U.S. Department of Labor

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

BRB No. 20-0011 BLA

LAVERNE REHBEIN (o/b/o CARLYN D. REHBEIN)	)	
Claimant-Respondent	)	
v.	)	
HERITAGE COAL COMPANY, LLC	)	
and	)	DATE ISSUED: 3/15/2022
PEABODY ENERGY CORPORATION, C/O UNDERWRITERS SAFETY & CLAIMS	)	
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 of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Robert S. Seer (Ellis Legal, PC) and Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis, PC), Chicago, Illinois, for Claimant.

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Cynthia Liao (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation

and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry W. Price's Decision and Order Awarding Benefits (2017-BLA-06037) rendered on a claim filed on July 6, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). The ALJ accepted the parties' stipulation that the Miner had twenty-seven years of underground coal mine employment and found Claimant[1] established the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4)(2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the district director, the Department of Labor (DOL) official who processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It next

[1] Claimant is the widow of the Miner who died on February 19, 2016. Director's Exhibit 14. She is pursuing this claim on behalf of the Miner's estate.

[2] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption that the Miner was totally disabled due to pneumoconiosis if she establishes 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); 20 C.F.R. §718.305.

[3] 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

contends the ALJ erred in finding it liable for the payment of benefits. On the merits, Employer argues the ALJ improperly invoked the Section 411(c)(4) presumption based on an erroneous finding that the Miner was totally disabled. It also asserts he erred in finding it did not rebut the presumption.[4] Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's Appointments Clause challenge and to affirm the determination that Employer is liable for benefits.

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.[5] 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 – District Director

Employer argues for the first time that the district director lacked the authority to identify the responsible operator and process this case because he is an "Inferior Officer" of the United States not properly appointed under the Appointments Clause. Employer's Brief at 54-60. Employer relies on *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), in which the United States Supreme Court held ALJs employed by the Securities and Exchange Commission are officers who must be appointed in conformance with the Appointments Clause. *Id.*

The Appointments Clause issue is "non-jurisdictional" and is subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018)

> 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.

[4] We affirm, as unchallenged on appeal, the determination that the Miner had twenty-seven years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19.

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

("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture."). *Lucia* was decided fifteen months prior to the ALJ's Decision and Order Awarding Benefits, but Employer failed to raise its challenge to the district director's appointment while the case was before the ALJ. At that time, the ALJ could have addressed Employer's arguments and, if appropriate, taken steps to have the case remanded - the remedy it seeks here. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 587-88, 591 (6th Cir. 2021); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019). Instead, Employer waited to raise the issue until after the ALJ issued an adverse decision. Based on these facts, we conclude Employer forfeited its right to challenge the district director's appointment. Further, because Employer has not raised any basis for excusing its forfeiture, we see no reason to entertain its arguments.[6] *See Davis*, 987 F.3d at 591-92; *Powell v. Serv. Emps. Int'l, Inc.*, 53 BRBS 13, 15 (2019); *Kiyuna*, 53 BRBS at 11; *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against resurrecting lapsed arguments because of the risk of sandbagging).

Responsible Operator/Carrier

The Miner last worked in coal mine employment for Peabody Coal Company (Peabody Coal) from September 9, 1971 to October 22, 1999. Director's Exhibits 4, 9. At the time, Peabody Coal was a subsidiary of and was self-insured for black lung liability through Peabody Energy Corporation (Peabody Energy). Director's Response Brief at 2, *citing* Employer's Brief at 30, 65. Peabody Coal changed its name to Heritage Coal Company (Heritage) after the Miner retired. Director's Exhibits 23, 24. In 2007, Peabody Energy sold Heritage to Patriot Coal Corporation (Patriot). Director's Exhibit 37. In 2011, the DOL authorized Patriot to self-insure for black lung liabilities, including claims that employees of Peabody Energy's subsidiaries filed before Patriot purchased them. *Id*. This authorization required Patriot to make an "initial deposit of negotiable securities" in the amount of $15 million. *Id*. In 2015, Patriot went bankrupt. Director's Exhibit 24.

Employer admits that Heritage is the correct responsible operator and was self-insured by Peabody Energy on the last day Heritage, then known as Peabody Coal, employed the Miner.[7] Employer's Brief at 65. However, it asserts the issue is one of

[6] On April 5, 2018, while this case was pending before a different ALJ, Employer stated its intent to preserve the issue of whether the ALJ was properly appointed. Employer's letter solely discussed the ALJ's appointment and did not mention the district director.

[7] Heritage Coal Company (Heritage) qualifies as a potentially liable operator because it is undisputed that: (1) the Miner's disability arose at least in part out of employment with Heritage; (2) Heritage operated a mine after June 30, 1973; (3) Heritage

carrier liability, maintaining that a private contract between Peabody Energy and Patriot (Separation Agreement) released Peabody Energy from liability for the claims of miners who worked for Heritage or Peabody Coal. Employer's Brief at 23-54; *see* Director's Exhibit 37. Employer also maintains the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. Employer's Brief at 23-54.

In support of its position that Patriot is the liable carrier, Employer submitted a 2007 Separation Agreement between Peabody Energy and Patriot, a March 4, 2011 letter from Steven Breeskin to Patriot releasing Peabody Energy's letter of credit in recognition of Patriot's authorization to self-insure, a copy of Patriot's authorization to self-insure, the deposition of Mr. Breeskin, and the deposition of David Benedict with twenty-two exhibits. Director's Exhibit 37; Employer's Exhibits 14-17. The ALJ rejected Employer's argument that Patriot is the liable carrier and concluded Heritage and Peabody Energy were correctly designated the responsible operator and carrier, respectively. Decision and Order at 14-20.

Employer argues the ALJ erred in finding it liable for benefits because: (1) the DOL released Peabody Energy from liability; (2) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability because the Director failed in his duty to require a sufficient amount of security from Patriot to cover its liability for benefits; and (3) the Director is equitably estopped from imposing liability on Peabody Energy. Employer's Brief at 23-54. Employer also asserts that allowing the district director to make an initial determination of the responsible carrier in instances involving potential Black Lung Disability Trust Fund (Trust Fund) liability violates due process. *Id*. at 60-65.

The Director responds that Peabody Energy was never released from liability for claims under the Act. Director's Response Brief at 8-13. He further asserts 20 C.F.R. §725.495(a)(4), which provides that liability be transferred to the Trust Fund if the most recent employment ended while the operator was authorized to self-insure and that operator no longer possesses sufficient funds to pay benefits, does not preclude Employer's designation as the responsible operator because Heritage is the Miner's most recent employer and it has not attempted to show it no longer possess sufficient funds to pay benefits. *Id*. at 13-14. In addition, he contends there is no basis for Employer's equitable

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employed the Miner for a cumulative period of at least one year; (4) the Miner's employment included at least one working day after December 31, 1969; and (5) Heritage is capable of assuming liability for the payment of benefits through Peabody Energy Corporation's (Peabody Energy) self-insurance coverage. 20 C.F.R. §725.494(a)-(e). Because Heritage was the last potentially liable operator to employ the Miner as a miner, the ALJ designated Heritage as the responsible operator and Peabody Energy as the responsible carrier. Decision and Order at 18.

estoppel argument. *Id*. at 4-18. The Director maintains Peabody Energy was properly designated as the responsible carrier because the Miner last worked for Peabody Coal when it was self-insured through Peabody Energy and there is no argument that Peabody Energy is incapable of paying benefits. *Id*. at 8. The Director further urges the Board to reject Employer's due process arguments. *Id*. at 27-31.

Letter of Credit

Employer maintains the March 4, 2011 letter from Mr. Breeskin to Patriot releasing a letter of credit financed under Peabody Energy's self-insurance program absolves Peabody Energy from potential liability under the Act. Employer's Brief at 29-36, *citing* 20 C.F.R. §§726.1, 726.101; Director's Exhibit 37. Employer further argues Mr. Benedict's deposition testimony establishes the DOL "explicitly consented to shifting the liability in this matter to Patriot."[8] Employer's Brief at 34. Employer asserts the regulations establish "that self-insured operators must meet a number of pre-requisites to qualify as a potential self-insurer," including the posting of security and contends the "submission of that security by the operator establishes its liability." Employer's Brief at 29-30. Insofar as the DOL "releases said security," Employer contends "the self-insurer's obligations under the Act are terminated, as the security previously proffered by the self-insurer no longer exists." *Id*. Because the DOL released "the letter of credit financed under Peabody Energy's self-insurance program," Employer argues the DOL released Peabody Energy's liability. *Id*. The Director responds that the release of the letter of credit and the deposition testimony establish, as he has previously acknowledged, that Patriot was authorized to self-insure retroactively and the Director released a portion of Peabody's security deposit. Director's Response Brief at 12. However, he argues it does not establish

[8] Employer argues that Mr. Benedict confirmed the letter of credit existed solely to secure legacy liability citing his testimony that, in his mind, Patriot maintained the letter of credit to secure Peabody Energy's legacy liability. Employer's Brief at 30-31, *citing* Employer's Exhibit 14 at 282-283. Employer further contends Mr. Benedict's testimony that he had conversations with Peabody Energy about its desire to have securities released as it was shedding liabilities establishes that the return of the letter of credit was in exchange for Patriot's security. *Id.* at 31, *citing* Employer's Exhibit 14 at 286. Employer also argues the DOL was aware of the legacy liabilities, based upon Mr. Benedict's testimony that he considered Peabody Energy's legacy claims in determining whether to authorize Patriot to self-insure. *Id.* at 32-33, *citing* Employer's Exhibit 15 at 80-83. Finally, Employer points to Mr. Benedict's testimony that Patriot's application to self-insure was for the purpose of covering all of its liabilities, and that he accepted a $15 million security deposit, despite his initial desire to secure $25 million. *Id.* at 33, *citing* Employer's Exhibit 14 at 132, 140-141, 148-150, Employer's Exhibit 15 at 161.

that the Director released Peabody from liability. *Id.* We agree with the Director's argument.

The ALJ correctly found neither the Act nor the regulations support Employer's argument that liability is created when a self-insurer posts a security and the subsequent release of that security absolves it from liability. Decision and Order at 15-16. The Act and the regulations require an operator to "secure the payment of benefits by (1) qualifying as a self-insurer . . . or (2) insuring and keeping insured [with a commercial carrier] the payment of such benefits. . . ." 30 U.S.C. §933(a), as implemented by 20 C.F.R. §726.110. To qualify as a self-insurer, operators must "execute and file with the Office [of Workers' Compensation Programs (OWCP)] an agreement and undertaking . . . in which the applicant shall agree . . . [t]o pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-Miners." 20 C.F.R. §726.110(a)(1). An operator is also required to "provide security in a form approved by the [OWCP] . . . and in an amount established by the [OWCP]." 20 C.F.R. §726.110(a)(3). These provisions establish an operator's liability stems from its obligation to pay federal black lung benefits, rather than whether it has complied with the requirements that it provide security for the payment of benefits.

Thus, we agree with the Director's argument that "the security deposit is an additional obligation separate from the responsibility to pay benefits." Director's Response at 10. Before the ALJ, and now before the Board, Employer has failed to cite any authority expressly allowing the DOL to release a designated responsible operator from liability. Moreover, as the Director correctly argues, Employer concedes that its self-insurance authorization was established by both a letter of credit and an indemnity bond. Director's Brief at 12. Employer specifically states "Peabody Energy was previously an entity authorized to self-insure its obligations under the Act. Its obligations were secured via an indemnity bond and a letter of credit in the amount of $13,000,000.00." Employer's Brief at 36. The regulations allow an operator to post security in the form of "a letter of credit issued by a financial institution," but clarify that "a letter of credit shall not be sufficient by itself to satisfy a self-insurer's obligations under this part." 20 C.F.R. §726.104(b)(3). There is no evidence the DOL also released the indemnity bond that Peabody Energy posted.

Moreover, the ALJ appropriately rejected Employer's arguments that the March 4, 2011 letter and Mr. Benedict's testimony establish the Director absolved or intended to absolve Peabody energy of its liability. Decision and Order at 16. Specifically, the ALJ "decline[d] to infer" from the testimonial evidence that the Director intended to release Peabody Energy from its liabilities, "particularly in light of the fact that the regulations do not permit such a release of liability for claims under the Act." Decision and Order at 16; Director's Exhibit 37; Employer's Exhibits 14, 16.

While, the March 4, 2011 letter from Mr. Breeskin to Rob Mead released the letter of credit financed under Peabody Energy's self-insurance program in "recognition of Patriot's authority to act as a self-insurer," the letter did not purport to absolve Peabody of its liability or release its indemnity bond that also secured its liabilities. Director's Exhibit 37. Thus, contrary to Employer's arguments, this letter does not contain or constitute an "express, affirmative action releasing Peabody from its liability," an "affirmative agreement" to hold Peabody Energy harmless, or an "affirmative action terminating Peabody's self-insurance status." Employer's Brief at 48. Further, the testimony highlighted by Employer confirms only that the DOL returned Peabody Energy's letter of credit because it authorized Patriot to self-insure, but it does not reflect any intent to release Peabody Energy from its liability. Employer's Exhibits 14, 16.

The ALJ considered all of the evidence of record, and appropriately found Employer offered no evidence that the DOL agreed not to seek payment from Peabody. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94 (7th Cir. 1990); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc); Decision and Order at 17. Because his findings are supported by substantial evidence, we affirm the determination that Employer failed to establish that the Director released Peabody Energy from its liabilities. *Poole*, 897 F.2d at 893-93; Decision and Order at 16-17.

Based on the foregoing, we reject Employer's argument that the DOL's release of the letter of credit to Patriot absolves Peabody Energy of liability.

Equitable Estoppel

Employer also argues that under the doctrine of equitable estoppel, it should be relieved of liability. Employer's Brief at 41-53. To invoke equitable estoppel, Employer must show the DOL engaged in affirmative misconduct and Employer reasonably relied on the DOL's action to its detriment. *LaBonte v. United States*, 233 F.3d 1049, 1053 (7th Cir. 2000); *United States v. Bob Stofer Oldsmobile-Cadillac, Inc.*, 766 F.2d 1147, 1151-52 (7th Cir. 1985). Affirmative misconduct is "more than mere negligence," and "requires an affirmative act to misrepresent or mislead." *LaBonte*, 233 F.3d at 1053.

Employer alleges the Director committed affirmative misconduct by releasing Peabody Energy from liability without securing proper funding by Patriot. Employer's Brief at 43-49. As discussed above, however, Employer has not established the DOL released Peabody from liability or made a representation of such a release with respect to Peabody's liability. Thus the ALJ properly rejected this argument. Decision and Order at 13; *LaBonte*, 233 F.3d at 1053; *Bob Stofer Oldsmobile-Cadillac*, 766 F.2d at 1151-52.

The ALJ also rationally found "there is inadequate evidence in the record that Peabody reasonably relied upon the actions of the Department to take any particular course of action to its detriment," as Employer did not identify "any evidentiary support in the record for this assertion." Decision and Order at 18; *LaBonte*, 233 F.3d at 1053; *Bob Stofer Oldsmobile-Cadillac*, 766 F.2d at 1151-52. Because Employer failed to establish the necessary elements, we affirm the ALJ's rejection of Employer's equitable estoppel argument.

20 C.F.R. § 725.495(a)(4)

Citing 20 C.F.R. §725.495(a)(4),[9] Employer contends the Director's failure to secure proper funding from Patriot absolves Peabody of liability. Employer's Brief at 36-41. This argument has no merit.

If the operator that most recently employed a miner cannot be considered a potentially liable operator pursuant to 20 C.F.R §725.494 – for example, where the operator is financially incapable of assuming liability for benefits – the responsible operator shall be the potentially liable operator that next most recently employed the miner. 20 C.F.R. §725.495(a)(3). If the most recent operator, however, was authorized to self-insure and no longer possesses sufficient funds to pay benefits, the next most recent employer cannot be named as the responsible operator, and liability transfers to the Black Lung Disability Trust Fund (Trust Fund). 20 C.F.R. §725.495(a)(4).

Employer argues that Patriot is not a potentially liable operator, because it no longer possesses sufficient funds to pay benefits in light of its bankruptcy. Employer's Brief at 38; *see* 20 C.F.R §725.494(e). Insofar as the DOL authorized Patriot to self-insure, Employer argues Heritage and Peabody Energy cannot be named as the responsible operator and carrier pursuant to 20 C.F.R. §725.495(a)(4). Employer's Brief at 36-41.

[9] 20 C.F.R. §725.495(a)(4) states:

> If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title, and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph [20 C.F.R. §725.495(a)(3)] shall be inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of [a potentially liable operator], the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

As the ALJ correctly found, however, Patriot never employed the Miner. He retired from Peabody Coal prior to its name change to Heritage and eight years before Patriot was created. Thus, 20 C.F.R. §725.495(a)(4) does not apply to Patriot as its unambiguous language addresses circumstances in which a miner's most recent *employer* is incapable of assuming liability. Decision and Order at 16-17. As noted, the Miner's most recent employer was Peabody Coal and Employer did not present any evidence Peabody Coal's self-insurer, Peabody Energy, cannot assume liability. Decision and Order at 19; 20 C.F.R. §§725.494(e), 725.495(a)(3). Rather, as the ALJ found, Employer meets the requirements for liability under the Act: Peabody Coal, a coal mine operator which later changed its name to Heritage, employed the Miner for at least one year; the Miner was not employed by any other coal mine operator after Peabody Coal/Heritage; and Peabody Coal/Heritage was self-insured through Peabody Energy during the Miner's employment and at his retirement. Decision and Order at 14-17. Employer identifies no error in these findings. *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b).

Employer's argument that the ALJ was required to find the DOL exhausted Patriot's bond in paying awards of benefits before Peabody Energy could be held liable is also without merit. Employer's Brief at 23-29. The ALJ correctly determined this argument presumes that Patriot is the responsible carrier in this claim. Decision and Order at 15. The ALJ accurately determined that Employer's contention is misplaced as the issue before him involved the identification of the financially solvent, potentially liable operator (and its carrier) to last employ the Miner. 20 C.F.R. §§725.494(e), 725.495(a)(1); Decision and Order at 15. As previously indicated, the ALJ properly found Peabody Coal/Heritage and Peabody Energy satisfied those criteria.[10] Decision and Order at 15. We therefore affirm the ALJ's finding Employer liable for benefits.[11]

[10] As we have affirmed the determination that the expenditure of Patriot's bond is not relevant to this claim, we need not address Employer's argument that its due process rights have been violated by the Director's failure to proffer an accounting of these funds. Employer's Brief at 27-28.

[11] Employer notes that it preserves the issue of whether the DOL's Black Lung Benefits Act Bulletin No. 16-01 violates the Administrative Procedure Act, but it does not ask the Board to address the issue. Employer's Brief at 54. Bulletin No. 16-01, which the Director of the Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, issued on November 12, 2015, instructed district directors to name Peabody Energy the responsible operator in claims involving Patriot. Employer's Brief at 54. Employer's statements do not meet the Board's briefing requirements. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b). We therefore do not consider them. Whether a circuit court would consider

Due Process Challenge

Employer next alleges the regulatory scheme whereby the district director must determine the liability of a responsible operator and its carrier, while also administering the Trust Fund, creates a conflict of interest that violates its due process right to a fair hearing.[12] Employer's Brief at 60-65. We disagree.

As the Director notes, Congress explicitly intended that "individual coal mine operators rather than the [Trust Fund] bear the liability for claims arising out of such operators' mines to the maximum extent feasible." Director's Response Brief at 27-28, *quoting* S. Rep. No. 209, 95th Cong., 1st Sess. 9 (1977), *reprinted in* House Comm. on Educ. and Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, 612 (Comm. Print 1979). Thus, as the Director avers, when identifying an Employer that meets the responsible operator criteria, DOL is acting in a manner consistent with congressional intent. Director's Response Brief at 28. Furthermore, Employer incorrectly maintains that a district director makes the final determination as to which operator is the responsible operator. Employer's Brief at 63. Although the regulations require all relevant documentary evidence to be submitted before the district director and require him or her to name the correct responsible operator, they also allow the putative responsible operator to request a de novo hearing before an ALJ on whether it was properly named a potentially liable operator or designated the responsible operator. 20 C.F.R. §725.419; *see Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 497 (D.C. Cir. 2018); *Rockwood Casualty Ins. Co. v. Director, OWCP*, 917 F.3d 1198, 1215 (10th Cir. 2019) (district director's designation of a responsible operator is not binding on the ALJ).

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the arguments preserved for purposes of federal appellate review is not for the Board to decide.

[12] Employer also states it preserves its arguments that the ALJ's decision to cut off discovery and the Director's failure to maintain proper records violate its due process rights. Employer's Brief at 53-54. As support, Employer states "[m]any of the arguments [it] made . . . are not yet ripe for inclusion." *Id.* Employer does not ask the Board to address these issues, but only wishes to note it is exhausting the administrative process. *Id*. Employer's statements do not meet the Board's briefing requirements. *See Cox v*, 791 F.2d at 446-47; 20 C.F.R. §802.211(b). We therefore do not consider them. Whether a circuit court would consider the arguments preserved for purposes of federal appellate review is not for the Board to decide.

The operator can then seek review of the ALJ's finding[13] before the Board and a United States Court of Appeals.[14] 20 C.F.R. §§725.481, 725.482; *see Acosta*, 888 F.3d at 497.

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

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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all 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 the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv).[15]

[13] If the responsible operator named by the district director is dismissed, the DOL has no recourse other than to transfer liability to the Black Lung Disability Trust Fund. 20 C.F.R. §725.418(d).

[14] Contrary to Employer's contention, rather than giving the Director the final say, the provision in 20 C.F.R. §725.465(b) barring the ALJ from dismissing a named responsible operator without the approval of the Director prevents premature dismissal of the named operator. 65 Fed. Reg. 79,920, 80,005 (Dec. 20, 2000) (regulation "ensures that the Director, as a party to the litigation, receives a complete adjudication of his interests"). This provision in no way limits the ALJ's discretion in concluding the designated responsible operator has shown that it does not meet the criteria of a responsible operator and that liability must therefore shift to the Trust Fund. *See* 20 C.F.R. §725.465(b); *Rockwood Casualty Ins. Co. v. Director, OWCP*, 917 F.3d 1198, 1215 (10th Cir. 2019).

[15] The ALJ found none of the other evidence established total disability because the sole pulmonary function study and arterial blood gas study were non-qualifying for disability, and there was 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 22; Director's Exhibit 16.

The ALJ considered the opinions of Drs. Istanbouly, Conibear, Clapp, Broudy, and Rosenberg.[16] Decision and Order at 24-25. Drs. Istanbouly[17] and Conibear opined the Miner was totally disabled from a respiratory perspective based upon the results of his August 19, 2015 examination conducted by Dr. Istanbouly. Director's Exhibits 16, 21, 52; Claimant's Exhibit 8. Dr. Clapp opined that the Miner had a moderate respiratory impairment based upon this examination and noted an "alarming deterioration" in his pulmonary condition. Claimant's Exhibit 12 at 3. Although Dr. Broudy opined the Miner was not disabled as of his August 19, 2015 examination, he opined the Miner "obviously" became totally disabled at some point prior to his respiratory death. Director's Exhibit 50; Employer's Exhibits 3, 19. Dr. Rosenberg opined the Miner was not totally disabled by a respiratory impairment based upon the August 19, 2015 examination. Director's Exhibit 51; Employer's Exhibits 4, 18. The ALJ found the opinions of Drs. Conibear and Broudy to be the most persuasive, and therefore found the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 25.

Employer contends the ALJ erred in his weighing of the medical opinion evidence. Employer's Brief at 6-17. We disagree. Initially, we reject Employer's argument that Dr. Broudy's opinion identified a disabling impairment related to an acute illness and thus is not supportive of a total disability finding. Employer's Brief at 15, *citing* 20 C.F.R. Part 718, Appendices B, C. The ALJ accurately noted that Dr. Broudy opined the Miner "[o]bviously" developed a disabling impairment prior to his death. Decision and Order at 7-8; Employer's Exhibit 19 at 4-5. Moreover, the physician attributed this disabling impairment to pneumonia, lung cancer, and severe chronic obstructive pulmonary disease (COPD). *Id.* As lung cancer and COPD are chronic conditions, there is no merit to Employer's argument that Dr. Broudy's opinion relates only to an acute respiratory condition. Employer's Brief at 15.

[16] The ALJ determined the Miner's usual coal mine employment as a repairman was a "very heavy duty job." *See Skrack*, 6 BLR at 1-711; Decision and Order at 20.

[17] Employer argues Dr. Istanbouly's opinion should be discredited because he was recently removed from the list of physicians approved to perform DOL-sponsored evaluations. Employer's Brief at 9. In support of its position, Employer cites evidence not in the record that it wishes to submit before the Board. *Id.* The Director notes this evidence indicates that Dr. Istanbouly was removed from the list not because of credibility issues, but because he submitted reports untimely. Director's Response Brief at 31-32. Regardless, the Board may not consider new evidence on appeal, so we decline to address these arguments. 20 C.F.R. §802.301; *Berka v. N. Am. Coal Corp.*, 8 BLR 1-183, 1-184 (1985).

The ALJ found Dr. Rosenberg's opinion that the Miner was not totally disabled as of August 19, 2015, entitled to less weight because Dr. Rosenberg did not address the Miner's condition after this period. Decision and Order at 25. Employer does not challenge this finding, and we therefore affirm it.[18] *Id.*; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). The ALJ further permissibly found the opinions of Drs. Conibear and Broudy to be the most probative of the Miner's condition because they took into account all of the Miner's records, and their opinions were supported by the treatment records which reflected the Miner's respiratory death and need for supplemental oxygen.[19]

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[18] Our dissenting colleague suggests remand is required because the ALJ failed to adequately explain his determination that Dr. Broudy and Dr. Rosenberg did not describe the Miner's usual coal mine employment in as much detail as Drs. Istanbouly and Conibear. However, Dr. Broudy opined the Miner was totally disabled and the ALJ found his opinion among the most probative of record. The dissent does not explain how reweighing Dr. Broudy's opinion for the purpose of giving him even greater weight with respect to his understanding of the Miner's job duties could alter the ALJ's total disability finding. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"). Moreover, Employer does not challenge the ALJ's determination that Dr. Rosenberg's opinion is entitled to less weight because he did not adequately address the Miner's condition subsequent to August 19, 2015. Here again, our dissenting colleague fails to explain how reweighing Dr. Rosenberg's understanding of the Miner's job duties could remedy the significant, *unchallenged* deficiency in his opinion: he did not consider whether the Miner was totally disabled in the six-month period leading to his respiratory death. *Shinseki*, 556 U.S. at 413; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Instead, the dissent restates Employer's argument that the ALJ erred in crediting Drs. Conibear and Broudy without first considering that the Miner's total disability "was due to an acute illness, pneumonia and end-stage lung cancer." Dissent at 20-21; Employer's Brief at 15. She then reasons that a new finding by the ALJ as to whether the Miner's total disability was caused by a chronic disease might somehow remedy Dr. Rosenberg's failure to consider the Miner's condition *at all* during the six months before his respiratory death. *Id.* Beyond improperly raising an argument that Employer does not make on its own behalf, our colleague ignores that Employer's identification of the alleged *cause* of the Miner's disability is relevant to disability causation or rebuttal thereof, *compare* 20 C.F.R. 718.204(b)(2) *with* 20 CFR §§718.204(c), 718.305(d)(1)(ii), and even Employer identifies at least one chronic disease, lung cancer, as being responsible for that disability.

[19] We are perplexed by our dissenting colleague's conclusion that the ALJ did not adequately explain his reliance on the Miner's treatment records as supporting the

See Poole, 897 F.2d at 893-94 (it is the ALJ's duty to weigh conflicting evidence and draw inferences); Decision and Order at 25-26; Claimant's Exhibit 8; Employer's Exhibit 19.

We further reject Employer's argument that the ALJ erred in crediting the opinions of Drs. Istanbouly[20] and Conibear[21] that Claimant is totally disabled because they relied, in

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physicians' diagnoses of a totally disabling respiratory impairment. The ALJ found these records support a finding of total disability because they show the Miner was on supplement oxygen, suffered from severe emphysema and lung cancer, and died a respiratory death. Decision and Order at 25. This finding is rational and supported by substantial evidence. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94 (7th Cir. 1990); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). In particular, the ALJ found this evidence of a respiratory death and need for oxygen supports the opinion of Dr. Conibear that the Miner was totally disabled based upon his symptoms, his drop in the PO2 with exercise, his severe emphysema, a large residual volume, limitations on his treadmill testing, his exercise stress test, and his subsequent chemotherapy for lung cancer. Decision and Order at 25; Claimant's Exhibit 8. Similarly, he found Dr. Broudy's opinion entitled to additional weight because he took into account all of the evidence of record, and credited his opinion that the Miner became totally disabled prior to his respiratory death as supported by the treatment records showing the Miner's hospitalizations for respiratory disease. Decision and Order at 25-26. As discussed above, the ALJ's findings are rational and supported by substantial evidence. *See Poole*, 897 F.2d at 893-94; *Crisp*, 866 F.2d at 185. They are also fully explained and thus in conformance with the Administrative Procedure Act. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316 (4th Cir. 2012) (if a reviewing court can discern what the ALJ did and why he did it, the duty of explanation under the APA is satisfied); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999).

[20] Dr. Istanbouly opined the Miner was totally disabled based upon the physical examination demonstrating reduced air entry bilaterally, the reduction in the pO2 with exercise, and the significant reduction in both the VO2max and total metabolic equivalents (METS) metrics. Director's Exhibits 16, 21, 52

[21] Dr. Conibear opined the Miner was totally disabled based upon his symptoms; the drop in his pO2 with exercise on arterial blood gas studies; evidence of severe emphysema, including a large residual volume in comparison to total lung capacity; the lack of evidence of heart disease, including achieving his maximum predicated heart rate for his age on a treadmill test; limitations on his treadmill testing that must be attributed to his pulmonary condition; and his VO2max and METS output demonstrating a maximum

part, upon his VO2 max.[22] According to Employer, the ALJ "failed to discuss" criticisms from Drs. Broudy and Rosenberg that this type of measurement is not appropriate to find total respiratory disability. Employer's Brief at 12. Contrary to Employer's arguments, the ALJ acknowledged that Drs. Broudy and Rosenberg opined they would not rely upon the VO2max to diagnose a pulmonary impairment because it measures pulmonary impairment as well as potential cardiac problems and deconditioning. Decision and Order at 24-25. While they considered pulmonary function studies to be more accurate, both agreed the VO2max is one of two methods for determining the existence of a pulmonary impairment, and neither Dr. Broudy nor Dr. Rosenberg indicated the VO2max test is not a medically acceptable diagnostic technique. *See Poole*, 897 F.2d at 893-94; *Crisp*, 866 F.2d at 185; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 24-25. Thus, the ALJ permissibly declined to discredit the opinions of Drs. Istanbouly and Conibear based upon their partial reliance on the Miner's VO2 max values.

Moreover, as discussed, Dr. Broudy agreed the miner was totally disabled and the ALJ permissibly found his opinion one of the most probative. Decision and Order at 25. Meanwhile, the ALJ permissibly discredited Dr. Rosenberg's opinion, the only contrary opinion of record. *Id.* Thus, the alleged error in the ALJ's crediting of the opinions of Drs. Conibear and Istanbouly would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Because it is supported by substantial evidence, we affirm the determination that the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv), and that the evidence as whole establishes total disability.[23] 20 C.F.R. §718.204(b)(2). We therefore affirm the determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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output below what is necessary to perform his usual coal mine employment. Claimant's Exhibit 8.

[22] The VO2max measures how much oxygen an individual is using during exercise. Employer's Exhibit 3 at 17.

[23] Because the ALJ provided valid reasons for crediting the opinions of Drs. Conibear and Broudy and for discrediting the contrary opinion of Dr. Rosenberg, we need not address Employer's remaining arguments regarding the ALJ's weighing of the medical opinion evidence. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 9-16.

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[24] nor clinical pneumoconiosis,[25] 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 failed to establish rebuttal by either method.

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 Co.*, 25 BLR 1-149, 159 (2015). The ALJ considered the opinions of Drs. Broudy and Rosenberg that the Miner did not have legal pneumoconiosis, but instead had COPD due solely to cigarette smoking.[26] Director's Exhibits 50, 51; Employer's Exhibits 4, 3, 18, 19. He found neither physician's opinion was sufficiently reasoned to carry Employer's rebuttal burden. Decision and Order at 28-29.

Employer contends the ALJ erred in finding the opinions of Drs. Broudy and Rosenberg inadequately reasoned to establish the Miner did not have legal pneumoconiosis. Employer's Brief at 19-22. We disagree. The ALJ accurately found that Dr. Rosenberg opined the Miner's COPD is due solely to smoking, in part, because his pulmonary function testing revealed a reduced FEV1/FVC ratio, which is not a pattern of impairment consistent with coal mine dust exposure. Decision and Order at 28-29;

[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).

[25] "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).

[26] The ALJ also considered the opinions of Drs. Istanbouly, Conibear, and Clapp that the Miner had legal pneumoconiosis and found they do not assist Employer in rebutting the presumption. Decision and Order at 29; Director's Exhibits 16, 21, 52; Claimant's Exhibits 8, 12.

Director's Exhibit 51; Employer's Exhibits 4, 18. The ALJ permissibly found this aspect of Dr. Rosenberg's rationale conflicts with the medical science the DOL accepts, recognizing coal mine dust exposure can cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV1/FVC ratio. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92 (6th Cir. 2014); Decision and Order at 28.

The ALJ further accurately noted that Drs. Broudy and Rosenberg relied, in part, on their opinion that cigarette smoking is more likely to cause COPD than coal mine dust exposure to determine the Miner's COPD was due solely to smoking. Decision and Order at 6-9; Director's Exhibits 50, 51; Employer's Exhibits 4, 3, 18, 19. The ALJ permissibly found the physicians' opinions were generally dismissive of the Miner's specific history and did not adequately address why his COPD was not related to or aggravated by coal mine dust exposure.[27] *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1345-46 (10th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03 (6th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 28. Because it is supported by substantial evidence, we affirm the ALJ's determination that Employer did not rebut the existence of legal pneumoconiosis, and therefore affirm the determination that Employer failed to rebut the Section 411(c)(4) presumption by proving the Miner did not have pneumoconiosis.[28] 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 30.

Finally, we affirm the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of the Miner's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). Because Drs. Rosenberg and Broudy did not diagnose the Miner with legal pneumoconiosis, contrary to the ALJ's findings, and they tied their disability causation analyses to their pneumoconiosis analyses, the ALJ reasonably discounted their

[27] Because the ALJ provided a valid reason for discrediting the opinions of Drs. Broudy and Rosenberg, we need not address Employer's arguments regarding the additional reasons he gave for rejecting their opinions. *See Kozele*, 6 BLR at 1-382 n.4; Decision and Order at 28.

[28] Because we have affirmed the determination that Employer did not rebut the existence of legal pneumoconiosis, we need not address its arguments that the ALJ erred in finding it also failed to rebut clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 17-19.

opinions on the issue of disability causation. *See Burris*, 732 F.3d at 735; Decision and Order at 30-31. Thus, we affirm the ALJ's determination that Employer failed to rebut the Section 411(c)(4) presumption.

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

SO ORDERED

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

I agree with my colleagues with respect to Employer's challenges to the authority of the ALJ to hear and decide this case, and to affirm the ALJ's determination that Employer is the properly designated responsible operator. However, I respectfully dissent from their decision to affirm the ALJ's award of benefits. I would vacate the ALJ's determination that Claimant established total disability and remand the case for further consideration of the evidence.

The ALJ determined Claimant established total disability based on the medical opinion evidence, the treatment records, and his weighing of the medical opinion evidence overall. 20 C.F.R. §718.204(b)(2); Decision and Order at 24-26. The ALJ considered the opinions of Drs. Istanbouly, Conibear, Clapp, Broudy and Rosenberg. Drs. Istanbouly and Conibear opined the Miner was totally disabled from a respiratory perspective as of his August 19, 2015 examination, while Dr. Clapp opined the Miner had a moderate respiratory impairment. Director's Exhibits 16, 21, 52; Claimant's Exhibits 8, 12. Dr. Broudy initially opined the Miner was not totally disabled as of his August 19, 2015 examination, but subsequently opined the Miner "obviously" developed a totally disabling impairment at some point prior to his respiratory death. Director's Exhibit 50; Employer's

Exhibits 3, 19. Dr. Rosenberg opined the Miner did not have a totally disabling respiratory or pulmonary impairment. Director's Exhibit 51; Employer's Exhibits 4, 18.

The ALJ found that Drs. Istanbouly and Conibear demonstrated a more thorough understanding of the exertional requirements of the Miner's usual coal mine employment than did Drs. Broudy and Rosenberg, and therefore accorded their opinions greater weight. Decision and Order at 25. He further found the opinions of Drs. Broudy and Conibear more credible than Dr. Rosenberg, because they demonstrated a consideration of all of the evidence up until the Miner's death and a deterioration in the Miner's condition. *Id.* Conversely, he found Dr. Rosenberg did not "appear to have considered the deterioration in the Miner's condition subsequent" to August 2015. *Id.* The ALJ therefore found Dr. Rosenberg's opinion to be the least probative medical opinion of record, and found the preponderance of the medical opinions support a finding of total disability. *Id.*

The ALJ further determined the treatment records weigh in favor of a finding of total disability as they demonstrate the Miner suffered from severe emphysema, was placed on two liters of continuous oxygen prior to his death, and died a respiratory death. Decision and Order at 25. Weighing the evidence as a whole, the ALJ found the treatment records support the findings of Drs. Istanbouly, Conibear, Clapp, and Broudy and establish that the Miner was totally disabled from a pulmonary or respiratory impairment. *Id.* at 26.

Employer contends the ALJ erred in relying on evidence that the miner's condition deteriorated immediately prior to his death, when that deterioration was "due to an acute illness, pneumonia and end-stage lung cancer." Employer's Brief at 15-16. I agree with Employer to the extent that the ALJ failed to provide an adequate explanation for his determinations in this regard. More specifically, I would hold that the ALJ did not adequately explain his determination that the opinions of certain physicians merit more weight as having considered the deterioration in the miner's condition subsequent to the 2015 diagnostic studies. Decision and Order at 25-26; *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In his opinion, the ALJ merely made a summary determination. Decision and Order at 25. However, the Administrative Procedure Act (APA),[29] requires an explanation, which is more than merely a conclusory statement. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165. Because the ALJ rested his determination of total disability on a deterioration in the Miner's condition occurring after the 2015 diagnostic studies, the ALJ

[29] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

must adequately explain how the opinions properly establish a deterioration in the Miner's condition, occurring subsequent to the 2015 diagnoses, to the level of total disability under the Act. 20 C.F.R. §718.204(b)(2)(iv) (total disability may be established by "a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques."); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987) (a report is "reasoned" if the underlying documentation supports the doctor's assessment of the miner's health).

Additionally, the ALJ found that the treatment records support those physicians' opinions as to total disability. Decision and Order at 25-26. Medical evidence can support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer a Miner is or was unable to do his last coal mine job. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990). However, the ALJ still must adequately explain his determination that such evidence establishes the Miner is totally disabled. *See Wojtowicz*, 12 BLR at 1-165.[30] I therefore would remand the case for the ALJ to explain how the treatment records support a finding of a chronic respiratory or pulmonary condition[31] and, as the use of supplemental oxygen by itself is not sufficient to establish respiratory or pulmonary disability under the Act, how the Miner's use of supplemental oxygen during his final hospitalizations specifically supports a finding of total disability. *See Wojtowicz*, 12 BLR at 1-165; 20 C.F.R. §718.204(b)(2)(i)-(iv).

[30] I disagree with my colleagues that the ALJ adequately explained why the treatment records support a finding of total disability, because they show the Miner was on supplemental oxygen, suffered from severe emphysema and lung cancer, and died a respiratory death. Both the majority and the ALJ simply list diagnoses and treatment from the Miner's records, but do not explain why these diagnoses and medical treatment support a finding of total disability. *See Wojtowicz*, 12 BLR at 1-165; Decision and Order at 25.

[31] In considering the treatment records, the ALJ should consider whether the evidence reliably supports total respiratory or pulmonary disability as contemplated under the Act. Appendix B to Part 718 provides that pulmonary function studies should "not be performed during or soon after an *acute* respiratory illness," Appendix B to Part 718 at (2)(i) (emphasis added); Appendix C to Part 718 provides that arterial blood gas studies should "not be performed during or soon after an *acute* respiratory or cardiac illness," Appendix C to Part 718 (emphasis added); and 20 C.F.R. §718.105(d) provides that arterial blood gas studies performed during a hospitalization that ended in the miner's death must be "accompanied by a physician's report that the test results were produced by a *chronic* respiratory or pulmonary condition," 20 C.F.R. §718.105(d) (emphasis added).

Consequently, I would vacate the ALJ's weighing of the medical opinion evidence as it was affected by his weighing of the treatment records.[32] Decision and Order at 25.

Further, the ALJ found the opinions of Drs. Broudy[33] and Rosenberg less credible than the opinions of Drs. Istanbouly and Conibear, because they described the Miner's usual coal mine employment in less detail. Decision and Order at 25. However, the ALJ determined the Miner's usual coal mine employment as a repairman "was a very heavy duty job." *Id*. at 20. The ALJ further acknowledged Drs. Broudy and Rosenberg described the Miner's employment as requiring "arduous or heavy duty." *Id*. at 25. Consequently, his determination that their opinions are entitled to less weight when they considered the correct exertional requirements of the Miner's usual coal mine employment is not adequately explained in accordance with the APA. *Wojtowicz,* 12 BLR at 1-165. Thus, I would remand the case for the ALJ to explain what evidence indicates Drs. Istanbouly and

[32] My colleagues would hold that Employer has not challenged the determination that Dr. Rosenberg's opinion is entitled to less weight because he did not address the decline in the Miner's function after August 2015. However, Employer argues the ALJ erred in finding the medical opinion evidence and treatment records establish a total disabling respiratory impairment due to a chronic disease that developed after August 2015. Employer's Brief at 15-16 As discussed above, I agree, to the extent the ALJ has not adequately explained his determination. *See Wojtowicz,* 12 BLR at 1-165; 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, I would vacate the determination that Dr. Rosenberg's opinion is entitled to less weight because he did not adequately address the evidence that developed after August 2015. Decision and Order at 25.

[33] Employer contends that Dr. Broudy was merely recognizing that total disability occurs at the time of respiratory death (something that happens to all who die) and his opinion does not qualify as a diagnosis of total disability under the regulations. Employer's Brief at 15. However, Dr. Broudy did not explain his remark. Employer's Exhibit 19 at 4. Thus, Employer's argument goes too far to assume what Dr. Broudy meant. Nonetheless, Employer's argument has some merit in questioning the ALJ's conclusion that Dr. Broudy was diagnosing total disability as it is defined in the regulations. The ALJ provided no explanation for his conclusion. Consequently, I agree with Employer to the extent that the ALJ concluded, without adequate explanation, Dr. Broudy found total disability (as it is defined in the regulation) and consequently that, absent adequate explanation, the ALJ inappropriately credited Dr. Broudy's opinion for those purposes. *See Wojtowicz,* 12 BLR at 1-165. Thus, contrary to the majority's opinion, the ALJ's errors in analyzing Dr. Broudy's opinion are not harmless.

Conibear were more knowledgeable of the exertional requirements of the Miner's usual coal mine employment in accordance with the APA. *Id.*

For these reasons, I respectfully dissent in part from the opinion of the majority.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge