**U.S. Department of Labor**

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

BRB No. 19-0458 BLA

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| CHRIS A. ANDERSON | ) | |
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| v. | ) | |
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| ICG KNOTT COUNTY, LLC, C/O ARCH COAL, INCORPORATED, | ) | DATE ISSUED: 09/30/2020 |
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| and | ) | |
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| SELF-INSURED THROUGH ARCH COAL, INCORPORATED, C/O UNDERWRITERS SAFETY & CLAIMS | ) | |
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| Employer/Carrier-Petitioners | ) | |
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| 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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia Maryland, for Employer/Carrier.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge John P. Sellers, III's Decision and Order Awarding Benefits (2018-BLA-05455) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on February 8, 2017.[1]

The administrative law judge credited Claimant with 23.24 years of underground coal mine employment and found he has a totally disabling pulmonary or respiratory impairment. 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).[2] He further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge lacked the authority to decide the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2.[3] It also challenges the

[1] The administrative law judge noted Claimant filed previous claims in 2013 and 2014 but withdrew both. Decision and Order at 2 n.2; *see* Director Exhibit 49. They are therefore considered not to have been filed. 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he or she has at least fifteen years of underground or substantially similar coal mine employment and a totally disabling respiratory or pulmonary 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

constitutionality of the Affordable Care Act (ACA) and the Section 411(c)(4) presumption, enacted as part of the ACA.[4] Alternatively, it contends the administrative law judge erred in finding Claimant established total disability, invoking the Section 411(c)(4) presumption, and in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, (the Director) filed a limited response urging the Board to reject Employer's Appointments Clause challenge and its contention the Section 411(c)(4) presumption is unconstitutional. Employer replied, reiterating its arguments.[5]

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

**Appointments Clause Challenge**

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to

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> of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
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> U.S. Const. art. II, § 2, cl. 2.

[4] On February 12, 2020, the Board issued an Order denying employer's request to hold this case in abeyance pursuant to *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (King, J., dissenting) and rejecting its argument the Section 411(c)(4) presumption is unconstitutional. *Anderson v. ICG Knott County, LLC*, BRB No. 19-0458 BLA (Feb. 12, 2020) (Order) (unpub.).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established 23.24 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 56; Decision and Order at 3.

*Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[7] Employer's Brief at 5-6; Employer's Reply Brief at 3-5. Employer asserts "[i]t remains unresolved whether the blanket ratification of all prior administrative law judge appointments, such as that rendered by the Secretary of Labor on December 21, 2017, satisfies the Appointments Clause."[8] Employer's Brief at 5; *see also* Employer's Reply Brief at 5. Further, Employer states the Secretary of Labor's ratification letter "merely 'rubber stamped' the improper procedure originally used to appoint Department of Labor administrative law judges." Employer's Brief at 6. Employer argues actions without legal authority are a nullity and, as a matter of law, cannot be cured by ratification. Employer's Reply Brief at 5, *citing Hardin City v. Trunkline Gas Co*., 330 F.2d 789, 792 (5th Cir. 1964) (actions taken without authority of law are void and not subject to ratification) and *U.S. v. L.A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952).

The Director responds that the Secretary's ratification brought the appointment into compliance. Director's Brief at 1-2. She also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers such as the Secretary. *Id*. at 2. We agree with the Director's position.

As the Director notes, an appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 2, *quoting Marbury v. Madison*, 5 U.S. 137,

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[7] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) administrative law judge. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[8] The Secretary issued a letter to the administrative law judge on December 21, 2017 stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Sellers.

157 (1803). Ratification is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Judge Sellers and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Sellers. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Sellers "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts" or that he did not make a "detached and considered judgement" when he ratified Judge Seller's appointment. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the administrative law judge's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relation Board properly ratified appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" earlier invalid actions). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different administrative law judge.[9]

[9] Employer also baldly asserts the letter ratifying Judge Sellers's appointment "does not reflect that the invalid removal protections for judges contained in the Administrative Procedure Act [APA] were addressed or revoked." Employer's Reply Brief at 4-5; *see also* Employer's Brief at 6. To the extent Employer challenges the provisions in the APA for removing administrative law judges, 5 U.S.C. §7521, we decline to address this issue

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine 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 cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv).[10] The administrative law judge must consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Employer argues the administrative law judge erred in finding total disability established based on the pulmonary function studies and medical opinions. Employer's Brief at 10-17; Employer's Reply Brief at 8-11. We disagree.

## Pulmonary Function Study Evidence

The administrative law judge considered four pulmonary function studies conducted on April 19, 2016; March, 30, 2017; June 1, 2017;[11] and August 9, 2017, which listed Claimant's height as 69 inches, 68.9 inches, 68 inches, and 66 inches respectively.[12] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 9-13.

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as it is inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

[10] The administrative law judge found there is no evidence of cor pulmonale with right-sided congestive heart failure or complicated pneumoconiosis. 20 C.F.R. §§718.204(b)(2)(iii), 718.304; Decision and Order at 9. He further determined Claimant did not establish total disability based on the blood gas studies because they all had non-qualifying values. 20 C.F.R. §718.204(b)(ii); Decision and Order at 14; Director's Exhibit 22.

[11] Dr. Gaziano reviewed the June 1, 2017 pulmonary function study for quality purposes only. Director's Exhibit 17.

[12] The administrative law judge noted Claimant also performed a pulmonary function study on March 31, 2017 in conjunction with Dr. Raj's Department-sponsored examination that produced qualifying values. Decision and Order at 12; Director's Exhibit 12. Dr. Gaziano reviewed the study for quality purposes only and concluded it was invalid due to less than optimal effort, cooperation, and comprehension. Director's Exhibit 16.

The administrative law judge noted Claimant testified he was 69 inches tall and that his treatment records also show he was five feet and nine inches tall. Decision and Order at 9 n.7; *see* Director's Exhibit 30 at 20; Employer's Exhibit 4. The administrative law judge thus determined the height of 66 inches is an outlier and did not use it in determining Claimant's height. Decision and Order at 9 n.7. Calculating an average height of 68.48 inches, the administrative law judge used the closest greater table height of 68.5 inches in determining the applicable height when comparing the study results with the values in the 20 C.F.R. Part 718, Appendix B tables. *Id*. He found at that height all of the studies produced qualifying values both before and after the administration of bronchodilators.[13] *Id*. at 10-11; Director's Exhibits 12, 13, 16, 17, 22; Claimant's Exhibit 1; Employer's Exhibit 5.

The administrative law judge rejected Employer's contention the April 19, 2016 and March 30, 2017 studies were unreliable, and noted "[n]o physician of record has opined that the June [1,] 2017 pulmonary function test is invalid." Decision and Order at 12. He agreed with Employer, however, the August 9, 2017 study was invalid. Decision and Order at 11-13. Regardless, he concluded Claimant established total disability as all of the remaining studies were qualifying before and after the administration of bronchodilators. *Id*. at 13; *see* 20 C.F.R. §718.204(b)(2)(i).

Employer contends the administrative law judge erred in finding the April 19, 2016, March 30¸2017, and June 1, 2017 studies support a finding of total disability. Employer's Brief at 10-17; Employer's Reply Brief at 8-11.

Initially we reject employer's assertion the administrative law judge erred in excluding 66 inches as an outlier height when calculating Claimant's average height. *See* Employer's Brief at 13-14; Employer's Reply Brief at 9-10. Employer asserts the height of 66 inches is not an outlier, noting Dr. Green similarly listed 66.5 inches as Claimant's height on treatment notes from September 12, 2018 and October 11, 2018. *See* Employer's Brief at 13; Claimant's Exhibits 2-3. Dr. Green recorded a height of 68 inches, however,

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Consequently, Claimant underwent another Department-sponsored pulmonary function study on June 1, 2017. *See* 20 C.F.R. §725.406(c); Director's Exhibit 13. Therefore, the administrative law judge stated he would not consider the March 31, 2017 study in evaluating whether Claimant is totally disabled. Decision and Order at 12. The height listed on this study is 68 inches. Director's Exhibit 12.

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

when conducting the June 1, 2017 study as part of the Department-sponsored pulmonary function study. *See* Director's Exhibit 13. Further, as the administrative law judge observed, the heights listed on the other pulmonary function studies of record are consistent with each other, Claimant's own testimony, and the treatment records that record Claimant's height as 69 inches. Decision and Order at 9 n.7; *see* Director's Exhibit 30 at 20; Employer's Exhibit 4. As substantial evidence supports the administrative law judge's finding the height of 66 inches was an outlier, we affirm his decision to exclude it when averaging Claimant's height.[14] *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983) (administrative law judge must make a factual finding to determine the miner's height when studies conflict); Decision and Order at 9 n.7.

Concerning the April 19, 2016 study, Employer argues it is invalid as it does not conform to the quality standards contained in 20 C.F.R. Part 718. Employer's Brief at 15-16; Employer's Reply Brief at 10-11. Contrary to Employer's contention, the administrative law judge accurately found the study is not subject to the regulatory quality standards because it was developed during Dr. Sikder's treatment of Claimant. 20 C.F.R. §718.101(b); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); Decision and Order at 12; Claimant's Exhibit 1. He properly considered, however, whether the study is nonetheless sufficiently reliable to support a finding of total disability. 20 C.F.R. §718.101(b); *see J.V.S.* [*Stowers*] *v. Arch of W. Va*., 24 BLR 1-78, 1-89, 1-92 (2008); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); Decision and Order at 12; Claimant's Exhibit 1. He properly rejected Dr. Jarboe's opinion that Claimant's effort was "suboptimal" and that he "did not maintain maximum effort throughout the expiratory maneuver[]" Employer's Exhibit 5; *see* Decision and Order at 12, giving more weight to the opinions of Dr. Sikder, who signed the report, and the technician who administered the test, both of whom opined Claimant gave "good effort."[15] *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997)

[14] It appears the administrative law judge used the excluded March 31, 2017 study's height measurement in averaging Claimant's height for purposes of evaluating the pulmonary function studies. *See* Decision and Order at 9 fn.7. Error, if any, in doing so is harmless, however, as excluding this height yields an average height of 68.63 inches, under which the studies still qualify. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[15] As Employer contends, the administrative law judge mistakenly indicated Dr. Ajjarapu "confirmed" the technician's firsthand observations of Claimant's efforts on the April 19, 2016 study. Decision and Order at 12. Because Dr. Ajjarapu has not offered an opinion in this case, and the administrative law judge previously discussed Dr. Sikder's

(an administrative law judge may rely on the opinion of the physician who administered a ventilatory study over those who reviewed the results); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231 (6th Cir. 1994); *see also Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-149 (1990) (administrative law judge must provide a rationale to credit consultant's opinion over physician or technician who observed the test); Decision and Order at 12. As Employer asserts, however, Dr. Jarboe also stated "[t]his study cannot be validated as only one pre and one post dilator flow volume curve is displayed." Employer's Brief at 15-16, *quoting* Employer's Exhibit 5. The administrative law judge must consider all relevant evidence. 30 U.S.C. §923(b). Because it is unclear whether he considered Dr. Jarboe's opinion in its entirety when assessing the reliability of the April 16, 2016 pulmonary function study, we must vacate his finding the study is valid. Remand is not required on this basis, though, based on our holdings *infra*.

Employer also argues the administrative law judge erred in not adequately explaining why Dr. Jarboe's opinion was insufficient to invalidate the March 30, 2017 study. Employer's Brief at 14-15. Contrary to employer's assertion, the administrative law judge noted Dr. Jarboe stated Claimant "failed to blast out the air on either the pre or post dilator studies" and observed the study contained only two, rather than three, flow volume curves.[16] Employer's Exhibit 5; *see* Decision and Order at 13. He permissibly found, however, the contrary opinions of the physician who signed the report and the technician who administered the test outweighed Dr. Jarboe's opinion. *See Hunt*, 124 F.3d at 744; *Worrell*, 27 F.3d at 231; *Brinkley*, 14 BLR at 1-149; Decision and Order at 13; Claimant's Exhibit 1. He also permissibly rejected Dr. Jarboe's opinion that the test was invalid because it had only two of three tracings, noting that the quality standards did not apply because it was a treatment study and finding that with the two of three tracings the test was still reliable. Decision and Order at 13. Thus, we affirm his finding the qualifying March 30, 2017 study is valid and supports a finding of total disability.

Employer next asserts the June 1, 2017 pulmonary function study cannot be considered qualifying under the regulations. Employer's Brief at 11; Employer's Reply Brief at 8-9. Employer argues because both the MVV values lack tracings, and the pre-

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confirmation of this study, we attribute the discrepancy to scrivener's error. *See* Decision and Order at 12; Claimant's Exhibit 1.

[16] The March 30, 2017 study was conducted as part of a routine exam and is contained in Claimant's treatment records. Claimant's Exhibit 1. Thus, we affirm the administrative law judge's determination it is not subject to the regulatory quality standards. 20 C.F.R. §718.101(b); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); Decision and Order at 13.

and post-bronchodilation pulmonary function studies produced qualifying FEV1 values but non-qualifying FVC values, neither study contains the requisite two valid qualifying values.[17] *See* 20 C.F.R. §718.204(b)(2)(i); Employer's Brief at 11; Employer's Reply Brief at 8-9; Director's Exhibits 13, 17. Claimant responds Employer's assertion is "not without merit," respecting the MVV value in the June 1, 2017 pre-bronchodilator study, but immaterial to the outcome given the post- bronchodilator values. Claimant's Brief at 7.

Contrary to Employer's contention, the post-bronchodilator values on the June 1, 2017 study qualify based on the FEV1 and FVC values making it irrelevant whether the MVV value complies with the quality standards for that portion of the study.[18] *See* Director's Exhibit 13. Regardless, Employer challenges the validity of the MVV values for the first time on appeal. Before the administrative law judge, it asserted only that the June 1, 2017 study did not meet the Federal guidelines for disability because the FVC values and FEV1/FVC ratios are not qualifying and no MVV was performed. Decision and Order at 13; Employer's Post Hearing Brief at 29-30, 34. Contrary to Employer's contention, the administrative law judge accurately noted in his pulmonary function study table that the June 1, 2017 study contained MVV values. *See* Decision and Order at 11; Director's Exhibit 13. Employer made no other argument regarding the June 1, 2017 study below and thus waived its ability to otherwise challenge the validity of the MVV portion of the June 1, 2017 study on appeal. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consolidation Coal Co*., 9 BLR 1-73, 1-75 (1986); *Lyon v.*

[17] Employer states the MVV portions of the June 1, 2017 study were done with only one tracing so "it is impossible to determine whether there was 'excessive variability between the three acceptable curves' as mandated for validity under Appendix B(2)(iii)(D)." Employer's Brief at 12. It also asserts the "Best Data Spirometry" results did not contain a "best" MVV value but only showed the best results of the FVC and FEV1 trials and no MVV results appeared on the final summary page of the test report prepared by the hospital. *Id*.

[18] Applicable disability values for Claimant, aged 51 and 68.5 inches in height, are FEV1 2.08 and FVC 2.62. 20 C.F.R. Part 718, Appendix B. As previously discussed, however, the administrative law judge erred in factoring in the height from the excluded March 31, 2017 pulmonary function study in calculating Claimant's average height. *See supra*. Using the average height of 68.63 inches, which excludes the March 31, 2017 height and the outlying 66 inches, and applying the greater table height of 68.9 inches, results in applicable disability values of FEV1 2.11 and FVC 2.66. 20 C.F.R. Part 718, Appendix B. Thus, the June 1, 2017 study produced a non-qualifying pre-bronchodilator FVC value of 2.96, but qualifying post-bronchodilation values of FEV1 1.79 and FVC 2.61. Director's Exhibit 13.

*Pittsburg & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984). We therefore affirm the administrative law judge's determination the June 1, 2017 study supports a finding of total disability.

Given we have affirmed that the March 30, 2017 and June 1, 2017 studies support a finding of total disability and there are no non-qualifying studies, Employer has not demonstrated how -- even if the April 19, 2016 study was unreliable -- it could affect the administrative law judge's overall finding that the valid, qualifying pulmonary function studies support a finding of total disability. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."). Thus, we affirm his determination Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i).

**Medical Opinions**

At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered Dr. Raj's opinion diagnosing a totally disabling respiratory impairment and Dr. Jarboe's contrary opinion.[19] Decision and Order at 14-18; Director's Exhibit 12; Employer's Exhibit 5. He gave Dr. Raj's opinion "probative weight," finding it supported by the objective studies, but gave Dr. Jarboe's opinion "little probative weight" because it was not well-reasoned. Decision and Order at 14-17. Employer argues the administrative law judge wrongly rejected Dr. Jarboe's opinion by finding he improperly "disregarded all of the pulmonary function tests of record except [the June 2017 study]." Employer's Brief at 18-19. We disagree.

Contrary to Employer's contention, the administrative law judge acknowledged Dr. Jarboe reviewed the April 19, 2016, March 30, 2017, and June 1, 2017 pulmonary function studies. Decision and Order at 17; *see* Employer's Brief at 18-19. As the administrative

[19] The administrative law judge also considered Dr. Dahhan's opinion, noting he diagnosed an obstructive respiratory impairment, but did not state whether it was totally disabling. Decision and Order at 16; *see* Director's Exhibit 22. Because Dr. Dahhan's opinion was "vague" on the issue of total disability and he relied solely on an invalid pulmonary function study, the administrative law judge gave his opinion "little probative weight." *Id*. Employer has not challenged this finding, and we therefore affirm it. *See Skrack*, 6 BLR at 1-711. Further, the administrative law judge considered Dr. Sikder's treatment records, diagnosing a moderate obstructive and restrictive impairment, but gave her opinion little weight because she did not state whether Claimant is totally disabled from a respiratory standpoint. Decision and Order at 17; Claimant's Exhibit 1. Employer also did not challenge this determination.

law judge found, Dr. Jarboe based his opinion solely on the June 1, 2017 study, however, because he determined it was the only valid test of record.[20] Decision and Order at 17; Employer's Exhibit 5. Because we have affirmed Dr. Jarboe erred in his consideration of the June 1, 2017 pulmonary function study and incorrectly believed the other qualifying studies were invalid, we also affirm the administrative law judge's discrediting of Dr. Jarboe's opinion. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Rowe*, 710 F.2d at 255; Decision and Order at 17.

In addition, Employer contends the administrative law judge erred in his consideration of Dr. Raj's opinion. *See* Employer's Brief at 17-18; Employer's Reply Brief at 11. The administrative law judge found Dr. Raj diagnosed totally disabling restrictive and obstructive defects with no bronchodilator response, and emphasized Claimant became short of breath after walking twenty-five feet uphill. Decision and Order at 15; Director's Exhibit 12. He also noted Dr. Raj concluded Claimant could not meet the exertional requirements of his last coal mine work. *Id*. The administrative law judge observed Dr. Raj's March 31, 2017 qualifying pulmonary function study was later invalidated by Dr. Gaziano for unacceptable vents.[21] Decision and Order at 11, 12-13; Director's Exhibits 13, 16. However, the administrative law judge found the subsequent qualifying pulmonary function study, performed by Dr. Green on June 1, 2017 and validated by Dr. Gaziano, was probative of Claimant's level of disability. Decision and Order at 12-13, 15; Director's Exhibits 12, 13, 16, 17. The administrative law judge recognized Dr. Raj did not review the June 1, 2017 study but determined because both tests qualified with similar values, Dr. Raj's opinion was supported by the objective studies. Decision and Order at 15-16.

Employer argues the administrative law judge erred in crediting Dr. Raj's opinion because he relied solely on the March 31, 2017 pulmonary function study, which the administrative law judge determined was invalid.[22] Employer's Brief at 17-18. It further

[20] Dr. Jarboe stated although the FEV1 value on the June 1, 2017 study was qualifying, the FVC value and FEV1/FVC ratio were non-qualifying. Employer's Exhibit 5. He also observed there was no MVV value obtained in conjunction with this study. *Id*. As the administrative law judge accurately found, however, there was an MVV value obtained on the June 1, 2017 study. Decision and Order at 17; *see* Director's Exhibit 13.

[22] Employer also states the administrative law judge erred in crediting Dr. Raj's opinion because he diagnosed complicated pneumoconiosis. Employer's Brief at 17. It did not provide any additional information concerning this assertion. The Board's procedural rules require the brief accompanying a petition for review to contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result that the petitioner seeks on each issue and any authorities upon which the petition

asserts the administrative law judge's reliance on the June 1, 2017 study was also erroneous because it was non-qualifying and because "Dr. Raj could have, but did not review the June 1, 2017[] study." *Id*.

Employer's arguments on this point lack merit. We have affirmed the administrative law judge's determination the March 30, 2017 and June 1, 2017 pulmonary function studies are valid and qualifying. We have also affirmed the administrative law judge's discrediting of Dr. Jarboe's opinion. Moreover, even if Dr. Raj's opinion that Claimant is disabled is not considered, the evidence as a whole still establishes total disability because there are two qualifying pulmonary function studies and no contrary probative evidence of record.[23] 20 C.F.R. § 718.204(b)(2) (qualifying evidence in any of the four categories establishes total disability when there is "no contrary probative evidence."); *see also*, *Rafferty*, 9 BLR at 1-232; *Fields*, 10 BLR at 1-19; *Shedlock*, 9 BLR at 1-198; Decision and Order at 18. We therefore further affirm the administrative law judge's finding Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.305(b).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[24] or by establishing that "no part of the miner's respiratory or pulmonary total disability was

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relies to support such proposed result." 20 C.F.R. §802.211(b). Thus, we decline to address this allegation as insufficiently briefed. *See Cox v. Director, OWCP*, 791 F.2d 445, 446(6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

[23] Although the blood gas studies are non-qualifying, the administrative law judge accurately determined they do not call into question the qualifying pulmonary function studies because they measure different types of impairment. *See Tussey v. Island Creek Coal Co*., 982 F.2d 1036, 1040-41 (6th Cir. 1993); Decision and Order at 18.

[24] "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).

caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

Employer concedes Dr. Jarboe's diagnosis of legal and clinical pneumoconiosis forecloses it from rebutting the existence of pneumoconiosis, but contends the administrative law judge erred in finding it did not rebut disability causation solely because the administrative law judge erroneously found Dr. Jarboe did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. Employer's Brief at 20-21. According to Employer, Dr. Jarboe's acknowledgement that Claimant suffered from legal pneumoconiosis precludes the administrative law judge from discrediting Dr. Jarboe for failing to diagnose the disease. *Id.* But, in so arguing, Employer plainly mischaracterizes the administrative law judge's findings.

It is true Dr. Jarboe conceded claimant's clinical pneumoconiosis caused a restriction that he classified as legal pneumoconiosis. Employer's Exhibit 5; Decision and Order at 24. But Dr. Jarboe further asserted that smoking, not coal dust exposure, caused Claimant's remaining obstructive impairment and that it therefore did not constitute legal pneumoconiosis.[25] *Id*.

The administrative law judge disagreed, however, and for reasons Employer does not challenge on appeal, determined Employer did not meet its burden to establish the obstructive impairment was not also legal pneumoconiosis. Decision and Order at 24. We therefore affirm the administrative law judge's decision that Claimant's obstructive impairment is legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge thus permissibly discredited Dr. Jarboe's opinion on the cause of the miner's disability as he failed to recognize Claimant's obstructive impairment as legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to meet its burden to disprove the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737

[25] 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." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The United States Court of Appeals for the Sixth Circuit holds this standard requires employer to show "coal mine employment did not contribute, in part, to [claimant's] alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020).

F.3d 1050, 1062 (6th Cir. 2013); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-505 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995)(where physician failed to properly diagnose pneumoconiosis, administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"); Decision and Order at 26. Thus, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that no part of the miner's respiratory disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). [26]

[26] Employer does not challenge the administrative law judge's determination Dr. Dahhan's opinion is insufficient to rebut total disability causation and we therefore affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 25-26.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge