U.S. Department of Labor

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

BRB No. 21-0228 BLA

CHARLES F. LEE, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG ELK CREEK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 01/05/2023
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Granting Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2019-BLA-05783) rendered on a subsequent claim filed on January 6, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Employer is the properly designated responsible operator. She found Claimant established 15.18 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Further finding Employer failed to rebut the presumption, the ALJ awarded benefits.

[1] Claimant filed an initial claim for benefits on December 13, 1995, which ALJ Daniel K. Rocketenetz denied for failure to establish any element of entitlement. Director's Exhibit 1; Attachment A to Employer's Closing Brief (*Lee v. Charah Constr. Co., Inc., et al*, Case No. 1996-BLA-1862 (OALJ Feb. 17, 1996) (unpub.)). Although ALJ Rocketenetz's Decision and Order Denying Benefits is available for review, the underlying claim record was destroyed in the Federal Records Center in accordance with the Office of Workers' Compensation Program's records retention schedule, which calls for documents in a denied claim to be destroyed after fifteen years. Director's Exhibit 1; Director' Brief at 22-23; *see* National Archives and Records Administration, Request for Records Disposition Authority, https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-labor/rg-0271/daa-0271-2017-0004_sf115.pdf, last accessed on Jan. 5, 2023.

[2] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because ALJ Rocketenetz denied Claimant's prior claim for failure to establish any element of entitlement, Claimant had to submit new evidence establishing any element in order to obtain review of the merits of his current claim. *Id*.

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

On appeal, Employer argues the ALJ lacked the authority to decide the case because she was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It further asserts remand is required because removal provisions applicable to ALJs render her appointment unconstitutional. Next, it contends the ALJ erred in finding it is the responsible operator. On the merits, Employer argues the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption and that Employer did not rebut it. Claimant did not file a response. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Benefits Review Board to reject Employer's constitutional challenges and affirm the ALJ's responsible operator determination. Employer filed a reply brief reiterating its contentions.

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).

Appointments Clause

Employer requests the Board vacate the ALJ's Decision and Order and remand the case to be heard by a constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. ,

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similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[4] 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.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 20; Director's Exhibit 4.

138 S. Ct. 2044 (2018).[6] Employer's Brief at 12-17; Employer's Reply at 1-4 (unpaginated). It acknowledges the Secretary of Labor (the Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 12-17; Employer's Reply at 1-4 (unpaginated). We disagree.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had the authority at the time of ratification to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *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 that public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

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[6] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to the Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[7] The Secretary issued a letter to ALJ Timlin 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 ALJ Timlin.

Congress authorized the Secretary to appoint ALJs 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 ALJs in a single letter. Rather, he specifically identified ALJ Timlin and gave "due consideration" to her appointment. Secretary's December 21, 2017 Letter to ALJ Timlin. The Secretary further stated he was acting in his "capacity as head of [DOL]" when ratifying the appointment of ALJ Timlin "as an Administrative Law Judge." *Id*.

Employer does not assert the Secretary had no "knowledge of all material facts," and generally speculates he did not make a "genuine, let alone thoughtful, consideration" when he ratified the ALJ's appointment. Employer's Reply at 2 (unpaginated). Employer therefore has not overcome the presumption of regularity.[8] *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. We thus hold the Secretary properly ratified the ALJ'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" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier invalid actions was proper). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded ALJs. Employer's Brief at 17-21; Employer's Reply at 4-8 (unpaginated). It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*, 138 S. Ct. 2044. Employer's Brief at 17-21; Employer's Reply at 4-8 (unpaginated). In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the

[8] While Employer states the Secretary signed the ratification letter "with a robo-pen," Employer's Reply at 2 (unpaginated), this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 17-21. For the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we reject Employer's arguments.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1).[9] Once the Director properly identifies a potentially liable operator, it may be relieved of liability only if it shows either that it is financially incapable of paying benefits or that another financially capable operator more recently employed the miner for at least one year. 20 C.F.R. §725.495(c). However, if the responsible operator the district director designates is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent Employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that operator or of its authorization to self-insure. *Id*. "Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim." *Id.* In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id*.

Employer does not challenge that Big Elk Creek Coal Company (Big Elk) meets the criteria at 20 C.F.R. §725.494(a)-(e) to be the "potentially liable operator." Rather, Employer asserts it is not the responsible operator because Claimant last worked for Charah Construction Company (Charah) for a cumulative period of one year and the district director did not properly investigate whether Charah is financially capable of paying benefits. Employer's Brief at 22-26. It also alleges that if Charah lacked the ability to pay, "the district director was required to put a state guaranty fund on notice." *Id*. Employer

[9] The regulation at 20 C.F.R §725.494 requires that the miner's disability or death must have arisen at least in part out of employment with the operator; the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; the operator must have employed the miner for a cumulative period of not less than one year; the miner's employment included at least one working day after December 31, 1969; and the operator is capable of assuming liability for benefits. 20 C.F.R §725.494(a)-(e).

asserts it cannot be held liable for benefits due to these "procedural defects" in the district director's responsible operator designations. *Id.* at 22, 25. We disagree.

The district director provided the required regulatory statement pursuant to 20 C.F.R. §725.495(d), indicating Charah "was not covered by an insurance policy that included federal black lung coverage, or approved to self-insure its liability, on the date on which the miner was last employed by that operator." Director's Exhibit 32. Thus, contrary to Employer's argument, having put forward prima facie evidence that Charah was not financially capable of assuming liability, the district director was not further required to investigate whether the corporate officers of that company possessed sufficient assets to secure the payment of benefits. 20 C.F.R. §725.495(d); Employer's Brief at 23. Rather, Employer as the designated responsible operator bore the burden of showing a more recent employer possesses sufficient assets to pay benefits including, if necessary, "presenting evidence" that the owner, partners, or, president, secretary, and treasurer "possess sufficient assets to secure the payment of benefits . . ." 20 C.F.R. §725.495(c); *see Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999) (en banc); *see also Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-161 (1999) (en banc).

The ALJ correctly found that Employer did not introduce any evidence to support its argument that Charah is financially capable of paying benefits. Decision and Order at 19. Employer therefore failed to satisfy its burden at 20 C.F.R. §725.495(c)(2). Thus, we affirm the ALJ's finding that Employer is the responsible operator as it is supported by substantial evidence.[10] *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23 (6th Cir. 2014); Decision and Order at 20.

We also reject Employer's assertion that it must be dismissed from the case because the district director never vacated his initial Proposed Decision and Order (PDO) designating Charah as the responsible operator before the case was referred to the Office of Administrative Law Judges (OALJ). Employer's Brief at 26-27 (citing 20 C.F.R.

[10] We reject Employer argument, raised for the first time in this appeal, that the district director should have named "a state guaranty fund" as a responsible party. Employer's Brief at 23-24; *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). Once the district director issued the required statement pursuant to 20 C.F.R. §725.495(d) indicating Charah was not covered by an insurance policy or authorized to self-insure, the burden shifted to Employer to establish Charah is capable of paying benefits. 20 C.F.R. §725.495(c). While Employer now alleges a state insurance guaranty may have been capable of assuming liability, it did not submit any evidence to support its assertion, nor did it argue before the district director or ALJ that a state guarantee fund should be made a party to the claim. *Id.* Therefore, we will not now entertain its argument. 20 C.F.R. §802.301(a).

§725.407(d) (the district director may not notify additional operators of their potential liability after a case has been referred to the OALJ)). Contrary to Employer's assertion, although the district director issued an initial PDO designating Charah as the responsible operator on February 9, 2018, Charah timely requested revision to the PDO on February 23, 2018, which prompted the district director to issue a new Notice of Claim, Schedule for the Submission of Additional Evidence, and, ultimately, a revised PDO on January 24, 2019 naming Big Elk as the responsible operator. 20 C.F.R. §725.419(a), (c); Director's Exhibits 43, 79, 87, 94. As the revised PDO naming Big Elk the responsible operator supersedes the PDO against Charah, Big Elk was the only designated responsible operator on March 27, 2019, when the district director referred the case to the OALJ. 20 C.F.R. §725.419(c). We thus reject Employer's assertion that 20 C.F.R. §725.407(d) mandates its dismissal from the case.

Due Process – Destruction of the Prior Claim Record

Employer requests that the Board vacate the ALJ's Decision and Order and transfer liability for benefits to the Black Lung Disability Trust Fund because evidence in the prior claim was not made part of the record as required by regulation.[11] Employer's Brief at 27-30; *see* 20 C.F.R. §718.309(c)(2) ("Any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim."). It alleges a general due process violation pertaining to its ability to mount a meaningful defense against the claim. We reject Employer's argument.

To sustain its allegation of a procedural due process violation, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999). In the absence of deliberate misconduct, "the mere failure to preserve evidence [from a prior black lung claim] – evidence that may be helpful to one or the other party in some hypothetical future proceeding – does not violate [a party's right to due process]." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting coal mine operator's argument that due process is violated whenever the Trust Fund loses or destroys evidence from a miner's prior claim). Although Employer speculates that the medical evidence from the record of Claimant's prior claim as well as Claimant's prior testimony might have been helpful to its

[11] At the hearing, the ALJ overruled Employer's assertions of prejudice, explaining that Claimant must establish each element of entitlement "from scratch" because of the prior record's absence. Hearing Transcript at 6.

defense,[12] it neither alleges that such evidence was made unavailable due to deliberate misconduct nor explains how it was deprived of a fair opportunity to mount a meaningful defense in this claim. *See Holdman*, 202 F.3d at 883-84; *Borda*, 171 F.3d at 184; *see also Oliver*, 555 F.3d at 1219. Employer therefore has not shown a due process violation.

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

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

Length of Coal Mine Employment

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

The ALJ credited Claimant's testimony and Employment History Form in conjunction with his Social Security Earnings Statement (SSES) to find he worked in qualifying coal mine employment with Davis Construction Company in 1964, 1966-1967, 1969-1973 and 1984-1985, and that he worked in underground coal mines for Eastover Mining Company in 1973-1983, Big Elk in 1986-1987, and Maggard & Maggard Coal

[12] Employer contends that, in destroying the prior claim record, the DOL deprived it of the opportunity to establish Claimant did not "develop[] legal pneumoconiosis in a latent and progressive fashion" by "show[ing] the state of Lee's respiratory capacity, and what symptoms, if any, Lee had up to 3-4 years after he left the mines." Employer's Brief at 28-29. Employer does not further elaborate on this assertion and its significance is unclear given that the ALJ recognized Claimant did not establish clinical or legal pneumoconiosis in his prior claim. *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"); Decision and Order at 2. With regard to Claimant's prior testimony, Employer generally speculates it would have been useful to see if the testimony is consistent with his statements in the current claim or sheds light on the nature of his employment with other employers. Employer's Brief at 29. But Employer's speculative comments provide no basis for remand. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consol. Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *see also Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009).

Company (Maggard & Maggard) in 1988. Decision and Order at 11-18. She credited Claimant's hearing testimony, SSES, and the deposition testimony of Charah supervisor, Jimmy Boone, to find Claimant performed qualifying coal mine employment with Charah in 1989-1992. *Id.* Because the beginning and ending dates of Claimant's employment with each of these coal mine operators was unknown, the ALJ applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine the number of days Claimant worked in coal mine employment during these years.[13] She divided Claimant's yearly earnings as reported in his SSES by the coal mine industry's average yearly earnings for miners who worked 125 days in coal mine employment, as reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*. Using this calculation, she credited Claimant with twelve full years of coal mine employment for each year between 1971 and 1982 because his earnings met or exceeded the average yearly earnings for 125 working days as reported in Exhibit 610 for each of those years. *Id.* at 16. For the years in which Claimant earned less than the Exhibit 610 average yearly earnings (1964, 1966-1967, 1969-1970, 1983-1992), the ALJ credited him with a fraction of a year based on the ratio of days worked to 125, for a total of 6.68 partial years of coal mine employment.[14] *Id.* at 16-17. Adding the sums together, the ALJ found Claimant established 17.68 years of coal mine employment between 1964 and 1992. *Id.*

Employer argues the ALJ erred in relying on a 125-day divisor to credit Claimant with full and partial years of coal mine employment. Employer's Brief at 38-43. However, this case arises in the jurisdiction of the United States Court of Appeals for the Sixth Circuit which has held that 125 days of coal mine employment equates to a full year of coal mine employment for all purposes under the Act. *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019) (if the formula at 20 C.F.R. §725.101(a)(32)(iii) yields at least 125 working

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

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

20 C.F.R. §725.101(a)(32)(iii).

[14] The ALJ credited Claimant with 0.77 year with Davis Construction in 1964-1970, 0.63 partial year with Eastover Mining in 1983, 0.12 year with Davis Construction in 1984-1985, 1.65 years with Big Elk in 1986-1987, 0.13 year with Maggard & Maggard in 1988, and 2.38 years with Charah in 1989-1992. Decision and Order at 16-17.

days, a miner can be credited with a year of coal mine employment regardless of the actual duration of employment for the year).[15] We thus affirm the ALJ's finding that Claimant established over fifteen years of qualifying coal mine employment.[16] *See* 20 C.F.R. §725.101(a)(32); *Shepherd*, 915 F.3d at 402.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found the preponderance of pulmonary function and medical opinion evidence establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iv), and Claimant therefore invoked the rebuttable presumption of total disability due to pneumoconiosis and established a change in an applicable condition of entitlement.[17] Decision and Order at 22-32. Employer alleges the ALJ erred in finding the

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

[16] Employer asserts it was prejudiced by the ALJ's consideration of Mr. Boone's testimony in finding that Claimant's employment with Charah constitutes qualifying coal mine employment (comparable to underground coal mine employment). But any error the ALJ may have made in finding Claimant's 2.38 years of employment with Charah is qualifying is immaterial to her overall finding that Claimant established over fifteen years of qualifying employment. The ALJ's calculation of 17.68 years of coal mine employment, minus the 2.38 years of employment with Charah, still amounts to 15.3 years of qualifying coal mine employment sufficient to invoke the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[17] The ALJ found the preponderance of the blood gas evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 25. She further

pulmonary function and medical opinion evidence establish total disability at 20 C.F.R §718.204(b)(2)(i), (iv). We agree the ALJ's findings in this regard cannot be affirmed.

Pulmonary Function Studies

The ALJ accurately noted the parties designated three pulmonary function studies. for consideration at 20 C.F.R. §718.204(b)(2)(i): Dr. Forehand's March 7, 2017 study produced non-qualifying values before and after bronchodilation; Dr. Forehand's April 7, 2017 study produced qualifying values before and after bronchodilation; and Dr. Dahhan's June 19, 2018 study produced qualifying values before and after bronchodilation. Decision and Order at 23-24; Director's Exhibits 14 at 2, 18 at 14, 23 at 11. The ALJ found that a preponderance of pulmonary function studies is qualifying and that Claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Employer asserts the ALJ erred in not specifically addressing the opinions of its medical experts challenging the validity of each of the pulmonary function studies. Employer's Closing Brief at 5-6, 25-26.[18] We agree.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the reporting requirements of 20 C.F.R. §718.103 and the regulatory quality standards at 20 C.F.R. Part 718, App. B. 20 C.F.R. §§718.101(b), 718.103(c); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). A study that does not substantially comply with these requirements cannot establish the presence or absence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i). 20 C.F.R. §718.103(c). In the absence of evidence to the contrary, compliance with the quality standards at 20 C.F.R. Part 718, App. B, is presumed. 20 C.F.R. §718.103(c). The party challenging the validity of a study has the burden to

found the record contains no evidence of cor pulmonale with right-sided congestive heart failure at 20 C.F.R. §718.204(b)(2)(iii). *Id.*

[18] Drs. Vuskovich validated the March 7, 2017 study, while Drs. Gaziano and Rosenberg opined it is invalid. Director's Exhibit 15; Employer's Exhibits 1, 2. Dr. Gaziano validated the April 7, 2017 study, while Drs. Vuskovich and Rosenberg opined it is invalid. Director's Exhibit 16; Employer's Exhibits 1, 2. Regarding the June 19, 2018 study, Dr. Vuskovich opined its post-bronchodilator results and pre-bronchodilator FVC results are valid and show "moderate ventilatory impairment with an obstructive pattern;" however, he opined the pre-bronchodilator FEV1 results are invalid. Employer's Exhibit 1 at 9. Dr. Rosenberg opined the results of the June 19, 2018 pre- and post-bronchodilator studies are invalid. Employer's Exhibit 2. In its Closing Brief, Employer summarized this evidence and argued Claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(i) because the studies are invalid. Employer's Closing Brief at 5-6, 25-26.

establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984). An ALJ must consider a reviewing doctor's opinion regarding a claimant's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Siegel v. Director*, OWCP, 8 BLR 1-156, 1-157 (1985); *Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985).

Although the ALJ summarized the various challenges to the pulmonary function study evidence by Employer's experts, she stated only that, "putting aside the issue of [the studies'] validity," the studies are contemporaneous and as a whole "weigh[] slightly in support of a finding of total disability." Decision and Order at 24. And while she purported to give the tests "less weight due to the inconsistent efforts by Claimant," she did so without resolving the conflict in the evidence and rendering a finding on their validity. *Id*.

Because the ALJ did not satisfy her obligation to consider whether the pulmonary function studies are in substantial compliance with the quality standards prior to determining whether Claimant is totally disabled, and she failed to resolve the conflicts in the evidence, her decision does not comply with the regulations and the APA.[19] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate her finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *See Director, OWCP v. Congleton*, 743 F.2d 428, 430 (6th Cir.1984) (finding which does not encompass discussion of contrary evidence cannot be affirmed); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order at 24.

Weighing of Medical Opinions and Evidence as a Whole

The ALJ considered three medical opinions. The ALJ credited Dr. Forehand's opinion that Claimant has disabling obstructive impairment as supported by Claimant's qualifying pulmonary function studies. In contrast, she rejected the opinions of Drs. Vuskovich and Rosenberg as equivocal because they concluded the evidence is not sufficiently reliable to render an opinion on whether Claimant is totally disabled. Employer's Exhibits 1 at 11, 2 at 4. Having vacated the ALJ's weighing of the pulmonary function study evidence, which influenced her credibility findings with regard to the

[19] The APA requires every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

medical opinion evidence,[20] we vacate her finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole.[21] *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 30-31.

We thus also vacate her findings that Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and invoked the Section 411(c)(4) presumption.[22]

Remand Instructions

On remand, the ALJ must address whether the March 7, 2017, April 7, 2017, and June 19, 2018 pulmonary function studies are in substantial compliance with the regulatory

[20] In weighing the medical opinions, the ALJ stated, "Based on the fact that the Department consultant validated the [the pulmonary function test on which Dr. Forehand relied], it is sufficiently reliable to provide documentation for Dr. Forehand's opinion, although the opinions to the contrary will also be considered in assessing the validity of his opinion." Decision and Order 30. She also concluded, "While the pulmonary function testing is questionable, all of the FEV1 values were qualifying, and at least one of the reviewing physicians found each test to be valid." *Id*. at 31. Neither statement, however, resolves the conflict in the evidence or constitutes a finding as to the pulmonary function studies' validity.

[21] Contrary to Employer's assertion, the ALJ properly characterized Dr. Vuskovich's opinion as having reviewed treatment blood gas studies, rather than treatment pulmonary function studies. Decision and Order at 30; Employer's Exhibit 1. The ALJ further correctly recognized pulmonary function and blood gas studies measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984); Decision and Order at 31. We thus reject Employer's assertion that the ALJ selectively analyzed Dr. Vuskovich's opinion in finding his opinion regarding Claimant's normal gas exchange does not contradict Dr. Forehand's diagnosis of a disabling impairment by pulmonary function study. *See Tussey*, 982 F.2d at 1040-41; *Sheranko*, 6 BLR at 1-798; Director's Exhibits 18, 29; Employer's Exhibit 1 at 11, Employer's Brief at 37-38.

[22] Because we have vacated the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption, we decline to address, at this time, Employer's challenge to the ALJ's determination that it failed to rebut the presumption. On remand, should the ALJ again find Claimant invoked the Section 411(c)(4) presumption and that Employer has failed to rebut it, Employer may challenge such findings in a future appellate proceeding.

quality standards. *See Keener*, 23 BLR at 1-237. In so doing, the ALJ must be cognizant that compliance with the quality standards is presumed, 20 C.F.R. §718.103(c), and Employer has the burden to establish the results are unreliable, as it is the party challenging the validity of these studies. *See Vivian*, 7 BLR at 1-361.

The ALJ must then reconsider the medical opinions of Drs. Forehand, Vuskovich, and Rosenberg under 20 C.F.R. §718.204(b)(2)(iv) in light of her findings regarding the pulmonary function studies. She should recognize that a physician may offer a reasoned medical opinion diagnosing total disability even if the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties").

In evaluating the pulmonary function study and medical opinion evidence on the issue of total disability, the ALJ must discuss all relevant evidence, critically analyze the medical opinions, and render necessary credibility findings. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *McCune*, 6 BLR at 1-998. In rendering her credibility findings, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951) ("substantiality of evidence must take into account whatever in the record fairly detracts from its weight"); *Rowe*, 710 F.2d at 255. She must also explain her findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes total disability, then he will have established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1). The ALJ must then determine whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii).

Alternatively, if the ALJ finds Claimant cannot establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718, benefits must be denied. *Anderson v.*

Valley Camp of Utah, Inc., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge