**U.S. Department of Labor**

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

BRB No. 21-0013 BLA

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| BERT R. BILITER | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| RIDGETOP MINING, INCORPORATED | ) | DATE ISSUED: 11/23/2021 |
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| and | ) | |
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| AMERICAN RESOURCES INSURANCE COMPANY | ) | |
| | ) | |
| 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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

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

Timothy J. Walker and Andrew L. Kenney (Fogle Keller Walker, PLLC) Lexington, Kentucky, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits (2019-BLA-05550) rendered on a subsequent claim[1] filed on December 12, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant had at least twenty-three years of coal mine employment, either underground or in surface conditions substantially similar to an underground mine, and 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, 30 U.S.C. §921(c)(4) (2018),[2] and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.305, 725.309. The ALJ further found Employer failed to rebut the presumption, and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Employer also argues the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award

[1] The ALJ noted that because the records for Claimant's prior two claims were destroyed, he proceeded under the assumption that the claims were denied for failure to demonstrate any element of entitlement. Decision and Order at 4; *see* Director's Exhibit 1.

[2] 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); 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, 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)(1); *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 Claimant did not establish any element of entitlement in his prior claim, he has to submit evidence establishing at least one element to obtain review of the merits of his current claim. *Id*.

of benefits. The Director, Office of Worker' Compensation Programs, declined to file a brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). 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). Employer challenges the ALJ's finding that Claimant established total disability based on the medical opinions.[5] Decision and Order at 11.

[4] The record reflects that Claimant performed his most recent coal mine employment in Kentucky. Decision and Order at 3; Director's Exhibits 9. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] The ALJ found the pulmonary function studies are non-qualifying and therefore insufficient to 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 4-5; Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibit 1. The ALJ considered three valid blood gas studies. Decision and Order at 5-7. Dr. Green's March 14, 2018 study was non-qualifying at rest but qualifying with exercise; Dr. Rosenberg's September 12, 2018 study was non-qualifying at rest and no exercise test was conducted; and Dr. Green's second blood gas study, dated April 5, 2019, was non-qualifying at rest and with exercise. Director's Exhibit 13, Employer's Exhibit 1, Claimant's Exhibit 1.

A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part

The ALJ initially found Claimant's last coal mine job involved moderate to heavy manual labor. Decision and Order at 5. He then credited Dr. Green's opinion that Claimant is totally disabled over the contrary opinions of Drs. Rosenberg and Tuteur. *Id*. at 7-11. Employer asserts that Dr. Green's opinion is insufficiently reasoned to support Claimant's burden of proof, that the ALJ did not equally scrutinize the evidence, and that he failed to adequately explain why he discredited Employer's experts. We disagree.

Dr. Green performed the Department of Labor's complete pulmonary evaluation of Claimant on March 14, 2018. Director's Exhibit 13. In his report, he noted Claimant last worked "in the strip mines" where he operated heavy equipment, primarily a grader and end loader. *Id.* at 2. He also described that Claimant "lifted 50-100 pounds at any given time" and "climbed 10 steps to get in and out of his equipment." *Id*. Dr. Green opined that Claimant's blood gas studies showed hypoxemia, and that the exercise portion of the test was qualifying for total disability. *Id*. Dr. Green found Claimant demonstrated hypoxia after "minimal exercise," that would render it "harmful for [him] to return to his previous coal mine employment" and concluded he is totally disabled from a respiratory or pulmonary standpoint. *Id.*

Dr. Green conducted a second examination at Claimant's request on April 5, 2019. Claimant's Exhibit 1. Although both the resting and exercise blood gas studies conducted as part of this exam were non-qualifying, Dr. Green stated that Claimant "continues to show hypoxemia" and "demonstrates the continued findings of impaired gas exchange and an increased alveolar arterial oxygen gradient." *Id.* He determined Claimant "could not perform the duties of his previous coal mine employment . . . because of the impaired gas exchange." *Id.*

Dr. Rosenberg examined Claimant on Employer's behalf on September 12, 2018. Employer's Exhibit 1. He stated Claimant's last coal mine job as a heavy equipment operator did "not really [have] much manual labor involved." *Id*. at 2. He noted Claimant's description of a "cough and sputum production on most days, with a history of wheezing,"

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718, respectively. A "non-qualifying" study yields results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

The ALJ gave greatest weight to the exercise studies, finding their results in equipoise and insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 7. The ALJ observed, however, that "Claimant's PO2 in the April 5, 2019 study dropped from seventy-nine to seventy during exercise, which is one point above the qualifying value of sixty-nine for a PCO2 value of thirty-one." Decision and Order at 7; Claimant's Exhibit 1 at 8, 10.

and shortness of breath for "the last 10-15 years." *Id*. Based on the non-qualifying resting blood gas study he obtained, Dr. Rosenberg opined Claimant is not disabled from a pulmonary perspective because Claimant's "gas exchange [was] preserved." *Id*. at 2-3. Dr. Rosenberg concluded that Claimant was "not disabled from performing his previous coal mine job or other similarly arduous types of labor." *Id.*

Finally, Dr. Tuteur prepared a consultative report on Employer's behalf based on his review of the medical evidence. Employer's Exhibit 2. He opined Claimant was disabled and would be unable to perform his last coal mine work; however, he attributed the disability to "morbid obesity, documented coronary artery disease, and diabetes mellitus." Employer's Exhibit 2 at 4. Dr. Tuteur dismissed Dr. Green's 2018 qualifying exercise blood gas study because he believed the "barometric pressure was under 700 mm Hg." *Id.* He stated, "there is no impairment of oxygen gas exchange and . . . no worse than trivial generalized impairment of ventilatory function . . . ."[6] *Id.*

As the ALJ noted, Dr. Green obtained objective testing during two separate examinations and had an accurate understanding of the exertional requirements of Claimant's usual coal mine work. Decision and Order at 8, 10-11; Director's Exhibits 13, 24; Claimant's Exhibit 1. Employer's argument that Dr. Green's opinion is not supported by the objective medical data and "appears to be primarily based on his blood gas studies performed in 2018," is not accurate. Employer's Brief at 10-11 (unpaginated). Dr. Green noted the 2018 qualifying exercise study values and acknowledged that the 2019 values were non-qualifying and showed "some interval improvement" in Claimant's hypoxemia. Decision and Order at 10, *quoting* Claimant's Exhibit 1 at 4-5. But he found Claimant was totally disabled from performing the exertional requirements of his previous coal mine work because Claimant continued to show impaired oxygen exchange and an increased alveolar arterial oxygen gradient. Decision and Order at 10-11; Claimant's Exhibit 1 at 4-5. Consequently, the ALJ acted within his discretion as fact finder in giving "probative weight" to Dr. Green's opinion because he permissibly found it adequately explained and supported by the objective evidence. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 10-11.

We also reject Employer's contention that the ALJ erroneously discredited the opinions of Drs. Rosenberg and Tuteur. Employer's Brief at 11 (unpaginated). The ALJ

[6] Although Dr. Tuteur reviewed Dr. Green's April 5, 2019 opinion that Claimant is totally disabled from performing his previous coal mine employment despite the non-qualifying studies obtained, Dr. Tuteur did not specifically address Dr. Green's opinion. *See* Employer's Exhibit 2.

permissibly found Dr. Rosenberg's opinion unpersuasive because he did not have an accurate understanding of the exertional requirements of Claimant's usual coal mine work. Decision and Order at 9; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000). Dr. Rosenberg observed"[t]here was not really much manual labor involved with driving the heavy equipment," which the ALJ permissibly found contrary to his finding that Claimant's usual coal mine work required moderate to heavy manual labor. Decision and Order at 5, 9; Employer's Exhibit 1.

Similarly, the ALJ permissibly found Dr. Tuteur's opinion unpersuasive because he did not adequately address whether Claimant could perform the exertional requirements of his job even assuming Claimant had only a "trivial" impairment. *Cornett*, 227 F.3d at 587; Decision and Order at 10, Employers Exhibit 2 at 4. In addition, the ALJ found Dr. Tuteur's opinion unpersuasive that Claimant's March 14, 2018 exercise study was only qualifying "because [the] barometric pressure was under 700 mm Hg."[7] Decision and Order at 10, *quoting* Employer's Exhibit 2 at 4. The ALJ permissibly determined his opinion was speculative because he did not offer any medical support or explanation for this conclusion, especially given Dr. Green's reliance on this study and Dr. Gaziano's independent validation of its qualifying values. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 10; Director's Exhibits 13, 18; Employer's Exhibit 2. We therefore affirm the ALJ's finding that the opinions of Drs. Rosenberg and Tuteur are entitled to "little probative weight." Decision and Order at 9-10; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Employer's arguments are a request to review the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. Thus, we further affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 11.

**Rebuttal of the Section 4 11(c)(4) Presumption**

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[8] or that "no part of [his] respiratory or pulmonary total

[7] The regulations set forth criteria based upon the altitude of the test site but not barometric pressure. *See* 20 C.F.R. Part 718, Appendix C.

[8] "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

disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015). The ALJ found Employer failed to establish rebuttal under either method. Employer challenges the ALJ's findings that it did not disprove legal pneumoconiosis or disability causation.[9]

**Legal Pneumoconiosis**

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-159. The United States Court of Appeals for the Sixth Circuit holds 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).

Employer relies upon the opinions of Drs. Rosenberg and Tuteur. Dr. Rosenberg examined Claimant, conducted objective tests, and reviewed Dr. Green's March 14, 2018 report before generally concluding Claimant does not have legal pneumoconiosis. Employer's Exhibit 1 at 3. The ALJ discredited Dr. Rosenberg's opinion because he failed to explain how Claimant's gas exchange was "preserved" in light of Dr. Green's qualifying exercise blood gas study.[10] Decision and Order at 15; Employers Exhibit 1 at 3. The ALJ also noted that while Dr. Rosenberg reported Claimant had a 10 to 15 year history of

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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).

[9] The ALJ found Employer disproved clinical pneumoconiosis. Decision and Order at 14.

[10] We note Dr. Rosenberg did not consider Dr. Green's subsequent April 5, 2019 exercise blood gas study, which was non-qualifying but which Dr. Green found also showed an oxygen impairment. *See* Claimant's Exhibit 1.

shortness of breath and other "various respiratory symptoms," he failed to address whether these symptoms were indicative of a respiratory disease significantly related to coal mine dust exposure. Decision and Order at 15, *quoting* Employer's Exhibit 1 at 3. Because the ALJ acted within his discretion in finding Dr. Rosenberg's opinion that Claimant does not have legal pneumoconiosis unpersuasive, we affirm his determination it does not satisfy Employer's burden of proof. *Napier*, 301 F.3d at 713-14; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Minich*, 25 BLR at 1-159.

Dr. Tuteur stated Claimant was exposed to sufficient amounts of coal mine dust during his employment to "produce a dust related primary pulmonary process in a susceptible host." Employer's Exhibit 2 at 1-2. He also noted "[Claimant] coughs daily, intermittently associated with expectoration of some material," and that "[w]heezing is a regular clinical feature even at rest and lying down." *Id.* Dr. Tuteur nonetheless stated, however, that "there is no convincing evidence for the presence of [] legal coal workers' pneumoconiosis of sufficient severity and profusion to produce clinical symptoms, physical examination abnormalities (no obstructive ventilatory abnormality), or radiographic change." Employer's Exhibit 2 at 5. He further opined that "had [Claimant] never inhaled coal mine dust, the clinical picture depicted in this database would have been no different." *Id.*

Although Dr. Tuteur opined that Claimant's disability was due to his obesity and cardiac related problems, the ALJ permissibly found that he failed to adequately address how either of these diagnoses excluded his exposure to coal mine dust from being a contributing cause. *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order at 16; Employer's Exhibit 2 at 5. For this reason, the ALJ permissibly determined that Dr. Tuteur's opinion was also insufficient to disprove the existence of legal pneumoconiosis.

Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(a); Decision and Order at 15. Therefore we affirm the ALJ's finding that Employer failed to rebut the presumption of legal pneumoconiosis.

**Disability Causation**

In order to disprove disability causation, Employer must establish "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The ALJ found the opinions of Drs. Rosenberg and Tuteur not credible as to the cause of Claimant's

respiratory disability because neither physician diagnosed legal pneumoconiosis. Decision and Order at 18; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013). Employer raises no specific allegations of error regarding the ALJ's findings on disability causation, other than its general contention that Claimant does not have legal pneumoconiosis, which we have rejected. We therefore affirm the ALJ's determination that Employer failed to establish no part of Claimant's respiratory disability was due to legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge