U.S. Department of Labor

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

BRB No. 24-0011 BLA

GORDON R. OLSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	**NOT-PUBLISHED**
	)	
ENERGY WEST MINING COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 01/30/2025
	)	
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.

Dianna Cannon (Cannon Disability Law, P.C.), Salt Lake City, Utah, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

David Casserly (Seema Nanda, Solicitor of Labor; Jennifer Feldman Jones, Acting 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 BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order – Awarding Benefits (2018-BLA-05264) rendered on a claim filed on November 28, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Subsequent to the hearing held on July 8, 2019, and submission of the parties' post-hearing briefs, the ALJ issued an Order reopening the record to permit the parties to submit additional evidence and argument, which both parties did. He then issued his Decision and Order – Awarding Benefits on July 8, 2022. Initially, the ALJ accepted the parties' stipulations that Claimant suffered from pneumoconiosis and that his pneumoconiosis arose out of coal mine employment. Next, the ALJ found Claimant established 25.18 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues that the ALJ erred in reopening the record and in finding Claimant established a totally disabling respiratory or pulmonary impairment.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's challenge to the ALJ's reopening of the record.

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

[1] Section 411(c)(4) of the Act 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 25.18 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 48.

with applicable law.[3] 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).

Procedural Challenge

The ALJ conducted a hearing on July 8, 2019. The record closed on October 25, 2019, after the parties submitted post-hearing briefs and reply briefs. 20 C.F.R. §725.475; Notice of Hearing. In its closing brief before the ALJ, Employer argued that the May 28, 2019 pulmonary function study and examination conducted by Dr. Pearce was not reliable because Claimant had undergone an exploratory laparotomy that may have affected his lung function. *See* Employer's Closing Brief at 13-18. Employer claimed the process of "healing may take months" and Claimant might "return to his former status where he did not require supplemental oxygen."[4] *Id.* at 18.

On April 1, 2021, the ALJ issued an Order Reopening Record for Further Evidentiary Development (Order Reopening Record) to give the parties the opportunity to further develop evidence related to Claimant's pulmonary condition and to submit additional briefing after the submission of any additional evidence. The ALJ explained:

> **Upon review of the record**, I note that the **probative value of the most recent** direct evidence of Claimant's pulmonary condition – his May 28, 2019 examination by Dr. Pearce – is qualified by the fact that Claimant was recovering from recent abdominal surgery at the time. Both Claimant's treating pulmonologist, Dr. Pearce, whose office administered the testing showing diminished lung function and a need for oxygen; and Employer's examining doctor, Dr. Farney, who did not credit this testing, commented in reports and testimony on this issue. **As a result, it is not clear whether Claimant suffered at the time of the hearing**, *see, e.g., Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1232 (6th Cir. 1993) (citing *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988)), *vacated on other grounds*, 512 U.S. 1231 (1994), **or continues to suffer, from a totally disabling respiratory/pulmonary impairment**. *See generally* 20 C.F.R. §718.204.

[3] The Board will apply the law of the United States Court of Appeals for the Tenth Circuit because Claimant performed his last coal mine employment in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 5, 6.

[4] Appendix B to 20 C.F.R. Part 718 provides that "[t]ests shall not be performed during or soon after an acute respiratory illness."

> Moreover, the [Department of Labor] pulmonary examination occurred April 21, 2015, four years prior to both the Claimant's surgery and the hearing, and therefore was unable to timely address the "relevant conditions of entitlement." *See generally* 20 C.F.R. §725.456(e).

Order Reopening Record (emphasis added).

In response to the ALJ's Order Reopening Record, Claimant submitted Dr. Pearce's July 8, 2021 supplemental medical report, which included July 2, 2021 treatment notes and a July 2, 2021 pulmonary function study and walk-test, and Dr. Gagon's July 15, 2021 medical report, which included June 24, 2021 treatment notes and a July 1, 2021 pulmonary function study.[5] Claimant's Exhibits 20, 21. Employer submitted Dr. Farney's July 29, 2021 supplemental medical report and Dr. Fino's August 9, 2021 supplemental medical report. Employer's Exhibits 15, 16. The parties also submitted supplemental closing arguments, at which time Employer stated its belief that reopening the record was unnecessary but if the additional evidence is considered, it too warrants denial of the claim.[6] Employer's Supplemental Closing Argument Following Reopening at 2-3; Claimant's Supplemental Closing Brief; Order Granting Stipulated Joint Motion Extending Deadlines; Decision and Order at 2-3.

On July 8, 2022, the ALJ issued his Decision and Order – Awarding Benefits and admitted the parties' additional exhibits, noting neither party objected to the admission of this evidence. Decision and Order at 2-3.

Employer argues that black lung cases are "adversarial [and] not inquisitorial," and the ALJ has no specific authority under the regulations or the Administrative Procedure Act (APA) to reopen the record, on his own accord, for further medical development when

[5] On June 23, 2021, Claimant filed a Stipulated Joint Motion to Issue Proposed Scheduling Order requesting the ALJ adopt his proposed scheduling order. Claimant's Stipulated Joint Motion to Issue Proposed Scheduling Order. Claimant noted Employer's counsel did not sign the motion but allowed Claimant to represent, by way of the motion, that Employer did not object and agreed to the proposed scheduling order. *Id.* The ALJ granted the motion. Order Granting Stipulated Joint Motion Extending Deadlines.

[6] Employer's brief on appeal states that it objected to the ALJ's Order Reopening Record, but it provides no citation or reference to the record where that objection could be found. Employer's Brief at 1. It appears to have first raised concerns about the order in its August 31, 2021 Supplemental Closing Argument Following Reopening where it stated reopening the record was "unnecessary." *See* Employer's Supplemental Closing Argument Following Reopening at 2-3.

"no party had sought reopening, and a record was presented that was ripe for a decision to be issued in 2019." Employer's Brief at 4, 6-9. It maintains that the proper course of action for the ALJ when he reviewed the initial evidence was to issue a Decision and Order denying benefits and then allow Claimant to pursue his right under the regulations to submit newer evidence through the modification process. *Id.* at 6-9.

The Director and Claimant contend that the ALJ acted within his discretion in handling procedural and evidentiary issues in the absence of any express limitations on his general authority to manage hearings and evidentiary development as set forth in the regulations and the APA. Director's Brief at 1-2; Claimant's Brief at 5-6. We agree with the Director and Claimant that the ALJ acted within his discretion.

An ALJ is granted broad discretion in resolving procedural and evidentiary issues. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). A party seeking to overturn an ALJ's resolution of a procedural or evidentiary issue must show that the ALJ's action was an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). The regulation at 20 C.F.R. §725.455(c) provides that "[t]he conduct of the hearing and the order in which allegations and evidence shall be presented shall be within the discretion of the administrative law judge and shall afford the parties an opportunity for a *fair hearing*." 20 C.F.R. §725.455(c) (emphasis added). Section 556(d) of the APA provides that: "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. §556(d); 29 C.F.R. §18.90(b)(2) ("If the record is reopened, the other parties must have an opportunity to offer responsive evidence, and a new evidentiary hearing may be set."); *see also Energy W. Mining Co v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) ("The Due Process Clause [requires that] . . . [the] government must provide a litigant with 'a fair opportunity to mount a meaningful defense to the proposed deprivation of its property.'") (citations omitted).

Employer fails to identify any authority that bars ALJs from reopening the record after it has been closed or otherwise explain how this ALJ's conduct exceeds his broad authority under the APA or the Black Lung Benefits Act.[7] *See* Employer's Brief at 6-9. The Director correctly points out that ALJs have discretion over when the record closes. Director's Brief at 1 (citing 29 C.F.R. §18.90 (record closes at the end of the hearing,

[7] Employer points out that black lung litigation is adversarial and not inquisitorial. *See* Employer's Brief at 9. However, as discussed below, the ALJ did not develop evidence for the parties; he provided both parties with the opportunity to develop additional evidence and provide supplemental briefing.

"unless the judge directs otherwise")). Additionally, ALJs must afford the parties a fair hearing, 20 C.F.R. §725.455(c), and part of that duty mandates that the ALJ "shall at the hearing *inquire fully into all matters at issue*, and shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure[.]" 20 C.F.R. §725.455(b) (emphasis added).

Moreover, when fundamental fairness and due process are not implicated, the decision to reopen the record or take official notice of a matter are procedural issues committed to the ALJ's discretion. *See Troup v. Reading Anthracite Coal Co*., 22 BLR 1-14, 1-21 (1999) (en banc); *Clark*, 12 BLR at 1-153; *see also Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 501 (4th Cir. 1999) (noting the latitude which ALJs possess to reopen the record in a case). As the Tenth Circuit has explained, in order to establish a due process violation Employer must show that the "adjudication was infected by 'some prejudicial, *fundamentally unfair element*.'" *Oliver*, 555 F.3d at 1219 (quoting *Stanley*, 194 F.3d at 501) (emphasis added). Such unfairness has not occurred here.

Contrary to Employer's characterization, the ALJ did not "change the record" presented by the parties or specifically direct that new evidence be submitted in his Order Reopening Record.[8] Employer's Brief at 6-9. Rather, the ALJ provided both parties the opportunity to submit new evidence and additional briefing in light of Claimant's intervening abdominal surgery[9] and questions the parties raised about its effect on his lung condition.[10] Order Reopening Record; Order Granting Stipulated Joint Motion Extending

[8] Employer contends that because the Department of Labor regulations require "issue exhaustion" before an ALJ and that "[n]o issue about new testing was raised by the parties and was waived." Employer's Brief at 9. We agree with the Director's contention that while issue exhaustion prevents parties from untimely raising issues, Employer does not explain why that doctrine deprives the ALJ of discretion to allow the parties to submit supplemental evidence under the circumstances presented by this case. Director's Brief at 2. Nor does Employer suggest that Claimant acted untimely in response to the ALJ's order allowing the parties to submit supplemental evidence and arguments.

[9] The surgery occurred on May 6, 2019, five years after the claim had been filed and two months before the formal hearing.

[10] While Employer generally stated reopening the record was "unnecessary" in its August 31, 2021 supplemental closing argument, that statement was made five months after the ALJ issued his order. By that time, Employer had utilized the opportunity to submit additional evidence on August 2 and 10, 2021, the parties filed a joint motion for an extension of time "to facilitate the submission of additional medical evidence" on June 23, 2021, and none of those filings mentioned an objection to the ALJ's order. Employer's

Deadlines; Decision and Order at 2-3. While the ALJ provided some discussion of the evidence related to the parties' surgery arguments, he did not specifically require or otherwise direct the parties to submit any evidence at all. Order Reopening Record; Decision and Order at 2-3. Because the ALJ provided Employer with a meaningful opportunity to be heard and to rebut any additional evidence developed by Claimant, which it did, Employer has failed to show that the "adjudication was infected by 'some prejudicial, *fundamentally unfair element.*'"[11] *See Oliver*, 555 F.3d at 1219 (emphasis added).

Consequently, we reject Employer's assertion that the ALJ exceeded his authority or abused his discretion in reopening the record.[12] *See Blake*, 24 BLR at 1-113; *Clark*, 12 BLR at 1-153 (ALJ has broad discretion over procedural matters).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all

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Supplemental Closing Argument Following Reopening at 2-3; Employer's Exhibits 15, 16; Employer's August 2 and 10, 2021 Letters to the ALJ; Stipulated Joint Motion to Issue Proposed Scheduling Order. Under these circumstances, the ALJ did not abuse his discretion in concluding Employer's belated, general statement that reopening the record was "unnecessary" did not constitute a clear objection to the admission of the supplemental evidence. Decision and Order at 2-3.

[11] We are not persuaded by Employer's contention that the ALJ's decision to reopen the record is fundamentally flawed because he relied on *Skukan*, 993 F.2d at 1232, *vacated on other grounds*, 512 U.S. 1231. Employer's Brief at 7-8; Employer's Supplemental Closing Argument Following Reopening at 2-3; Order Reopening Record. Regardless of whether the Sixth Circuit's overturned decision in *Skukan* is persuasive or even applicable, an ALJ's broad procedural discretion is well founded in caselaw and the regulations, as already discussed.

[12] Employer generally contends that the case was "ripe for a decision" in 2019. Employer's Brief at 6 (citing 20 C.F.R. §725.476 (decisions to be issued 20 days after record closes)). However, as the Director points out, Employer failed to allege any harm arising from any delay in the ALJ's issuing of his decision. Director's Brief at 2.

relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). 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 argues the ALJ erred in finding Claimant established total disability based on the medical opinions and evidence as a whole.[13] Employer's Brief at 9-19. We disagree.

Medical Opinions

The ALJ examined five medical opinions relevant to total disability.[14] Decision and Order at 14-43. Dr. Cahill conducted the Department of Labor (DOL) complete pulmonary evaluation of Claimant on April 21, 2015, and opined Claimant is totally disabled based on x-ray evidence of simple pneumoconiosis. Director's Exhibit 10 at 10. In her August 20, 2015 supplemental report, Dr. Cahill opined "[Claimant] should not return to underground mining work" and "[h]e is capable of working above ground but should avoid further coal dust or other dust exposure." *Id.* The ALJ found Dr. Cahill's opinion to be not well-reasoned or well-documented and gave it little probative weight. Decision and Order at 39.

Dr. Pearce has been Claimant's treating pulmonologist since 2005. Claimant's Exhibit 1, 20; Employer's Exhibit 14. In his July 2, 2018 report, Dr. Pearce opined that Claimant "does not meet the necessary criteria for pulmonary disability" but advised against continuing his work as a miner because further exposure would potentially "worsen" his pulmonary conditions. Claimant's Exhibit 1 at 4 (unpaginated). On May 28, 2019, Dr. Pearce examined Claimant and opined Claimant required continuous supplemental oxygen based on his oxygen saturation level and that he has a mild restriction and moderately reduced diffusion capacity based on the May 28, 2019 pulmonary function

[13] The ALJ found Claimant did not establish total disability based on the pulmonary function or blood gas studies and there is 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 13-14. The ALJ also found Claimant did not establish complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 11.

[14] The ALJ determined Claimant's usual coal mine employment required medium exertion including occasionally lifting up to fifty pounds and rarely lifting up to 100 pounds, and that he stood and walked for one-third of the day. Decision and Order at 38-39. We affirm this finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

study results. *Id.* at 2 (unpaginated). He opined that Claimant does not have the capacity to continue the heavy labor required by his last coal mine work based on his symptoms, including fatigue on exertion, shortness of breath, wheezing, coughing, and dizziness, and his breathing impairments. *Id.*

During his September 4, 2019 deposition, Dr. Pearce testified that the May 28, 2019 pulmonary function study results "possibl[y]" could have reflected Claimant's "state of recovery" from his surgery two weeks prior. Employer's Exhibit 14 at 42. Dr. Pearce further testified that, based on Claimant's breathing impairments, he could not perform his past coal mine work and that "he has an impairment when lifting and carrying things[,]" estimating he could not carry anything weighing more than ten to fifteen pounds, and that he was impaired walking up inclines and stairs. *Id.* at 31-32. In addition, Dr. Pearce testified Claimant could not continue his coal mine work because irritants would aggravate his pneumoconiosis, reactive airways disease, and asthma. *Id.* at 26-28.

On July 2, 2021, Dr. Pearce continued his treatment of Claimant's respiratory condition, provided clinical observations, and conducted a pulmonary function study and a walk-test. Claimant's Exhibit 20. He opined that "[d]espite the improvement in the pulmonary function tests, his symptoms still remain fairly *debilitating*." *Id.* at 1 (unpaginated) (emphasis added). Further, he stated "[Claimant] continues to require supplemental oxygen delivery to be [able] to maintain saturations greater than 90% during exertion" and opined that his ongoing need for supplemental oxygen during activity would preclude him from working in the coal mine. *Id.* During the walk-test Dr. Pearce observed that, "[w]hile on room air during exercise, [Claimant's] oxygen saturations eventually dropped down to 87% after approximately 300 feet. Work of breathing increased; *he became dyspneic at that point as well. He will need to continue with his oxygen as he has been doing*." *Id.* at 4 (unpaginated) (emphasis added). Dr. Pearce stated that, "[d]uring his office appointment, it was evident that [Claimant] continues to struggle with his symptoms of shortness of breath and exercise limitation, occasional resting dyspnea, . . . a continued need for oxygen supplementation," and exercise and activity because he becomes dyspneic "fairly quickly." *Id.* at 1, 3-4 (unpaginated).

The ALJ noted "Dr. Pearce provided direct observations of the Claimant's *exertional limitations due to respiratory distress* [during his treatment of Claimant on July 2, 2021]." Decision and Order at 43 (emphasis added). Specifically, the ALJ found Dr. Pearce's direct observations in 2021 supported his earlier 2019 deposition testimony that Claimant's breathing impairments would prevent him from carrying ten to fifteen pounds and walking up steps. The ALJ determined his opinion was well-documented and well-reasoned. *Id.* at 40-41.

Dr. Gagon, Claimant's primary care physician, noted in his October 28, 2017 and June 3, 2019 reports that Claimant uses supplemental oxygen and had been diagnosed with "reactive airways disease, asthma, chronic bronchitis, and respiratory tract infections." Claimant's Exhibit 2 at 1, 3 (unpaginated). He opined Claimant's lung impairments are disabling and he "cannot be further exposed to coal dust without having an adverse effect upon his breathing impairment and his health." *Id.* at 1-3 (unpaginated). During his April 11, 2018 deposition, he testified that, "[b]ased on pulmonary function tests, [Claimant] has normal pulmonary capacity [to perform work outside the mines]." Employer's Exhibit 3 at 18-19. He further testified that "general[ly]" simple pneumoconiosis is not associated with a disabling pulmonary impairment, and that Claimant "has some chronic lung disease . . . [and] exposure to coal dust . . . is going to exacerbate his breathing problems." *Id.* at 9-11.

In his July 15, 2021 supplemental report, Dr. Gagon stated Claimant is "severely limited with activity and . . . is totally disabled from working in any physical employment, particularly in a coal mine . . . [and that he] needs to use a nebulizer, CPAP [continuous positive airway pressure], and continues to require supplemental oxygen." Claimant's Exhibit 21 at 2 (unpaginated). Dr. Gagon reported that Claimant's July 1, 2021 pulmonary function study, which was conducted as a part of Claimant's treatment, showed an obstructive airway disease and the pulmonary function studies that predated his abdominal surgery also showed an obstructive disease. *Id.* at 1 (unpaginated). He opined Claimant has shortness of breath with minimal exertion, severe limitation with physical activities, and "chronically low oxygen levels requiring continuous oxygen." *Id.* at 2, 4 (unpaginated). The ALJ found Dr. Gagon's opinion to be documented, reasoned, and entitled to "some probative weight." Decision and Order at 41.

Dr. Farney examined Claimant on March 1, 2018, reviewed his medical records, and opined that Claimant did not have a disabling impairment "based upon the objective data." Employer's Exhibits 2 at 22. In his May 16, 2019 supplemental report, Dr. Farney opined the most recent pulmonary function study was taken while Claimant was recuperating from a major abdominal surgery and thus it was "not appropriate for determination of disability since full recovery may take significantly more time." Employer's Exhibit 10 at 12. At his August 8, 2019 deposition, Dr. Farney noted the improvement from the May 2019 testing conducted by Dr. Pearce to the July 2019 testing conducted by Dr. Farney and opined Claimant could perform a physically demanding job from a respiratory standpoint. Employer's Exhibits 8 at 39-41; 12. In his July 29, 2021 supplemental report, Dr. Farney reviewed Drs. Pearce's and Gagon's 2021 supplemental reports and objective testing. He questioned the reliability of Dr. Pearce's walk-test results in light of Claimant's prior normal blood gas study results from April 21, 2015, and March 1, 2018, and opined that Claimant's pulmonary function results over almost fifteen years

are "all normal or nearly normal." Employer's Exhibit 15 at 6. He concluded there was "no compelling evidence of progressive disease related to coal dust exposure." *Id.*

In his November 26, 2018 medical report, Dr. Fino reviewed Claimant's medical records and opined Claimant does not have a respiratory or pulmonary impairment. Employer's Exhibit 4. He maintained his opinion during his June 14, 2019 and August 22, 2019 depositions and in his May 23, 2019 and August 9, 2021 supplemental reports. Employer's Exhibits 7, 9, 13, 16. In his June 14, 2019 deposition, Dr. Fino stated he "suspect[ed]" that Claimant's need for continuous supplemental oxygen was related to his abdominal surgery and that Claimant previously had not needed oxygen except at night due to sleep apnea. Employer's Exhibit 7 at 35. He also testified that Dr. Pearce's May 28, 2019 pulmonary function study results "reflect[ed] the effect that the surgery had on [Claimant's] lungs[,]" but that he could still perform heavy and very heavy manual labor. Employer's Exhibit 13 at 8-10. In his August 9, 2021 supplemental report, Dr. Fino reviewed Drs. Pearce's and Gagon's 2021 supplemental reports and objective testing. Employer's Exhibit 16. He opined the pulmonary function study results were normal, questioned whether Dr. Pearce's walk-test was valid, and concluded the "additional information does not cause me to change any of my original opinions." *Id.* at 7.

While the ALJ determined Drs. Farney's and Fino's opinions are well-documented, he found their failure to adequately address Dr. Pearce's and Gagon's post-surgery treatment of Claimant's respiratory condition undermined their probative weight. Decision and Order at 41-43. At the beginning of his Decision and Order, the ALJ explained:

> Upon initial review of the evidence of record I determined that the Claimant's May 28, 2019, pulmonary evaluation showing diminished lung function and need for supplemental oxygen was performed while the Claimant was recovering from abdominal surgery. Based on medical opinions by Drs. M. Pearce and R.J. Farney related to the May 28, 2019, testing, additional medical testimony *on whether the Claimant suffered or continued to suffer from a totally disabling respiratory/pulmonary impairment* after an appropriate surgical recovery period was necessary.

Decision and Order at 2 (emphasis added); *see also* Order Reopening Record.

The ALJ noted that during Dr. Pearce's July 2, 2021 treatment of Claimant, "Dr. Pearce provided direct observations of the Claimant's exertional limitations due to respiratory distress" that were supported by Dr. Gagon's observations during his 2021 treatment of Claimant. Decision and Order at 43. Further, the ALJ discredited Drs. Fino and Farney because they did not adequately address Drs. Pearce's and Gagon's observations of Claimant's symptoms and limitations during their 2021 treatment. *Id.* at

42-43. For these reasons, the ALJ gave more probative weight to Dr. Pearce's opinion, as supported by Dr. Gagon's opinion, over those of Drs. Farney and Fino. *Id.* Thus, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and based on the evidence as a whole. *Id.*

Initially, we reject Employer's contention that the ALJ applied the wrong legal standard by relying on Drs. Gagon's and Pearce's statements regarding the "inadvisability" of returning to coal mine work as evidence of total disability. Employer's Brief at 17-18 (citing *W.C. v. Whitaker Coal Corp.*, 24 BLR 1-20, 1-30 (2008)). We also reject Employer's contention that the ALJ failed to resolve the "conflicting evidence." Employer's Brief at 9-19 (citing *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013 (10th Cir. 2010)). While Drs. Pearce and Gagon opined that Claimant should not work in a dusty environment because it would aggravate his pulmonary impairments, the ALJ did not rely on this aspect of their opinions in determining they support a finding of total disability. Decision and Order at 40-41. Rather, as discussed below, the ALJ properly considered whether each physician's opinion is reasoned and documented, and he adequately explained the bases for his credibility determinations.[15] *See Gunderson*, 601 F.3d at 1022-24; *Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 38-43.

Employer also contends the ALJ failed to address whether the results of Dr. Pearce's July 2, 2021 walk-test are "medically acceptable and relevant to establishing or refuting" Claimant's entitlement to benefits pursuant to 20 C.F.R. §718.107(b).[16] Employer's Brief

[15] Employer contends the ALJ failed to adequately address Claimant's hearing testimony, asserting his testimony demonstrates "non-pulmonary causes" for his use of supplemental oxygen, and that the ALJ failed to explain how this testimony impacted the medical opinions. Employer's Brief at 10-11. The ALJ accurately summarized Claimant's testimony, including that Claimant has been using continuous supplemental oxygen since April 2019. Decision and Order at 7; Hearing Transcript at 35. Moreover, the proper inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment, while the cause of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption. *See* 20 C.F.R. §§718.204(b), (c), 718.305(d)(1)(ii); *see also Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989).

[16] Section 718.107(b) provides: "[t]he party submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is

at 13-15; Employer's Supplemental Closing Argument Following Reopening at 6-7. Any alleged error is harmless, however, as the ALJ specifically relied on Dr. Pearce's direct observations of Claimant's "exertional limitations due to respiratory distress" during the walk test as opposed to only the specific measurement results of the tests. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 38-43.

We also reject Employer's argument that the ALJ failed to consider whether Dr. Pearce opined that Claimant is totally disabled. Employer's Brief at 16. Contrary to Employer's argument, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *See Scott v. Mason Coal Co*., 60 F.3d 1138, 1141 (4th Cir. 1995); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). The ALJ acknowledged that Dr. Pearce opined Claimant's symptoms are "fairly debilitating" and that his "ongoing need for supplemental oxygen during activity would preclude him from working in the coal mines." Decision and Order at 22; Claimant's Exhibit 20 at 1. The ALJ concluded Dr. Pearce's direct observations of Claimant's "exertional limitations due to respiratory distress" supported his earlier opinion that Claimant's breathing impairments would prevent him from carrying ten to fifteen pounds and impact his ability to walk up steps. Decision and Order at 40, 43. Consequently, we see no error in the ALJ's finding that Dr. Pearce's opinion is well-documented and reasoned and supports a finding of total disability. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Pickup*, 100 F.3d at 873; Decision and Order at 16-22, 40-43.

Nor are we persuaded by Employer's argument that Dr. Gagon's opinion is not well-reasoned or supported by the non-qualifying clinical testing. Employer's Brief at 12, 18-19. Contrary to Employer's argument, a physician may conclude a miner is disabled even if the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests). The ALJ accurately noted Dr. Gagon's opinion was based on his treatment of Claimant, the July 1, 2021 non-qualifying pulmonary function study results he obtained which showed an obstruction, and Claimant's use of supplemental oxygen and his shortness of breath and cough with minimal exertion. Decision and Order at 41. Consequently, we see no error in the ALJ's finding

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medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b).

that Dr. Gagon's opinion is entitled to "some probative weight" and supports Dr. Pearce's observations of exertional limitations due to respiratory distress. *See Hicks*, 138 F.3d at 533; *Pickup*, 100 F.3d at 873; Decision and Order at 41, 43.

Finally, Employer generally contends that Drs. Farney's and Fino's opinions and the weight of the non-qualifying objective testing demonstrate that Claimant failed to establish total disability. Employer's Brief at 19. However, Employer does not challenge the ALJ's determination that Drs. Farney's and Fino's opinions are entitled to little probative weight because they failed to adequately address Drs. Pearce's and Gagon's observations from their post-surgery treatment of Claimant's respiratory condition. Decision and Order at 42-43. Consequently, we affirm these credibility determinations as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ has discretion to evaluate the medical evidence and assess its probative value. *See Pickup*, 100 F.3d at 873; *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993). The Board cannot reweigh the evidence or substitute its inferences for those of the ALJ. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). As the ALJ's credibility determinations are rational and supported by substantial evidence, we affirm his finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 43. Thus, we affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018);

Decision and Order at 43, 48. We further affirm, as unchallenged, the ALJ's finding that Employer did not rebut the presumption. *See Skrack*, 6 BLR at 1-711; Decision and Order at 48-51.

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

I concur in result only.

JUDITH S. BOGGS
Administrative Appeals Judge