U.S. Department of Labor

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

BRB No. 21-0434 BLA

EARNEST D. ANDERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EWELL SPRADLIN COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	DATE ISSUED: 01/10/2023
	)	
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 Dana Rosen, Administrative Law Judge, United States Department of Labor.

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

Ann Marie Scarpino (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, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Dana Rosen's Decision and Order Awarding Benefits (2018-BLA-05686) rendered on a subsequent claim,[1] filed on April 7, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least nineteen years of surface coal mine employment in conditions substantially similar to those in an underground mine and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she 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. §§718.305, 725.309. She further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II §2, cl. 2.[4] It further asserts the removal provisions applicable to

[1] The ALJ noted the records for Claimant's prior claim were destroyed and proceeded under the assumption that the claim was denied for failure to demonstrate any element of entitlement. Decision and Order at 2, 61; Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 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 becomes final, 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 the ALJ proceeded as if Claimant did not establish any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element to obtain review of the merits of his current claim. *Id*.

[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,

the ALJ render her appointment unconstitutional. On the merits, Employer argues the ALJ erred in concluding Claimant invoked the Section 411(c)(4) presumption because she incorrectly calculated his length of coal mine employment and erred in finding he established a totally disabling respiratory impairment. In addition, it argues the ALJ erred in finding it failed to rebut the presumption.

Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging rejection of Employer's constitutional challenges to the ALJ's appointment and removal protections. Employer filed a reply brief reiterating its arguments on the issues the Director addressed.

The Benefits Review 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 Challenge

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 13-14; Employer's Reply at 3. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all

> 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] We will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 6.

[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 Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia*, 138 S. Ct. at 2055 (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

sitting DOL ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in ALJ Rosen's prior appointment.[8] Employer's Brief at 13-18; Employer's Reply at 1-5.

The Director responds, asserting the ALJ had the authority to decide this case because the Secretary's ratification brought her appointment into compliance. Director's Response at 2-4. He also maintains Employer failed to demonstrate the Secretary's actions ratifying the appointment were improper. *Id.* at 4. We agree with the Director's position.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Response at 3 (quoting *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 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*, 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 public officers have properly discharged their official duties, with "the burden shifting to the attacker to show

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[7] The Secretary of Labor (Secretary) issued a letter to ALJ Rosen 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 Rosen. ALJ Rosen issued no orders in this case until her September 12, 2019 notice of assignment and scheduling order.

[8] On July 20, 2018, the Department of Labor (DOL) expressly conceded the Supreme Court's holding in *Lucia* applies to the DOL's ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

the contrary." *Advanced Disposal,* 820 F.3d at 603 (citing *Butler v. Principi,* 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress has 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 but rather specifically identified ALJ Rosen and indicated he gave "due consideration" to her appointment. Secretary's December 21, 2017 Letter to ALJ Rosen. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Rosen "as an Administrative Law Judge." *Id.*

Employer does not assert the Secretary had no "knowledge of all material facts," but instead generally speculates he did not provide "genuine consideration" of the ALJ's qualifications when he ratified the ALJ's appointment. Employer's Brief at 16-17; Employer's Reply at 3. Employer therefore has not overcome the presumption of regularity.[9] *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. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States,* 520 U.S. 651, 654-66 (1997) (appointment valid where the 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" all its earlier actions was proper).[10]

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[9] While Employer notes the Secretary's ratification letter was signed by a "robo-pen," Employer's Reply at 3, this does not, as Employer seems to acknowledge, 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 an appointment be evidenced by an "open and unequivocal act").

[10] While Employer correctly states Executive Order 13843, which removes ALJs from the competitive civil service, applied only to future appointments, Employer's Brief at 23, the Executive Order does not state that the Secretary's 2017 ratification of the ALJ's appointment was impermissible or invalid. Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Rosen's appointment, which we hold constituted a valid exercise of his authority, bringing the ALJ's appointment into compliance with the Appointments Clause.

Consequently, we reject Employer's argument 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 18-23; Employer's Reply at 5-8. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018). Employer's Brief at 18-23. 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 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 18-23. 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), the Board rejects Employer's arguments.

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

Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *See 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 that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

Employer first asserts the ALJ erred in finding at least fifteen years of coal mine employment. Employer's Brief at 30-32. We disagree. The ALJ considered Claimant's deposition and hearing testimony, employment history forms, and Social Security Administration (SSA) earnings records. Decision and Order at 6-10; Director's Exhibits 3, 4, 6-9, 13. She permissibly found Claimant's SSA earnings records, testimony, and employment history forms to be the most probative evidence. *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984) (ALJ may credit SSA records over testimony and other sworn statements); Decision and Order at 9. Further, she found Claimant was employed for a calendar year in each year from 1967 to 1985 and presumed, in the absence of contrary evidence, Claimant worked for at least 125 days in such employment in each of those years.

Shepherd v. Incoal, Inc., 915 F.3d 392, 404 (6th Cir. 2019); 20 C.F.R. §725.101(a)(32)(ii); Decision and Order at 9-10. She thus credited Claimant with nineteen years of coal mine employment from 1967 to 1985. Decision and Order at 9-10.

The ALJ also made an alternative finding. She applied the calculation method at 20 C.F.R. §725.101(a)(32)(iii) to calculate Claimant's coal mine employment.[11] Decision and Order at 10. Thus, she divided Claimant's yearly earnings as reported in his SSA earnings records by the coal mine industry's average yearly earnings for 125 days of employment, as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.[12] Decision and Order at 10. For each year in which Claimant's earnings met or exceeded the Exhibit 610 average yearly earnings for 125 days of employment, she credited Claimant with a full year of coal mine employment. *Id*. For the years in which Claimant's earnings fell short, she credited him with a fractional year, calculated by dividing Claimant's annual earnings by the Exhibit 610 average yearly earnings. *Id*. Utilizing this framework, the ALJ credited Claimant with a partial year of coal mine work in 1968, 1975, and 1976, and a full year of coal mine employment in every other year. *Id.* She therefore credited him with at least sixteen years of coal mine employment from 1967 to 1985. *Id*.

Employer argues the ALJ erred in finding Claimant worked for nineteen years between 1967 and 1985 because his earnings in 1968, 1975, and 1976 did not establish 125 working days. Employer's Brief at 31. However, Employer does not challenge the ALJ's alternative finding that, even if Claimant did not have a full year of coal mine employment in 1968, 1975, and 1976, he established at least sixteen years of coal mine employment based on his coal mine related earnings.[13] Decision and Order at 10. Thus, we need not

[11] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may divide the miner's annual earnings by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual.* 20 C.F.R. §725.101(a)(32)(iii).

[12] The "average yearly earnings" figures appear in the center column of Exhibit 610 and reflect multiplication of the "average daily wage" by 125 days.

[13] Employer asserts the ALJ erred in crediting Claimant's non-coal mine employment with Knoxville Bumper Exchange in 1967 and 1968. Employer's Brief at 31. In making her alternative finding using Claimant's earnings to determine the length of his coal mine employment, the ALJ only considered Claimant's earnings from Employer in 1967 and 1968. Decision and Order at 7; Director's Exhibit 7. Thus, contrary to Employer's contention, the ALJ did not credit Claimant for any non-coal mine employment with Knoxville Bumper Exchange in 1967 and 1968. *Id*.

address Employer's argument as it has not explained how the error to which it points would have made any difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

Employer also argues the ALJ erred in finding Claimant's coal mine employment is qualifying. Employer's Brief at 31-32. We disagree.

We reject Employer's assertion that Claimant's testimony is insufficient to establish all of his coal mine employment was performed in conditions substantially similar to those in underground mines. Employer's Brief at 31. Claimant is not required to prove the dust conditions aboveground were identical to those underground. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65 (6th Cir. 2015); 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013). Instead, he need only establish he was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2).[14]

Claimant testified his work in the "strip pit" was dusty. Director's Exhibit 13 at 15-16, 28, 54; *see* Hearing Transcript at 13. He further stated as follows: when "[y]ou get on a D-9 and just ride it through a strip pit, if it ain't raining, and when you get off, why you can turn your shirt over and pour the dust out." *Id*. Specifically, he testified he would have to empty the coal dust out of his pockets before going in the house after his shift. *Id*. The ALJ permissibly found Claimant's uncontradicted testimony credible and establishes he was regularly exposed to coal mine dust during his employment.[15] *See Kennard*, 790 F.3d at 664; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (claimant's testimony that the conditions throughout his coal mine employment were

[14] We reject Employer's argument that the regulation at 20 C.F.R. §718.305(b)(2) is invalid. Employer's Brief at 32. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, as well as the United States Court of Appeals for the Tenth Circuit, have rejected similar arguments and have upheld the validity of 20 C.F.R. §718.305(b)(2). *See Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 301-03 (6th Cir. 2018); *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018).

[15] Employer argues the ALJ found Claimant's "post-1985 trucking work was not qualifying employment, [but] she never undertook that same analysis for the time [he] worked in a similar role from 1978-1985." Employer's Brief at 31. It has not adequately explained its contention that Claimant did "similar work" during these two time periods. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b). Further, the ALJ never rendered a finding that Claimant's post-1985 work is not qualifying. She did not address whether Claimant's work during this time was qualifying.

"very dusty" met his burden to establish he was regularly exposed to coal mine dust); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 & n.17 (10th Cir. 2014) (claimant's testimony that he was exposed to "pretty dusty" conditions "provided substantial evidence of regular exposure to coal mine dust"); Decision and Order at 10.

Because it is supported by substantial evidence, we affirm the ALJ's finding Claimant established at least sixteen years of qualifying coal mine employment.[16] 20 C.F.R. §718.305(b)(2).

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or 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), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based on the pulmonary function studies and medical opinions.[17] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 48-49, 52-53. Employer argues the ALJ erred in finding Claimant established total disability based on the pulmonary function studies and medical opinions. Employer's Brief at 24-30. We disagree.

The ALJ considered three pulmonary function studies Claimant performed on June 21, 2016, August 17, 2017, and January 23, 2020, that the parties designated pursuant to

[16] Employer asserts the ALJ erroneously found it was bound to a stipulation with respect to the length of Claimant's coal mine employment. Employer's Brief at 30. Employer's argument is not persuasive. The ALJ did not rely on any stipulations in making her findings regarding the length and nature of Claimant's coal mine employment; rather she specifically stated the parties did not stipulate to the length of Claimant's coal mine employment. Decision and Order at 6, 10.

[17] The ALJ found the arterial blood gas studies do not establish total disability and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 49.

the evidentiary limitations. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 44-46, 48-49; Director's Exhibit 17; Claimant's Exhibit 1; Employer's Exhibit 1. She further considered eight pulmonary function studies contained in Claimant's treatment records, which he performed on November 6, 2018, January 4, 2019, April 4, 2019, June 19, 2019, September 12, 2019, October 24, 2019, April 22, 2020, and July 21, 2020. Decision and Order at 46-49; Claimant's Exhibit 3; Employer's Exhibits 15 at 16, 38, 39, 43, 48, 51, 54.

The ALJ assigned controlling weight to the pre-bronchodilator study results. Decision and Order at 46-49. She found the August 17, 2017, January 4, 2019, April 4, 2019, June 19, 2019, October 24, 2019, January 23, 2020, April 22, 2020, and July 21, 2020 studies produced qualifying[18] values for total disability pre-bronchodilator, while the June 21, 2016, November 6, 2018, and September 12, 2019 studies produced non-qualifying values. Decision and Order at 44-49. Further, she found all of the studies are valid. *Id.*

The ALJ gave significant weight to the August 17, 2017 study and found the preponderance of the pulmonary function study evidence is qualifying and supports a finding of total disability. Decision and Order at 48-49. Thus, she found Claimant established total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 48-49.

Initially, we reject Employer's argument that the ALJ ignored the evidentiary limitations. Employer's Brief at 24. The regulations set limits on the amount of specific types of medical evidence the parties can submit into the record. 20 C.F.R. §725.414. In support of their affirmative cases, each party may submit "the results of no more than two pulmonary function tests." 20 C.F.R. §725.414(a)(2)(i), (3)(i). The results of the DOL-sponsored complete pulmonary evaluation of Claimant are not counted as evidence submitted by the parties. 20 C.F.R. §725.406(b). In rebuttal, each party may submit "no more than one pulmonary function test . . . submitted by" the opposing party "and by the Director pursuant to [20 C.F.R.] §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). The regulations further provide that "[n]otwithstanding the limitations" of 20 C.F.R. §725.414(a)(2), (3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4).

Thus, the ALJ properly considered Dr. Forehand's June 21, 2016 pulmonary function study conducted as a part of Claimant's DOL-sponsored examination, as well as

[18] 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).

the January 23, 2020 and August 17, 2017 studies Claimant and Employer designated, respectively. 20 C.F.R. §§725.406(b), 725.414(a)(2)(i), (3)(i); Director's Exhibit 17; Claimant's Exhibit 1; Employer's Exhibit 1. The remainder of the studies the ALJ considered were contained in the Claimant's treatment records, which are not subject to the evidentiary limitations. 20 C.F.R. §725.414(a)(4); Claimant's Exhibit 3; Employer's Exhibits 15 at 16, 38, 39, 43, 48, 51, 54.

Employer next argues the ALJ erred in finding the pulmonary function studies contained in Claimant's treatment records valid. Employer's Brief at 26-27. The ALJ correctly observed the quality standards do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment); Decision and Order at 44. An ALJ must still determine, however, if treatment record pulmonary function studies are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). The ALJ addressed the reliability of each of the pulmonary function studies contained in Claimant's treatment records and found them reliable. Decision and Order at 46-48. Employer generally argues the pulmonary function studies contained in the treatment records are invalid based on "uncontradicted opinions," but does not allege any specific error made by the ALJ for any individual pulmonary function study or any evidence the ALJ failed to consider. Employer's Brief at 25-27. Thus we reject this argument. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b).

Nor is there merit to Employer's argument the ALJ improperly based her finding of total disability at 20 C.F.R. §718.204(b)(2)(i) solely on a head count. Employer's Brief at 25. Contrary to Employer's characterization, the ALJ properly performed a qualitative and quantitative analysis of the pulmonary function studies, evaluating whether they are reliable and then permissibly concluding that the preponderance of the reliable pulmonary function study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i) because the majority are qualifying. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); Decision and Order at 44-49. We therefore affirm her finding the pulmonary function studies establish total disability.[19] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 48-49.

[19] We need not address Employer's argument the ALJ erred in finding the August 17, 2017 pulmonary function study qualifying as this would not change the ALJ's finding

The ALJ also weighed Dr. Forehand's opinion that Claimant is totally disabled and the opinions of Drs. Rosenberg and Jarboe that he is not. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 50-53. She found Dr. Forehand's opinion well-reasoned and documented. Decision and Order at 50. On the other hand, she found the opinions of Drs. Rosenberg and Jarboe unpersuasive and contrary to the weight of the objective testing. *Id.* at 50-52.

Employer argues the ALJ erred in crediting Dr. Forehand's opinion because he relied on the June 21, 2016 arterial blood gas study when the ALJ found the blood gas study evidence does not establish total disability at 20 C.F.R. 718.204(b)(2)(ii). Employer's Brief at 29. We disagree.

Total disability can be established with a reasoned medical opinion even in the absence of qualifying pulmonary function or arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(iv); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests). Further, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

Dr. Forehand observed that Claimant's usual coal mine employment included cleaning coal and operating heavy equipment including a bulldozer, drill, grader, and shovel, and opined that his pO2 result of 51 on a blood gas study is insufficient for him to meet the physical demands of his job. Director's Exhibit 17. Thus, contrary to Employer's contentions, the ALJ permissibly credited Dr. Forehand's opinion because she found he based his total disability assessment on his physical examination of Claimant, the results of the June 21, 2016 blood gas study, and his understanding of the physical requirements of Claimant's usual coal mine work.[20] *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179,

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the majority of the valid studies are qualifying. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); Employer's Brief at 28.

[20] Employer argues Dr. Forehand's "failure to reconsider his opinion in light of subsequent testing [] detracted from his opinion." Employer's Brief at 29. The ALJ noted Dr. Forehand did not have the opportunity to consider Claimant's later treatment records, but found nothing in the records contradicted his opinion, and that the records actually "showed a decline in Claimant's condition" which supports his opinion. Decision and Order at 50. Because Employer does not challenge this finding, we affirm it. *See Skrack*

185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 50.

Employer asserts the ALJ erred in discrediting the opinions of Drs. Rosenberg and Jarboe. Employer's Brief at 27-29. We disagree.

Dr. Rosenberg opined Claimant's pulmonary function studies show he has a moderate airflow obstruction, but he is not totally disabled from a pulmonary perspective because his post-bronchodilator values are normal. Employer's Exhibit 1 at 42-43. Dr. Jarboe opined Claimant is not totally disabled based, in part, on his August 17, 2017 pulmonary function study which showed "normal limits" and no impairment post-bronchodilator. Employer's Exhibit 2 at 6-7. The ALJ found Claimant's pre-bronchodilator results are a more accurate measure of his condition and ability to perform his usual coal mine employment. Decision and Order at 51. Moreover, she noted the preponderance of the pulmonary function testing is qualifying. *Id*. She thus permissibly found Drs. Rosenberg and Jarboe did not adequately explain why Claimant is not totally disabled in light of the weight of the pulmonary function study evidence.[21] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Crisp*, 866 F.2d at 185; Decision and Order at 51-52.

We therefore affirm the ALJ's finding the medical opinion evidence establishes total disability.[22] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 53. Further, we affirm the ALJ's finding Claimant established total disability in consideration of the evidence as

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v. Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983); Decision and Order at 50. Thus, Employer has failed to demonstrate how Dr. Forehand's failure to review Claimant's later medical records renders his opinion less credible. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

[21] We reject Employer's argument that the ALJ erred in crediting "a solitary six-minute walk test over other objective tests in the file." Employer's Brief at 28-29. While the ALJ discussed Dr. Rosenberg's and Dr. Jarboe's failure to address the August 27, 2019 six-minute walk test alongside the July 21, 2020 test, her total disability finding was based on the pulmonary function studies and medical opinions, not the six-minute walk tests. Decision and Order at 48-52.

[22] Because the ALJ provided a valid reason for discrediting the opinions of Drs. Rosenberg and Jarboe, we need not address Employer's remaining arguments regarding the weight she accorded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-381 n.4 (1983); Employer's Brief at 27-29.

a whole, 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1).

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

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

Employer challenges the ALJ's finding it did not rebut the presumption of legal pneumoconiosis. Employer's Brief at 33-36. The ALJ found the x-ray evidence,[24] computed tomography (CT) scan evidence, and medical opinion evidence all support a finding of clinical pneumoconiosis and, therefore, Employer did not rebut the presumption that Claimant has clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 55-57. Employer does not allege specific error in the ALJ's finding that it failed to rebut the presumption of clinical pneumoconiosis. [25] Thus we affirm this finding. *See Cox*, 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21; 20 C.F.R. §802.211(b).

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[23] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[24] To the extent Employer argues the ALJ erred in assigning less weight to Dr. Forehand's x-ray interpretation based on his credentials, we disagree. Employer's Brief at 36. The ALJ permissibly found Dr. Forehand's interpretation entitled to less weight than the interpretations of Drs. Seaman and Meyer because they are dually-qualified B readers and board-certified radiologists, while Dr. Forehand is a B reader only. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59-60 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993); *see generally Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); 20 C.F.R. §718.304(a); Decision and Order at 55.

[25] We note Employer asserts the ALJ erred by not considering whether "the overstated work history Dr. Forehand relied upon" affected his credibility. Employer's

Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, we need not address Employer's arguments regarding legal pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 33-36. We therefore affirm the ALJ's conclusion that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

The ALJ also found Employer did not rebut the presumption by establishing no part of the Claimant's respiratory or pulmonary total disability is caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 59-61. Because Employer raises no specific arguments on total disability causation, we affirm the ALJ's determination that Employer failed to prove no part of Claimant's total disability was caused by pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 60.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

Brief at 36. However, because Dr. Forehand opined Claimant has both clinical and legal pneumoconiosis, the ALJ properly did not consider his opinion on pneumoconiosis, as it does not aid Employer in rebutting the presumption. *See Shinseki*, 556 U.S. at 413; Decision and Order at 55-58.