U.S. Department of Labor

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

BRB No. 22-0490 BLA

HARRY L. MCPEEK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
C H DEVELOPMENT, LLC	)	
	)	DATE ISSUED: 12/18/2023
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for Claimant.

Tighe A. Estes and H. Brett Stonecipher (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer.[1]

[1] On November 30, 2022, the attorneys who appear in the party identification block filed a motion to substitute as Employer's counsel. On December 7, 2022, Paul E. Jones of the Jones & Jones Law Office, PLLC, Pikeville, Kentucky, filed a motion to withdraw as counsel after having previously filed Employer's Petition for Review and Brief. We grant the motion to withdraw as counsel filed by Jones & Jones, and grant the motion to substitute Employer's counsel filed by Reminger Co., L.P.A., who subsequently filed Employer's reply brief.

David Casserly (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, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's[2] Decision and Order Awarding Benefits (2020-BLA-05498) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on November 8, 2017.[3]

The ALJ found Employer is the properly designated responsible operator. Next, he credited Claimant with 21.11 years of coal mine employment, of which he determined 16.7411 years occurred in underground coal mines or on the surface in substantially similar conditions, and found Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] and established a change in an applicable condition of entitlement.[5] 30 U.S.C. §921(c)(4) (2018);

[2] Administrative Law Judge (ALJ) Peter B. Silvain, Jr. held a telephonic formal hearing in this case on February 22, 2021. However, ALJ Sellers issued an Order on May 22, 2021, indicating that he would adjudicate this claim and render a decision because ALJ Silvain was no longer with the Office of Administrative Law Judges.

[3] This is Claimant's second claim for benefits. On April 20, 2004, the district director denied his first claim, filed on April 29, 2002, as abandoned. Director's Exhibit 1. A denial by reason of abandonment is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409.

[4] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[5] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White*

20 C.F.R. §725.309. He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it is the responsible operator. It also contends the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment and total disability necessary to invoke the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to affirm the ALJ's responsible operator determination. Employer filed a reply brief to the Director's response, reiterating its contentions regarding the ALJ's responsible operator determination.

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[7] Once the district director identifies a

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). Here, because Claimant's prior claim was denied as abandoned, he was required to establish any element of entitlement to obtain review of his subsequent claim on the merits. *White*, 23 BLR at 1-3.

[6] 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 Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 20.

[7] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must

potentially liable operator, that operator may be relieved of liability only if it proves it is financially incapable of assuming liability for benefits, or another operator more recently employed the miner for a cumulative period of at least one year and is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

On December 28, 2018, the district director issued a Notice of Claim advising Employer that it had been identified as a potentially liable operator. Director's Exhibit 22. Employer controverted the claim and filed documentary evidence consisting of Claimant's responses to its interrogatories but did not designate any liability witnesses. Subsequently, the district director issued a Schedule for the Submission of Additional Evidence and designated Employer as the responsible operator. Director's Exhibit 34. Employer continued to challenge its designation as responsible operator, but it did not submit any additional documentary evidence to the district director and did not identify any liability witnesses. Director's Exhibit 39; *see* 20 C.F.R. §725.408(b)(2). Thereafter the district director issued a Proposed Decision and Order naming Employer as the responsible operator and awarding benefits. Director's Exhibit 52. Employer requested a hearing and the case was forwarded to the Office of Administrative Law Judges, where it was ultimately assigned to the ALJ. Director's Exhibits 59, 60, 72. Before the ALJ, Employer argued Claimant's testimony showed he was not exposed to coal mine dust while working for it and, thus, it could not be the properly designated responsible operator. Decision and Order at 11. The ALJ noted Employer had not submitted any documentary evidence before the district director to support its argument, nor identified any liability witnesses as 20 C.F.R. §725.414(b), (c) requires. *Id.* He found that, because Employer failed to timely submit evidence to show it was not a liable operator and failed to identify any liability witnesses, there was no evidence to show it was improperly identified as the responsible operator. Decision and Order at 12; 20 C.F.R. §725.456(b)(1). Moreover, the ALJ found that, even had there been no procedural barrier to considering Claimant's testimony, he would find it insufficient to establish Claimant was not exposed to coal dust while employed with Employer. *Id.* at 13.[8] Thus, the ALJ found Employer is the properly designated responsible operator. Decision and Order at 10-13.

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be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[8] There is a rebuttable presumption that anyone working in or around a coal mine or coal preparation facility is a miner and, for purposes of determining whether Employer is an operator, that during such an individual's employment that individual was regularly and continuously exposed to coal mine dust. 20 C.F.R. §725.491.

Employer argues the ALJ erred in finding it is the responsible operator because Claimant's hearing testimony demonstrates he was not exposed to coal mine dust while working for it. Employer's Brief at 5-6, 8-9. The Director asserts Employer is precluded from relying on Claimant's testimony as liability evidence because it failed to timely designate Claimant as a liability witness before the district director. Director's Response Letter at 2-3.

The regulation set forth in 20 C.F.R. §725.414(c) provides:

> [A]ll parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator. Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator will not be admitted in any hearing conducted with respect to the claim unless [the ALJ] finds that the lack of notice should be excused due to extraordinary circumstances.

20 C.F.R. §725.414(c). Here, the ALJ correctly found Employer is precluded from relying on Claimant's testimony on the responsible operator issue because Claimant was not designated as a liability witness at any point before the district director.[9] 20 C.F.R. §§725.414(c), 725.456(b)(1), (2). Thus, the ALJ properly declined to consider Claimant's testimony on the liability issue. 20 C.F.R. §725.414(c); Decision and Order at 12.

We likewise reject Employer's contention that the ALJ erred by failing to consider documentary evidence relevant to its liability, specifically Claimant's deposition testimony and an employment questionnaire contained in his prior claim. Employer's Brief at 6-7. Employer does not dispute it did not identify Claimant as a liability witness or that the only evidence it submitted before the district director regarding liability consisted of Claimant's answers to its interrogatories. Director's Exhibit 18. Moreover, it does not challenge the ALJ's determination that the evidence it submitted fails to establish that Claimant was not exposed to coal mine dust during his coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12. As a consequence, Employer is precluded from relying on Claimant's testimony or any other documentary

[9] Where no party provides notice to the district director of the name and address of a witness whose testimony pertains to liability of a potentially liable operator, the witness's testimony "will not be admitted in any hearing" absent extraordinary circumstances. 20 C.F.R. §725.414(c). Employer did not argue extraordinary circumstances before the ALJ.

evidence to contest its designation as the responsible operator absent showing extraordinary circumstances.[10] 20 C.F.R. §§725.414(d), 725.456(b)(1).

Lastly, Employer contends extraordinary circumstances exist for its failure to produce liability evidence. Employer's Brief at 10-11. We agree with the Director's position that Employer forfeited this argument by not raising it before either the ALJ or the district director. 20 C.F.R. §802.301(a) (Board's review authority is limited to "findings of fact and conclusions of law on which the decision or order appealed from was based"); *see Joseph Forrester Trucking v. Director, OWCP* [*Mabe*], 987 F.3d 581, 588 (6th Cir. 2021) (black lung regulations require that an issue be "raised before the ALJ to preserve issue for the Board's review"); Director's Response Letter at 4. As Employer has identified no basis to disturb the ALJ's responsible operator finding, we affirm it.

Invocation of the Section 411(c)(4) Presumption – Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich American Insurance Group v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

The ALJ found Claimant worked in coal mine employment for more than twenty years. He further found Claimant established at least fifteen years of qualifying coal mine

[10] Although Claimant's testimony from his prior claim was in the record, Employer did not identify Claimant as a liability witness as required by 20 C.F.R. §725.414(c) nor did it argue extraordinary circumstances should excuse such lack of notice. Moreover, the employment questionnaire Employer relies on indicates Claimant was exposed to dust while employed by Employer, which does not support rebuttal of the Section 725.491(d) presumption of exposure, which can only be rebutted by a showing that the employee was not exposed to coal mine dust for significant periods during such employment. 20 C.F.R. §725.491(d). Even had the ALJ considered this piece of evidence, it would not have helped Employer to rebut the presumption of exposure. Thus we conclude any error by the ALJ in not considering this evidence is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

employment either at underground coal mines or at surface coal mines where he was regularly exposed to coal mine dust. Decision and Order at 4-10.

Employer does not dispute the ALJ's finding that Claimant had 21.11 years of coal mine employment,[11] but challenges his finding that Claimant worked for 16.7411 years in conditions "substantially similar" to those in an underground coal mine. It contends the evidence fails to demonstrate Claimant was *regularly* exposed to dust, gases, or fumes and, therefore, he cannot invoke the Section 411(c)(4) presumption. Employer's Brief at 4-5. We disagree.

The relevant evidence in this case consists of Claimant's hearing testimony, his Employment History Form (CM-911a form), and his answers to interrogatories. Hearing Transcript at 15-16, 18-20-22, 28; Director's Exhibits 4, 17. During the hearing, Claimant testified he worked for Peabody Coal Company at different underground mine sites at various times during his coal mining career. Hearing Transcript at 15-18. He stated he worked in a preparation plant during his early mining career and was exposed to coal dust "because they didn't do much about coal dust in that period of time [or] era." *Id.* at 16. Further, he testified he later worked for several years as a miner helper and a miner operator and these jobs were "at the face [of the mine], every bit of it." *Id.* at 17. In addition, he stated he worked at one surface mine, which entailed running dozers and loaders where he "was exposed to coal dust." *Id.* He testified he worked at surface mines and coal preparation plants where he was regularly breathing in coal mine dust. *Id.* at 18-19. When asked about his exposure to coal dust during his employment with Employer, Claimant testified he worked at a surface preparation plant but was not exposed to coal dust because this site was "a wet, wet operation" that "drenched [the] coal out of a pond, drenched it." *Id*. at 19-20, 22. He stated his last coal mine employment occurred at an underground mine and his job as a foreman occurred in conditions where the coal and rock dust "would be so thick you couldn't see your hand in front of your face." *Id.* at 23.

Initially, we reject Employer's argument that the ALJ failed to make specific findings regarding Claimant's coal dust exposure with each operator, as the ALJ delineated each coal mine operator, determined whether it was an underground mine or surface mine, and assessed whether Claimant was regularly exposed to coal dust during his employment.[12] Employer's Brief at 5; Decision and Order at 9. Next, the ALJ permissibly

[11] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 21.11 years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-8.

[12] The ALJ specifically found Claimant's work for Peabody Coal Company occurred at an underground mine "at various points in his career." Decision and Order at

found Claimant's uncontradicted testimony[13] credible and accorded it "great weight" as it adequately detailed Claimant's dust exposure in his surface coal mine employment, indicating he was regularly exposed to coal mine dust. *See Duncan*, 889 F.3d at 304; *Kennard*, 790 F.3d at 663; *Sterling*, 762 F.3d at 489-90; *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Tackett v. Cargo Mining Co*., 12 BLR 1-11, 1-14 (1988); Decision and Order at 9. Further, the ALJ rationally found Claimant's CM-911a Employment History Form, where he reported he was "exposed to dust, gases, and fumes" during his employment with the coal companies listed, corroborated Claimant's testimony that he was regularly exposed to coal mine dust. *See United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001); 78 Fed. Reg. 59,102, 59,103-05 (Sept. 25, 2013) (lay evidence addressing the individual miner's experiences satisfies the regular dust exposure standard); Decision and Order at 9; Director's Exhibit 4. Lastly, the ALJ noted Claimant indicated he was exposed to coal dust "on all coal related jobs" when answering the interrogatories. Decision and Order at 9; Director's Exhibit 17 at 3. The ALJ therefore permissibly found Claimant was regularly exposed to coal dust during the "majority" of his employment at surface mines and preparation plants and that Claimant established he worked in conditions substantially similar to an underground mine for 16.7411 years.[14] *See*

9; Hearing Tr. at 15-18; *see Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-29 (2011) (work at an underground mine site constitutes qualifying coal mine employment). Addressing Claimant's surface coal mine work, he found Claimant was regularly exposed to coal dust at J & D Mining Company, McPeek Mining Company, Cajun Trade Corporation, Elmer Kincaid Coal Company, and Gray Fork Coal Company. Decision and Order at 9; Hearing Tr. at 18-19, 57. However, the ALJ acknowledged Claimant's testimony that he was not regularly exposed to coal dust during his tenure with Employer. Hearing Tr. at 20-22, 28. Based on his calculation that Claimant worked for Employer for 4.3689 years, the ALJ decreased the total length of his qualifying mine employment by this amount. Decision and Order at 9.

[13] Employer does not contest the accuracy of Claimant's testimony regarding the number of years he worked, his work duties, or that most of his work occurred at underground coal mine sites and preparation plants.

[14] Unlike the determination as to whether Employer is an operator, where there is a rebuttable presumption that the individual employed was regularly and continuously exposed to coal mine dust during the course of employment, the burden is on the claimant to establish regular exposure to coal dust in order to qualify for the Section 411(c)(4) presumption. The ALJ did not credit Claimant's employment with Employer for purposes of establishing his entitlement to the Section 411(c)(4) presumption because "there is insufficient testimony to conclude that his working conditions at C H Development

20 C.F.R. §718.305(b)(2); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 (10th Cir. 2014) ("substantial similarity" is proved if claimant proves that the miner was regularly exposed to coal mine dust); Decision and Order at 9.

In addition, we are not persuaded by Employer's argument that this case is similar to *Sargent v. Island Fork Construction Limited*, BRB No. 19-0054 BLA (Jan. 29, 2020) (unpub.). Employer's Brief at 4-5.[15] In *Sargent*, ALJ Lauren C. Boucher based her determination that the claimant was regularly exposed to coal mine dust *solely* on his "yes" response on the CM-911a form, indicating he was exposed to dust, gas or fumes; in this case, Claimant's hearing testimony, supported by additional evidence, established his regular exposure to coal dust. BRB No. 19-0054 BLA, slip op. at 6. In this case, the ALJ relied on Claimant's unrefuted hearing testimony; in *Sargent*, the Board held ALJ Boucher not only failed to specifically address whether the claimant's affirmative response on his CM-911a form demonstrated the regularity of his coal dust exposure, but she also violated the Administrative Procedure Act (APA)[16] when she substituted her general knowledge of coal mining for evidence affirmatively establishing whether the claimant's surface work constituted qualifying coal mine employment. *Id.* As discussed previously, the ALJ specifically addressed all relevant evidence and permissibly relied on Claimant's unrefuted hearing testimony, as further bolstered by his CM-911a form and answers to interrogatories. Thus, this case is distinguishable from *Sargent*.[17]

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). The Board cannot

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[Employer] were substantially similar to conditions in an underground mine." Decision and Order at 9.

[15] We note that *Sargent* is unpublished; hence it is not precedential.

[16] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[17] To the extent Employer argues that *Sargent* stands for the proposition that an ALJ may not rely on an affirmative response on a CM-911a form to establish regular coal dust exposure, we reject this argument as the Board rendered no such holding. *Sargent v. Island Fork Construction Limited*, BRB No. 19-0054 BLA, slip op. at 4-7 (Jan. 29, 2020) (unpub.); *see* Employer's Brief at 4-5.

substitute its inferences for those of the ALJ. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established more than fifteen years of qualifying coal mine employment. 20 C.F.R. §718.305(b)(2); *see Duncan*, 889 F.3d at 304; *Sterling*, 762 F.3d at 490-91.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.[18] 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 the relevant evidence supporting a finding of 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 arterial blood gas study evidence, the medical opinion evidence, and the evidence as a whole.[19] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 14-21.

Arterial Blood Gas Studies

Employer argues the ALJ erred in finding the arterial blood gas study evidence supports finding total disability. Employer's Brief at 11-12. We disagree. The ALJ considered four arterial blood gas studies dated February 1, 2018, February 12, 2019, August 28, 2019, and October 17, 2019. Decision and Order at 15-17; Director's Exhibits 10, 15 at 16; Claimant's Exhibit 9; Employer's Exhibits 1, 3. Based on the August 28, 2019

[18] Because it is not challenged on appeal, we affirm the ALJ's determination that Claimant's usual coal mine employment as a foreman, which "regularly required [him] to lift up to 100 pounds of equipment" and occasionally assist others to "lift more than 100 pounds," constituted heavy manual labor. *See Skrack*, 6 BLR at 1-711; Decision and Order at 14.

[19] The ALJ found Claimant did not establish total disability based on the pulmonary function study evidence, and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 14-15.

arterial blood gas study that produced qualifying values[20] both at rest and exercise, the ALJ found the arterial blood gas study evidence supports finding total disability. Decision and Order at 16.

We reject Employer's argument that the ALJ erred in failing to explain how he weighed the conflicting arterial blood gas studies. Employer's Brief at 12.

The ALJ noted the February 1, 2018 and October 17, 2019 resting arterial blood gas studies produced non-qualifying results, while the February 12, 2019 resting blood gas study and the August 28, 2019 resting and exercise blood gas studies produced qualifying results.[21] Decision and Order at 15. He permissibly assigned less weight to the February 12, 2019 resting blood gas study as it was performed during Claimant's hospitalization for an acute respiratory illness.[22] 20 C.F.R. §§718.105, 718.204(b)(2)(ii); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 15-16. Contrary to Employer's argument, the ALJ was not required to accord greater weight to the October 17, 2019 resting study because it is the most recent study.[23] *See Woodward v. Director,*

[20] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[21] The arterial blood gas studies administered on February 1, 2018, February 12, 2019, and October 17, 2019, do not include any exercise results. Director's Exhibits 10, 15 at 16; Claimant's Exhibit 9; Employer's Exhibit 3.

[22] As this blood gas study is contained in Claimant's treatment records, it is not subject to the quality standard requiring that blood gas studies "must not be performed during or soon after an acute respiratory or cardiac illness." 20 C.F.R. §718.101(b); 20 C.F.R. Part 718, Appx. C; Director's Exhibit 15 at 16. However, the ALJ was nevertheless required to determine whether the study can reliably establish total disability. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000) ("Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator must still be persuaded the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.").

[23] We further note that it is within the ALJ's discretion, as the trier-of-fact, to determine whether the time span between when objective tests and physical examinations are administered is significant. *See Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985). We are not persuaded, however, that a time difference of two months between two arterial blood gas studies would be "significant" such that the later October

OWCP, 991 F.2d 314, 319 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 16. He permissibly assigned the most weight to the August 28, 2019 exercise blood gas testing on the basis that an exercise study is more probative of Claimant's ability to perform his usual coal mine work requiring physical exertion. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255 (6th Cir. 1983); Decision and Order at 17. As the only exercise blood gas study of record, taken on August 28, 2019, is qualifying, we affirm as supported by substantial evidence the ALJ's finding the blood gas studies support finding total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 17.

Medical Opinions

Employer challenges the ALJ's finding the medical opinion evidence supports finding total disability. Employer's Brief at 14-16. The ALJ considered the opinions of Drs. Alam and Dahhan that Claimant is totally disabled, and Dr. Jarboe's opinion that he was not. Decision and Order at 17-21; Director's Exhibit 10; Claimant's Exhibit 5; Employer's Exhibits 1, 3. He attributed little weight to Dr. Jarboe's opinion as he found it not well reasoned or documented, and he assigned probative weight to the opinions of Drs. Alam and Dahhan as he found them well-reasoned and documented. Decision and Order at 17-19, 21.

Employer does not challenge the ALJ's crediting of Dr. Dahhan's opinion that Claimant is totally disabled or his discrediting of Dr. Jarboe's opinion that Claimant is not. Thus we affirm these determinations. *Skrack*, 6 BLR at 1-711.

We reject Employer's argument that the ALJ mischaracterized Dr. Alam's opinion. Employer's Brief at 12-13. Dr. Alam acknowledged the arterial blood gas study he administered yielded "barely" non-qualifying results, and he initially opined Claimant was not disabled. However, after reviewing additional blood gas studies, he testified Claimant's "pO2 value has never been above 70," which demonstrates a consistent abnormality in his gas exchange. Employer's Exhibit 9 at 5, 8. Referring to the February 12, 2019 and August 28, 2019 studies, Dr. Alam stated "those two blood gases are good evidence that yes, . . . he's not going to be able to sustain any work." *Id.* at 11. The ALJ found Dr. Alam's disability assessment, and his overall opinion, reasoned and documented. Decision and Order at 17-19.

Employer's argument amounts to a request to reweigh the evidence, which the Board is not empowered to do. It is the ALJ's responsibility to weigh the evidence, draw

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17, 2019 study would outweigh the earlier August 28, 2019 study based on recency. *See* Employer's Brief at 12.

inferences and determine credibility. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). The Board is not empowered to engage in a *de novo* review but rather is limited to reviewing the ALJ's decision for errors of law and determining whether the factual findings are supported by substantial evidence. *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983). Because it is supported by substantial evidence, we affirm the ALJ's finding, within his discretion, that Dr. Dahhan's opinion that Claimant is totally disabled is reasoned and documented. *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion). We therefore affirm the ALJ's finding that the medical opinions support finding total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17-21. Further, we affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 21.

Because we affirm the ALJ's findings that Claimant had more than fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, we also affirm his conclusions that Claimant invoked the Section 411(c)(4) presumption of disability due to pneumoconiosis and established a change in an applicable

condition of entitlement. 20 C.F.R. §§718.305(b)(1), 725.309(c); Decision and Order at 21-22, 32.

Employer does not challenge the ALJ's finding that it failed to establish rebuttal of the Section 411(c)(4) presumption, and thus we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 21-32.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge