U.S. Department of Labor

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

BRB No. 20-0387 BLA

SHARON VANCLEVE (o/b/o DONALD R. VANCLEVE)	)	
v.	)	
HERITAGE COAL COMPANY	)	
and	)	
PEABODY ENERGY CORPORATION,	)	DATE ISSUED: 11/04/2022
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 Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

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

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

William M. Bush (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: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jonathan C. Calianos's Decision and Order Awarding Benefits (2017-BLA-05763) rendered on a claim filed on April 9, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Heritage Coal Company (Heritage) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. He also determined Claimant established the Miner had twenty years of surface coal mine employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found 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.[3] It

[1] Claimant is the widow of the Miner, who died on September 8, 2015. Director's Exhibit 55. She is pursuing his claim on his behalf. *Id.*

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

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

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

U.S. Const. art. II, § 2, cl. 2.

also argues the duties that the district director performs create an inherent conflict of interest that violates its due process rights. In addition, it asserts the ALJ erred in finding Peabody Energy is the liable carrier. On the merits of the claim, it maintains the ALJ erred in finding Claimant established total disability necessary to invoke the Section 411(c)(4) presumption. It also challenges the ALJ's rebuttal findings.[4]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response urging the Benefits Review Board to reject Employer's constitutional arguments and affirm his finding Peabody Energy is the responsible carrier.

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

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Heritage is the correct responsible operator and it was self-insured by Peabody Energy on the last day Heritage employed the Miner; thus we affirm these findings.[6] *See Skrack v. Island Creek Coal Co.*,

[4] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had twenty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7-10.

[5] 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. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 6-7; Director's Exhibits 5, 11.

[6] Employer states it preserves its "ability to challenge" Black Lung Benefits Act (BLBA) Bulletin No. 16-01 as an invalid rule because it contradicts liability rules under the BLBA; it was issued without notice and comment; and it violates the Administrative Procedure Act (APA). Employer's Brief at 54. BLBA Bulletin No. 16-01, which the DCMWC Director issued on November 12, 2015, provides guidance to DCMWC staff in adjudicating claims in which a miner's last coal mine employment of at least one year occurred with one of the subsidiary companies affected by Patriot's bankruptcy. Apart from one sentence summarizing its arguments, Employer has not set forth sufficient detail to permit the Board to consider the merits of the issues it identified. *See Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b). Whether Employer has adequately preserved the issues for appellate review is a matter for a federal circuit court to decide, should Employer appeal. *See Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir.

6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); August 22, 2019 Telephonic Hearing Tr. at 11-20; September 26, 2019 Order Denying Motion to Dismiss Peabody Energy Corporation as Responsible Operator (Sept. 26, 2019 Order); Decision and Order at 6, 49. Patriot Coal Corporation ("Patriot") was initially another Peabody Energy subsidiary. Director's Exhibits 5, 11, 37, 63. In 2007, after the Miner ceased his coal mine employment with Heritage, Peabody Energy transferred a number of its other subsidiaries, including Heritage, 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 63 at 15-17. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Heritage, Patriot later went bankrupt and can no longer provide for those benefits. *Id*.; *see* Director's Exhibit 38; Director's Brief Exhibit B. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Heritage when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. August 22, 2019 Telephonic Hearing Tr. at 11-20; Sept. 26, 2019 Order; Decision and Order at 6, 49.

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 11-57. 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;[7] (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; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (5) the DOL released Peabody Energy from liability; (6) the Director is equitably estopped from imposing liability on the company; and (7) the DOL violated its due process rights by not maintaining adequate records with respect to

2018) (employer must exhaust its administrative remedies before seeking appellate review of BLBA Bulletin No. 16-01); *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) ("to acknowledge an argument is not to make an argument"); *see also Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022) (rejecting argument that BLBA Bulletin No. 16-01 is an invalid rule).

[7] Employer raised this argument for the first time in this claim in its post-hearing brief to the ALJ. Employer's Post-Hearing Brief at 20.

Patriot's bond and failing to comply with its duty to monitor Patriot's financial health.[8] *Id*. It maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id*.

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 (October 25, 2022), *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022), and *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. Thus we affirm the ALJ's determination that Heritage and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevented 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 pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based on the medical opinion evidence.[9] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 13-31. He weighed the

[8] Employer states it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 52-53. But Employer neither asks the Board to address this issue nor sets forth any argument that would enable our review. *See Cox*, 791 F.2d at 446-47; *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b).

[9] The ALJ found Claimant did not establish total disability based on the pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 10-12, 31 n.9.

opinions of Drs. Chavda, Sood, Rosenberg, and Broudy. Director's Exhibits 15, 23, 25, 28; Employer's Exhibits 5, 14-15; Claimant's Exhibit 6.

The ALJ found the opinions of Drs. Chavda and Sood that the Miner was totally disabled by a respiratory or pulmonary impairment well-reasoned and documented. Decision and Order at 30. He found Dr. Rosenberg's opinion expressed in his medical report that the Miner was not totally disabled inadequately reasoned. *Id.* at 30-31. But the ALJ acknowledged that in his deposition, Dr. Rosenberg stated the Miner was "probably" disabled by low diffusing capacity and pulmonary hypertension, and thus found Dr. Rosenberg's opinion supportive of a finding of total disability. *Id.* at 30-31. Finally, the ALJ found Dr. Broudy's opinion that the Miner was not totally disabled inadequately reasoned. *Id.*

We reject Employer's argument that the ALJ erred in crediting Dr. Chavda's opinion. Employer's Brief at 6-7. Dr. Chavda noted the Miner's usual coal mine employment was working as a dozer operator, requiring him to "constantly" lift and pull heavy equipment and cables that weighed forty to fifty pounds. Director's Exhibit 23. He opined the Miner was totally disabled because a June 17, 2015 pulmonary function study revealed reduced a FEV1 value, a qualifying[10] FVC value under the regulations, and a severely reduced single breath carbon monoxide diffusion capacity (DLCO) value. *Id.* Based on the results of this pulmonary function study, Dr. Chavda opined the Miner would not have had the lung capacity to perform his usual coal mine employment. *Id.* The ALJ permissibly found Dr. Chavda's opinion well-reasoned and documented. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consolidation Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 30.

We further reject Employer's argument that the ALJ should have discredited Dr. Chavda's opinion because he did not review all of the evidence of record. *Id.* An ALJ is not required to discredit a physician who did not review all of a miner's medical records when the opinion is otherwise well-reasoned, documented, and based on his own examination of the miner and objective test results. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996).

Nor was the ALJ required to discount Dr. Chavda's opinion because the doctor relied, in part, on the Miner's reduced DLCO value to diagnose total disability. Employer's Brief at 6-7. Employer cites no support for its contention that the regulations do "not allow

[10] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

for a determination of disability based on the DLCO." *Id.* The regulations specifically provide that even where the pulmonary function studies and blood gas studies are non-qualifying, "total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on *medically acceptable clinical and laboratory diagnostic techniques*, concludes that a miner's respiratory or pulmonary condition prevents . . . [him] from" performing his usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv) (emphasis added). Moreover, contrary to Employer's characterization, the ALJ did not conclude that the DLCO value from the pulmonary function study Dr. Chavda relied on is invalid; rather he noted the study meets American Thoracic Society criteria. Decision and Order at 11. Employer has not adequately explained its assertion that the ALJ found the DLCO values invalid. *Cox*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b); Employer's Brief at 6-7.

We also disagree with Employer that the ALJ erred in crediting Dr. Sood's opinion. Employer's Brief at 7. Dr. Sood noted the Miner's usual coal mine employment was working as a dozer operator, requiring him to perform "heavy physical labor, including climbing in and out of equipment, lifting [forty-fifty] pounds, and shoveling mud." Claimant's Exhibit 6 at 2. He opined the Miner's June 17, 2015 pulmonary function study revealed a moderate restrictive impairment pre-bronchodilator, confirmed by lung volume measurements, and a diffusing capacity that showed severe reduction. *Id.* at 4. In addition, he noted the FVC value was qualifying for total disability. *Id.* He concluded the Miner was totally disabled based on the pulmonary function study results. *Id.* at 7. The ALJ permissibly found Dr. Sood's opinion well-reasoned and documented. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 30.

Employer argues the ALJ should have discredited Dr. Sood's opinion because he misstated that the Miner's rheumatoid arthritis was only "self-reported" and "unsubstantiated." Employer's Brief at 7. This argument, however, conflates the question of whether a disabling impairment exists at 20 C.F.R. §718.204(b)(2) with the separate inquiries relating to the etiology of the Miner's lung diseases and the cause of his disabling impairment at 20 C.F.R. §§718.201(a)(2), 718.204(c).[11] Nor does Employer explain why Dr. Sood's statement that the Miner's pulmonary function tests "did not demonstrate airflow obstruction" as measured by a decreased FEV1/FVC ratio, or his reference to the American Medical Association Guidelines to the Evaluation of Permanent Impairment,

[11] Moreover, contrary to Employer's argument, while Dr. Sood initially summarized the Miner's "clinical evaluations" as revealing "rheumatoid arthritis, a self-reported diagnosis which has not been independently substantiated," he later acknowledged numerous instances of the Miner having been diagnosed with the disease and the doctor himself opined that it was a substantial contributing cause, along with coal mine dust exposure, to the Miner's lung diseases.

undermine his opinion. Dr. Sood opined the lack of airflow obstruction "may be explained by concomitant restrictive lung disease which increases the FEVI/FVC ratio value," he diagnosed COPD based on several other factors, and he opined the COPD rendered the Miner totally disabled from performing his usual coal mine work under "standards defined by the Black Lung Benefits Act." Employer's Brief at 7. Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113.

Finally, we reject Employer's argument that the ALJ's consideration of Dr. Broudy's opinion does not satisfy the explanatory requirements of the Administrative Procedure Act,[12] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); Employer's Brief at 7-8. Dr. Broudy opined the Miner's June 17, 2015 pulmonary function study results were "abnormal." Director's Exhibit 28 at 2. He also noted the Miner's diffusion capacity results were reduced by twenty-nine percent. *Id*. Although he acknowledged the Miner's usual coal mine employment was working as a dozer operator and the June 17, 2015 pulmonary function study is "technically valid," he nonetheless concluded the Miner was not totally disabled. *Id*. at 2-3. The only basis he provided for this conclusion was that the Miner's pulmonary function and arterial blood gas testing did not produce qualifying values for total disability. *Id*.

During his deposition, Dr. Broudy opined the Miner's pulmonary function testing is consistent with a "restrictive ventilator defect." Employer's Exhibit 14 at 21. He also stated he would not rely on a reduced diffusion capacity value to assess disability if the Miner's arterial blood gases are non-qualifying. *Id*. at 18-19. Thus, he maintained his original opinion that the Miner was not disabled. *Id*. at 15.

The ALJ found Dr. Broudy's opinion unpersuasive. Although Dr. Broudy generally testified he based his total disability opinion on "the [M]iner's actual job duties," the ALJ permissibly found he did not adequately explain why he concluded that "given [the Miner's] restrictive impairment, as well as his severely reduced diffusion capacity, he would be able to go back to his previous coal mine job, which required heavy labor." Decision and Order at 31; *see Napier*, 301 F.3d at 713-14; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Crisp*, 866 F.2d at 185. Because the ALJ's credibility finding is supported by

[12] The Administrative Procedure Act provides 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).

substantial evidence, and we can discern the ALJ's basis for discrediting Dr. Broudy's opinion, we reject Employer's argument. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion); *Mingo Logan Coal Co v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied if the reviewing court can discern what the ALJ did and why he did it).

Finally, Employer does not challenge the ALJ's finding that Dr. Rosenberg's opinion is supportive of a finding of total disability. Decision and Order at 30-31. Therefore we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Thus we affirm the ALJ's finding 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. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232. We therefore affirm his determination that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305; Decision and Order at 31-32.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[13] 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 rebut the presumption by either method.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish the Miner did not have any of the 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).

[13] "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). "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).

The ALJ found the x-ray, CT scan, and medical opinion evidence insufficient to disprove clinical pneumoconiosis.[14] Decision and Order at 33-42. Employer argues the ALJ erred in finding the x-ray and CT scan evidence insufficient to rebut the presumption of clinical pneumoconiosis.[15] Employer's Brief at 8-10. We disagree.

The ALJ weighed nine readings of four x-rays dated July 20, 2012, February 17, 2014, June 17, 2015, and August 14, 2015. Decision and Order at 34. All of the readings were by physicians dually-qualified as Board-certified radiologists and B readers. *Id*. The ALJ gave equal weight to the readings based on the physicians' qualifications. *Id*. Dr. Crum read the July 20, 2012 x-ray as positive for pneumoconiosis, but Dr. Meyer read it as negative for the disease. Claimant's Exhibit 3; Employer's Exhibit 4. Dr. Ahmed read the February 17, 2014 x-ray as positive for pneumoconiosis, but Dr. Tarver read it as negative for the disease. Claimant's Exhibit 1; Employer's Exhibit 1. Drs. Crum and Alexander read the June 17, 2015 x-ray as positive for pneumoconiosis, but Dr. Meyer read it as negative. Director's Exhibits 15, 29; Claimant's Exhibit 4. Finally, Dr. Crum read the August 14, 2015 x-ray as positive for pneumoconiosis, but Dr. Seaman indicated this x-ray is unreadable. Employer's Exhibit 2.

The ALJ found the readings of the July 20, 2012 and February 17, 2014 x-rays in equipoise because an equal number of dually-qualified physicians read each x-ray as positive and negative for pneumoconiosis. Decision and Order at 35. He found the June 17, 2015 x-ray supports a finding of pneumoconiosis because two of the three dually-qualified physicians who reviewed the x-ray read it as positive for the disease. *Id.* Finally, he found Dr. Crum's positive reading establishes the August 14, 2015 x-ray as positive for pneumoconiosis because Dr. Seaman indicated it was unreadable. *Id*. Thus he found the record contains two positive x-rays, the readings of two other x-rays in equipoise, and no negative x-rays. *Id*.

Contrary to Employer's argument, the ALJ performed a qualitative and quantitative review of the x-ray interpretations. He permissibly found Drs. Crum, Meyer, Ahmed, Alexander, Tarver, and Seaman equally qualified as dually-qualified radiologists. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 34-35. Further, the ALJ was not required to assign controlling weight to the negative readings by Drs. Tarver and

[14] The ALJ noted there is no biopsy evidence in the record. Decision and Order at 37.

[15] Because Employer does not challenge the ALJ's finding the medical opinion evidence insufficient to rebut the presumption of clinical pneumoconiosis, we affirm this finding. *Skrack*, 6 BLR at 1-711; Decision and Order at 38-42.

Meyer based on their qualifications beyond that of being dually-qualified radiologists. Employer's Brief at 8-10. While an ALJ may rely on a reader's additional qualifications (such as teaching credentials or expertise demonstrated by lecturing and publishing articles) to accord greater weight to that physician's readings, he is not required to do so. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc) , *aff'd on recon*., 24 BLR 1-13 (2007) (en banc) ; *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *see also J.V.S. v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-90 n.13 (2008); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004) (en banc). Thus we affirm the ALJ's finding that the x-ray evidence does not rebut the presumption of clinical pneumoconiosis. Decision and Order at 34-35.

With respect to the CT scan evidence, the ALJ noted the record contains three readings of a July 20, 2012 CT scan. Decision and Order at 36-37. Dr. Crum read it as positive for pneumoconiosis, whereas Drs. Meyer and Tarver read it as negative for the disease. Claimant's Exhibit 7; Employer's Exhibits 6, 7. The ALJ found all three radiologists have equal qualifications because they are all dually-qualified radiologists. *Id*. at 34-37. As the ALJ recognized, however, the parties are limited to "one reading or interpretation of each medical test or procedure to be submitted as affirmative evidence," including CT scans. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006) (en banc); *see* 20 C.F.R. §718.107; *see* Decision and Order at 36-37. Because Employer submitted two readings of the same CT scan, the ALJ declined to consider one of the two readings. Decision and Order at 36-37. Thus he found the remaining readings establish the interpretations of the July 20, 2012 CT scan are in equipoise because an equal number of physicians read it as positive and negative for pneumoconiosis. *Id*.

Employer argues the ALJ erred in applying the evidentiary limitations because Claimant did not raise this issue. Employer's Brief at 8-9. But the evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver. *Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004). Further, Employer reiterates its argument that the ALJ was required to assign controlling weight to the negative readings by Drs. Tarver and Meyer based on their qualifications beyond that of being dually-qualified radiologists. Employer's Brief at 8-9. As discussed above, we reject this argument. Thus we affirm the ALJ's finding that the CT scan evidence does not rebut the presumption of clinical pneumoconiosis. Decision and Order at 36-37.

As Employer failed to establish the x-ray, CT scan, and medical opinions rebut the presumption of clinical pneumoconiosis, we affirm the ALJ's finding that the evidence as a whole does not rebut the existence of the disease. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 42.

Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[16] *See* 20 C.F.R. §718.305(d)(1)(i). We thus affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption by establishing the Miner did not have pneumoconiosis.

Disability Causation

The ALJ next considered whether Employer established "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201."[17] 20 C.F.R. §718.305(d)(1)(ii). He permissibly discredited the disability causation opinions of Drs. Broudy and Rosenberg because neither diagnosed clinical pneumoconiosis, contrary to his finding that Employer failed to disprove the Miner had the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 46-47. We therefore affirm the ALJ's finding that Employer did not

[16] Because the ALJ's determination that Employer did not disprove clinical pneumoconiosis precludes a finding that the Miner did not have pneumoconiosis, we need not address Employer's argument that the ALJ erred in finding it failed to rebut the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Employer's Brief at 10.

[17] To the extent Employer argues the ALJ misapplied the rebuttal standard on total disability causation, we disagree. Employer's Brief at 10. The Sixth Circuit has stated:

> Simply put, the "play no part" or "rule-out" standard and the "contributing cause" standard are two sides of the same coin. Where the burden is on the employer to disprove a presumption, the employer must "rule-out" coal mine employment as a cause of the disability. Where the employee must affirmatively prove causation, he must do so by showing that his occupational coal dust exposure was a contributing cause of his disability. Because the burden here is on the [employer], the [employer] must show that the coal mine employment played no part in causing the total disability.

Big Branch Res., Inc. v. Ogle, 737 F.3d 1063, 1070-1071 (6th Cir. 2013). In addition, the "rule out" standard the ALJ applied is consistent with the regulation implementing Section 411(c)(4) as amended, which provides that the party opposing entitlement must establish that "no part of the miner'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).

rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and therefore the award of benefits.[18]

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[18] Contrary to Employer's argument, because this case is not a survivor's claim, the ALJ was not required to evaluate the cause of the Miner's death. Employer's Brief at 11.