U.S. Department of Labor

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

BRB No. 21-0011 BLA

ROBERT L. NANTZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG ELK CREEK COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 6/16/2022
	)	
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 Awarding Benefits of Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus and Michael A. 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; Christian P. Barber, Acting 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, BUZZARD and JONES, Administrative Appeals Judges.

BUZZARD and JONES, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order Awarding Benefits (2018-BLA-05265) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found 12.4 years of qualifying coal mine employment and thus concluded Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering whether Claimant established entitlement to benefits without the presumption, the ALJ found Claimant established total disability due to legal pneumoconiosis. 20 C.F.R. §§718.202, 718.204(b), (c). Thus, he awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution.[3] It further asserts the removal provisions applicable to the ALJ render his appointment unconstitutional. On the merits, Employer argues the ALJ erred in his

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[1] While Claimant's representative indicated at the hearing that this case is a subsequent claim (Hearing Transcript at 8), there is no prior claim in the record before us and Claimant indicated on his application that he had not previously filed a federal black lung claim. Director's Exhibit 2.

[2] Section 411(c)(4) of the Act provides a miner with a rebuttable presumption that he 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] 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.

weighing of the evidence to find total disability and legal pneumoconiosis.[4] The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging rejection of Employer's constitutional challenges. Employer filed a reply brief addressing the Director's arguments. Claimant has not filed a response brief.

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

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. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 9-10, 18; Employer's Reply at 1, 7-8. 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

[4] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant established 12.4 years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 26.

[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 Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18.

[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 the ALJ 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

ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 9-13; Employer's Reply at 2-5.

The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Response at 3-5. We agree with the Director's argument.

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 at the time of ratification the authority 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).

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 Nordby and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Nordby. The Secretary further stated he was acting in his "capacity as head of [DOL]" when ratifying the appointment of ALJ Nordby "as an Administrative Law Judge." *Id.*

Employer does not assert the Secretary had no "knowledge of all material facts," but generally speculates he did not make a "genuine, let alone thoughtful, consideration"

> Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Nordby.

when he ratified the ALJ's appointment. Employer's Brief at 15. 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 also challenges the constitutionality of the removal protections afforded to DOL ALJs, generally asserting the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing to Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 14-18; Employer's Reply at 5-7. Employer also 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), and 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 14-18; Employer's Reply at 5-7. The removal argument is subject to issue preservation requirements, however, and Employer forfeited its argument by not raising it before the ALJ. *See Joseph Forrester Trucking v. Director* [*Davis*], *OWCP*, 987 F.3d 581, 587 (6th Cir. 2021) ("Black lung benefits adjudication regulations require that litigants raise issues before the ALJ as a prerequisite to review by the Benefits Review Board."); 20 C.F.R. §§725.463 (ALJ hearing "shall be confined" to issues raised before the district director or new issues "not reasonably ascertainable" before the district director), 802.301 (Board cannot engage in *de novo* proceeding; it may only "review the findings of fact and conclusions of law on which the decision or order appealed from was based"); *see also Fleming v. USDA*, 987 F.3d 1093, 1097 (D.C. Cir. 2021) (constitutional arguments

[8] While Employer notes the Secretary signed the ratification letter "with an autopen," Employer's Brief at 12, 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").

concerning §7521 removal provisions are subject to Department of Agriculture's statutory issue exhaustion requirement). Regardless, Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[9] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. The Court explained, "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo*

[9] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1137-38.

Entitlement under 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc). The ALJ found Claimant established he is totally disabled due to legal pneumoconiosis.[10] Decision and Order at 38.

Legal Pneumoconiosis

To establish legal pneumoconiosis Claimant must demonstrate he has 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(b). The United States Court of Appeals for the Sixth Circuit holds that a miner can establish an impairment is significantly related to coal mine dust exposure "by showing that his disease was caused 'in part' by coal mine employment." *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the medical opinions of Drs. Ajjarapu, Vuskovich, and Rosenberg. Decision and Order at 27-30. Dr. Ajjarapu opined Claimant has legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure and cigarette smoking. Director's Exhibit 25. Drs. Vuskovich and Rosenberg opined Claimant does not have legal pneumoconiosis, but instead has an obstructive impairment due to cigarette smoking. Employer's Exhibits 4, 7, 9, 10. The ALJ found the opinions of Drs. Vuskovich and Rosenberg entitled to little weight, and credited the opinion of Dr. Ajjarapu.

[10] The ALJ found Claimant failed to establish clinical pneumoconiosis. Decision and Order at 33.

Decision and Order at 12, 28, 30, 36. He therefore found the medical opinion evidence establishes legal pneumoconiosis. 20 C.F.R. §718.202(a); Decision and Order at 36.

Employer contends the ALJ erred in weighing the medical opinion evidence. Employer's Brief at 19-24. We disagree.

The ALJ accurately found that Dr. Ajjarapu based her diagnosis on a physical examination of Claimant, his reported symptoms and history, the objective testing from her examination, and "her own skills as a doctor dealing with patients suffering from some form of [coal workers' pneumoconiosis]." Decision and Order at 12, 28; Director's Exhibit 24. The ALJ also accurately found Dr. Ajjarapu explained both tobacco smoke and coal dust cause the following: airway inflammation leading to bronchospasm, excessive airway secretions, and bronchitis symptoms. Decision and Order at 12, 38; Director's Exhibit 24 at 7. The ALJ permissibly credited this opinion as consistent with the DOL's recognition that the effects of smoking and coal dust exposure can be additive. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012).

Employer argues the symptoms Dr. Ajjarapu relied on are not substantiated in the record. Employer Brief at 23. However, similar symptoms are reported in Claimant's treatment records and, as the ALJ found, Dr. Ajjarapu considered her examination of Claimant, as well as his medical, work, and smoking histories in diagnosing legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (An ALJ "may not reject physical limitations noted in a doctor's report as being nothing more than mere notations of the patient's descriptions unless there is specific evidence for doing so in the report."); Decision and Order at 12, 36-7; Director's Exhibit 24; Claimant's Exhibits 4-6. It is within the ALJ's purview as the fact-finder to make credibility[11] findings and weigh the medical evidence. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012). Because it is supported by substantial evidence, we affirm the ALJ's determination that Dr. Ajjarapu's opinion is well-documented and well-reasoned. *Young*,

[11] Employer also argues the ALJ did not explain how Dr. Ajjarapu is well-qualified to provide an opinion in this case given she is not a Board-certified pulmonologist. Employer's Brief at 18. However, the ALJ permissibly found Dr. Ajjarapu well-qualified based on her curriculum vitae and her experience evaluating miners suffering from coal workers' pneumoconiosis. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006); *Bateman v. Eastern Associated Coal Corp*., 22 BLR 1-255, 1-261 (2003); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); Decision and Order at 28.

947 F.3d at 407; *Groves*, 761 F.3d at 598-99; *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005).

We also reject Employer's argument that the ALJ erred in discrediting Drs. Vuskovich's and Rosenberg's opinions. Employer's Brief at 24-6. Dr. Vuskovich opined Claimant does not have legal pneumoconiosis because his fifty pack-years of cigarette smoking "overwhelmed" his less lengthy twelve-and-a-half year history of coal mine dust exposure in causing his obstructive lung disease. Employer's Exhibits 4, 10. The ALJ permissibly discredited Dr. Vuskovich's opinion because he did not explain how he was able to determine that coal mine dust is not a contributing or aggravating factor in Claimant's individual case. *See Director, OWCP v. Rowe,* 710 F.2d 251, 255 (6th Cir. 1983); *see also Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985) (ALJ may reject medical opinions that rely on generalities); 65 Fed. Reg. at 79,941 (risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure can be additive with cigarette smoking); Decision and Order at 33-34.

Nor is there merit to Employer's argument that the ALJ failed to address Dr. Rosenberg's reasoning. Employer's Brief at 25. Dr. Rosenberg opined Claimant's obstruction was variable and improved with time, leaving him with "only mild airflow obstruction." Employer's Exhibit 7. The ALJ permissibly found Dr. Rosenberg's opinion, that none of Claimant's obstruction was due to coal mine dust exposure because it partially improved over time, did not adequately explain why coal mine dust exposure did not contribute to the residual mild obstructive disease.[12] *See Barrett,* 478 F.3d at 356; *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

Based on the foregoing, we affirm the ALJ's determination that Claimant established legal pneumoconiosis. 20 C.F.R. §§718.201(a)(2), 718.203; Decision and Order at 36.

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

[12] The ALJ stated Drs. Vuskovich and Rosenberg both indicated the effect of coal mine dust exposure was "overwhelmed" by tobacco smoke. Decision and Order at 18, 32. While Dr. Vuskovich provided that opinion, Dr. Rosenberg did not. However, given the ALJ provided other permissible bases for discrediting Dr. Rosenberg's opinion regarding legal pneumoconiosis, this mischaracterization is harmless. *Larioni v. Director, OWCP,* 6 BLR 1-1276, 1-1278 (1984).

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 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). The ALJ found Claimant established total disability based on the evidence as a whole. Decision and Order at 32.

Pulmonary Function Studies

The ALJ considered three pulmonary function studies administered on April 26, 2016, August 3, 2016, and September 14, 2018. Decision and Order at 10. The April 26, 2016 study was qualifying.[13] Decision and Order at 10; Director's Exhibit 27. The August 3, 2016 study was qualifying before the administration of bronchodilators, and non-qualifying with bronchodilators. Decision and Order at 10; Director's Exhibit 24. The September 14, 2018 study was non-qualifying. Decision and Order at 10; Employer's Exhibit 2. The ALJ found "Claimant's qualifying FEV1 and MVV numbers indicate that a respiratory impairment may exist. . . ." Decision and Order at 11.

Employer contends the ALJ erred in finding the August 3, 2016 pulmonary function study is valid. Employer's Brief at 26-28. We disagree.

A technician administered the August 3, 2016 study as part of the DOL sponsored complete pulmonary evaluation Dr. Ajjarapu conducted. Director's Exhibit 24. The technician noted good effort and good cooperation. *Id.* Dr. Gaziano indicated, "Vents are acceptable." Director's Exhibit 21. Dr. Rosenberg opined the test "appeared valid." Employer's Exhibit 7. Dr. Vuskovich opined the pre-bronchodilator study was invalid because the flow volume loops and tracings show inadequate effort. Employer's Exhibit 4 at 5. He explained Claimant did not take the deepest breath possible initially, which

[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). Employer argues the April 26, 2016 test is not qualifying because the FVC value exceeded the applicable value for Claimant's height and age. Employer's Brief at 6 n.3. However, the FEV1 and MVV values were less than those provided in the regulations; thus, the pulmonary function study is qualifying. 20 C.F.R. §718.204(b)(2)(i) (pulmonary function study supports total disability when it shows FEV1 values equal to or less than those listed in the applicable table if, in addition, either the FVC or MVV test values are equal to or less than the applicable values or the FEV1/FVC ratio is fifty-five percent or less).

artificially lowered his FEV1 and FVC, and his respiratory rate was not sufficient to generate a valid MVV. *Id.* He further indicated the improvement after use of bronchodilators was due to improved effort, finding the post-bronchodilator values valid. *Id.*

Contrary to Employer's arguments, the ALJ did not erroneously find the August 3, 2016 pulmonary function study valid because Dr. Ajjarapu conducted the test. Employer's Brief at 27; Decision and Order at 31. Rather the ALJ found the earlier April 26, 2016 study was conducted by Dr. Ajjarapu, and found that test valid based on her determination that Claimant put forth adequate effort.[14] Decision and Order at 31.

Nor did the ALJ mischaracterize Dr. Vuskovich's opinion that the August 3, 2016 study was invalid. Employer's Brief at 28. The ALJ accurately noted Dr. Vuskovich opined the study was invalid due to inadequate effort, specifically because Claimant did not take the initial deepest breath possible. Decision and Order at 16-17; Employer's Exhibit 4. He further accurately noted the physician opined the improvement in Claimant's post-bronchodilator response is due to "maximum effort" and not a response to bronchodilators. *Id*. at 17. The ALJ found Dr. Vuskovich's opinion is not adequately explained because he did not identify how the tracings demonstrated his findings or how he was able to differentiate improvement due to effort and improvement due to medication. *Id*. The ALJ has discretion to weigh the evidence, draw appropriate inferences, and determine credibility. *Banks*, 690 F.3d at 482-83; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002). Here, the ALJ permissibly found Dr. Vuskovich's opinion, the only physician who believed the August 3, 2016 pulmonary function study was invalid, is not adequately explained. *Banks*, 690 F.3d at 482-83; *Napier*, 301 F.3d at 713-14. We therefore affirm his determination that the August 3, 2016 pulmonary function study is valid.[15] Decision and Order at 17.

[14] The ALJ found Dr. Ajjarapu conducted the earlier, April 26, 2016 study, and found it valid. Decision and Order at 31; Director's Exhibit 27. We affirm, as unchallenged on appeal, the ALJ's determination that the April 26, 2016 pulmonary function study is valid. *Larioni,* 6 BLR at 1-1278; Decision and Order at 31.

[15] Because the ALJ permissibly found Dr. Vuskovich did not adequately explain his opinion invalidating the August 3, 2016 pulmonary function study, we need not address Employer's arguments that the ALJ erred in crediting the opinions of Drs. Ajjarapu and Gaziano that the study is valid. *See Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 26-28.

We further reject Employer's argument that it was not rational for the ALJ to determine the pulmonary function studies support a finding of total disability when the most recent pulmonary function study is non-qualifying. Employer's Brief at 30. Contrary to Employer's arguments, the ALJ was not required to assign the most weight to the September 14, 2018 non-qualifying study because it was taken more recently. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993); Employer's Brief at 30. Rather, the ALJ rationally found the weight of the valid[16] pulmonary function study evidence supports a finding of total disability. *Banks*, 690 F.3d at 482-83; *Napier*, 301 F.3d at 713-14; Decision and Order at 11, 21. Therefore, we affirm the ALJ's determination that the pulmonary function study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(i).

Medical Opinion Evidence

Turning to the medical opinion evidence, the ALJ considered the opinion of Dr. Ajjarapu that Claimant is totally disabled and those of Drs. Vuskovich and Rosenberg that he is not.[17] Decision and Order at 30-32; Director's Exhibit 24; Employer's Exhibits 4, 6-7, 10. The ALJ further considered Claimant's testimony and treatment records. Decision and Order at 30-32.

Although all three physicians noted Claimant operated heavy equipment at a surface mine,[18] the ALJ determined none of the physicians' opinions on total disability are

[16] As the ALJ noted, Drs. Vuskovich and Rosenberg opined the MVV portion of the September 14, 2018 study is invalid. Decision and Order at 11; Employer's Exhibits 4, 7.

[17] The arterial blood gas studies of record were non-qualifying, and there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 11; Director's Exhibit 24; Employer's Exhibit 3. Consequently, Claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii).

[18] The parties do not challenge the ALJ's finding that Claimant's usual coal mining work was as a machine operator; accordingly, it is affirmed. *Skrack*, 6 BLR at 1-711; Decision and Order at 23. Taking official notice of the Dictionary of Occupational Titles ("DOT"), the ALJ determined Claimant's work as machine operator required "medium" exertion. Decision and Order at 22-3. Employer argues the ALJ failed to provide notice that he intended use the DOT and there was sufficient evidence for the ALJ to make findings without use of the DOT. Employer's Brief at 29. Contrary to Employer's assertion, the ALJ provided in his prehearing order and notice of hearing issued five months prior to the hearing that "[i]f necessary, the court will take official notice of occupational exertion requirements described in the [DOT]." Decision and Order at 22 n.35 (citing June

persuasive as they did not discuss the exertional requirements of Claimant's usual coal mine employment or the duties he could and could not perform. Decision and Order at 28, 31-32. However, the ALJ found Dr. Ajjarapu's severe impairment diagnosis is better supported by objective testing, treatment records, and Claimant's credible testimony than Drs. Vuskovich's and Rosenberg's mild impairment diagnoses. Decision and Order at 32. Consequently, he found the evidence establishes Claimant has a severe impairment that would render him totally disabled from performing his usual coal mine employment as a machine operator. *Id*.

Employer contends the ALJ erred in weighing the medical opinions, treatment records, and testimony. Employer's Brief at 26-31. We disagree.

Contrary to Employer's argument, the ALJ was permitted to consider Claimant's lay testimony. Employer's Brief at 29. In a deceased miner's claim or a survivor's claim, lay testimony from individuals other than the miner may be sufficient to establish total disability *if* no other relevant evidence exists which addresses total disability, *and* the testimony is not from a party entitled to benefits or augmented benefits.[19] 20 C.F.R. §718.204(d)(1)-(3); *see Coleman v. Director, OWCP*, 829 F.2d 3, 5 (6th Cir. 1987) (presence in the record of "medical evidence on the issue of disability due to a respiratory or pulmonary impairment" precludes the use of a widow's lay testimony to invoke the presumption of death due to pneumoconiosis). However, in a living miner's claim such as this, "a finding of total disability due to pneumoconiosis shall not be made *solely* on the miner's statements or testimony." 20 C.F.R. §718.204(d)(5) (emphasis added). Therefore, while Claimant's lay testimony may not serve as the sole basis upon which to find he is totally disabled, the ALJ permissibly credited it alongside the other relevant evidence of record. *Id*.

Here, the ALJ found Claimant credibly testified that twice a day he takes fifteen-minute walks to the end of his 500-foot driveway and back which then requires he sit for 10 minutes and use an inhaler to recover. Decision and Order at 4, 31; Hearing Transcript

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2018 Notice of Hearing at 1). As he provided adequate notice with no response or objection from Employer, the ALJ permissibly took official notice of the DOT to determine the exertional requirements of Claimant's usual coal mine employment. 29 C.F.R. §18.84; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989).

[19] Statements made by a miner prior to his or her death "are relevant and shall be considered" when determining if the miner was totally disabled at the time of his or her death. 20 C.F.R. §718.204(d)(4).

at 33-34. He further testified that while he is able to lift a case of Pepsi more than once a day he could not stand for a forty-hour work week. *Id.* The ALJ found this testimony consistent with Claimant's treatment records which reflect regular and frequent treatment for chronic obstructive pulmonary disease, bronchitis, and acute respiratory failure. *Id*. at 29, 32. As Employer does not challenge these credibility determinations, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Nor is there any merit to Employer's argument that, in crediting Dr. Ajjarapu's opinion that Claimant has a severe impairment, the ALJ held Employer's experts to a higher standard. Employer's Brief at 28. The ALJ found none of the physicians' opinions persuasive as to whether Claimant's impairment is disabling; however, he then considered their respective opinions that Claimant's impairment was either mild or severe. Decision and Order at 32. The ALJ permissibly found Dr. Ajjarapu's diagnosis of a severe impairment more persuasive than the opinions of Drs. Vuskovich and Rosenberg that it is mild. *Id.* at 31-32. In support, he found Dr. Ajjarapu's opinion was more consistent with Claimant's testimony and the treatment records which reflect severe physical limitations and frequent need for treatment for respiratory disease such that he would be unable to climb into the machine cab or perform other duties of his usual coal mine employment. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255; Decision and Order at 31-32. Because it is supported by substantial evidence, we affirm the ALJ's determination that Dr. Ajjarapu's opinion, in conjunction with Claimant's credible testimony, treatment records, and physical demands of his coal mine employment establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

We further reject Employer's argument that the ALJ erred in finding the evidence as a whole establishes total disability when the weight of the arterial blood gas study evidence is non-qualifying. Employer's Brief at 30. The ALJ acknowledged that none of the arterial blood gas studies were qualifying but correctly noted pulmonary function studies 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); *Shedlock*, 9 BLR at 1-198. Consequently, we affirm the ALJ's determination that the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 32.

Total Disability Causation

To establish his total disability is due to pneumoconiosis, Claimant must prove pneumoconiosis was "a substantially contributing cause of his totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c); *Robinson v. Pickands Mather & Co*., 914 F.2d 35, 38 (4th Cir. 1990). Pneumoconiosis is a "substantially contributing cause" if it has a "material adverse effect" on Claimant's respiratory or pulmonary condition or

"[m]aterially worsens" a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

Employer argues the ALJ erred in finding Claimant's total disability is due to legal pneumoconiosis. Employer's Brief at 31-33. We disagree.

As we have affirmed the ALJ's permissible determination that Dr. Ajjarapu's reasoned opinion is sufficient to prove Claimant's totally disabling obstructive lung disease is legal pneumoconiosis, Dr. Ajjarapu's opinion clearly also establishes Claimant is totally disabled due to the disease; that conclusion necessarily flows from those facts. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Hawkinberry v. Monongalia County Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 36-38. Because Drs. Vuskovich and Rosenberg did not diagnose legal pneumoconiosis or total disability, the ALJ also permissibly found their opinions not credible on the issue of disability causation. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997); *Adams*, 694 F.3d at 826 (ALJ may discount a physician's opinion as to disability causation because he erroneously failed to diagnose pneumoconiosis); *see also Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) (ALJ who has found the disease and disability elements established may not credit an opinion denying causation without providing "specific and persuasive" reasons for concluding it does not rest upon a disagreement with those elements); Decision and Order at 36. We therefore affirm the ALJ's finding that Claimant established he is totally disabled due to legal pneumoconiosis and the award of benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge