U.S. Department of Labor

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

BRB Nos. 22-0111 BLA
and 22-0112 BLA

OLA MAE HAMPTON (o/b/o and Widow of EDGAR A. HAMPTON)	)	
Claimant-Respondent	)	
v.	)	
ANR COAL COMPANY, LLC f/k/a ENTERPRISE COAL COMPANY	)	
and	)	DATE ISSUED: 6/29/2023
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2008-BLA-05389 and 2012-BLA-06075) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on March 12, 2007,[1] and a survivor's claim filed on May 17, 2012.[2]

The ALJ found Claimant[3] established the Miner had at least thirty years of coal mine employment, including at least fifteen years in underground mines and surface mines in conditions substantially similar to those underground, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),[4] and established a change in an applicable condition of

[1] This is the Miner's second claim for benefits. On June 15, 1995, ALJ Ainsworth H. Brown denied the Miner's prior claim, filed on August 2, 1993, because he failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 1 at 24-32. The Benefits Review Board affirmed ALJ Brown's finding that the evidence did not establish the existence of pneumoconiosis and therefore affirmed the denial of benefits. *Hampton v. Enterprise Coal Co.*, BRB No. 95-1738 BLA (Sept. 19, 1995) (unpub.). The Miner took no further action until filing his current claim. Director's Exhibit 3.

[2] Employer's appeal in the miner's claim was assigned BRB No. 22-0111 BLA, and its appeal in the survivor's claim was assigned BRB No. 22-0112 BLA. The Board has consolidated these appeals for purposes of decision only.

[3] Claimant is the widow of the Miner, who died on May 12, 2012. Director's Exhibit 69 at 548. She is pursuing the miner's claim on her husband's estate's behalf and her survivor's claim. Director's Exhibit 68 at 549.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or

entitlement, 20 C.F.R. §725.309.[5] He further found Employer failed to rebut the presumption and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, the ALJ also determined Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[6]

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[7] It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. On the merits of entitlement, Employer asserts the ALJ erred in finding Claimant established at least fifteen years of qualifying

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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.

[5] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner did not establish the existence of pneumoconiosis in his prior claim, Claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of the Miner's current claim. *White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Decision and Order at 3-4, 21.

[6] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

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

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

U.S. Const. art. II, § 2, cl. 2.

coal mine employment and a totally disabling respiratory or pulmonary impairment necessary to invoke the Section 411(c)(4) presumption. It also argues the ALJ erred in finding it did not rebut the presumption.

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds, urging the Board to reject Employer's Appointments Clause challenge. In addition, the Director urges the Board to reject Employer's specific assertions regarding the definition of coal mine dust and the validity of 20 C.F.R. §725.305(b)(2).

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[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 (1965).

Appointments Clause/Removal Protections

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[9] Employer's Brief at 16-22; Employer's Reply to Claimant's Response Brief at 4-5; Employer's Reply to the Director's Response Brief at 1-6. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[10] but maintains the ratification

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 7-9.

[9] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[10] The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is

was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 18-22; Employer's Reply to Claimant's Response Brief at 4-5; Employer's Reply to the Director's Response Brief at 4. It also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 22-27; Employer's Reply to Claimant's Response Brief at 5-6; Employer's Reply to the Director's Response Brief at 4-6. It generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 23-27; Employer's Reply to Claimant's Response Brief at 4-5. In addition, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 22-27; Employer's Reply to Claimant's Response Brief at 6; Employer's Reply to the Director's Response Brief at 4-6. For the reasons set forth in *Johnson v. Apogee Coal Co.*, BRB No. 22-0022 BLA, slip op. at 3-5 (May 26, 2023), and *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-307-08 (2022), we reject Employer's arguments.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment, and had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011).

Length and Nature of Coal Mine Employment

Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. The "conditions in a mine other than an underground mine will be

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> intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's Dec. 21, 2017 Letter to ALJ Kane.

considered 'substantially similar' to those in an underground mine if [the Miner] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich American Insurance Group v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015).

The ALJ found Claimant established at least thirty years of coal mine employment based on the parties' stipulation. Decision and Order at 7. Employer does not challenge the ALJ's length of coal mine employment finding. Thus, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Instead, Employer argues the ALJ erred in finding Claimant established the Miner was regularly exposed to coal mine dust in the years he worked aboveground at preparation plants and the tipple. Employer's Brief at 37-41.

The ALJ considered the Miner's deposition and hearing testimony, and Employer's statement regarding the Miner's dust exposure. Decision and Order at 6-7. He determined the evidence demonstrated "the Miner worked either underground or in an enclosed building where he was exposed to coal dust daily between 1958 and 1963," and "then worked at the tipple or preparation plant between 1963 through 1992 . . . [where] he was also exposed to rock and coal dust." *Id.* at 7. Thus, he found Claimant established at least fifteen years of qualifying coal mine employment based on the Miner's testimony. *Id.*

Employer argues Claimant failed to establish the Miner's "surface work was comparable to underground work in terms of the severity and regularity of dust exposure." Employer's Brief at 37. Employer's argument is unpersuasive.

Contrary to Employer's assertion, a claimant is not required to prove the dust conditions aboveground were identical to those underground. *See Kennard*, 790 F.3d at 664-65; 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013); Employer's Brief at 37-38. Instead, a claimant need only establish a miner was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2).[11] Here, the Miner testified at the March 7, 1995 hearing in his prior claim that he was exposed to dust during his entire coal mine employment. Director's Exhibit 1 at 43-44. He also testified at his June 6, 2007

[11] We reject Employer's argument that the regulation at 20 C.F.R. §718.305(b)(2) is invalid. Employer's Brief at 39-41. The Sixth Circuit, as well as the United States Court of Appeals for the Tenth Circuit, have rejected similar arguments and have upheld the validity of 20 C.F.R. §718.305(b)(2). *See Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 301-03 (6th Cir. 2018); *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018).

deposition that while he worked in underground coal mine employment for TA Warrant Coal Company and Fire King Coal Company, Inc., from 1959 to 1963,[12] he worked aboveground at a preparation plant and the load-out for Kentucky Elkhorn Coal, Inc. (Kentucky Elkhorn) from 1963 to 1983, at the load-out for IJA Coal Sales Inc. and Dorton Dock Partnership in 1984, and at the tipple and as a foreman for ANR Coal Company (ANR)[13] from 1981 to April 10, 1992.[14] Director's Exhibit 19 at 6, 11-14. Specifically, he explained his job as a slate picker at Kentucky Elkhorn occurred inside a building at a picking table with a "screen and crusher[,] and sometimes it would get so dusty I couldn't see." *Id.* at 28. He further stated the preparation plants used magnetite instead of rock dust, and "[i]t was dusty as it could be."[15] *Id.* at 27.

Additionally, Employer's October 19, 1993 statement signed by Superintendent Dean Harold noted the Miner worked as a tipple operator from January 5, 1981, and then worked as a foreman from July 26, 1988, until he retired on April 10, 1992.[16] Director's Exhibit 6. It indicated the Miner was exposed to dust in both positions. *Id*.

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[12] The Miner also testified he worked in coal mine employment for Hawkeye and Jack I. Branham Jr. & Howard Jones from 1958 to 1959. Director's Exhibit 19 at 13.

[13] The Miner clarified that ANR Coal Company (ANR), the named responsible operator in this case, was formerly known as Enterprise Coal Company (Enterprise Coal). Director's Exhibit 19 at 24. Enterprise Coal was the name of the operator when Superintendent Dean Harold signed the October 19, 1993 statement regarding the Miner's employment for it. Director's Exhibit 6.

[14] The Miner clarified he worked concurrently for Kentucky Elkhorn Coal, Inc. (Kentucky Elkhorn) and ANR from 1981 to 1983. Director's Exhibit 19 at 11.

[15] We reject Employer's argument that the Miner's exposure to magnetite rather than "coal mine dust" is insufficient to establish regular coal mine dust exposure. Employer's Brief at 38. As the Director asserts, "'[c]oal mine dust' means all dust generated in the course of coal mining operations . . . ." Director's Brief at 7-8 (citing 65 Fed. Reg. 79,920, 79,958 (Dec. 20, 2000)); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015) (rejecting distinction between coal dust and rock dust for invoking the Section 411(c)(4) presumption); *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55 (1990) (en banc); *George v. Williamson Shaft Contracting Co.*, 8 BLR 1-91, 1-93 n.1 (1985); *Conley v. Roberts and Schaefer Co.*, 7 BLR 1-309, 1-311 (1984).

[16] We note the ALJ committed an apparent scrivener's error when he found that "[w]hile [the Miner's] work as a foreman from 1988 to 1998 did not expose him

The ALJ permissibly found the Miner's uncontradicted testimony, as well as Employer's statement regarding his employment, credible and established he was regularly exposed to coal mine dust during his entire aboveground coal mine employment. *See Kennard*, 790 F.3d at 664; *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (claimant's testimony that the conditions throughout his coal mine employment were "dusty as it could be" met his burden to establish he was regularly exposed to coal mine dust); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44, 1344 n.17 (10th Cir. 2014) (claimant's testimony that he was exposed to "pretty dusty" conditions "provided substantial evidence of regular exposure to coal mine dust"); *Bonner v. Apex Coal Corp.*, 25 BLR 1-279, 1-282-84 (2022) (credible testimony regarding a miner's appearance and the dust on his clothes when he returned home from work may be sufficient to establish the miner was regularly exposed to coal mine dust); Decision and Order at 7; Employer's Brief at 36-39. Thus, as it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.[17]

Total Disability

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 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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continuously to dust, he had some exposure during these years when he filled in for various employees." Decision and Order at 7. Employer's October 19, 1993 statement indicated the Miner worked at the tipple from January 5, 1981, and as a foreman from July 26, 1988, to April 10, 1992. Director's Exhibit 6. Consequently, the ALJ likely meant to write 1988 to 1992 as opposed to 1988 to 1998 as the period when the Miner worked as a foreman. Director's Exhibit 6.

[17] We reject Employer's argument that the ALJ erred in finding the Miner was regularly exposed to coal mine dust exposure "from 1988 to 1998, a decade that 'did not expose him continuously to dust.'" Employer's Brief at 38-39 (citing Decision and Order at 7). Workers at a preparation plant and tipple are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment; they need not show "continuous" exposure. 20 C.F.R. §725.202(a). Rather, the presumption is rebutted with evidence that the Miner was not "regularly exposed" to coal mine dust when he worked at those sites. 20 C.F.R. §725.202(a)(1), (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).

The ALJ found Claimant established total disability based on the arterial blood gas study evidence, the medical opinion evidence, and in consideration of the evidence as a whole.[18] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 9-10.

Arterial Blood Gas Studies

The ALJ considered three arterial blood gas studies dated May 30, 2007, March 4, 2008, and August 28, 2008. Director's Exhibits 13, 62 at 1246; Employer's Exhibit 2. The May 30, 2007 and March 4, 2008 studies Dr. Rasmussen conducted produced non-qualifying resting values and qualifying exercise values. Director's Exhibits 13, 62 at 1246. The August 28, 2008 study Dr. Jarboe conducted produced non-qualifying resting values. Employer's Exhibit 2. The ALJ found the May 30, 2007 and March 4, 2008 studies valid and the August 28, 2008 study invalid.[19] Thus, as both valid studies produced qualifying values with exercise, he found Claimant established total disability based on a preponderance of the arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 9.

Employer argues the ALJ mischaracterized the arterial blood gas studies by inaccurately "finding that 'both' of Dr. Rasmussen's post exercise tests produced qualifying values." Employer's Brief at 29. It maintains the Miner's the post-exercise results on the May 30, 2007 study "exceeded disability standards."[20] *Id.* at 29 n.6. We disagree.

[18] The ALJ found the pulmonary function studies do not establish total disability 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 8-9.

[19] Employer does not contest the ALJ's findings regarding the validity of the arterial blood gas studies; thus, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

[20] As Employer does not challenge the ALJ's characterization of the exercise values of the March 4, 2008 arterial blood gas study as qualifying, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 9.

For a PCO_2 value of 31, any value equal to or less than 69 for PO_2 is qualifying at test sites up to 2,999 feet above sea level. 20 C.F.R. Part 718, Appendix C. The May 30, 2007 arterial blood gas study produced values of 31 for PCO_2 and 67 for PO_2 during exercise. Director's Exhibit 13 at 25. Thus, contrary to Employer's assertion, the ALJ accurately characterized the May 30, 2007 exercise study as qualifying. Decision and Order at 9.

We also reject Employer's argument that the ALJ erred in ignoring an entire set of non-qualifying studies because it does not specifically identify any of the studies he allegedly failed to consider. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §802.211(b); Employer's Brief at 29.

Further, Employer argues the ALJ should have found that the August 28, 2008 non-qualifying arterial blood gas study outweighed the qualifying arterial blood gas studies because it is the most recent study. Employer's Brief at 29-30. However, the ALJ found the August 28, 2008 study invalid, and we have affirmed this finding. Thus we reject Employer's argument on this basis.[21]

Having found the May 30, 2007 and March 4, 2008 arterial blood gas studies both produced qualifying values with exercise and are valid, the ALJ permissibly found the arterial blood gas study evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(ii).

[21] Moreover, the ALJ was not required to credit the August 28, 2008 non-qualifying study over the prior qualifying studies. The Sixth Circuit has held it is irrational to credit evidence solely because of recency where the miner's condition improved. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (citing *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992)); *see also Thorn v. Itmann Coal Co*., 3 F.3d 713, 719 (4th Cir. 1993). In explaining the rationale behind the "later evidence rule," the court reasoned a "later test or exam" is a "more reliable indicator of a miner's condition than an earlier one" where "a miner's condition has worsened" given the progressive nature of pneumoconiosis. *Woodward*, 991 F.2d at 319-20. Because the results of the tests do not conflict in such circumstances, "[a]ll other considerations aside, the later evidence is more likely to show the miner's condition." *Id.* But if "the tests or exams" show the miner's condition has improved, the reasoning "simply cannot apply" because one must be incorrect -- "and it is just as likely that the later evidence is faulty as the earlier." *Id.* Thus, the ALJ correctly did not find the August 28, 2008 study more probative based only on its recency where the miner's condition improved. *See Woodward*, 991 F.2d at 319-20; *Adkins*, 958 F.2d at 51-52; Decision and Order at 7-8, 19. We therefore reject Employer's argument to the contrary.

See Martin v. Ligon Preparation Co., 400 F.3d 302, 307 (6th Cir. 2005); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40 (6th Cir. 2014); *Woodward*, 991 F.2d at 319-20; *Coen v. Director. OWCP*, 7 BLR 1-30, 1-31-32 (1984) (it is within the ALJ's discretion to find a particular study more probative than another study); Decision and Order at 9.

As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established total disability based on a preponderance of the arterial blood gas study evidence. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 9.

Medical Opinions

The ALJ next considered the medical opinions of Drs. Rasmussen, Baker, Perper, Jarboe, and Rosenberg. Decision and Order at 9-10. He determined "all of the physicians . . . opined that the Miner was totally disabled and unable to perform his last coal mine employment." *Id*. at 10; Director's Exhibits 13; 62 at 48, 1246, 1943; Claimant's Exhibit 7; Employer's Exhibits 2-4, 7, 17, 22-24, 32, 33, 36, 37. Thus, he found "the preponderance of the medical opinion evidence supports a finding of total disability." Decision and Order at 10.

Employer argues the ALJ erred in crediting the opinions of Drs. Baker and Perper, and in construing the opinions of Drs. Rasmussen, Jarboe, and Rosenberg as supporting a finding of total disability. Employer's Brief at 21-25. We disagree.

We reject Employer's argument that Dr. Baker had no knowledge of the exertional requirements of the Miner's last coal mine job and did not explain how the objective testing supported his opinion. Employer's Brief at 34-36. Dr. Baker examined the Miner on August 8, 2008, noted he worked thirty-three years at preparation plants, and listed his last coal mine job as a working foreman. Director's Exhibit 62 at 1220-24. He also stated the Miner "may have a totally disabling respiratory impairment as his FEV_1 values [on pulmonary function testing] meet the federal disability guideline." *Id*. at 1224.

Subsequently, Dr. Baker reviewed additional objective testing results and medical records, including the reports of Drs. Rasmussen, Jarboe, and Rosenberg. Director's Exhibit 62 at 49-54. He noted the Miner had "abnormality of gas exchange during exercise" on blood gas testing and that "[t]he evidence of arterial desaturation . . . found by both Dr. Rasmussen and Dr. Jarboe would be consistent with the correlation of cor pulmonale and/or interstitial fibrosis that could cause impairment of oxygen transfer." *Id*. at 53. Thus, he opined the Miner had a totally disabling pulmonary impairment primarily based on his oxygen desaturation. *Id*. at 54. Contrary to Employer's arguments, Dr. Baker had knowledge of the Miner's last coal mine job as a working foreman and adequately explained why the abnormal results on the exercise arterial blood gas study supports a finding that he was totally disabled. Therefore, the ALJ permissibly credited Dr. Baker's

opinion. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility).

We also reject Employer's argument that Dr. Perper's opinion is insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv) because he opined the Miner was totally disabled based on respiratory symptoms. Employer's Brief at 34. To the contrary, a physician may base his total disability opinion on a miner's lung disease-induced respiratory symptoms. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physician's identification of the miner's symptoms of "shortness of breath," "acute shortness of breath," and "mild shortness of breath" with various activities constitutes a "reasoned medical opinion"); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989) (physician's "recitation of [the miner's] symptoms" constituted relevant evidence that the ALJ must consider absent a specific "basis for a finding that the listed limitations are the patient's rather than the doctor's conclusions"). Moreover, Dr. Perper produced a medical report after reviewing evidentiary and medical records, and an autopsy report of several slides taken from the Miner's lungs. Claimant's Exhibit 7 at 2-50. As he opined the Miner was "unquestionably" totally disabled at the time prior to his death – based not only on his "severe shortness of breath" and "respiratory failure," but also on his hypoxemia and severe hypercapnia "even after being given supplemental oxygen" – Employer's argument that his opinion cannot establish total disability is unpersuasive. *Id.* at 63-64.

We further reject Employer's argument that the ALJ erred in finding all the physicians opined the Miner was totally disabled because Drs. Rasmussen, Jarboe, and Rosenberg opined any lung impairment he had was not due to a respiratory disease. Employer's Brief at 31-32. 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 pursuant to 20 C.F.R. §718.305.[22] *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989).

[22] We reject Employer's argument that the Board held otherwise in *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986). Employer's Brief at 32-33. In that case, the Board concluded that a physician's testimony, indicating that a miner's "severe degenerative neuromuscular problem" affected his objective testing results, may be "relevant to the issue of the *reliability* of pulmonary function studies as indicators of a chronic respiratory or pulmonary disease" for purposes of invoking an interim presumption that is no longer in effect. *Casella*, 9 BLR at 1-134 (emphasis added). But the Board did not hold that a physician's opinion on the *cause* of a respiratory or pulmonary impairment

Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 352-53 (6th 2007); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 27-29, 31 n.7, 32-36. Having correctly found all the physicians opined the Miner was totally disabled, we affirm the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv).

We further affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; *see also Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984) (non-qualifying pulmonary function tests do not undermine qualifying blood gas evidence because the studies measure different types of impairment); Decision and Order at 9-10. Thus, we affirm the ALJ's findings that Claimant invoked the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305, and established a change in an applicable condition of entitlement.[23] 20 C.F.R. §725.309(c); Decision and Order at 10, 21.

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that was reflected on an otherwise reliable objective test is relevant to whether the miner is disabled. Unlike *Casella*, Employer does not challenge the reliability of Claimant's objective testing and the relevant regulation applicable to this claim specifically states that if "a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled *due to pneumoconiosis*." 20 C.F.R. §718.204(a) (emphasis added).

[23] Employer argues Claimant failed to establish a change in an applicable condition of entitlement as no physician opined the evidence "established a progression or change in [the Miner's] blood gas tests from the time he first filed for benefits." Employer's Brief at 29, 36. We disagree. Contrary to Employer's argument, a claimant must show that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final" by submitting new evidence that establishes an element of entitlement upon which the prior denial was based. 20 C.F.R. §725.309(c); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59 (6th Cir. 2013); *White* 23 BLR at 1-3. Here, the ALJ reasonably found that because Claimant established every element of entitlement, she is entitled to benefits and thus established a change in an applicable condition of entitlement since the denial of the Miner's prior claim. Decision and Order at 21.

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,[24] 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.[25]

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 United States Court of Appeals for the Sixth Circuit holds an employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

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[24] "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).

[25] We affirm, as unchallenged on appeal, the ALJ's finding that Employer did not disprove clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 13-17. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis. However, we address legal pneumoconiosis because the ALJ's findings on that issue have bearing on whether Employer disproved disability causation by establishing that no part of the Miner's total disability was due to either clinical or legal pneumoconiosis. *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8, 1-159 (2015).

The ALJ considered the medical opinions of Drs. Jarboe, Rosenberg, and Caffrey.[26] Employer's Exhibits 2-4, 7, 17, 23, 24, 32, 33, 36, 37. Drs. Jarboe and Rosenberg opined the Miner did not have legal pneumoconiosis but oxygenation abnormality, lung cancer, chronic bronchitis, and emphysema unrelated to his coal mine dust exposure. Employer's Exhibits 32 at 6-7, 11-13; 36 at 3-5; 37 at 7-8. Dr. Caffrey diagnosed mild to moderate emphysema unrelated to coal mine dust exposure. Employer's Exhibits 31, 34. The ALJ found their opinions unreasoned and thus unpersuasive.[27] Decision and Order at 18-19.

Employer argues the ALJ erred. Employer's Brief at 41-47. We disagree.

Drs. Jarboe and Rosenberg opined the Miner's abnormal oxygenation was not related to coal mine dust exposure. Employer's Exhibits 32 at 6-7; 36 at 5; 37 at 9, 11. They also opined that the emphysema seen on the Miner's autopsies was not due to coal mine dust exposure. Employer's Exhibits 36 at 3; 37 at 7, 10.

Dr. Jarboe noted "there are findings that allow you to make a decision that it's unlikely to be coal mine dust" that was a contributing factor to the Miner's reduction in diffusing capacity. Employer's Exhibit 4 at 40. He stated that "[o]ne of them is that if, indeed, emphysema is causing it, there's . . . clear evidence that when a miner gets emphysema, it's proportionate to the . . . nodulation that occurs in the . . . X-ray." *Id*. Thus, he concluded the Miner's emphysema was not related to coal mine dust inhalation because he "did not see any nodulation in [the Miner's] X-ray." *Id*.

Dr. Rosenberg stated that "despite this earlier detection of parenchymal abnormalities related to CWP [coal workers' pneumoconiosis], abnormal pulmonary function attributable to pneumoconiosis detected only by CT scan could never be identified." Employer's Exhibit 32 at 7. Citing a study for the proposition that "micronodules detected by computed tomography have no influence, by themselves, on pulmonary function," he concluded that "when CWP is only found pathologically and not radiographically[,] including by CT imaging, the absence of pulmonary impairment would similarly apply in this situation." *Id*.

The ALJ permissibly found Drs. Jarboe's and Rosenberg's opinions inconsistent with the regulations that recognize legal pneumoconiosis can exist in the absence of a

[26] The ALJ stated the medical opinions of Drs. Rasmussen, Baker, and Perper "do not help . . . Employer rebut the presumption as they all found legal pneumoconiosis." Decision and Order at 18.

[27] Employer does not challenge the ALJ's weighing of Dr. Caffrey's opinion; thus we affirm this finding. *See Skrack*, 6 BLR at 1-711.

positive x-ray for clinical pneumoconiosis. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487-88 (6th Cir. 2012) (affirming an ALJ's discrediting of a physician who relied on negative radiographic evidence to exclude a diagnosis of legal pneumoconiosis, as legal pneumoconiosis may exist in the absence of clinical pneumoconiosis); 20 C.F.R. §§718.201, 718.202(a)(4), (b); Decision and Order at 19-20.

Further, in light of the DOL's recognition of scientific studies stating that the risks of smoking and coal mine dust exposure may be additive, the ALJ permissibly found Dr. Rosenberg's opinion attributing the Miner's emphysema to smoking unpersuasive because he did not adequately explain why the Miner's history of coal mine dust exposure did not contribute to or aggravate his respiratory impairment. *See Huscoal, Inc. v. Director, OWCP* [*Clemons*], 48 F.4th 480, 489-90 (6th Cir. 2022); *Barrett*, 478 F.3d at 356; 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,940; Decision and Order at 18-20.

We consider Employer's general arguments that the ALJ should have found the opinions of Drs. Jarboe and Rosenberg well-documented and reasoned to be a simple request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; Employer's Brief at 41-47. Because the ALJ acted within his discretion in rejecting both opinions,[28] we affirm his finding Employer did not disprove legal pneumoconiosis. We therefore affirm the ALJ's finding that Employer did not establish rebuttal at 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 at 19-21. Contrary to Employer's argument, the ALJ permissibly discredited the disability causation opinions of Drs. Jarboe and Rosenberg because they failed to diagnose legal pneumoconiosis, contrary to his finding Employer did not disprove the disease.[29] *See Ogle*, 737 F.3d at 1074; *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *see also*

[28] Because the ALJ provided valid reasons for discrediting the opinions of Drs. Jarboe and Rosenberg, we need not address Employer's additional arguments regarding the weight he assigned to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 41-47.

[29] As the ALJ permissibly found Employer failed to rebut the presumption of total disability due to legal pneumoconiosis, we need not address Employer's argument regarding clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Employer's Brief at 47.

Hobet Mining, LLC v. Epling, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 21; Employer's Brief at 47-48. Thus, we affirm the ALJ's finding that Employer failed to establish no part of the Miner's respiratory disability was due to legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 21.

We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the award in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(l) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge