



BRB No. 25-0021 BLA

DOUGLAS A. EVENSON)
)
 Claimant-Respondent)
)
 v.)
)
 ANTELOPE COAL COMPANY)
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

NOT-PUBLISHED

DATE ISSUED: 01/13/2026

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Carrie Bland, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Austin), Norton Virginia, for Claimant.

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

BEFORE: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Associate Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits (2023-BLA-05086) rendered on a claim filed on September 24, 2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with seventeen years of surface coal mine employment in conditions substantially similar to those in an underground coal mine and found he has a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, she determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).¹ She further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus erred in finding he invoked the Section 411(c)(4) presumption. It also contends the ALJ erred in finding it did not rebut the presumption.² Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

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. 20 C.F.R. §718.305(b)(1)(iii). 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.⁴

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 determination that Claimant had seventeen years of qualifying coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 11-12.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit because Claimant performed his coal mine employment in Wyoming. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 34; Director's Exhibit 3.

⁴ We affirm, as unchallenged on appeal, the ALJ's determination that Claimant's usual coal mine work was as a driller. *Skrack*, 6 BLR at 1-711; Decision and Order at 4-5.

See 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or arterial blood gas studies,⁵ 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 evidence supporting total disability 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). The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinion evidence, and the evidence as a whole.⁶ 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 17-22.

Pulmonary Function Studies

The ALJ considered the November 22, 2021 pulmonary function study conducted as part of the Department of Labor sponsored complete pulmonary evaluation of Claimant, as well as three earlier studies obtained as part of Claimant's medical treatment with Dr. Patel conducted on December 12, 2017, December 23, 2019, and January 11, 2021. Decision and Order at 14-17; Director's Exhibits 13, 23; Employer's Exhibit 1 at 11-13. The December 12, 2017 and December 23, 2019 studies produced qualifying values; a bronchodilator was not administered. Director's Exhibit 23 at 1; Employer's Exhibit 1 at 12-13. The January 11, 2021 pulmonary function study produced non-qualifying results; a bronchodilator was not administered. Employer's Exhibit 1 at 11. Finally, the November 22, 2021 study produced qualifying results before the administration of a bronchodilator and non-qualifying values after the administration of a bronchodilator. Director's Exhibit 13 at 7.

The ALJ found all the pulmonary function studies were sufficiently reliable to make a disability determination. Decision and Order at 16. After finding the pre-bronchodilator results were a more accurate representation of Claimant's condition, the ALJ concluded that the preponderance of the pulmonary function studies produced qualifying results and therefore establish total disability. *Id.* at 17.

⁵ 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).

⁶ The ALJ accurately found the only blood gas study of record produced non-qualifying values 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 18.

Employer argues the ALJ erred in finding the November 22, 2021 pulmonary function study valid and erred in weighing the pulmonary function study evidence as a whole.⁷ Employer’s Brief at 9. We disagree.

When weighing pulmonary function studies conducted in anticipation of litigation, the ALJ must determine whether the studies are in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.103(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).

We reject Employer’s contention that the November 22, 2021 pulmonary function study cannot be credited as Dr. Forehand only reported the raw data for the two best tests conducted and the “agency” requires all three acceptable trials be reported so that the variability in the FEV1 results can be determined. Employer’s Brief at 9. No such requirement exists.⁸ Employer is correct that the regulations do specify “a minimum of three flow-volume loops and derived spirometric tracings shall be carried out.” 20 C.F.R. §718, Appendix B (2)(ii). But the study results included the necessary tracings, and Employer does not allege this requirement was not met. Director’s Exhibit 13 at 8. Further, while the regulations do require tracings to determine if maximum effort is obtained during the FVC maneuver, 20 C.F.R. §718, Appendix B (1)(v), there is no specific requirement for what data must be transcribed beyond the tracings, which are present in this case. *Id.* Moreover, contrary to Employer’s argument, as the variability in the FEV1 results is calculated using the two best FEV1s and Dr. Forehand provided the data for the results of

⁷ We affirm, as unchallenged on appeal, the ALJ’s findings that the December 12, 2017 and December 23, 2019 qualifying pulmonary function studies are valid and sufficiently reliable for determining total disability. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.101(b); Decision and Order at 15-17; Director’s Exhibit 23 at 1; Employer’s Exhibit 1 at 12-13.

⁸ Even if the test did not meet the quality standards, the ALJ would still have the discretion to consider and credit the test if it was sufficiently reliable. 20 C.F.R. §718, Appendix (2)(ii)(G).

the two best trials, the variability can be calculated consistent with 20 C.F.R. §718, Appendix (2)(ii)(G). *Id.* Thus, we reject this argument. As Employer raises no other challenge to the validity of the November 22, 2021 pulmonary function study, we affirm the ALJ's determination that it is valid.⁹ Decision and Order at 16-17.

Nor are we persuaded by Employer's argument that the ALJ erroneously counted heads to find the pulmonary function study evidence established total disability. Employer's Brief at 9. Contrary to Employer's argument, the ALJ considered the validity of the pulmonary function studies, the date each study was conducted, and whether a bronchodilator was administered, in addition to the number of qualifying and non-qualifying studies. Decision and Order at 14-17. The ALJ permissibly accorded greater weight to Claimant's pre-bronchodilator values as indicative of his true pulmonary condition. 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (post-bronchodilator results "do[] not provide an adequate assessment of the miner's disability"); *Jericol Mining Inc. v. Napier*, 301 F.3d 703, 712-13 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 17; Director's Exhibits 13, 23; Employer's Exhibit 1 at 12-13.

Consequently, the ALJ was not required to disregard the three qualifying results because of the non-qualifying results from the January 11, 2021 study and permissibly found total disability established by a preponderance of the valid and qualifying pre-bronchodilator studies. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); Decision and Order at 17. We therefore affirm, as supported by substantial

⁹ The ALJ accorded no weight to Dr. Tuteur's opinion that the November 22, 2021 pulmonary function study was invalid because he offered no explanation for the basis of his opinion. *See N. Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); Decision and Order at 16-17; Director's Exhibit 22 at 3. Similarly, the ALJ accorded little weight to Dr. Goodman's opinion that the study was invalid because he failed to reconcile his statement that there is an argument that it is unfair to judge the validity of the study but then proceeded to judge the validity of the study. *See Pickup*, 100 F.3d at 873; *Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); Decision and Order at 16; Director's Exhibit 20 at 1. The ALJ further found that Dr. Forehand's opinion that the study is valid is a more reliable indicator as to the veracity of the test results and adherence to the standards as the administering physician. *See Pickup*, 100 F.3d at 873; *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1335-37 (10th Cir. 2014); *Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985); Decision and Order at 16; Director's Exhibits 15 at 1; 16 at 3-4. As Employer does not challenge these findings, they are affirmed. *Skrack*, 6 BLR at 1-711.

evidence, the ALJ's conclusion that the preponderance of pulmonary function studies support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 17.

Medical Opinions

Prior to weighing the medical opinion evidence, the ALJ considered the exertional requirements of Claimant's usual coal mine work as a driller. Decision and Order at 12-13. She considered Claimant's testimony and his Form CM-913, Description of Coal Mine Work. *Id.* On his CM-913, Claimant indicated that his job required sitting for twelve hours per day and lifting fifty pounds once per day. Director's Exhibit 4 at 2. Claimant further testified that while this was his basic job he did other work as needed. Hearing Transcript at 28-32. He testified he drilled blast patterns, moved cables, and replaced the bit on the drill, which weighed about seventy-five pounds. *Id.* Based on the foregoing, the ALJ concluded that Claimant's usual coal mine work as a driller involved heavy manual labor and sometimes very heavy manual labor. Decision and Order at 12-13.

Employer argues that the ALJ erred in finding Claimant performed heavy and very heavy labor as his testimony suggested some heavy lifting, but it asserts these tasks did not constitute his "usual" coal mine employment and that the ALJ did not resolve contradictions in the evidence. Employer's Brief at 7-8. We disagree.

Contrary to Employer's assertion, a task need not be performed every day for it to be considered part of the Claimant's duties for purposes of determining whether he can perform his usual coal mine employment. *See also Eagle v. Armco Inc.*, 943 F.2d 509, 511-12 & n.4 (4th Cir. 1991) (whether a miner can perform his usual coal mine work depends on whether he can perform the "most arduous" part of that work); *Heavilin v. Consolidation Coal Co.*, 6 BLR 1-1209, 1-1213 (1984) (determination of nature of usual coal mine work and its physical requirements is for the fact-finder). Nor is the evidence in this case necessarily contradictory.

Claimant initially stated he last worked as a driller, sitting for twelve hours a day, lifting fifty pounds at least once per day, and running a variety of equipment including a dozer, hand wrenches, drills, hauling trucks, water trucks, and blades. Director's Exhibit 4 at 2-3. At the hearing, he agreed that the essential requirement of his job required him to "continually drill[] pretty much the twelve-hour shift." Hearing Transcript at 14. But when asked to describe his day in detail, he explained that he was a driller on a drill and blast team; he would lay out patterns to make the drilling more effective, then drill, get down to check his bit, replace the seventy-five pound bit as needed, and get in and out of

his truck “a good half a dozen times a day.”¹⁰ *Id.* at 28-31, 35-36. When needed he would help with other tasks, including loading blast holes and moving electrical cable when necessary. *Id.* at 28-30. Considering the evidence as a whole, the ALJ found that Claimant’s job required heavy labor, consisting of getting in and out of the truck, loading blast holes, drilling, and carrying up to fifty pounds a day, and at times very heavy manual labor when he had to carry and change drill bits. Decision and Order at 13.

The ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). In this case, the ALJ considered the relevant evidence, did not find it contradictory, and permissibly found that Claimant’s day-to-day work required heavy labor and, at times, very heavy labor when he lifted drill bits. *Stallard*, 876 F.3d at 670; *Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-152; Decision and Order at 13. Employer’s arguments are a request to reweigh the evidence which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ’s determination that Claimant’s usual coal mine employment involved heavy manual labor and, at times, very heavy labor. Decision and Order at 13.

The ALJ next considered the opinions of Drs. Forehand, Green, Tuteur, and Fino. Decision and Order at 18-21; Director’s Exhibits 13, 16, 22; Claimant’s Exhibit 1; Employer’s Exhibit 4. Dr. Forehand opined that Claimant has “[i]nsufficient residual ventilatory capacity” and a “significant, work-limiting respiratory impairment” that renders him totally disabled. Director’s Exhibit 13 at 4. Dr. Green diagnosed Claimant with disabling chronic obstructive pulmonary disease (COPD) and indicated he could not return to his last coal mine employment given his moderate to severe chronic airflow obstruction. Claimant’s Exhibit 1 at 4, 9. Dr. Tuteur opined that Claimant has at most a mild obstruction but has the pulmonary capacity to return to coal mine employment based on his best pulmonary function study values. Director’s Exhibit 22 at 3-4. Finally, Dr. Fino determined that Claimant has a moderate respiratory impairment and “would be able to work if his job involved sitting all day and lifting 50 pounds once per day.” Employer’s Exhibit 4 at 5. The ALJ found all of the physicians highly qualified to offer an opinion. Decision and Order at 20. She determined the opinions of Drs. Forehand and Green were persuasive and found the opinions of Dr. Tuteur and Dr. Fino not well-reasoned. *Id.* at 21.

¹⁰ Dr. Forehand also noted that when interviewing Claimant, Claimant indicated he not only operated equipment but also maintained it, lifted heavy bits, lifted cables and water lines, maintained the drill, lifted hydraulic hoses, lifted and carried hand tools, and climbed on and off the equipment, constituting very heavy labor. Director’s Exhibits 13, 21 at 7.

The ALJ also considered Dr. Patel's treatment records but found that, other than the pulmonary function studies included in the records, they "do not otherwise shed light on Claimant's respiratory condition." *Id.*

Employer contends the ALJ erred in her weighing of the medical opinion evidence and Claimant's treatment records. Employer's Brief at 10-11. We disagree.

Contrary to Employer's argument, the ALJ did not fail to explain the weight she accorded to Claimant's treatment records. Employer's Brief at 10. The ALJ considered the treatment records but found that they do not shed light on whether Claimant suffers from a totally disabling respiratory impairment beyond including pulmonary function studies she had already considered. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (ALJ has the discretion to weigh the evidence and draw inferences therefrom); Decision and Order at 21; Employer's Exhibit 1. While Employer alleges Claimant's lack of reported symptoms of shortness of breath and cough in 2019 and 2021 support a finding of no disability, those same records report restrictive lung disease, a moderate obstruction, and emphysema. Employer's Exhibit 1 at 15, 18, 23, 25, 28. Regardless, Dr. Patel did not offer an opinion in the treatment records as to whether Claimant had a respiratory impairment that would render him totally disabled and did not provide a diagnosis that could be compared to Claimant's job duties to determine if he was disabled. Employer's Exhibit 1. Consequently, we affirm the ALJ's determination that the treatment records are silent as to the extent of Claimant's impairment. *See Underwood*, 105 F.3d at 949; *see also Marra v. Consolidation Coal*, 7 BLR 1-216, 218-19 (1984); Decision and Order at 21.

We further reject Employer's contention that the ALJ failed to explain why the superior qualifications of Drs. Tuteur and Fino did not outweigh Dr. Forehand's qualifications. Employer's Brief at 10. Credibility determinations are within the discretion of the ALJ. *N. Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 873 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993). The ALJ was not required to give greater weight to Employer's experts based on qualifications such as certifications and publications, but permissibly found Drs. Forehand, Green, Tuteur, and Fino are all highly qualified. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003) (qualifications alone do not provide a basis for giving greater weight to a particular physician's opinion; that opinion must also be adequately reasoned and documented); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993) (ALJ is not required to defer to the physicians with superior qualifications); Decision and Order at 20.

Nor are we persuaded by Employer's argument that the ALJ erred in crediting Dr. Forehand's opinion. Employer's Brief at 10-11. Initially, we reject Employer's argument that Dr. Forehand's opinion should be discredited because he did not address the January

11, 2021 pulmonary function study. Employer's Brief at 10. An ALJ is not required to discredit a physician who did not review all of the medical evidence in the record when the opinion is otherwise well-reasoned, documented, and based on the physician's own examination of the miner and objective test results. *See Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); *see also Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986) (ALJ properly considered whether the objective data offered as documentation adequately supported the opinion). Dr. Forehand conducted a complete examination of Claimant on November 22, 2021. Director's Exhibit 13. Specifically, Dr. Forehand noted Claimant's occupational, smoking, and medical histories, and conducted a physical examination, a chest x-ray, an EKG, a pulmonary function study both with and without bronchodilators, and both a resting and exercise blood gas study. *Id.* He subsequently reviewed the December 23, 2019 pulmonary function study, Dr. Tuteur's opinion, Dr. Goodman's validation report, and Dr. Gaziano's validation report. Director's Exhibit 16. He explained that Claimant's pulmonary function study, with an FEV1 value of 56%, renders him unable to meet the physical demands of his job. Director's Exhibits 13, 21. The ALJ permissibly found Dr. Forehand's opinion reasoned and documented as he based his opinion on his physical examination of Claimant and the objective testing he conducted.¹¹ *Hansen*, 984 F.2d at 370; *Crisp*, 866 F.2d at 185; Decision and Order at 20-21.

Employer's argument that the ALJ erred in discrediting the opinions of Drs. Tuteur and Fino does not persuade us. Employer's Brief at 9-10. The ALJ accurately noted that Dr. Tuteur based his opinion that Claimant is not disabled on his reliance on post-bronchodilator pulmonary function studies, which the ALJ found to be less indicative of Claimant's condition. Decision and Order at 20; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997) (ALJ may discount opinion that contradicts his findings). Further, the ALJ accurately noted that Dr. Fino opined Claimant was not disabled based on his belief that Claimant's job required him to sit all day and only lift fifty pounds once a day and based on the doctor's erroneous conclusion that the December 12, 2017 pulmonary function study was not qualifying. Decision and Order at 21. The ALJ permissibly found Dr. Fino's opinion unpersuasive as his opinion was based on an incorrect understanding of Claimant's usual coal mine employment and an erroneous understanding of the objective evidence. *Id.*; *see Akers*, 131 F.3d at 441. As Employer does not challenge these credibility findings, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

¹¹ Contrary to Employer's arguments, Dr. Forehand explained how the pre-bronchodilator FEV1 result on the pulmonary function study he conducted is a better indicator of the presence of a respiratory impairment, a finding consistent with the ALJ's findings. Employer's Brief at 10; Director's Exhibits 13 at 5; 16 at 3.

Moreover, even if Employer were right that Dr. Forehand's opinion cannot carry Claimant's burden and is entitled to less weight than those of Drs. Patel, Fino, and Tuteur, it does not challenge the ALJ's finding that Dr. Green authored a more persuasive opinion entitled to greater weight than the opinions of Drs. Tuteur and Fino. Decision and Order at 21. As that finding is not challenged, it is affirmed. *Skrack*, 6 BLR at 1-711. Consequently, we affirm the ALJ's findings that the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 21.

Finally, contrary to Employer's arguments, the ALJ permissibly found the pulmonary function studies and medical opinion evidence establishes total disability despite the non-qualifying blood gas studies. 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) ("blood gas studies and pulmonary function studies measure different types of impairment"). Decision and Order at 22. We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305, 725.309; Decision and Order at 22; Employer's Brief at 8.

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 pneumoconiosis¹² or that "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.¹³

¹² "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).

¹³ The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 23.

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 by, dust exposure in coal mine employment.” See 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); see *Consolidation Coal Co. v. Director, OWCP* [Noyes], 864 F.3d 1142, 1152 (10th Cir. 2017); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the medical opinions of Drs. Tuteur and Fino. Director’s Exhibit 22; Employer’s Exhibit 4. Dr. Tuteur opined that Claimant’s “no worse than mild obstructive ventilatory defect” is due to long-term cigarette smoking and not coal dust. Director’s Exhibit 22 at 3. Dr. Fino indicated that the reversibility and variability of Claimant’s moderate respiratory impairment are related to cigarette smoking and coal dust did not play a role. Employer’s Exhibit 4 at 5-6. The ALJ concluded that neither Dr. Tuteur’s nor Dr. Fino’s opinion on legal pneumoconiosis was well-reasoned. Decision and Order at 24.

Employer contends the ALJ erred in discrediting the opinions of Drs. Tuteur and Fino. Employer’s Brief at 4-8. We disagree.

The ALJ accurately noted that Dr. Tuteur attributed Claimant’s impairment solely to cigarette smoking. Decision and Order at 24; Director’s Exhibit 2. She permissibly discredited Dr. Tuteur’s opinion for failing to explain how Claimant could be “unsusceptible to coal mine dust but wholly susceptible to cigarette smoke.” See *Energy W. Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 831 (10th Cir. 2017); *Blue Mountain Energy v. Director, OWCP* [Gunderson], 805 F.3d 1254, 1260-62 (10th Cir. 2015); 65 Fed. Reg. 70,920, 79,939-42 (Dec. 20, 2000); Decision and Order at 24. The ALJ further accurately noted that Dr. Tuteur’s opinion was based on an inconsistency as the physician first noted that Claimant smoked cigarettes from 1976 through 2015 and then inaccurately indicated he smoked for forty-four pack years, and therefore permissibly discredited him for that reason. See *Pickup*, 100 F.3d at 873; *Hansen*, 984 F.2d at 370; Decision and Order at 24; Director’s Exhibit 22 at 1, 3.

We further reject Employer’s argument that the ALJ applied the wrong standard in considering Dr. Fino’s opinion. Employer’s Brief at 5-6. The ALJ correctly stated Employer must establish that Claimant’s obstruction is not “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §§718.201(b), 718.305(d)(1)(i); *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020); *W. Va. CWP Fund v. Director, OWCP* [Smith], 880 F.3d 691, 699 (4th Cir. 2018); Decision and Order at 22. Moreover, the ALJ accurately noted that Dr. Fino opined

that he could not rule out some of the obstruction as being due to coal mine dust inhalation but also stated that Claimant's condition would be no different if he never worked in the mines. Decision and Order at 25; Employer's Exhibit 4 at 5-6. She further noted that the only basis for the opinion that Dr. Fino gave was the variability in the results of the pulmonary function studies. Decision and Order at 25; Employer's Exhibit 4 at 5-6. Specifically, Dr. Fino opined that "[t]he FEV1 values in 2019 and in November of 2021 [pulmonary function studies] were qualifying. However, the FEV1 values from 12/12/17 and 1/11/21 were not qualifying. Thus, there is a lot of variability in the FEV1 values." Employer's Exhibit 4 at 4-5. The ALJ therefore found Dr. Fino's opinion is based in part on a misunderstanding of the objective evidence as the December 12, 2017 pulmonary function test was qualifying and reasonably accorded it less weight. Decision and Order at 25. As Dr. Fino offered no other reason for his finding that, despite being unable to rule out contribution from coal mine dust exposure, he was able to attribute the impairment solely to cigarette smoking, the ALJ permissibly found his opinion inadequately explained. *See Minich*, 25 BLR at 1-155 n.8; Decision and Order at 25.

Because the ALJ permissibly discredited the only opinions supportive of Employer's burden of proof,¹⁴ we affirm her finding that Employer did not disprove that Claimant has legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "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 25-26. She permissibly discounted the opinions of Drs. Tuteur and Fino on the cause of Claimant's total disability because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 26. We therefore affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption and the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 26.

¹⁴ Having affirmed the ALJ's rejection of Employer's experts, we need not consider Employer's challenges to Dr. Forehand's opinion regarding legal pneumoconiosis. Employer's Brief at 10-11.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge