart to administer its black lung claims; the district director served the Amended Notice of Claim on HealthSmart by certified mail and on Arch Coal's counsel by regular mail; and its counsel, in turn, confirmed actual notice was given, the purpose of the notice requirements was met. 33 U.S.C. §919(b); 20 C.F.R. §§725.360, 725.407(b); *see Honaker*, 33 F.3d at 404; *Warman*, 804 F.2d at 347; *Osborne*, 895 F.2d at 951; *Howard*, 20-0229 BLA, slip op at 9.

We similarly reject Employer's assertions that the district director did not properly identify Arch Coal as a "responsible party," or serve it with the December 8, 2016 PDO as the regulations require. Employer's Brief at 20-22 (citing 33 U.S.C. §919(e) and 20 C.F.R. §725.418(b), (d)). As in *Howard*, and as the Director correctly asserts here, Employer's argument ignores that the PDO identifies Arch Coal as the self-insurer for Arch of Kentucky. Director's Exhibit 46 at 7, 17; Director's Brief at 18; *see Howard*, 20-0229 BLA, slip op at 10.[13] The PDO was also served via certified mail on both Apogee, care of Healthsmart, and Arch Coal's counsel, who timely responded on January 4, 2017. Director's Exhibits 46 at 17, 21, 27, and 46B; Director's Brief at 18; *see Honaker*, 33 F.3d at 404. We therefore reject Employer's contention that it should be dismissed as a liable party because it was not properly served the PDO. *See* 33 U.S.C. §919(e); 20 C.F.R.

[12] Although the record contains a single certified mail tracking number to, and a return receipt from, "Arch of Ky/Apogee Coal Co. Llc, C/O Healthsmart," the certificate of service indicates service was made on both Apogee and Arch Coal at the same address for HealthSmart. Director's Exhibit 23 at 3, 7.

[13] Unlike the PDO at issue in *Howard*, nowhere in the PDO in this case does it contain a typographical error naming another carrier or self-insurer as liable for the claim. Director's Exhibit 46.

§725.418(b), (d); *Honaker*, 33 F.3d at 404; *Howard*, 20-0229 BLA, slip op at 9; Employer's Brief at 18-19, 22.

As Employer received actual notice of the claim and PDO, and as the ALJ acted within her discretion in denying Employer's discovery request and excluding its documentary liability evidence in this case, we affirm the ALJ's determination that Apogee and Arch Coal are the responsible operator and carrier, respectively, and are liable for this claim.[14]

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

In order to invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground or substantially similar surface coal mine employment and has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

Length of Coal Mine Employment

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

The ALJ credited Employer's letter verifying Claimant's employment dates as establishing eleven full calendar years of coal mine employment in 1977-1986 and 1990. Decision and Order at 9. Further finding Employer's employment verification letter and

[14] Employer additionally asserts the "DOL did not identify Arch [Coal] as the potential *responsible operator* in the notice of claim or the PDO;" Arch coal "does not satisfy the regulatory definition of 'operator;'" "Apogee, not Arch [Coal] employed Ison and controlled the mine where he worked;" the DOL did not substantiate the insolvency of Patriot in accordance with 20 C.F.R. §725.495(d); and "the agency offered no evidence to justify its effort to pierce Arch [Coal]'s corporate veil and hold it responsible for its former subsidiary, and offered no proof that it ever decided to treat Arch [Coal] as Ison's *employer or a responsible operator*." Employer's Brief at 17-20 (emphasis added). These assertions incorrectly presume the ALJ found Arch Coal primarily liable for the claim as the responsible operator. As the ALJ found Arch Coal is the liable *self-insurer* for the responsible operator, Apogee, we reject these assertions. Decision and Order at 42-46; Director's Exhibit 46 at 7, 10-11.

Claimant's Social Security Earnings Statement (SSES) establish partial calendar years of coal mine employment in 1972, 1976, 1987, 1988, 1989, 1991 and 1992, the ALJ applied 20 C.F.R. §725.101(a)(32)(iii) to determine the number of days Claimant worked in coal mine employment during these years.[15] She divided Claimant's yearly earnings as reported in his SSES by the coal mine industry's average yearly earnings for 125 days of employment, as reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*. Despite evidence showing Claimant's employment relationship with a coal mine operator did not span a full calendar year in 1987, 1988, or 1989, the ALJ credited him with a full year of coal mine employment for each of those years because his earnings met or exceeded the average "yearly" earnings for 125 working days as reported in Exhibit 610 for those years. Decision and Order at 11. For the years in which Claimant earned less than the Exhibit 610 average yearly earnings (1972, 1976, 1991, and 1992), the ALJ credited him with a fraction of a year based on the ratio of days worked up to 125 working days. In total, the ALJ credited Claimant with an additional 4.23 partial years of coal mine employment. *Id.* Adding this sum to Claimant's eleven full calendar years of coal mine employment in 1977-1986 and 1990, the ALJ found Claimant established 15.23 years of coal mine employment between 1972 and 1992. *Id.* at 11-12.

Employer contends the ALJ improperly ignored the beginning and ending dates of Claimant's employment set forth in Employer's employment verification letter and thus erred in relying on a 125-day divisor to credit Claimant with full and partial years of coal mine employment in 1972, 1976, 1987, 1988, 1989, 1991 and 1992. Employer's Brief at 32-41; Employer's Reply at 5-6. Employer's arguments are without merit as this case arises with the jurisdiction of the Sixth Circuit which made clear in *Shepherd* that, under the definition of a "year" at 20 C.F.R. §725.101(a)(32):

> [I]f the beginning and ending dates of the miner's employment cannot be determined *or* – even if such dates are ascertainable – if the miner was employed by the mining company for "less than a calendar year," the

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

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

20 C.F.R. §725.101(a)(32)(iii).

> adjudicator may determine the length of coal mine employment by the average daily earnings of an employee in the coal mining industry. If the quotient from that calculation yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year. If the calculation shows that the miner worked fewer than 125 days in the calendar year, the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125. 20 C.F.R. §725.101(a)(32)(i).

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

We also reject Employer's assertion that the Sixth Circuit's interpretation of 20 C.F.R. §725.101(a)(32) constitutes dicta. The court in *Shepherd* expressly remanded the case for the ALJ to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)" when evaluating the miner's length of coal mine employment. *Shepherd*, 915 F.3d at 407. Thus, regardless of Employer's disagreement with *Shepherd*, the court's interpretation of the regulation constitutes controlling law in this case.[16] *See Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7, 1-8 (1993).

As Employer raises no further challenge to the ALJ's length of coal mine employment calculation, we affirm her finding that Claimant established 15.23 years of qualifying coal mine employment. *See* 20 C.F.R. §725.101(a)(32); *Shepherd*, 915 F.3d at 402.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on

[16] It is well-settled that a lower court is required to give full effect to the execution of an appellate court's mandate, both express and implied, without altering or amending the mandate. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-15 (4th Cir. 2005); *Piambino v. Bailey*, 757 F.2d 1112, 1119-20 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). As the Board stated in *Hall v. Director, OWCP*, 12 BLR 1-80 (1988), "the United States judicial system relies on the most basic of principles, that a lower forum must not deviate from the orders of a superior forum, regardless of the lower forum's view of the instructions given it." *Hall*, 12 BLR at 1-82; *see Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7, 1-8 (1993).

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). The ALJ found the preponderance of pulmonary function and medical opinion evidence establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iv), and Claimant therefore invoked the rebuttable presumption of total disability due to pneumoconiosis.[17] Decision and Order at 13-25. Employer alleges the ALJ erred in finding the pulmonary function and medical opinion evidence establish total disability at 20 C.F.R §718.204(b)(2)(i), (iv), and on the record as a whole.

Pulmonary Function Studies

The ALJ accurately noted the parties designated three pulmonary function studies for consideration at 20 C.F.R. §718.204(b)(2)(i): Dr. Habre's December 19, 2013 study; Dr. Green's April 20, 2016 study; and Dr. Rosenberg's May 10, 2017 study. Decision and Order at 13-14; Director's Exhibits 15, 16; Employer's Exhibit 2. She found all three studies qualifying,[18] but determined Dr. Habre's December 19, 2013 study is invalid.[19] The

[17] The ALJ found the preponderance of the blood gas evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 15. She further found Claimant's August 2016 medical treatment record, the only evidence to diagnose "cor pulmonale," does not establish total disability at 20 C.F.R. §718.204(b)(2)(iii) "because the basis for this diagnosis is unclear." *Id.*

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

[19] The ALJ accurately observed Claimant's medical treatment records contain three pulmonary function studies that Dr. Alam administered on January 3, 2013, March 2, 2015, and June 1, 2015. Decision and Order at 46-47; Director's Exhibit 17 at 31, 37, 94. She found the 2013 study produced non-qualifying values while both 2015 studies produced qualifying values. Decision and Order at 47; Order on Reconsideration at 5. Initially, she found the qualifying 2015 studies insufficient to establish total disability because they failed to meet the regulatory quality standard requirement that a study be accompanied by three tracings. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, App. B; Decision and Order at 47. However, pursuant to Claimant's motion for reconsideration, she observed that the regulatory quality standards do not apply to Claimant's treatment studies

ALJ concluded the preponderance of the studies establishes total disability at 20 C.F.R. §718.204(b)(2)(i) as all three studies produced qualifying values. Decision and Order at 13-14. Employer asserts the ALJ's finding is in error. We disagree.

As the ALJ found, Employer's expert, Dr. Rosenberg, relied on pulmonary function testing to diagnose Claimant with a totally disabling severe airflow obstruction. Employer's Exhibit 3 at 2-3; Employer's Exhibit 4 at 5, 12-13; Decision and Order at 23. While Employer notes Dr. Rosenberg also stated Claimant's qualifying May 2017 pulmonary study was not valid, even if we agreed that two of the three designated qualifying studies are invalid, the remaining valid and qualifying April 2016 study constitutes substantial evidence for the ALJ's determination that the pulmonary function studies support a finding of total disability.[20] S*ee Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (a party challenging the validity of a study has the burden to establish the results are suspect or unreliable). Thus, we affirm the ALJ's determination. As Employer asserts no other error in the ALJ's weighing of the pulmonary function study evidence, we affirm her finding that it establishes total disability at 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

The ALJ credited the opinions of Drs. Green, Rosenberg, and Tuteur that Claimant is totally disabled over Dr. Habre's contrary opinion. Director's Exhibits 14, 15, 19, 20, 21; Employer's Exhibits 3, 4, 6. She found Drs. Green's, Rosenberg's, and Tuteur's opinions better supported by the qualifying pulmonary function study evidence and thus concluded Claimant has a disabling respiratory or pulmonary impairment. Decision and Order at 23-24.

We reject Employer's assertion that the ALJ failed to consider whether Claimant's back injury, advanced cardiac disease, obesity, or diabetes prevented him from returning to work. Employer's Brief at 42-44; Employer's Reply at 6-8. Citing *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994) and *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834 (7th Cir. 1994), Employer maintains that a pre-existing disability or co-existing non-respiratory impairment precludes an award of benefits. Contrary to Employer's argument, the relevant issue at 20 C.F.R. §718.204(b)(2) is the presence of a disabling

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and found the March 2015 study probative of a totally disabling pulmonary impairment. 20 C.F.R. §718.101(b); Order on Reconsideration at 8.

[20] The ALJ accurately observed Dr. Rosenberg relied on the study to diagnose a disabling obstruction. Decision and Order at 23; Employer's Exhibit 3 at 2-3.

respiratory or pulmonary impairment – the cause of the impairment is addressed at 20 C.F.R. §718.204(c) or, in this case, in consideration of rebuttal of the Section 411(c)(4) presumption. Moreover, because this claim was filed after January 19, 2001, any independent disability unrelated to Claimant's pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a).

Having affirmed the ALJ's findings at 20 C.F.R. §718.204(b)(2)(i), we see no error in her weighing of the medical opinion evidence. She permissibly found the total disability diagnoses of Drs. Green, Rosenberg, and Tuteur reasoned and documented because they are consistent with the weight of the pulmonary function study evidence. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

We also reject Employer's contention that the ALJ erred in discounting Dr. Habre's opinion. Director's Exhibit 16 at 10. Dr. Habre opined Claimant is not totally disabled because he invalidated Claimant's December 2013 pulmonary function study and relied on the December 2013 non-qualifying blood gas study. *Id*. The ALJ permissibly found Dr. Habre's opinion less credible because he did not account for Claimant's valid and qualifying pulmonary study evidence at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 23; *see Morrison*, 644 F.3d at 478; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 at 185; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Because it is supported by substantial evidence, we affirm the ALJ's conclusion that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole.[21] Decision and Order at 24. Thus, we affirm the ALJ's conclusion that Claimant established a totally disabling

[21] Although the ALJ found the preponderance of the blood gas evidence does not support total disability, such evidence does not preclude a finding of total disability based on pulmonary function tests, as they measure a different type of impairment than blood gas studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984); Decision and Order at 24. We thus reject Employer's assertion that the ALJ erred in failing to explain why she found the qualifying pulmonary function studies sufficient to establish total disability despite the non-qualifying arterial blood gas results. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 44.

respiratory or pulmonary impairment and therefore invoked the Section 411(c)(4) presumption.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Clamant has neither legal nor clinical pneumoconiosis,[22] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.[23]

Legal Pneumoconiosis

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

Employer relies on the opinions of Drs. Rosenberg and Tuteur to disprove legal pneumoconiosis. Dr. Rosenberg diagnosed totally disabling chronic obstructive pulmonary disease (COPD) and emphysema, both of which he attributed entirely to smoking and not coal dust exposure. Director's Exhibits 19, 20; Employer's Exhibits 3, 4 at 13-18. Dr. Tuteur diagnosed disabling COPD unrelated to coal dust exposure, caused

[22] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment 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).

[23] The ALJ found Employer failed to disprove that Claimant has clinical and legal pneumoconiosis. Decision and Order at 34, 38.

by smoking and aggravated by gastroesophageal reflux disease (GERD). Employer's Exhibit 6 at 9. The ALJ found their opinions not well-reasoned and inconsistent with the preamble to the revised 2001 regulations. Decision and Order at 34-37. Thus, she concluded Employer did not satisfy its burden of proof. Employer generally asserts the ALJ improperly relied on the preamble to assess the credibility of its physicians' opinions. Employer's Brief at 46-47; Employer's Reply at 9. We disagree.

The preamble sets forth the DOL's resolution of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits.[24] *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248 (3d Cir. 2011); 65 Fed. Reg. at 79,939-42. The ALJ therefore permissibly considered the medical opinions in conjunction with the scientific premises underlying the amended regulations, as expressed in the preamble. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Groves*, 761 F.3d at 601; *Adams*, 694 F.3d at 801-03.

The ALJ observed correctly that Drs. Rosenberg and Tuteur eliminated coal mine dust exposure as a cause of Claimant's obstruction, in part, because they believed smoking carries a greater risk of pulmonary impairment than coal mine dust exposure. Decision and Order at 36-37; Director's Exhibit 19 at 30-33; Employer's Exhibits 3 at 3-5, 4 at 15-18, 6 at 6. She permissibly found their opinions unpersuasive to the extent they relied on generalities drawn from medical literature, rather than the specifics of Claimant's case. *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 36-37. Further, we see no error in the ALJ's finding that Drs. Rosenberg and Tuteur failed to adequately explain why coal mine dust exposure was not additive along with smoking in causing or aggravating Claimant's COPD. *See* 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,940; *Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 35-37.

Similarly, the ALJ permissibly rejected Dr. Rosenberg's explanation that Claimant's marked decrement in his FEV1/FVC ratio on pulmonary function testing indicates a smoking-related form of COPD rather than COPD caused by coal dust exposure, as it contradicts the DOL's position that COPD caused by coal dust exposure may be associated with decrements in the FEV1/FVC ratio. *See Sterling*, 762 F.3d at 491;

[24] Contrary to Employer's contention, the preamble does not constitute evidence outside of the record. Employer's Brief at 46-47; *see A & E Coal Co., v. Adams*, 694 F.3d 798, 801-03 (6th Cir. 2012).

65 Fed. Reg. at 79,943; Decision and Order at 36; Director's Exhibit 19 at 29-30; Employer's Exhibit 4 at 13-15.

Additionally, the ALJ accurately noted Dr. Rosenberg based his opinion on his view that coal-dust-related COPD does not progress after exposure to coal mine dust ceases, which is inconsistent with the DOL's recognition that coal mine dust exposure can cause a latent and progressive pulmonary impairment. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014) (upholding an ALJ's decision to discredit a physician whose opinion regarding legal pneumoconiosis conflicted with the recognition that pneumoconiosis is a latent and progressive disease); Decision and Order at 36 n.17; Employer's Exhibit 4 at 18-20.

Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *See Anderson*, 12 BLR at 1-113. Because the ALJ permissibly discredited the opinions of Drs. Rosenberg and Tuteur, the only opinions supportive of a finding that Claimant does not suffer from legal pneumoconiosis, we affirm her finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis.[25] *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 38.

Disability Causation

To disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). Contrary to Employer's assertion, the ALJ correctly observed that, to meet this burden, "Employer must 'rule out' any connection between pneumoconiosis and the miner's total disability." Decision and Order at 38; *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1069-70 (6th Cir. 2013). Further, the ALJ permissibly discredited the opinions of Drs. Tuteur and Rosenberg on the cause of Claimant's respiratory disability because their conclusions were tied to their erroneous opinions that Claimant does not have legal pneumoconiosis, contrary to the ALJ's findings. *See Ogle*, 737 F.3d at 1070; *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 38-39. Thus, we affirm the ALJ's finding that

[25] Employer's failure to disprove legal pneumoconiosis precludes a finding that it rebutted the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address Employer's argument that the ALJ erred in finding Employer failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Employer failed to establish no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii).

Commencement Date for Benefits

Finally, Employer challenges the ALJ's determination on reconsideration that Claimant's benefits commence in March 2015, the month of his earliest valid and qualifying pulmonary function study, rather than January 2016, the month in which Claimant filed this claim. Employer's Brief at 48-51; Employer's Reply at 9-11. We disagree.

The commencement date for benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence in the month the claim was filed, unless evidence the ALJ credits establishes Claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

While this case was pending before the ALJ, Claimant argued he became totally disabled sometime before January 2013, when Dr. Alam obtained qualifying pulmonary function values in the course of treating Claimant. Claimant's Closing Brief at 25. However, in determining total disability at 20 C.F.R. §718.204(b)(2)(iv), the ALJ considered all of Dr. Alam's studies to be invalid because they did not comply with the quality standards at 20 C.F.R. §718.103(b) and Appendix B to Part 20 C.F.R. Part 718.[26] Decision and Order at 46-47. Thus, in determining the onset date of Claimant's disability, the ALJ rejected Claimant's contention as to when he first became disabled and determined the commencement date for benefits to be January 2016, the month Claimant filed his claim. *See Owens*, 14 BLR at 1-50; *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985); Decision and Order at 47.

On March 26, 2020, Claimant timely requested reconsideration, asserting the ALJ erred in discrediting Dr. Alam's qualifying pulmonary function studies based on the quality standards, which do not apply to treatment studies. Claimant maintained that Dr. Alam's studies were sufficiently reliable and that benefits should commence as of Dr. Alam's March 2015 qualifying study. Motion for Reconsideration at 3-6. In response, Employer argued Claimant forfeited his argument because he failed to argue March 2015 as the onset date of his disability before the ALJ issued her decision. Opposition to Reconsideration at

[26] The ALJ observed that none of the studies were accompanied by three tracings. Decision and Order at 47.

3. Alternatively, Employer argued Dr. Alam's March 2015 pulmonary study cannot support a March 2015 onset date because no physician attributed Claimant's respiratory disability at that time to pneumoconiosis, and further asserted Claimant had to affirmatively establish the causation element and could not rely on the Section 411(c)(4) presumption to satisfy his burden of showing he was totally disabled due to pneumoconiosis as early as March 2015. *Id.* at 4-6.

The ALJ rejected Employer's forfeiture argument and agreed with Claimant that she had erred in applying the quality standards when reviewing Dr. Alam's pulmonary function studies obtained during his treatment of Claimant. Order on Reconsideration at 8. Further finding Claimant's qualifying March 2015, June 2015, and non-qualifying August 2016 treatment studies sufficiently reliable, she considered whether the record establishes Claimant was totally disabled due to pneumoconiosis as of the date of Dr. Alam's March 2015 treatment study. *Id.* at 8-9. She accurately observed the non-qualifying August 2016 pulmonary function study is the only pulmonary function test that post-dates and is contrary to the qualifying March 2015 study; however, she found this non-qualifying study outweighed by the four contemporaneous and qualifying studies of record administered in March and June 2015, April 2016, and May 2017. *Id.* Thus, having previously found the blood gas and medical opinion evidence does not contradict the qualifying pulmonary function evidence, the ALJ found the record contains no credible contrary evidence establishing Claimant was not totally disabled after March 2015. *See Owens*, 14 BLR at 1-50; *Merashoff*, 8 BLR at 1-109; Order on Reconsideration at 47. Thus, relying on Dr. Alam's qualifying study and the Section 411(c)(4) presumption, which Employer failed to rebut, the ALJ concluded Claimant was totally disabled due to pneumoconiosis as early as March 2015, and therefore modified her prior order to reflect that benefits commence as of March 2015, rather than January 2016. Contrary to Employer's assertions on appeal, we discern no error in the ALJ's findings on reconsideration.

We reject Employer's assertion that Claimant forfeited his argument that the March 2015 pulmonary study establishes total disability due to pneumoconiosis by failing to raise it before the ALJ issued her decision. The ALJ rejected this argument on reconsideration, and Employer identifies no specific error in her determination. Order on Reconsideration at 9. Employer therefore has not shown the ALJ abused her discretion with regard to this procedural matter. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

We further reject Employer's assertion that the March 2015 study is invalid for failing to comply with regulatory quality standards. Employer's Brief at 49. The regulatory quality standards at 20 C.F.R. §718.103(b) and Appendix B to 20 C.F.R. Part 718 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 included as part of a miner's treatment). An ALJ must still determine if a miner's treatment record pulmonary function study results are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. at 79,928. As Employer identifies no error in the ALJ's finding that the March 2015 treatment study is sufficiently reliable because the report notes good effort and cooperation and Dr. Alam relied on it, we affirm the ALJ's finding that the study is probative of Claimant's respiratory disability. *See Vivian*, 7 BLR at 1-361; Order on Reconsideration at 8. We therefore also affirm the ALJ's finding based on the record as a whole that Claimant established a chronic and totally disabling pulmonary impairment as of the date of Dr. Alam's March 2015 study.[27] *See Rowe*, 710 F.2d at 255; Order on Reconsideration at 9.

Moreover, we reject Employer's assertion that the ALJ erred in failing to require Claimant to affirmatively establish his March 2015 respiratory disability is due to pneumoconiosis without the benefit of the Section 411(c)(4) presumption. Employer's Brief at 49-50. Without the presumption, the burden rests with Claimant to establish his total disability is due to pneumoconiosis. 20 C.F.R. §718.204(c); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994) (moving party must carry its burden of proof by a preponderance of evidence); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-296, 1-304 (2003) (proof that a claimant was disabled on a particular date does not establish the source of the disability); Employer's Brief at 49. However, Employer's assertion that the Section 411(c)(4) presumption, as implemented by 20 C.F.R. §718.305, does not assist claimants in establishing the date that benefits commence is incorrect. The regulation governing the commencement of benefits in a living miner's claim, 20 C.F.R. §725.503(b), states in relevant part: "Benefits are payable to a miner who is entitled beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment." 20 C.F.R. §725.503(b). It does not specify the manner in which a claimant must establish disability causation. Further, although the regulation governing disability causation criteria, 20 C.F.R. §718.204(c), requires proof distinct from that which establishes total disability, it expressly exempts invocation of the Section 718.305 presumption from its requirement.[28] In doing so, the plain language of Section 718.204(c)

[27] Apart from its challenge to the validity of the March 2015 study, which we reject, Employer does not challenge the ALJ's determination to credit the study as establishing a totally disabling impairment as of March 2015. Order on Reconsideration at 9.

[28] Section 718.204(c) specifies in pertinent part:

> Except as provided in [Section] 718.305 and paragraph (b)(2)(iii) of this section, proof that the miner suffers or suffered from a totally disabling

allows a claimant to establish disability causation with proof of total disability, fifteen years of qualifying coal mine employment, and invocation of the Section 411(c)(4) presumption.

Therefore, as we have affirmed the ALJ's findings with regard to invocation, rebuttal, and the March 2015 onset of total disability, we affirm her finding that Claimant established he was totally disabled due to pneumoconiosis as of March 2015. We thus affirm her determination that benefits commence as of March 2015. 20 C.F.R. §725.503(b); *see Williams v. Director, OWCP*, 13 BLR 1-28, 1-29-30 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 182-83 (1989).

> respiratory or pulmonary impairment as defined in paragraphs (b)(2)(i) … of this section shall not, by itself be sufficient to establish that the miner's impairment is or was due to pneumoconiosis. Except as provided in paragraph (d) [regarding claims of survivors and deceased miners which lack relevant medical evidence], the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report.

20 C.F.R. §718.204(c)(2). The regulation at 20 C.F.R. §718.305 provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of qualifying coal mine employment and "a totally disabling respiratory or pulmonary impairment established pursuant to [20 C.F.R.] §718.204." 20 C.F.R. §718.305(b)(iii).

Accordingly, the ALJ's Decision and Order Awarding Benefits and Order Granting Motion for Reconsideration and Amending Decision and Order are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge