U.S. Department of Labor

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

BRB No. 24-0076 BLA

VIRGINIA GIBSON (o/b/o LESTER GIBSON)	)	
Claimant-Respondent	)	
v.	)	**NOT-PUBLISHED**
CONSOL OF KENTUCKY, INCORPORATED	)	DATE ISSUED: 07/31/2025
and	)	
CONSOL ENERGY, INCORPORATED	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Second Modification of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Before: GRESH, Chief Administrative Appeals Judge, ROLFE, Administrative Appeals Judge, and ULMER, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits on Second Modification (2020-BLA-05833) rendered on a claim filed on May 3, 2006, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a second modification request[1] of a miner's claim.[2]

In a September 2, 2010 Decision and Order Denying Benefits, ALJ Pamela Lakes Wood credited the Miner with twenty-three years of underground coal mine employment and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she determined the Miner 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) (2018).[3] However, she found Employer rebutted the presumption by disproving the presence of pneumoconiosis[4] and denied benefits.

In consideration of the Miner's appeal without representation, the Benefits Review Board affirmed ALJ Wood's determination that he invoked the Section 411(c)(4) presumption. *Gibson v. Consol of Ky., Inc.*, BRB No. 14-0724 BLA, slip op. at 4 (Sept.

[1] The record contains two sets of Director's Exhibits. Director's Exhibits 1-129 contain documents from May 9, 2006, to January 4, 2019. While the second modification proceeding was pending at the Office of Administrative Law Judges, the Miner died and ALJ Steven D. Bell remanded the claim to the district director to identify who may properly pursue the claim on behalf of the Miner's estate. April 23, 2020 Order of Remand. On remand, Director's Exhibits 1-33 were designated. We will cite those exhibits as Director's Exhibits on Remand.

[2] The Miner died on February 8, 2020. Director's Exhibit on Remand 32. Claimant, the Miner's widow, is pursuing the claim on his behalf. Director's Exhibit on Remand 31 at 2.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability was due to pneumoconiosis if he had 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.

[4] ALJ Wood concluded Employer established the Miner did not suffer from clinical or legal pneumoconiosis. Decision and Order at 22-23.

29, 2011) (unpub.). The Board also affirmed ALJ Wood's rebuttal finding and the denial of benefits. *Id.* at 8.

On August 23, 2012, the Miner requested modification of ALJ Wood's denial and submitted new evidence.[5] In a March 23, 2017 Decision and Order, ALJ Joseph E. Kane (the ALJ) found no mistake of fact in the prior decision, but found a change in conditions as the new evidence did not support a finding that the Miner was totally disabled. Thus, he denied the request for modification.

On August 22, 2017, the Miner again requested modification and the parties submitted additional evidence. In the October 26, 2023 Decision and Order that is the subject of this appeal, the ALJ found Claimant established the Miner was totally disabled, 20 C.F.R. §718.204(b)(2), thereby establishing a mistake of fact in the previous decision denying modification.[6] Consequently, the ALJ determined Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(iii). He further found Employer did not rebut the presumption and determined that granting modification would render justice under the Act. 20 C.F.R. §725.310. He therefore awarded benefits.

On appeal, Employer argues the ALJ erred in finding the Miner was totally disabled and that it did not rebut the Section 411(c)(4) presumption.[7] Neither Claimant nor the Acting Director, Office of Workers' Compensation Programs, has filed a response.

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

[5] When evaluating a request for modification, the ALJ "must consider whether any additional evidence submitted by the parties demonstrates a change in condition and, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact." 20 C.F.R. §725.310(c).

[6] The ALJ also found that Claimant established a change in conditions by establishing the Miner was totally disabled. Decision and Order on Second Modification at 5.

[7] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had twenty-three years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Second Modification at 5-6.

with applicable law.[8] 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, 362 (1965).

An ALJ may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, the ALJ may correct any mistake of fact, including the ultimate fact of entitlement to benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). The ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented 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 qualifying pulmonary function studies or arterial blood gas studies,[9] 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 and must determine whether Claimant established total disability by a preponderance of the 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 studies, medical opinion evidence, and the evidence as a whole.[10] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order on Second Modification at 11.

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

[9] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] The ALJ found all the pulmonary function studies in the record are nonqualifying and therefore do not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i).

Arterial Blood Gas Studies

The ALJ considered the February 5, 2016 blood gas study submitted in the first modification proceeding that produced non-qualifying values at rest, and no exercise study was conducted. Director's Exhibit 108 at 18-20. He also considered the four studies the parties initially submitted, dated July 18, 2006, November 30, 2006, April 11, 2007, and July 15, 2008. Decision and Order on Second Modification at 8-9; Director's Exhibits 9 at 10-11; 43 at 12-13; 48 at 11; 52c at 3. The July 18, 2006 arterial blood gas study was qualifying at rest, and no exercise study was conducted. Director's Exhibit 9 at 10-11. The November 30, 2006 study was nonqualifying at rest and qualifying with exercise. Director's Exhibit 43 at 12-13. The April 11, 2007 arterial blood gas study was nonqualifying at rest and no exercise study was conducted. Director's Exhibit 48 at 11. The July 15, 2008 study was qualifying both at rest and with exercise. Director's Exhibit 52c at 3. The ALJ accorded greater weight to the exercise studies, both of which were qualifying, because he found them more indicative of whether the Miner could perform his usual coal mine work requiring heavy manual labor.[11] Decision and Order on Second Modification at 9. In addition, the ALJ noted that while the at-rest values on the most recent February 5, 2016 blood gas study are non-qualifying, "it was only two points away from qualifying at the PO2." *Id.* He thus concluded that the preponderance of the arterial blood gas studies support a finding of total disability. *Id.*

Employer asserts the ALJ failed to sufficiently explain how he reached a different result in his second modification decision than he did in his first modification decision when the blood gas testing he considered is the same. Employer's Brief at 16, 19. The ALJ previously found the non-qualifying February 5, 2016 blood gas study most indicative of the Miner's recent condition and therefore gave it more weight, concluding the blood gas evidence did not support a finding of total disability. Decision and Order on Modification at 12. Employer contends that because the February 2016 study is still the most recent one, it "remain[s] the most persuasive evidence" and "the same result should have occurred." Employer's Brief at 16. We disagree.

Decision and Order on Second Modification at 8. He noted that in the prior modification proceeding, Dr. Alam mentioned cor pulmonale but did not indicate it was related to right-sided congestive heart failure or discuss the basis of his finding. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order on Second Modification at 6 n.20.

[11] We affirm, as unchallenged on appeal, the ALJ's determination that the Miner's usual coal mine work required heavy labor. *See Skrack*, 6 BLR at 1-711.

Contrary to Employer's contention, on modification, an ALJ may correct any mistake of fact even when no new evidence is submitted. *See O'Keeffe*, 404 U.S. at 256; *Worrell*, 27 F.3d at 230; *Nataloni*, 17 BLR at 1-84; 20 C.F.R. §725.310(c). Further, we reject Employer's contention that the February 5, 2016 study is the most persuasive simply because it is the most recent. Employer's Brief at 16, 19; *see Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-49-52 (2023) (ALJ erred by crediting non-qualifying blood gas study over qualifying ones "solely on the basis of recency"); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993) ("blindly ascribing more weight to the most recent evidence" is "arbitrary and irrational"); *Smith v. Kelly's Creek Res.*, 26 BLR 1-15, 1-28 (2023). In the current proceeding, the ALJ permissibly accorded the most weight to the qualifying exercise test results, explaining they are most indicative of the Miner's ability to perform the exertional requirements of his usual coal mine employment. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002) (exercise studies may be more probative than resting blood gas studies regarding whether a miner is capable of performing his coal mine work); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); Decision and Order on Second Modification at 9. Therefore, we affirm, as supported by substantial evidence, the ALJ's finding that the blood gas study evidence as a whole supports a finding of total disability and consequently affirm his determination that there was a mistake in fact on this issue in the prior proceeding.[12] 20 C.F.R. §718.204(b)(2)(ii); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order on Second Modification at 9.

Medical Opinions

Next, the ALJ considered Drs. Fino's and Spagnolo's opinions submitted in the second modification proceeding; Drs. Dahhan's, Alam's, and Jarboe's opinions submitted in the first modification proceeding; and Drs. Baker's, Potter's, Jarboe's, and Repsher's opinions submitted in the initial claim proceeding. Decision and Order on Second Modification at 10-11. Drs. Baker, Fino, Jarboe, Potter, and Alam opined that the Miner was totally disabled due to a respiratory or pulmonary condition, while Drs. Dahhan and Repsher opined he was not. Director's Exhibits 9 at 15-16; 48 at 5; 51 at 17; 55 at 43, 58 at 3; 67; 55b at 2; 59 at 4; 78 at 2; 100 at 2; 108 at 15; 110 at 9-13, 34-36; 111 at 9-10; Claimant's Exhibit 2; Employer's Exhibit 2. Dr. Spagnolo opined that the Miner had

[12] Because we have affirmed the ALJ's finding that there was a mistake in fact concerning his blood gas study finding in the first modification proceeding, we need not address Employer's assertion that the ALJ erred by failing to explain why he reversed his finding that the 2016 objective studies were more credible than Dr. Jarboe's finding of total disability. Employer's Brief at 18 (citing Decision and Order on Modification at 13).

disabling heart disease, obesity, and malignancy but did not have a disabling lung impairment. Employer's Exhibit 1 at 14-15.

The ALJ initially considered the newly submitted opinions from Drs. Fino and Spagnolo. He accorded great weight to Dr. Fino's opinion that the Miner was totally disabled, finding it to be well-reasoned and well-documented because it was based on the exertional requirements of the Miner's usual coal mine employment and the February 5, 2016 pulmonary function study results. Decision and Order on Second Modification at 10; *see* Claimant's Exhibit 2;[13] Employer's Exhibit 2. He gave less weight to Dr. Spagnolo's opinion because Dr. Spagnolo did not discuss the exertional requirements of the Miner's usual coal mine employment in comparison to the objective testing or explain how he discounted "the prior long-term findings of a respiratory condition throughout the [arterial blood gas studies] and other records." Decision and Order on Second Modification at 10; Employer's Exhibit 1. Thus, the ALJ determined the newly submitted medical opinions support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Second Modification at 10.

The ALJ noted that in the initial claim, ALJ Wood gave the greatest weight to Drs. Baker's and Jarboe's opinions diagnosing a totally disabling respiratory or pulmonary impairment. Decision and Order on Second Modification at 10. He stated he agreed with ALJ Wood's findings, as Dr. Baker and Jarboe provided well-reasoned and documented opinions based on objective studies. *Id.* Further, he determined Dr. Potter considered only invalid testing and Dr. Repsher did not consider the other qualifying testing or address the Miner's exertional limits along with the objective study results. *Id.* Thus, the ALJ found no mistake in fact concerning ALJ Wood's finding that the Miner was totally disabled. *Id.*

Reviewing his weighing of the medical opinions from the first modification proceeding, the ALJ indicated that Dr. Dahhan's opinion that the Miner was not totally disabled was supported by the nonqualifying objective studies he performed, but it is not consistent with the ALJ's finding in the current modification proceeding that the blood gas study evidence supports a finding of total disability. Decision and Order on Second Modification at 10-11. He gave Dr. Dahhan's opinion less weight because the doctor did not discuss the Miner's exertional limitations in relation to the prior testing and his own February 6, 2016 blood gas testing "that revealed levels just above qualifying standards." *Id.* at 11. The ALJ found Dr. Alam's contrary opinion entitled to less weight as well because he did not fully explain the objective testing he relied on to find the Miner was

[13] As the ALJ noted, Claimant submitted only one page of Dr. Fino's report at Claimant's Exhibit 2. Decision and Order on Second Modification at 10 n.26. The top corner of the report states it is page 9. Claimant's Exhibit 2 at 2.

totally disabled. *Id.* He found Dr. Jarboe's[14] testimony diagnosing a totally disabling respiratory impairment well-reasoned and documented because Dr. Jarboe considered the prior objective studies, the Miner's symptoms, and the exertional requirements of the Miner's last coal mine work. *Id.* Thus, the ALJ found the preponderance of the medical opinion evidence supports a finding of total disability and establishes a mistake in a determination of fact. *Id.*

Employer contends the ALJ erred in his weighing of Drs. Fino's, Spagnolo's, Dahhan's, and Jarboe's opinions. Employer's Brief at 13-20. We disagree.

Employer asserts the ALJ did not adequately explain his reasons for crediting Dr. Fino's opinion given the objective studies. Employer's Brief at 17-18. It also argues Dr. Fino's opinion on total disability is "uncertain" because he could not exclude coal dust as a cause of the Miner's impairment and acknowledged other conditions could explain it. *Id.* at 18. Although Employer is accurate that Dr. Fino agreed during his deposition that the Miner would not be totally disabled based on Dr. Dahhan's most recent February 5, 2016 blood gas study values,[15] Dr. Fino based his total disability finding on the pulmonary function study values. Employer's Brief at 18; Employer's Exhibit 2 at 9. As blood gas and pulmonary function studies measure different types of impairments, Employer has not explained how Dr. Fino's blood gas study conclusion undermines his total disability opinion. *See Shinseki v. Sanders,* 556 U.S. 396, 413 (2009); *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); Employer's Brief at 18. In addition, contrary to Employer's assertion, a physician may conclude a miner is totally disabled even if the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner's usual coal mine employment); Employer's Brief at 18.

[14] In the paragraph discussing the ALJ's weighing of Dr. Jarboe's testimony submitted in the first modification proceeding, the ALJ mentions "Dr. Fino" at the beginning of the third sentence. Decision and Order on Second Modification at 11. We construe this to be a scrivener's error, as the context of the paragraph makes clear the ALJ is discussing Dr. Jarboe's opinion.

[15] Dr. Fino explained that he did not conduct pulmonary function or blood gas testing during his 2019 evaluation of the Miner due to an increased risk of bleeding. Employer's Exhibit 2 at 7.

Dr. Fino stated that regardless of whether the February 6, 2016 "FVC or FEV1 values [on pulmonary function testing] are actually qualifying according to the [Department of Labor] standards[,] . . . they were moderately reduced" and would prevent the Miner from a pulmonary standpoint from performing the very heavy to heavy labor required of his usual coal mine work.[16] Employer's Exhibit 2 at 8-9. Although the ALJ did not provide an exhaustive analysis of Dr. Fino's opinion, he noted that Dr. Fino considered the exertional requirements of the Miner's last coal mine employment and based his finding of total disability on the February 5, 2016 pulmonary function study values. Decision and Order on Second Modification at 10; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (duty of explanation under the Administrative Procedure Act "is not intended to be a mandate for administrative verbosity or pedantry;" if a reviewing court can discern "what the ALJ did and why he did it," the duty is satisfied). Thus, remand is not required on this basis as substantial evidence supports the ALJ's finding. *See Martin*, 400 F.3d at 305. We further reject Employer's argument concerning the alleged uncertainty of Dr. Fino's opinion regarding the cause of the Miner's impairment, as the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the Miner had a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption at 20 C.F.R. §718.305. Consequently, we affirm the ALJ's determination to give "great weight" to Dr. Fino's opinion. Decision and Order on Second Modification at 10.

Employer argues further that, contrary to the ALJ's findings, Dr. Spagnolo sufficiently explained his conclusion that the Miner does not have a totally disabling respiratory impairment. Employer's Brief at 13, 17. Employer asserts that, like Dr. Dahhan in the first modification request, Dr. Spagnolo considered all the evidence and therefore the ALJ should have credited his opinion for this reason absent a sufficient explanation for why the same result could not be reached. *Id.* at 17, 20. Contrary to Employer's contention, the ALJ was not required to give additional weight to Dr. Spagnolo's opinion because he reviewed the most evidence. *Church v. E. Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996) (ALJ is not required to discredit a physician who did not review all a miner's medical records when the opinion is otherwise well-reasoned and documented). Further, as explained *supra*, in a modification request an ALJ may correct

[16] Dr. Fino stated that he relied on the Miner's description of the exertional requirements of his usual coal mine work. Employer's Exhibit 2 at 8. However, this is consistent with the ALJ's determination, which we have affirmed, that the Miner's usual coal mine employment required heavy labor.

any mistake of fact and therefore is not bound by his prior findings.[17] 20 C.F.R. §725.310; *see O'Keeffe*, 404 U.S. at 256; *Worrell*, 27 F.3d at 230; *Nataloni*, 17 BLR at 1-84.

In the current proceeding, the ALJ permissibly gave less weight to Dr. Spagnolo's opinion because he found Dr. Spagnolo did not adequately explain how he concluded the Miner did not have a pulmonary or respiratory impairment even though he reviewed objective studies showing evidence of a respiratory condition. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order on Second Modification at 10; Employer's Exhibit 1 at 10, 13-14. The ALJ also permissibly found that while Dr. Spagnolo indicated the Miner has disabling obesity, he did not discuss whether this caused any type of a pulmonary impairment or how the diagnosis of obesity caused the Miner to be disabled. *Banks*, 690 F.3d at 489; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order on Second Modification at 10; Employer's Exhibit 1 at 15.

Finally, Employer argues the ALJ failed to explain why he reversed his determination on the weight to accord Dr. Jarboe's opinion. Employer's Brief at 18. We disagree. Contrary to Employer's characterization of Dr. Jarboe's testimony in the first modification proceeding, Dr. Jarboe observed a restrictive impairment that was totally disabling regardless of its cause. Director's Exhibit 110 at 35; *see* Employer's Brief at 18. Thus, the ALJ consistently found in both modification proceedings that Dr. Jarboe's opinion supports a finding of total disability. Decision and Order on Second Modification at 10-11. Consequently, we affirm the ALJ 's determination that the medical opinion evidence as a whole supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Second Modification at 11. We therefore further affirm the ALJ's findings that there was a mistake in fact on the issue of total disability since the prior modification request and that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305, 725.310; Decision and Order on Second Modification at 11.

[17] We also note that in the current proceeding, the ALJ found a mistake of fact in his crediting of Dr. Dahhan's opinion in the first modification proceeding. Decision and Order on Second Modification at 11. The ALJ permissibly gave less weight to Dr. Dahhan's opinion in the current proceeding because he concluded it was inconsistent with his determination that the blood gas study evidence as a whole supports a finding of total disability and because Dr. Dahhan did not discuss the exertional requirements of the Miner's usual coal mine work in relation to the prior testing, including his own February 5, 2016 blood gas testing that produced levels just above qualifying values. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order on Second Modification at 11.

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,[18] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.[19]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit holds this standard requires Employer show the Miner's coal mine dust exposure "did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id.* at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relies on Dr. Spagnolo's opinion[20] that the Miner's respiratory issues were not caused by, contributed to, or hastened by his coal dust exposure. Employer's

[18] "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).

[19] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order on Second Modification at 17; *see* 20 C.F.R. §718.305(d)(1)(i)(B).

[20] The ALJ noted that Employer submitted Dr. Fino's deposition testimony, based on a review of Dr. Dahhan's 2016 examination, in the second modification request but found it does not aid Employer on rebuttal because Dr. Fino stated he could not exclude coal mine dust as a cause of the Miner's respiratory impairment. Decision and Order on

Exhibit 1. It also previously submitted the reports of Drs. Jarboe, Repsher, and Dahhan, finding that the Miner does not have legal pneumoconiosis, in the first modification proceeding and initial proceeding.[21] Director's Exhibits 48 at 5; 51 at 16; 55 at 42, 66; 58 at 3; 59 at 3; 78 at 3; 79 at 2-3; 100 at 2; 108 at 53, 115; 110 at 32-34. The ALJ accorded less weight to Dr. Spagnolo's opinion, finding it poorly reasoned and insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order on Second Modification at 18. Similarly, the ALJ concluded the opinions of Drs. Dahhan, Jarboe, and Repsher are poorly reasoned and consequently do not aid Employer in rebutting the presumption. Decision and Order on Second Modification at 18-20.

Employer does not challenge the ALJ's discrediting of the opinions of Drs. Dahhan, Jarboe, and Repsher, and we therefore affirm these findings. *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983). Rather, Employer argues the ALJ applied the wrong legal standard[22] in considering Dr. Spagnolo's opinion and erred in finding his opinion insufficient to rebut legal pneumoconiosis. Employer's Brief at 11-14. We disagree.

Employer contends the ALJ applied the wrong burden of proof because he stated that Dr. Spagnolo did not explain how he "completely **ruled out** coal dust as even a contributing cause of the Miner's condition" or explain "why coal dust **could not have contributed** to the [M]iner's symptoms." Employer's Brief at 12 (quoting Decision and Order on Second Modification at 18 (emphasis added by Employer)). We consider the ALJ's word choice to be harmless as he correctly stated that to rebut the Section 411(c)(4) presumption, Employer "must affirmatively disprove the existence of pneumoconiosis." Decision and Order on Second Modification at 12; *see W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); *Young*, 947 F.3d at 405; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, as explained below, the ALJ

Second Modification at 17-18; Employer's Exhibit 2 at 19. As Employer does not challenge this finding, we affirm it. *See Skrack*, 6 BLR at 1-711.

[21] The ALJ also considered the reports of Drs. Baker, Potter, and Alam but accurately found they do not help Employer carry its burden of proof on rebuttal as all these physicians diagnosed legal pneumoconiosis. Decision and Order on Second Modification at 17; Director's Exhibits 9 at 15-17; 55b at 1-2; 100 at 2; 111 at 8-10.

[22] Employer contends "the 'rule out' standard applies to rebut disability causation, [but] under rebuttal of pneumoconiosis an employer may prevail under the not 'in part' standard by showing that coal-dust exposure had no more than a de minimis impact on the miner's lung impairment." Employer's Brief at 13.

discredited Dr. Spagnolo's opinion because he found it unpersuasive, not because it failed to satisfy a heightened legal standard. Decision and Order on Second Modification at 18.

Dr. Spagnolo opined that the variations in the Miner's objective test results were consistent with heart failure, morbid obesity, vasculitis, and lymphoma. Employer's Exhibit 1 at 14. However, as the ALJ permissibly found, Dr. Spagnolo did not adequately explain why coal mine dust could not have also contributed to the Miner's respiratory impairment or discuss the cause of the impairment, demonstrated by qualifying blood gas studies, that was present before the Miner gained weight.[23] *See Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356 (6th Cir. 2007); *Napier*, 301 F.3d at 713-14; *Groves*, 277 F.3d at 836; Decision and Order on Second Modification at 18. Employer's arguments are a request to reweigh the evidence, which we are 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 finding that Employer failed to establish that the Miner did not have legal pneumoconiosis. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Napier*, 301 F.3d at 713-14; Decision and Order on Second Modification at 20. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner 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 the [M]iner'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 on Second Modification at 20-21. He permissibly discredited the opinions of Drs. Jarboe, Repsher, and Dahhan on the cause of the Miner's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to his finding that Employer failed to disprove the disease.

[23] Dr. Spagnolo considered "[m]ultiple lung tests obtained from 2006-2016" and stated none of the tests showed an obstructive impairment, there was no evidence of a restrictive impairment in 2006 and 2007, and the total lung capacity was "slightly reduced in 2016" after the Miner gained one hundred pounds. Employer's Exhibit 1 at 14. However, the ALJ found that in Dr. Spagnolo's report there was evidence of a respiratory condition prior to the Miner gaining weight, as noted in comments to the testing he reviewed indicating reduced levels on the July 18, 2006, November 30, 2006, July 15, 2008, and February 5, 2016 blood gas studies as well as "lower limit of normal" notations on the July 18, 2006, November 30, 2006, April 11, 2007, October 22, 2008, and February 5, 2016 pulmonary function studies. *Id.* at 10; *see* Decision and Order on Second Modification at 10.

See Ogle, 737 F.3d at 1074; Decision and Order on Second Modification at 21. As Employer raises no specific allegations of error as to the ALJ's findings other than its assertions at legal pneumoconiosis, which we have rejected, we affirm the ALJ's determination that Employer failed to establish no part of the Miner's respiratory disability was caused by legal pneumoconiosis.[24] 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Second Modification at 21.

[24] We also affirm, as unchallenged, the ALJ's finding that granting modification renders justice under the Act. *See Skrack*, 6 BLR at 1-711; Decision and Order on Second Modification at 4-5.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge