U.S. Department of Labor

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

BRB No. 22-0228 BLA

JERRY HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH OF KENTUCKY/APOGEE COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 8/04/2023
	)	
ARCH RESOURCES[1]	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
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 Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

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

[1] In its brief, Employer indicates that Arch Coal, Incorporated, is now known as Arch Resources. Employer's Brief at 4.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor, Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2017-BLA-06125) rendered on a claim filed on June 2, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Arch of Kentucky/Apogee Coal Company (Apogee) is the responsible operator and Arch Coal, Inc. (Arch) is the responsible carrier. He credited Claimant with at least 17.5 years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus the ALJ concluded 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] Further, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It also argues the removal provisions applicable to ALJs

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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); *see* 20 C.F.R. §718.305.

[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they

rendered his appointment unconstitutional. Employer further argues the ALJ erred in finding Arch is the liable carrier. Moreover, Employer argues the ALJ erred in ruling that sixteen documents it requested the Director produce regarding its liability were protected by the deliberative process privilege. In addition, it asserts the ALJ deprived it of due process by refusing to allow it to obtain discovery from the Department of Labor (DOL) regarding the scientific bases for the preamble to the 2001 regulatory revisions, while relying on the preamble to assess the evidence in this case. On the merits, it contends the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Finally, it argues he erred in determining it did not rebut the presumption. Claimant has not filed a response brief.

The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's constitutional challenges and its argument regarding its discovery requests, and to affirm the ALJ's finding that Arch is liable for the payment of benefits. Moreover, the Director responds in support of the ALJ's holding that the Director properly invoked the deliberative process privilege with regard to documents Employer sought to discover regarding its liability. Finally, the Director contends Employer's arguments with respect to the ALJ's reliance on the preamble to the 2001 revised regulations and the denial of Employer's discovery requests regarding the preamble are not persuasive, but he does not otherwise address the merits of entitlement. Employer has filed a reply brief, reiterating its contentions on appeal.[4]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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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.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least 17.5 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See*

Appointments Clause and Removal Provisions

Employer urges the Board to vacate the ALJ's decision and remand the case[6] to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[7] Employer's Brief at 53-55; Employer's Reply Brief at 24-25. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting DOL ALJs on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id.*

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 27.

[6] Employer argues the United States Supreme Court's decision in *Carr v. Saul*, 593 U.S. , 141 S. Ct. 1352 (2021) "suggests that the Board is unable to decide matters of constitutional dimension." Employer's Brief at 53; Employer's Reply at 24-25. Contrary to Employer's contention, the constitutionality of the ALJ's appointment raises a substantial question of law and is therefore within the Board's scope of review. 33 U.S.C. §921(b)(3); *see Jones Bros, Inc. v. Sec'y of Labor*, 898 F.3d 669, 676 (6th Cir. 2018) (Appointments Clause argument is to be first considered by the administrative agency); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1118 (6th Cir. 1984) (Board is vested with "same judicial power to rule on substantive legal questions as was possessed by the district courts") (citation omitted); *see also Energy W. Mining Co. v. Lyle*, 929 F.3d 1202, 1206 (10th Cir. 2019) (Board has authority to remedy an Appointments Clause violation).

[7] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. 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 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 (DOL) has conceded the Supreme Court's holding in *Lucia* applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] The Secretary of Labor 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 a District Chief 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

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 53-55; Employer's Reply Brief at 24-25. It generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional. Employer's Brief at 53-55; Employer's Reply Brief at 24-25. It relies on the United States Supreme Court's holding in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). *See* Employer's Brief at 53-55; Employer's Reply Brief at 24-25. For the reasons set forth in *Johnson v. Apogee Coal Co.*, BLR , 22-0022 BLA, slip op. at 3-5 (May 26, 2023) and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

Employer's Discovery Requests

Liability-Related (Deliberative Process Privilege)

Employer argues the ALJ erred in denying its request for discovery related to its liability for this claim by holding that sixteen documents it sought were protected by the deliberative process privilege, which the Director invoked. Employer's Brief at 33-36. We disagree.

The deliberative process privilege is asserted by the DOL "to withhold information that may disclose predecisional intra-agency or inter-agency deliberations." 71 Fed. Reg. 67,024 (Nov. 17, 2006). It includes "written summaries of factual evidence that reflect a deliberative process; and recommendations, opinions, or advice on legal or policy matters . . . that are delegated or assigned to the agency." *Id*. The official delegated authority to invoke the privilege "shall consult with the Solicitor of Labor or his/her designee" and "shall personally review . . . [a]ll the documents sought to be withheld (or, in cases where the volume is so large that all of the documents cannot be personally reviewed in a reasonable time, an adequate representative sample of such documents) . . . ." *Id*. The declaration used to invoke the privilege must contain a sufficient description of the materials "to permit a determination as to whether the claim of privilege is properly asserted." *Id*. at 67,025.

In response to Employer's request for discovery, and the ALJ's partial granting of its request, then Director Julia K. Hearthway produced 4,296 pages of documents and a fifty-nine-page privilege log, with a description of the withheld documents, along with her declaration that she invoked the deliberative process privilege for sixteen documents.

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

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

ALJ's Order dated September 18, 2019; Director's Brief at 26. On October 23, 2020, Employer challenged the adequacy of the Director's production and the Director's assertion that sixteen of the documents sought were protected by the deliberative process privilege. Employer's Motion to Dismiss or Compel dated October 23, 2020. The ALJ denied Employer's motion, ruling that the Director had properly invoked the deliberative process privilege because she consulted with the Secretary of Labor's designee, the Solicitor of Labor, before invoking the privilege, established the withheld documents were pre-decisional and deliberative, and reviewed a representative sample of the withheld documents. ALJ's Order dated December 7, 2020 at 2-5; Director's August 18, 2020 Declaration, paragraphs 6-9.

Because the ALJ reasonably made the above findings based on the Director's declaration, we hold the ALJ committed no abuse of discretion in denying Employer's Motion to Compel. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc) (ALJ is afforded broad discretion in dealing with procedural matters); 20 C.F.R. §725.362 (interest of the Secretary of Labor in black lung claims is represented by the Solicitor of Labor or his or her designee); 71 Fed. Reg. at 67,024-25; ALJ's Order dated December 7, 2020 at 2-5; Director's August 18, 2020 Declaration, paragraphs 6-9.

Preamble-Related (Due Process)

Employer does not allege any specific error with the ALJ's finding that its preamble discovery request would not lead to relevant information that it is not already available to Employer or to evidence relevant to the adjudication of the present claim. *See* ALJ's Order dated April 4, 2019 at 5. Instead, it argues the ALJ violated its due process rights by preventing it from conducting discovery regarding the preamble and then discrediting its physicians as contrary to the scientific evidence cited in the preamble. Employer's Brief at 50-52; Employer's Reply Brief at 25-30. We disagree.

Due process requires that Employer be given notice and an opportunity to mount a meaningful defense. *See Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). Employer had the opportunity to submit evidence challenging the science that the DOL relied on in the preamble both when the DOL promulgated its regulations and before the ALJ prior to his reliance on the preamble in weighing the medical evidence in this case. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014) (party is free to challenge the DOL's position in the preamble by submitting the type and quality of medical evidence that would invalidate the DOL's position in that scientific dispute); *see also Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th

Cir. 2013) (parties may submit evidence of scientific innovations that archaize or invalidate the science underlying the preamble).

Employer generally asserts its experts "cit[ed] literature post-dating the preamble" but fails to explain how such literature invalidates the DOL's position set forth in the preamble. Employer's Brief at 52. Given that Employer was afforded the opportunity to submit evidence challenging the scientific findings contained in the preamble, it has failed to demonstrate how it was deprived of due process.[9] *See Hatfield*, 556 F.3d at 478; *Holdman*, 202 F.3d at 883-84. As Employer does not otherwise argue the ALJ erred in granting the Director's motion for a protective order, we affirm the ALJ's ruling. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); ALJ's April 4, 2019 Order at 2-5, 12.

Responsible Insurance Carrier

Employer does not directly challenge the ALJ's findings that Apogee is the correct responsible operator, and it was self-insured by Arch[10] on the last day Apogee employed Claimant; thus we affirm these findings. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 7-11. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus

[9] To the extent Employer argues the ALJ was biased because of a training program, it has not supported its claim with evidence in the record that ALJs were instructed to reject certain evidence, or that the ALJ attended the training or rendered an improper decision based on such training. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992) ("Charges of bias or prejudice are not to be made lightly and must be supported by concrete evidence."). Therefore, Employer's claim of bias is rejected, and we affirm the ALJ's granting of the Director's motion for a protective order regarding the DOL training discovery request as it is not "reasonably calculated to lead to the discovery of admissible evidence." ALJ's April 4, 2019 Order at 2-3, 5, 12; Employer's Brief at 48 n.21; Employer's Reply Brief at 28 n.8.

[10] Employer argues the ALJ improperly named Arch as the responsible operator. Employer's Brief at 18. Contrary to Employer's argument, the ALJ clearly found that Apogee is the responsible operator and it is "self-insured by Arch Coal, Inc." Decision and Order at 9. Thus he did not find "Arch Coal Inc." employed Claimant, but rather is liable as the responsible carrier. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why he did it, the duty of explanation under the APA is satisfied).

liability for the claim should transfer to the Black Lung Disability Trust Fund (Trust Fund). Employer's Brief at 18-33; Employer's Reply Brief at 5-24.

In 2005, after Claimant ceased his employment with Apogee, Arch sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot. Director's Brief at 2; Employer's Brief at 22; Director's Exhibit 32 at 1. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Brief at 17. In 2015, Patriot went bankrupt. Employer's Brief at 5. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Arch of liability for paying benefits to miners last employed by Apogee when Arch owned that company and provided self-insurance to it. Director's Brief at 2-3.

Employer raises several arguments to support its contention that Arch was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Arch, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 18-33; Employer's Reply Brief at 5-24. It maintains the ALJ erred in finding Arch liable for benefits because: (1) the district director improperly "pierce[d] Arch's corporate veil to hold it responsible" for Apogee's employee, Claimant; (2) he evaluated Arch's liability for the claim as a responsible operator or commercial insurance carrier rather than a self-insurer; (3) the sale of Apogee to Magnum released Arch from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability; (4) no evidence establishes Arch's self-insurance covered Apogee for this claim; (5) the Director changed its policy in naming Arch as the responsible carrier; (6) retroactive application of the policy reflected in Black Lung Benefits Act (BLBA) Bulletin No. 16-01[11] imposes new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the APA; and (7) the ALJ abused his discretion and deprived it of procedural due process by denying its request for discovery regarding BLBA Bulletin No. 16-01.[12] *Id*.

[11] The Black Lung Benefits Act (BLBA) Bulletin No. 16-01 is a memorandum the Director of the Division of Coal Mine Workers' Compensation issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

[12] The ALJ denied discovery regarding BLBA Bulletin No. 16-01 because Employer failed to establish the relevance of the material it sought. ALJ's September 18, 2019 Order at 6-7. Employer has not adequately set forth how the ALJ has abused his discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

The Board has previously considered and rejected these arguments under the same material facts in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 10-19 (Oct. 25, 2022) (en banc); *Howard*, 25 BLR at 1-308-18; and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus, we affirm the ALJ's determination that Apogee and Arch are the responsible operator and carrier, respectively, and are liable for this claim.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. 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.[13] *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying arterial blood gas studies,[14] 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Employer alleges the ALJ erred in finding total disability established by the pulmonary function studies and medical opinion evidence at 20 C.F.R §718.204(b)(2)(i),

[13] The ALJ observed Claimant testified at the hearing that his last job was as a general mine foreman in charge of the entire operation of the mines, and on a typical day he carried a tool belt weighing at least 25 pounds and handled a couple hundred bags of rock dust weighing 50 pounds apiece. Decision and Order at 5 (citing Hearing Transcript at 39-41).

[14] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

(iv), and based on the record as a whole.[15] Decision and Order at 25-29; Employer's Brief at 36-44. We disagree.[16]

Pulmonary Function Studies

The ALJ considered the results of six pulmonary function studies. The October 16, 2015 and March 9, 2018 studies, conducted by Drs. Alam and Shah, respectively, produced qualifying values before but not after the administration of a bronchodilator. Director's Exhibit 13; Claimant's Exhibit 2. Dr. Rosenberg's August 17, 2017 study produced non-qualifying values before and after the administration of a bronchodilator. Employer's Exhibit 4. Three treatment studies dated August 21, 2017, March 13, 2018, and February 25, 2019, all conducted before the administration of a bronchodilator, were also qualifying. Claimant's Exhibit 1; Employer's Exhibit 13.

The ALJ found Claimant's treatment studies were not sufficiently reliable because they each had only one tracing. Decision and Order at 26. Finding the remaining studies valid, and relying on the pre-bronchodilator values, the ALJ concluded that a preponderance of the pulmonary function study evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 26-27; *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (The DOL has cautioned against reliance on post-bronchodilator results in determining total disability because "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis.").

[15] The ALJ found the two blood gas studies, dated October 16, 2015 and August 17, 2017, were non-qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 13, 27; Director's Exhibit 13 at 7; Employer's Exhibit 4 at 31-32.

[16] Employer alleges the ALJ used disparaging language to describe its evidence, thereby suggesting he was not impartial and that it was denied due process. Employer's Brief at 38 n.16. We are not persuaded. Again, a charge of bias against an ALJ is not substantiated by a mere allegation but must be established by concrete evidence of prejudice against a party's interest. *Cochran*, 16 BLR at 107. Here, Employer points to no concrete evidence establishing the ALJ was biased or violated its due process.

Employer contends the ALJ erred in finding Dr. Alam's October 16, 2015[17] pulmonary function study valid because the ALJ did not adequately explain how he resolved conflicts in the evidence. Employer's Brief at 8, 38-39. We disagree.

When considering pulmonary function study evidence, the ALJ must determine whether the studies are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). "In the absence of evidence to the contrary, compliance with the [regulatory quality standards] shall be presumed." 20 C.F.R. §718.103(c). Thus, the party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

The October 16, 2015 pulmonary function study was conducted as part of Dr. Alam's evaluation of Claimant. Director's Exhibit 13. The technician who conducted the test noted good effort and cooperation, and Dr. Alam, signed off on the test results. *Id.* at 12. Dr. Gaziano also validated the study. Director's Exhibits 16; 24 at 1. Drs. Tuteur and Rosenberg opined the study was invalid. Director's Exhibit 19 at 1; Employer's Exhibits 5 at 3; 30 at 34-36.

The ALJ correctly noted Dr. Tuteur provided only a summary statement that Dr. Alam's October 16, 2015 study was invalid. Given the lack of support for his conclusion, we affirm the ALJ's rejection of his opinion. *See Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360-61 (6th Cir. 1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Employer's Exhibit 5 at 3, 19-20. Although Dr. Rosenberg opined Claimant's efforts shown on the study's flow volume were not "really totally consistent" and Claimant's performance could have been better, the ALJ permissibly found his opinion speculative.[18]

[17] Employer misidentifies the date of Dr. Alam's pulmonary function study as 2017. Employer's Brief at 38.

[18] Dr. Rosenberg opined the non-qualifying post-bronchodilator values Dr. Alam obtained were invalid because the variation between the FEV1 and FVC values was more than five percent. Employer Exhibit 30 at 34. With respect to the qualifying pre-bronchodilator values, Dr. Rosenberg indicated the FVC and FEV1 varied within an acceptable range, but based on the tracings for the flow volume, he concluded Claimant's efforts were not "really totally consistent." *Id.* at 35. He opined Dr. Alam's testing lacked value for measuring the severity of Claimant's pulmonary condition because the effort could have been better. *Id.* at 35-36.

See Peabody Coal Co. v. Smith, 127 F.3d 504, 507 (6th Cir. 1997); Decision and Order at 26; Employer's Exhibit 30 at 35-36.

Having provided permissible reasons for finding Employer's evidence not credible as to the validity of Dr. Alam's pulmonary function study, we reject Employer's contention that the ALJ did not properly explain why he relied on Dr. Gaziano's validation of Dr. Alam's study, the technician's comments regarding Claimant's effort and cooperation when performing the qualifying studies, or Dr. Alam's own assessment. 20 C.F.R. §718.103(c); *Vivian*, 7 BLR at 1-361; *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").

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Because it is supported by substantial evidence, we affirm the ALJ's determination that the pulmonary function studies support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 25-27.

Medical Opinions and Evidence as a Whole

The ALJ considered four medical opinions. Drs. Alam and Rao opined that Claimant is totally disabled while Drs. Tuteur and Rosenberg opined he is not. Decision and Order at 27-29. The ALJ credited Dr. Alam's opinion as reasoned and documented and supported by the qualifying pulmonary function tests he obtained.[19] *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985) (ALJ may properly credit medical opinions that are consistent with the objective evidence); Decision and Order at 27; Director's Exhibits 13 at 4; 23; 24. Conversely, the ALJ found that neither Dr. Tuteur nor Dr. Rosenberg adequately addressed why Claimant's qualifying pre-bronchodilator pulmonary function study results would not prevent him from performing his usual coal mine work. Decision and Order at 28; Director's Exhibit 19 at 3; Employer's Exhibits 4 at 3; 5 at 3; 6 at 2; 29 at 3-4; 30 at 29.

The ALJ concluded that Claimant established total disability based on Dr. Alam's opinion but also observed:

[19] Dr. Alam was aware that Claimant last worked as a foreman in underground mines; he indicated Claimant is totally disabled based on his respiratory symptoms, FEV1 value on pulmonary function testing, and "positive examination with rhonchi, barrel shaped chest with elevated respiratory rate." Director's Exhibit 13 at 4.

> [E]ven if I were to disregard [Dr. Alam's opinion], I find that the opinions of Dr. Tuteur and Dr. Rosenberg do not constitute contrary probative evidence that rebuts the presumption of total disability established by the qualifying pulmonary function studies. Neither Dr. Tuteur nor Dr. Rosenberg have explained how, given the pre-bronchodilator results obtained by Dr. Alam and Dr. Shah, the Claimant could perform the duties of his previous coal mine job, which, based on his credible and unrebutted testimony, required regular, sustained heavy and very heavy levels of exertion.

Decision and Order at 28.

Employer contends the ALJ erred by giving Claimant a presumption that he was totally disabled based on the qualifying pulmonary function studies and thus improperly shifted the burden of proof to Employer to establish that Claimant is not totally disabled. Employer's Brief at 36-37. We disagree.

The regulation provides that qualifying pulmonary function study evidence "shall establish a miner's total disability" "[i]n the absence of contrary probative evidence." 20 C.F.R. §718.204(b)(2)(i). Because we see no error in the ALJ's overall finding that the qualifying pulmonary function studies indicate Claimant is totally disabled and that Employer's experts did not persuasively explain why Claimant could perform the exertional requirements of his usual coal mine work in light of that evidence, we affirm the ALJ's credibility determinations. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark*, 12 BLR at 1-155.[20]

Additionally, although Employer points out the ALJ did not specifically discuss the non-qualifying blood gas study evidence in his overall assessment of the evidence, we consider the ALJ's error harmless as blood gas studies and pulmonary function studies

[20] Because the ALJ specifically relied on Dr. Alam's opinion at 20 C.F.R. §718.204(b)(2)(iv), we decline to address Employer's arguments regarding Dr. Rao's opinion. Further, even if we were to agree with Employer's contention that Dr. Alam's opinion is not reasoned, it would not change the outcome of this case. Claimant may establish total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i) irrespective of whether the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *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").

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).

Lastly, we reject Employer's contention that the case should be remanded because the ALJ failed to specifically address Claimant's "treatment notes revealing no subjective respiratory complaints until after [Claimant] pursued benefits, much less complaints of respiratory disabilities." Employer's Brief at 43. Having explained that he gave greatest probative weight to objective testing revealing a disabling impairment, i.e., a preponderance of the pulmonary function studies, we consider any error to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We therefore affirm the ALJ's conclusion that Claimant established total disability at 20 C.F.R. §718.204(b)(2) and invoked the Section 411(c)(4) presumption. Decision and Order at 28-29.

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,[21] 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.[22] Decision and Order at 29-37.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated

[21] "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).

[22] The ALJ found Employer disproved the existence of clinical pneumoconiosis. Decision and Order at 32.

by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit holds an employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer first contends the ALJ applied the wrong burden of proof because he stated that Employer must provide "strongly persuasive evidence demonstrating the falsity of a presumed fact." Employer's Brief at 9, 44 (quoting Decision and Order at 32). We consider the ALJ's error, if any, to be harmless as he correctly stated that "[r]ebuttal occurs when the Employer establishes that the Claimant does not have clinical or legal pneumoconiosis." Decision and Order at 29 (citing 20 C.F.R. §718.305); *Larioni*, 6 BLR at 1-1278. He also accurately cited to cases in which the Sixth Circuit and the Board have held that an "[e]mployer must affirmatively prove the absence of pneumoconiosis." Decision and Order at 32 (citing *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Sterling*, 762 F.3d at 491; *Minich*, 25 BLR at 1-154-56). Moreover, as explained below, the ALJ discredited Employer's experts because he found their opinions inadequately reasoned and not because they failed to satisfy a heightened legal standard. Decision and Order at 33-36; *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1073-74 (6th Cir. 2013) (affirming the ALJ's decision to discredit physicians' opinions as insufficiently documented and reasoned where they failed to adequately explain their conclusions).[23]

The ALJ gave little weight to Dr. Tuteur's opinion on legal pneumoconiosis, noting that because Dr. Tuteur "concluded Claimant *is not irreversibly impaired or disabled due to a pulmonary process*, [he] did not address the issue of whether the Claimant's history of coal mine dust exposure played a part in his respiratory impairment." Decision and Order at 34 (emphasis added); Employer's Exhibit 5 at 4-5, 22-23. As Employer does not

[23] We also reject Employer's assertion that the ALJ erred in considering the preamble when evaluating the opinions of Drs. Tuteur and Rosenberg. Employer's Brief at 9, 44-52. An ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the scientific evidence the DOL found credible in drafting the regulations. *See* 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000); *Sterling*, 762 F.3d at 491; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012).

specifically challenge the ALJ's rejection of Dr. Tutuer's opinion for this reason, we affirm it. *See Skrack*, 6 BLR at 1-711.

The ALJ further correctly observed that Dr. Rosenberg excluded a diagnosis of legal pneumoconiosis, in part, because Claimant's obstructive impairment shown on the pulmonary function study he conducted reversed to normal after bronchodilation. Dr. Rosenberg explained that Claimant does not have a respiratory impairment related to coal mine dust exposure, which is a fixed impairment and would not improve to normal. Employer's Exhibits 4 at 3; 6 at 2; 29 at 3; 30 at 47. However, the ALJ accurately noted Dr. Shah's March 9, 2018 pulmonary function study showed only partial reversibility with bronchodilation. Decision and Order at 34. The ALJ permissibly found Dr. Rosenberg's opinion unpersuasive as he did not "provide an adequate rationale" for his conclusion that a coal dust-induced impairment could not temporarily improve with bronchodilator medication, or why "coal dust exposure played no role in causing the Claimant's residual, fixed impairment reflected in Dr. Shah's studies." *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Decision and Order at 34.

The ALJ also permissibly found Dr. Rosenberg's rationale that Claimant does not have legal pneumoconiosis because his impairment developed after leaving the mines[24] to be inconsistent with the regulations recognizing pneumoconiosis as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure. 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Banks*, 690 F.3d at 477; Decision and Order at 34-35; Employer's Exhibit 29 at 4-5. Further, we see no error in the ALJ's finding that "[e]ven if Dr. Rosenberg is correct, that latent and progressive pneumoconiosis is rare," the physician did not explain why Claimant was not a "rare" case. *See Young*, 947 F.3d at 407; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); Decision and Order at 35.

Additionally, we affirm the ALJ's permissible determination that neither Dr. Tuteur nor Dr. Rosenberg adequately explained why Claimant's coal mine dust exposure was not a significant contributing cause or aggravating factor in his impairment. *See Groves*, 761

[24] Dr. Rosenberg observed that airflow obstruction will not occur "when coal dust exposure is maintained below 2 mg/m^3" and also will not develop when miners are no longer working. Employer's Exhibit 29 at 4-5. Based on this theory, he concluded "workers would not be expected in a latent and progressive fashion to experience falls in their FEV1 values [on pulmonary function testing] in relationship to legal [coal workers' pneumoconiosis] years after having left their coal mine employment." *Id*.

F.3d at 598-99; *Clark*, 12 BLR at 1-155; Decision and Order at 35-36; Director's Exhibit 19; Employer's Exhibits 4-6, 29, 30.

Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer failed to establish that Claimant does not have legal pneumoconiosis. *Ogle*, 737 F.3d at 1072-73; *Napier*, 301 F.3d at 713-14; Decision and Order at 36. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established that "no part of [Claimant's] 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)(ii); Decision and Order at 36-37. He permissibly discredited the opinions of Drs. Tuteur and Rosenberg on the cause of Claimant's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease. *See Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 36-37; Director's Exhibit 19; Employer's Exhibits 4-6, 29, 30. Because Employer raises no specific arguments on disability causation, we affirm the ALJ's determination that Employer failed to prove no part of Claimant's respiratory or pulmonary total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 36-37.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge