U.S. Department of Labor

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

BRB No. 20-0464 BLA

LARRY D. HONAKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION C/O UNDERWRITERS SAFETY & CLAIMS	)	DATE ISSUED: 11/22/2022
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for Employer and its Carrier.

Olgamaris Fernandez (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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2019-BLA-05013) rendered on a subsequent claim[1] filed on February 19, 2018, pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found that Eastern Associated Coal, LLC (Eastern) is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. He also accepted the parties' stipulation that Claimant established twenty-five years of qualifying coal mine employment and found Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier. Employer also contends the ALJ abused his discretion in excluding certain liability evidence and not permitting a post-hearing deposition of a medical expert. On the merits,

[1] Claimant previously filed claims in 2013 and 2015, both of which the district director denied. Director's Exhibits 1-2. The district director denied the most recent prior claim for failure to establish total disability. Director's Exhibit 2.

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

[3] Where a miner files a claim for benefits more than one year after the denial of a previous claim, the ALJ must also deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish total disability in his prior claim, he had to submit evidence establishing this element to obtain review of the merits of his current claim. *Id.*

Employer argues the ALJ erred in his consideration of the evidence regarding total disability. Claimant responds, urging affirmance of the award of benefits. He takes no position on the ALJ's liability findings, but requests that the Black Lung Disability Trust Fund (the Trust Fund) be held liable for benefits if Peabody Energy is relieved of liability. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's determination that Eastern is the responsible operator and Peabody Energy is the carrier liable for the payment of benefits.[4]

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, 362 (1965).

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Eastern is the correct responsible operator and was self-insured through Peabody Energy on the last day Eastern 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 6-7, 11. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (the Trust Fund).

Patriot was initially another Peabody Energy subsidiary. Director's Exhibit 42. In 2007, after Claimant ceased his coal mine employment with Eastern, Peabody Energy sold a number of its subsidiaries, including Eastern, to Patriot. Director's Exhibits 5, 15, 17, 42; Hearing Transcript at 28. That same year, Patriot was spun off as an independent company. Director's Exhibit 42. On March 4, 2011, the Department of Labor (DOL) authorized Patriot to self-insure itself and its subsidiaries, retroactive to 1973. Director's Exhibit 41 at 7. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Eastern, Patriot later went bankrupt and can no longer provide for those benefits. *See* Director's Exhibit 41; Decision and Order at 9 n.10. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant had twenty-five years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 24.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *Shupe v. Director*, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 11.

Peabody Energy of liability for paying benefits to miners last employed by Eastern when Peabody Energy owned and provided self-insurance to that company. Decision and Order at 5-11.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the responsible carrier in this claim and thus that the Trust Fund, not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy: (1) the DOL released Peabody Energy from liability; (2) the ALJ erroneously excluded its liability evidence; (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 Director is equitably estopped from imposing liability on the company; and (6) because Patriot cannot pay benefits, Black Lung Benefits Act Bulletin Nos. 12-07 and 14-02 place liability on the Trust Fund. Employer 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. Employer's Brief at 16-29.

The Board has previously considered and rejected arguments (1) and (3) through (7) 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 *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.[6] We also reject Employer's argument with respect to the exclusion of its liability evidence for the reasons set forth in those decisions; however, to establish the relevant factual context, below we describe the relevant procedural history in this case.

Procedural History

After Claimant filed his claim, the district director identified Eastern, self-insured through Peabody Energy, as the "potentially liable operator" in a March 5, 2018 Notice of Claim. Director's Exhibit 38. This notice gave Employer ninety days to submit evidence disputing its designation as a potentially liable operator or carrier. *Id.* In response, Employer denied liability, asserting Patriot is the responsible carrier, submitting certain

[6] Moreover, as the ALJ found, there is evidence that Peabody Energy continued to carry a surety for claims under the Act after the time of its alleged release in 2011. *See* Decision and Order at 10 (citing Director's Exhibit 41 at 21-23); Director's Brief at 16-17. Employer does not address this finding.

documentary evidence regarding liability, and requesting Peabody Energy be dismissed. Director's Exhibit 41-43.

On July 5, 2018, the district director issued a Schedule for the Submission of Additional Evidence (SSAE), identifying Eastern as the responsible operator and Peabody Energy as its insurer. Director's Exhibit 44. The district director informed Eastern and Peabody Energy that they had until October 3, 2018 to submit additional documentary evidence relevant to liability and identify any liability witnesses they intended to rely on if the case was referred to the Office of Administrative Law Judges (OALJ). *Id.* 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 [OALJ]." *Id.* at 3 (citing 20 C.F.R. §725.456(b)(1)).

Employer responded to the SSAE on July 13, 2018, contesting liability. Director's Exhibit 45. Thereafter, it requested an extension of time to submit medical evidence. Director's Exhibit 48. The district director provided Employer until October 7, 2018 to submit evidence. Director's Exhibit 49. It did not submit additional evidence to the district director regarding liability or identify any liability witnesses.

The district director issued a Proposed Decision and Order (PDO) on October 29, 2018, awarding benefits and designating Eastern as the responsible operator and Peabody Energy as the responsible carrier. Director's Exhibit 50. In response to the PDO, Employer denied liability, requesting reconsideration of the determination that Peabody Energy is liable, or in the alternative, requesting a hearing before an ALJ.[7] Director's Exhibit 56.

After the case was transferred to the OALJ, Employer submitted additional evidence pertaining to its liability, specifically Employer's Exhibits 3 through 7.[8] *See* Employer's Evidence Summary Form. The Director opposed the admission of the deposition testimony. Director's Objection to Employer's Motion to Admit the Depositions of David Benedict and Steven Breeskin. The ALJ excluded Employer's Exhibits 3 through 7

[7] The district director did not address Employer's request for reconsideration but referred the claim to the OALJ for a hearing. Director's Exhibit 58.

[8] Employer's Exhibit 3 is the deposition testimony of Mr. David Benedict, a former Department of Labor (DOL) Employee; Employer's Exhibit 4 is the deposition testimony of Mr. Steven Breeskin; Employer's Exhibit 5 is in camera deposition testimony of Mr. Benedict; Employer's Exhibit 6 is in camera deposition testimony of Mr. Breeskin; and Employer's Exhibit 7 contains "various" DOL documents. *See* Employer's Evidence Summary Form; Hearing Transcript at 20-21. The depositions were conducted as part of other black lung claims involving Peabody Energy. Hearing Transcript at 15-16.

because Employer did not submit the evidence to the district director,[9] timely identify Mr. Benedict or Breeskin as liability witnesses, or establish extraordinary circumstances for failing to do so. 20 C.F.R. §725.456(b)(1); Hearing Transcript at 15-17; April 29, 2020 Order Denying Admission of Certain Documents and the Admission of Testimony of DOL Personnel (April 29, 2020 Order).

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 determination that Employer's failure to timely submit the evidence, identify its liability witnesses, or establish extraordinary circumstances justifying its failure precluded admission of the evidence and testimony before the ALJ. Thus, we affirm the ALJ's determination that Eastern and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

Post-Hearing Evidentiary Issue

On August 21, 2019, Employer moved to hold the record open to conduct a post-hearing deposition of Dr. Rosenberg. Employer's Motion to Hold the Record Open. Employer requested leave to perform the deposition on September 11, 2019, one day after the hearing, stating that was the earliest date Dr. Rosenberg was available. *Id.*

At the hearing, the ALJ asked Employer to explain why he should allow Dr. Rosenberg's post-hearing deposition.[10] Employer responded it was difficult to schedule depositions given the limited number of qualified experts and the schedules of the experts and parties on both sides. Hearing Transcript at 17-18. Employer explained the purpose of the deposition was to allow Dr. Rosenberg to consider all the evidence of record and provide a more in-depth explanation than he gave in his report. *Id.* at 18-19. The ALJ

[9] Employer represented that the documents contained in Employer's Exhibit 7 were also submitted before the district director but were more legible copies and also may contain publicly available DOL orders. Hearing Transcript at 12-13. The ALJ indicated it was unclear if the various documents within Employer's Exhibit 7 were already submitted and declined to admit it, ruling the exhibit was either untimely or duplicative. *Id.* at 15, 20-21.

[10] The ALJ indicated that it is "well-known" he does not allow post-hearing depositions. Hearing Transcript at 17. While the basis of this general statement is unexplained, his Notice of Hearing and Pre-Hearing Order (Notice of Hearing) in this claim provides, "[e]xcept for good cause shown or with the consent of the parties, no evidence will be admitted unless it is identified and presented to the other parties 20 calendar days or more prior to the hearing. . . . This also applies to deposition exhibits." Notice of Hearing at 7.

indicated that, considering "the three factors in *Lee v. Drummond*, 6 BLR 1-44," he was not convinced Employer took "reasonable steps to secure the evidence before the hearing" or that the evidence was unknown or unavailable earlier. *Id.* at 19-20. Given that Dr. Rosenberg's report was dated August 21, 2019, which was close to the twenty-day deadline for exchanging evidence, the ALJ was "hard pressed" to find how the deposition would not be cumulative or how it would be necessary for a fair hearing under *Lee*.[11] *Id.* at 19-20. While indicating he prefers strict application of Section 725.458,[12] the ALJ offered to keep the record open until 2:00 p.m. the next day, when he was available, to allow Dr. Rosenberg's testimony to be taken as part of the hearing. *Id.* at 34-36.

Employer argues that, given Dr. Rosenberg's schedule as a practicing physician, as well as counsel's schedule, it was unable to move the deposition from 4:00 p.m. to the earlier time requested by the ALJ; thus, the ALJ's refusal to allow the deposition "[b]ecause of two hours" was an abuse of discretion. Employer's Brief at 12-13. Employer's argument lacks merit.

An ALJ exercises broad discretion in resolving procedural and evidentiary matters. *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-63 (2004) (en banc). A party seeking to overturn an ALJ's disposition of a procedural or evidentiary issue must establish that the ALJ's action represented an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Further, post-hearing depositions may be obtained only with the permission, and in the discretion, of the ALJ. *Lee v. Drummond Coal Co.*, 6 BLR 1-544, 1-547 (1983); 20 C.F.R. §725.458.

We perceive no abuse of discretion in the ALJ's findings. Dr. Rosenberg's report is dated August 21, 2019, less than a month prior to the hearing, as is Employer's motion

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[11] In *Lee*, the Board considered whether an ALJ abused his discretion in not permitting a post-hearing deposition and set forth criteria for the ALJ to consider. *Lee v. Drummond Coal Co.*, 6 BLR 1-544, 1-547 (1983). A party who seeks admission of a post-hearing deposition bears the burden of establishing the necessity for the evidence. *Id.* The proffered evidence should be probative and not merely cumulative. *Id.* The party seeking the deposition must establish that reasonable steps were taken to secure the evidence before the hearing, or that the evidence was unknown or unavailable at an earlier time. *Id.* at 1-547-48. Finally, the evidence must be reasonably necessary for a fair hearing. *Id.* at 1-548.

[12] "No post hearing deposition . . . shall be permitted unless authorized by the [ALJ] upon the motion of a party to the claim." 20 C.F.R. §725.458. Additionally, "at least 30 days prior notice of any deposition shall be given to all parties unless such notice is waived." *Id.*

to hold the record open for his testimony.[13] Employer indicated the day after the hearing was the earliest available time Dr. Rosenberg could attend a deposition; however, as the ALJ indicated, Employer does not explain what reasonable efforts it made to obtain a date prior to the hearing, particularly given the ALJ provided notice that depositions should be obtained prior to the hearing. Hearing Transcript at 17, 19-20; Notice of Hearing.

Employer also does not address the ALJ's finding that Dr. Rosenberg's deposition would be cumulative and thus not necessary for a fair hearing. Hearing Transcript at 19-20; Employer's Brief at 12-13. The primary reason Employer provided for obtaining the deposition was to allow Dr. Rosenberg to explain his opinions more fully. Hearing Transcript at 18-19. However, the Board in *Lee* held the ALJ did not abuse his discretion in refusing a post-hearing deposition solely for the purpose of clarifying the expert's own report. *Lee*, 6 BLR at 1-548. While Employer also indicated Dr. Rosenberg should be allowed to consider all the evidence, Dr. Rosenberg considered all the medical evidence of record in his report. Hearing Transcript at 18; Employer's Exhibit 2. Accordingly, we affirm the ALJ's denial of Employer's motion for Dr. Rosenberg's post-hearing deposition as within his discretion. 20 C.F.R. §725.458; *Skrack*, 6 BLR at 1-711; *Lee*, 6 BLR at 1-547-48; *Dempsey*, 23 BLR at 1-63.

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

To invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018), Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See 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).

[13] Here, Employer provided the parties notice of Dr. Rosenberg's September 11, 2019 deposition on August 27, 2019. Notice of Deposition. There is no indication that the parties waived the thirty-day notice requirement at 20 C.F.R. §725.458.

The ALJ found Claimant established total disability based on the preponderance of the blood gas studies, medical opinions, and the evidence as a whole.[14] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 18, 24. Employer alleges the ALJ erred in his consideration of the arterial blood gas studies, in determining Claimant's usual coal mine employment required heavy exertion, and in finding the medical opinions established total disability.

Blood Gas Studies

The ALJ considered four arterial blood gas studies dated May 16, 2018, September 7, 2018, April 5, 2019, and May 26, 2019. Decision and Order at 16. The May 16, 2018 study Dr. Nader conducted on behalf of the DOL was qualifying[15] at rest. Director's Exhibit 23. The September 7, 2018 study conducted at rest was not qualifying. Director's Exhibit 27. The ALJ indicated the April 5, 2019 and May 26, 2019 studies were non-qualifying at rest but qualifying with exercise. Decision and Order at 16; Claimant's Exhibits 1-2.

The ALJ found the non-qualifying September 7, 2018 study invalid due to the lack of any information required by the quality standards in the regulations. Decision and Order at 17. The ALJ gave the most probative weight to the two 2019 exercise studies, as better indicators of Claimant's ability to perform exertional work, and as the most recent studies of record. *Id*. Weighing the evidence together, he found the blood gas studies established total disability. *Id.* at 18.

[14] The ALJ found the pulmonary function studies were non-qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure; thus, Claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(i), (iii). Decision and Order at 16, 18. Employer argues the ALJ erred in his consideration of the pulmonary function studies; however, all the studies were non-qualifying, and it fails to explain how the ALJ's alleged errors would have made a difference. Employer's Brief at 3 n.2-3, 4; *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (dismissing error as harmless when appellant fails to explain how "error to which he points could have made any difference").

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

Employer argues the ALJ erred in failing to consider that the most recent exercise study demonstrated non-qualifying values at peak exercise.[16] Employer's Brief at 5-6. We disagree.

During Dr. Nader's May 26, 2019 examination, two exercise blood samples were obtained. Claimant's Exhibit 1. Claimant designated the results of one of those exercise studies – the "Exercise ABG #1" results of a pCO2 of 36 and a pO2 of 59, which, as the ALJ found, are qualifying.[17] Claimant's Evidence Summary Form at 4; Claimant's Exhibit 1 at 16 (unpaginated); Decision and Order at 16; Appendix C to Part 718. As Employer indicates, Dr. Nader obtained a second exercise blood gas sample. Claimant's Exhibit 1 at 17 (unpaginated). However, no party designated the results of this second exercise study as a part of their affirmative evidence. *See* Claimant's Evidence Summary Form; Employer's Evidence Summary Form. Claimant filled his second available evidentiary slot with the resting and exercise results of the May 5, 2019 blood gas study that Dr. Green conducted. *See* 20 C.F.R. §725.414(a)(2)(i); Claimant's Evidence Summary Form at 4; Claimant's Exhibit 2.

While Employer could have designated the results of the second exercise blood gas study from May 26, 2019 as its affirmative evidence, it did not do so. *See* Employer's Evidence Summary; 20 C.F.R. §725.414(a)(3)(i); *see also Jordan v. Director, OWCP*, 892 F.2d 482, 487-88 (6th Cir. 1989) (parties are deemed to have constructive knowledge of published federal regulations). Accordingly, we see no error in the ALJ's decision to rely on the first May 29, 2019 exercise study result designated by Claimant and not the undesignated, second exercise study result. *See* 20 C.F.R. §725.413(d) (medical information disclosed must not be considered unless a party designates it as evidence in the claim).

Employer also argues the ALJ failed to consider how the barometric pressure affected the blood gas study results. It contends the ALJ erred in not accepting Dr. Rosenberg's explanation that a different barometric pressure would have resulted in higher blood gas results, and in finding Dr. Rosenberg's opinion undermined for failing to address the effects of the barometric pressure on all the blood gas studies. Employer's Brief at 7-11. It submits Dr. Rosenberg thoroughly explained his opinion using the May 26, 2019 study as an illustration. Employer's Brief at 8-9.

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[16] Employer does not challenge the ALJ's finding that the September 7, 2018 blood gas study is invalid; thus, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17.

[17] Claimant also designated the resting results of the May 26, 2019 blood gas study. Claimant's Evidence Summary Form at 4.

Contrary to Employer's argument, the ALJ permissibly found Dr. Rosenberg's rationale unpersuasive because the regulations already account for the effects of elevation in Appendix C to Part 718. *See Big Horn v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055 (10th Cir. 1990); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus, the ALJ permissibly found the April 5, 2019 and May 26, 2019 exercise blood gas studies qualify as disabling.[18] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 17.

Because the ALJ then permissibly provided greatest weight to the two most recent exercise blood gas studies, we affirm his finding that the exercise blood gas studies establish total disability. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984) (an exercise blood gas study may be given more weight than resting blood gas studies); 20 C.F.R. §718.204(b)(ii); Decision and Order at 17.

Medical Opinion Evidence

The ALJ next considered the medical opinion evidence. Drs. Nader[19] and Green opined Claimant is totally disabled while Dr. Rosenberg opined he is not. Director's Exhibits 23, 30; Claimant's Exhibits 1-2; Employer's Exhibit 2. The ALJ found all the doctors were well-qualified to offer opinions and had an "adequate" understanding of Claimant's usual coal mining job. Decision and Order at 23. The ALJ found Drs. Nader's and Green's opinions well-reasoned and documented. *Id.* He found Dr. Rosenberg's opinion merited little weight because it conflicted with the two most recent qualifying exercise blood gas studies and did not explain the "significant drop" of oxygen during exercise. *Id.* at 23-24.

[18] Employer also argues the ALJ erred in requiring Dr. Rosenberg to discuss all of the arterial blood gases regarding the effect barometric pressure has on them, indicating Dr. Rosenberg used the May 26, 2019 study as an illustration. Employer's Brief at 11. However, as the ALJ permissibly found, Dr. Rosenberg's opinion was also undermined for not explaining if the April 5, 2019 study would no longer be disabling based on his analysis regarding the barometric pressure and because he made no mention of the September 7, 2018 study. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 17.

[19] Dr. Nader provided two separate medical examination opinions: one on behalf of the Department of Labor based on an examination performed May 16, 2018, and one on behalf of Claimant based on an examination performed May 26, 2019. Director's Exhibits 23, 30; Claimant's Exhibit 1. He opined Claimant was disabled in both reports.

Employer argues the ALJ erred in finding Claimant's usual coal mine employment required heavy labor and thus erred in finding that Drs. Nader and Green adequately understood Claimant's job duties. Employer's Brief at 14-16. However, we need not resolve this issue.

Even if we were to agree that the ALJ did not adequately consider the exertional requirements of Claimant's usual coal mine employment, Drs. Nader's and Green's opinions do not constitute contrary evidence to the arterial blood gas studies which support total disability.[20] 20 C.F.R. §718.204(b) ("in the absence of contrary evidence," qualifying arterial blood gas studies "shall establish a miner's total disability"). As the ALJ found, their opinions are consistent with his findings regarding the arterial blood gas studies. Decision and Order at 23. Thus, any potential error by the ALJ in addressing Claimant's usual coal mine employment is harmless. *See Larioni,* 6 BLR at 1-1278*; Sarf,* 10 BLR at 1-120-21. Moreover, other than arguing the ALJ erred in his consideration of the blood gas studies, an argument we have rejected, Employer does not challenge the ALJ's discrediting of Dr. Rosenberg's opinion that Claimant is not disabled. Employer's Brief at 7-11; *see Skrack,* 6 BLR at 1-711.

Based on the foregoing, we affirm the ALJ's determination that all the evidence weighed together supports a finding of total disability; thus, we also affirm his conclusion that Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 24. Because Employer has not challenged the ALJ's finding that it failed to rebut the presumption, we also affirm these findings and the award of benefits. *Skrack,* 6 BLR at 1-711; Decision and Order at 32-33.

[20] We note that Dr. Nader's May 26, 2019 report includes the second exercise blood gas sample not designated by the parties, and Dr. Nader erroneously indicates it is qualifying under the regulations. *See* Claimant's Exhibit 1; Employer's Brief at 7 n.8; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-240 (2007) (en banc). But even assuming Dr. Nader's consideration of this evidence diminishes the credibility of his 2019 opinion, it does not constitute contrary evidence to undermine the qualifying arterial blood gas studies.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge