U.S. Department of Labor

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

BRB No. 21-0262 BLA

DALLAS CHAFINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN EDGE MINING	)	DATE ISSUED: 9/28/2022
	)	
and	)	
	)	
NATIONAL UNION FIRE/AIG	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Lawrence E. Webster, Pikeville, Kentucky, for Claimant.

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

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2018-BLA-06260) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on August 4, 2017.[1]

The ALJ found Employer is the properly designated responsible operator. He credited Claimant with thirty-eight years of coal mine employment with at least fifteen years in underground mines, and found he established 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,[2] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it is the responsible operator. It also contends he erred in finding Claimant is totally disabled and therefore invoked the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits.

[1] This is Claimant's fourth claim for benefits. The district director denied Claimant's prior claim on November 30, 2012, because he failed to establish total disability. 20 C.F.R. §718.204(b)(2); Director's Exhibit 4.

[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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Where 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)(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 total disability in his prior claim, he had to submit new evidence establishing this element of entitlement to obtain review of the merits of his current claim. *Id*.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

The Director, Office of Workers' Compensation Programs, has filed a limited response in support of the ALJ's responsible operator finding.

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[6] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another potentially liable operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c)(2).

Before the ALJ, Employer first argued Claimant's testimony establishes it is not a coal mine operator but rather a contractor for Sassy Coal. Employer's Post-Hearing Brief at 6-8. It also argued his testimony establishes Sassy Coal is a successor to Employer. *Id.* The ALJ rejected these arguments as he concluded "Claimant's contradictory statements about who owned the coal provide no basis for concluding Employer was a contracting labor company for [Sassy Coal]." Decision and Order at 6. He also found Claimant's

[5] Because Claimant performed his last coal mine employment in Kentucky, 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); Decision and Order at 5; Employer's Exhibit 5 at 13.

[6] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

testimony does not establish Sassy Coal "was a successor coal company to Employer or that it was the sole operator of the mining operations Claimant performed for Employer." *Id*. Employer does not specifically challenge these findings; thus we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer also argued the evidence of record establishes Claimant worked for Employer for less than one year and so it is not a potentially liable operator. Employer's Post-Hearing Brief at 6-7. Alternatively, it asserted the evidence establishes Claimant had at least one year of coal mine employment with one of three more recent employers: Sassy Coal, Brem Coal, or Woodman Three Mines. *Id*. To support its argument that it is not the responsible operator, Employer sought to admit a February 27, 2019 letter from claims examiner Lori Galati-Varney setting forth Claimant's earnings with Brem Coal and Woodman Three Mines and indicating insurance policies covered these operators during relevant periods. Hearing Tr. At 10; Employer's Exhibit 4.

The ALJ excluded the February 27, 2019 letter from the record because it was not timely submitted to the district director as the regulations require. Decision and Order at 3. He found the evidence does not establish Claimant worked for a "cumulative period" of at least one year for either Sassy Coal, Brem Coal, or Woodman Three Mines. *Id*. at 5. Thus, he concluded Employer is responsible for paying benefits because it is the last potentially liable operator that employed Claimant for at least one year. *Id*. at 5-6.

Excluded Evidence

We first address Employer's argument that the ALJ erred in excluding the February 27, 2019 letter. Employer's Brief at 12-15.

The regulations require that, absent extraordinary circumstances, an employer's liability evidence must be timely submitted to the district director and may not thereafter be admitted into the record by the ALJ. 20 C.F.R. §§725.414(d), 725.456(b)(1). If the district director fails to identify the proper responsible operator prior to the claim's transfer to the ALJ, the improperly-designated operator must be dismissed and the Black Lung Disability Trust Fund must assume liability for benefits. *See Rockwood Cas. Ins. Co. v. Director, OWCP* [*Kourianos*], 917 F.3d 1198, 1215 (10th Cir. 2019); 20 C.F.R. §725.407(d).

Because an ALJ exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.,* 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn the disposition of a procedural or evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

At the March 19, 2019 hearing for this claim, Employer identified the February 27, 2019 letter as Employer's Exhibit 4 and moved to admit it into the record. Hearing Tr. at 10; Employer's Exhibit 4. The Director objected because Employer failed to submit the letter to the district director. Hearing Tr. at 10. Employer did not dispute that it failed to submit the evidence to the district director, but argued the letter should be admitted because it requested the relevant information from the district director prior to issuance of the district director's Proposed Decision and Order (PDO) and did not receive it until the case was before the ALJ. *Id*. At the hearing, the ALJ instructed the parties to further address this issue in their briefs. *Id*. Employer did not raise any additional argument in its post-hearing brief.

In his Decision and Order, the ALJ found Employer did not provide any support for its assertion that it sought this evidence from the district director prior to issuance of the PDO. Decision and Order at 3. Thus he excluded this evidence because Employer failed to timely submit it to the district director or establish extraordinary circumstances for failing to do so. *Id*; *see* 20 C.F.R. §§725.414(d), 725.456(b)(1).

Before the Board, Employer now raises two new arguments for the first time. It argues the ALJ should have admitted the February 2019 letter because it establishes the district director "failed to follow the regulatory procedure" in processing the claim.[7] Employer's Brief at 12-15. Specifically, Employer asserts the district director did not discuss Woodman Three Mines as a potentially liable operator in either the Notice of Claim, the Schedule for the Submission of Additional Evidence, or the PDO, nor explain why he did not name that entity as the responsible operator when processing this claim. *Id*. Employer also argues the decision of the United States Court of Appeals for the Sixth Circuit in *Shepherd v. Incoal*, 915 F.3d 392, 401-05 (6th Cir. 2019) constitutes a change in law with respect to the definition of one year under the regulations, including for purposes of identifying the responsible operator. Employer's Brief at 12-15. Had *Shepherd* been issued when this case was before the district director, Employer argues it would have engaged in "[f]urther investigation" with respect to Claimant's employment with Brem Coal and Woodman Three Mines. *Id*. Thus it argues *Shepherd* constitutes extraordinary circumstances warranting admission of the February 2019 letter. *Id*.

[7] Employer argues that in a claim referred to the Office of Administrative Law Judges, if the district director designates a responsible operator that is not the last operator for which the miner worked, the district director must provide an explanation for his or her designation and reasoning for not designating the most recent employer pursuant to 20 C.F.R. §725.495(d). Employer's Brief at 13.

Employer, however, failed to raise either argument before the ALJ in support of its contention that extraordinary circumstances warrant admission of this evidence, as the Director argues, and we thus cannot address them for the first time now on appeal.[8] *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021); *McKinney v. Benjamin Coal Co.*, 6 BLR 1-529, 1-531 (1983) (where petitioner raised an argument for the first time on appeal, the Board declined to consider it). As Employer has not identified any error in the ALJ's finding that it provided no support for its proffered basis for establishing extraordinary circumstances, i.e., it sought the information contained in Employer's Exhibit 4 prior to the issuance of the district director's PDO, we conclude it has not established an abuse of discretion. *Blake*, 24 BLR at 1-113.

Woodman Three Mines and Sassy Coal

Employer next argues the ALJ erred in finding Claimant did not work for a "cumulative period" of at least one year with either Woodman Three Mines or Sassy Coal.[9] Employer's Brief at 6-12, 16.

[8] The Sixth Circuit decided *Shepherd* on February 6, 2019, more than one month before the March 19, 2019 hearing in this case, five months before Employer submitted its post-hearing brief on July 8, 2019, and almost two years before the ALJ issued his Decision and Order. Although Employer contends there was only a "short timeframe between the publication of *Shepherd* and the submission of the briefs," Employer's Brief at 8, we agree with the Director that five months is "hardly a 'short' time, particularly in light of the decision's significance to Employer's position." Director's Brief at 17 n. 15. Thus Employer had ample opportunity to raise *Shepherd* to support its extraordinary circumstances argument before the ALJ. But it did not raise this argument at the hearing or in its post-hearing brief. Similarly, we reject Employer's argument that the ALJ should have provided the parties an opportunity to submit additional evidence relevant to the alleged change in law that the issuance of *Shepherd* occasioned. Employer's Brief at 6-9. Employer never made this request to the ALJ despite that *Shepherd* was issued before the hearing, the date the parties filed their briefs, and the date the ALJ issued his Decision and Order. *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021); *McKinney v. Benjamin Coal Co.*, 6 BLR 1-529, 1-531 (1983).

[9] Employer does not challenge the ALJ's finding that it meets the regulatory definition of a potentially liable operator and is financially capable of assuming liability. 20 C.F.R. §725.494(a)-(e); Decision and Order at 5-6. Nor does it challenge the ALJ's finding that Brem Coal employed Claimant for less than one year. *Id.* Thus we affirm these findings. *Skrack*, 6 BLR at 1-711.

With respect to Woodman Three Mines, Employer contends Claimant's Social Security Administration (SSA) earnings record, considered in conjunction with his deposition testimony, establish Claimant had at least 125 working days with this operator. Employer's Brief at 16. Citing the Sixth Circuit's decision in *Shepherd*, Employer argues a finding of 125 working days establishes one year of coal mine employment, even where the miner and employer did not have a 365-day employment relationship. *Id*., *citing Shepherd*, 915 F.3d at 401-05. This argument has no merit.

To support its contention that Claimant had 125 working days with Woodman Three Mines, Employer maintains Claimant testified "he was making approximately [$14.00] per hour in the later part of his career," including when he worked for this operator. Employer's Brief at 6-12, 16. Using a rate of $14.00 per hour, Employer argues Claimant earned $112.00 in a typical eight-hour work-day with this employer. *Id*. Claimant's SSA earnings record indicates he earned $25,512.75 with Woodman Three Mines in 2010. Director's Exhibit 13. Employer maintains that dividing Claimant's 2010 SSA earnings by the daily wage of $112.00 equates to 227.9 working days, or one year of coal mine employment under *Shepherd*. Employer's Brief at 16.

As the Director correctly responds, however, the record belies Employer's characterization of Claimant's testimony. Director's Response at 12-13. Claimant never testified he earned $14.00 an hour with Woodman Three Mines. In discussing his earnings with Employer, Mountain Edge Mining, Claimant stated his highest hourly wage was $14.00 an hour. Director's Exhibit 34 at 10-11. But Claimant never associated this hourly wage for his work with Woodman Three Mines. Because the record does not support Employer's argument, we reject it.[10] As Employer raises no other argument, we affirm the ALJ's finding[11] that Woodman Three Mines did not employ Claimant for at least one

[10] Relying on an alternative theory, Employer asserts Claimant testified he typically earned $15,000 a year with Sassy Coal. Employer's Brief at 16. Because he earned more than this amount in 2010 with Woodman Three Mines, Employer argues Claimant worked for more than one year for this operator. *Id*. But as the Director correctly argues, Claimant's earnings with another operator do not establish his yearly earnings with Woodman Three Mines. Director's Response at 12-13. Further, Employer again mischaracterizes the record. Claimant testified the most he ever earned with Mountain Edge Mining in any given year was $15,000. Director's Exhibit 34 at 10-11.

[11] There is no evidence in the record indicating Claimant's starting and ending dates with Woodman Three Mines. Claimant testified he worked for Woodman Three Mines in 2010. Employer's Exhibit 5 at 20. He could not remember when he started working for this operator, but that he worked until the end of the year. *Id*. at 21-22. Furthermore, he indicated this operator did not pay him in cash. *Id*. As the Director correctly argues, where

year.[12] *Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b); Decision and Order at 5-6.

With respect to Sassy Coal, Claimant's SSA earnings record indicates he earned wages each year from 2006 to 2009 for a total of $19,910. Director's Exhibit 13. During a 2012 deposition, Employer's counsel asked Claimant about his work with this operator. Director's Exhibit 34 at 12-13. Although his SSA earnings record indicates he started working with it in 2006, Claimant testified he "started working for Sassy Coal . . . back . . . earlier than that. I [do not] know what it was. I mean 2000, 2001, [2002, or 2003]." *Id*. Employer's counsel noted there was a gap in Claimant's earnings in his SSA earnings record for the years 2000 to 2002, and so asked Claimant if he "might have worked for Sassy Coal in 2000, 2001 and 2002?" *Id*. Claimant responded as follows:

> I believe I started there—-if I'm not mistaken, I was working for Christopher Coal Company in [1999] and 2000. I'm not -- and I changed, [went] over to work for Sassy then somewhere along that time. I'm don't - not for what date it was. (sic).

Id. Claimant stated he was on Sassy Coal's payroll around this time. *Id*. When asked if Sassy Coal paid him by cash or check, Claimant answered "[m]aybe both. I don't know. I don't remember." *Id*. Employer's counsel also asked Claimant if he worked for Sassy Coal "on two different occasions," and Claimant indicated he "was off for about . . . a year" due to an operation for gall bladder surgery but could not specifically recall when he had the surgery. *Id*. at 14. In a 2019 deposition, Claimant stated he did not know when he started working for Sassy Coal. Employer's Exhibit 5 at 17.

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evidence does not establish the beginning and ending dates of a miner's coal mine employment, the ALJ may apply the calculation method at 20 C.F.R. §725.101(a)(32)(iii). Director's Response at 12-13. Had the ALJ applied this formula by dividing Claimant's 2010 earnings as reported in his SSA earnings record by the coal mine industry's average yearly earnings for 125 days of employment, as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*, he would have credited Claimant with less than one year of coal mine employment with this operator (25,512.75/ 28,230.00 = 0.9).

[12] Because the only support for Employer's argument that Claimant had 125 working days with Woodman Three Mines is its contention that he earned $14.00 per hour with this entity, and we reject this contention, we further reject Employer's argument that we should instruct the ALJ to apply the Sixth Circuit's decision in *Shepherd* and re-calculate Claimant's employment with Woodman Three Mines. Employer's Brief at 7-9.

The ALJ summarily found the evidence does not establish Claimant worked for at least one year for Sassy Coal. Decision and Order at 5. In challenging this finding, Employer argues Claimant's SSA earning record and 2012 deposition testimony establish at least one year of coal mine employment for Sassy Coal under the regulations and the Sixth Circuit's decision in *Shepherd*. Employer's Brief at 6-12.

Based on our review of the ALJ's Decision and Order, we are unable to ascertain the basis for his conclusion that Sassy Coal did not employ Claimant for at least one year.[13] Nor is there any indication the ALJ weighed Claimant's 2012 deposition testimony as it relates to Employer's argument that Claimant worked for Sassy Coal sometime earlier than 2006, he was paid in cash, and his SSA earnings record is inaccurate. Employer's Brief at 6-12. Because the ALJ did not fully explain his responsible operator determination, address relevant evidence, or render necessary credibility findings, his responsible operator finding does not satisfy the Administrative Procedure Act (APA) and we therefore vacate it.[14] 30 U.S.C. §923(b); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983) (ALJs have a duty to consider all relevant evidence and make findings of fact and conclusions of law which adequately set forth the factual and legal basis for their decisions); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

The Director urges the Board to hold that no reasonable fact finder could find Claimant worked for Sassy Coal for at least one year. Director's Brief at 11-16. While acknowledging Claimant's 2012 deposition testimony, he maintains "there was no basis for the ALJ to credit [Claimant's] testimony for the proposition that he worked for Sassy Coal before 2003" or that his SSA earnings record is inaccurate. *Id*. at 14. He argues Claimant's testimony "was punctuated with frequent references to the limits of his

[13] We reject Employer's argument that the ALJ should have applied an hourly wage of $14.00 when calculating Claimant's coal mine employment with Sassy Coal. Employer's Brief at 12-16. Nor is there merit to Employer's argument that Claimant testified that the most he ever earned with Sassy Coal in any one year was $15,000. *Id*. As discussed above, the relevant testimony Employer cites in support of these arguments involves Claimant's earnings with Mountain Edge Mining, and not any employment with Sassy Coal. Director's Exhibit 34 at 10-11.

[14] The Administrative Procedure Act proves that 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).

memory" and "uncertainty." *Id*. at 13-14. Thus he argues Claimant's testimony is not credible in regard to his employment relationship with Sassy Coal. *Id*.

Contending that the evidence in this case does not establish the beginning and ending dates of Claimant's employment with Sassy Coal, the Director asserts application of the method of calculation at 20 C.F.R. §725.101(a)(32)(iii) is proper.[15] Director's Brief at 11-16. He maintains that dividing Claimant's total earnings with Sassy Coal as reported in his SSA earnings record by the coal mine industry's average daily earnings, as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*, establishes less than 125 working days with this operator. Director's Brief at 11-16.

We decline the Director's invitation to hold Claimant's testimony not credible[16] and the evidence insufficient to establish Sassy Coal employed Claimant for at least one year as a matter of law. The ALJ is tasked with evaluating the credibility of the evidence and resolving any conflict. *Rowe*, 710 F.2d at 255 (Board lacks the authority to render factual findings to fill in gaps in an ALJ's opinion); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (same). Under these circumstances, the proper course is for the Board to remand the claim for the ALJ to consider the evidence in the first instance.

Thus, we vacate the ALJ's responsible operator finding and remand this case for further consideration of this issue. We instruct him to address all relevant evidence and reconsider whether Employer met its burden to prove Sassy Coal more recently employed Claimant for at least one year.[17] *See Rowe*, 710 F.2d at 254-55; *McCune*, 6 BLR at 1-998;

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[15] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may divide the miner's annual earnings by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual.* 20 C.F.R. §725.101(a)(32)(iii).

[16] Although the ALJ found Claimant's testimony not credible with respect to whether Employer is a contractor for Sassy Coal and whether Sassy Coal is a successor operator to Employer, Decision and Order at 6, an ALJ may find an individual's testimony less credible on one issue, but more credible and probative on another issue. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305-06 (6th Cir. 2005); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) ("The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable.").

[17] As the Director acknowledges, Claimant's "employment relationship with Sassy Coal spann[ed] multiple calendar years." Director's Brief at 13 n. 13. Under the regulations, if the evidence establishes that the miner's employment lasted for a calendar

20 C.F.R. §§725.494(c), 725.495(c)(2). He must consider the parties' arguments[18] and explain his findings as the APA requires. *Wojtowicz*, 12 BLR at 1-165. If he finds the evidence establishes Sassy Coal employed Claimant for less than one year, he may reinstate his responsible operator finding. 20 C.F.R. §§725.494(c), 725.495(c)(2).

If, however, the ALJ finds Sassy Coal employed Claimant for at least one year, he must address whether it is financially capable of assuming liability. While Employer bears the burden of establishing that the more recent operator is financially capable of paying benefits, 20 C.F.R. §725.495(c), the regulations also create a presumption of financial capability under certain circumstances. If the responsible operator that the district director designates is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the more recent employer's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that employer or of its authorization to self-insure. *Id*. In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id*.

Merits of the Claim

In the interest of judicial economy, we address Employer's contentions that the ALJ erred in finding the pulmonary function studies and medical opinion evidence establish

year, . . . it must be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii); *see Shepherd*, 915 F.3d at 401-02.

[18] The ALJ should address if Employer designated Claimant as a liability witness when this case was before the district director and, if not, whether it established extraordinary circumstances for failing to do so. If no party provides notice to the district director of the name and address of a witness whose testimony pertains to liability of a potentially liable operator, the witness's testimony "will not be admitted in any hearing" absent extraordinary circumstances. 20 C.F.R. §725.414(c).

total disability and, therefore, erred in determining Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.

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

A miner is totally disabled if a pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.[19] *See* 20 C.F.R. §718.204(b)(1). Total disability can be established 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2). The ALJ determined Claimant established total disability based on the pulmonary function study and medical opinion evidence.[20] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 7-8, 13-14.

Pulmonary Function Studies

Employer first argues the ALJ erred in finding the pulmonary function studies are qualifying for total disability.[21] Employer's Brief at 18-21.

The ALJ considered the results of a single pulmonary function study that Dr. Ajjarapu conducted on October 2, 2017. Decision and Order at 7; Director's Exhibit 16. The doctor recorded Claimant's age as eighty-six years old at the time of the study. *Id.* The ALJ noted that, under the Board's decision in *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008), studies performed on a miner over the age of seventy-one must be treated as qualifying if they would be qualifying for a seventy-one year old, the maximum age set forth in the regulations' chart of qualifying values. Decision and Order

[19] The ALJ found Claimant's usual coal mine employment was working as a beltman which required heavy manual labor. Decision and Order at 5. Employer does not challenge this finding. Thus we affirm it. *Skrack*, 6 BLR at 1-711.

[20] The ALJ found the arterial blood gas studies do not establish total disability and there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii)-(iii); Decision and Order at 6, 8.

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

at 7 n.23. However, the party opposing entitlement may offer evidence that the studies do not indicate disability for a miner over seventy-one. *Id*.

The ALJ considered the opinions of Drs. Broudy and Rosenberg that the "Knudson predictive equation" establishes the October 2, 2017 pulmonary function study is non-qualifying when accounting for Claimant's age of eighty-six. Decision and Order at 8 n.25, 10-13; Director's Exhibit 21; Employer's Exhibits 1-3. He found their opinions unpersuasive. Decision and Order at 10-13. The ALJ also considered Dr. Ajjarapu's opinion questioning the reliability of extrapolating values based on the Knudson formula for a miner who is eighty-six years old. Decision and Order at 10; Director's Exhibit 23. He found her opinion credible. Decision and Order at 10. Thus the ALJ rejected Employer's position that the October 2, 2017 study does not support a finding of total disability when extrapolating the Appendix B values for an eighty-six year old miner. *Id*.

The ALJ then assessed whether the October 2, 2017 study is qualifying using the values for a seventy-one year old male miner set forth in the tables at Appendix B. *Meade*, 24 BLR at 1-47; Decision and Order at 7-8. Because this study produced qualifying values based on Claimant's height, the ALJ found it qualifying for total disability. *Id*. As the record contains no contrary pulmonary function testing, the ALJ found this evidence establishes total disability. Decision and Order at 7-8.

Employer argues the ALJ erred in discrediting the opinions of Drs. Broudy and Rosenberg, while crediting Dr. Ajjarapu's opinion, with respect to the reliability of the Knudson equations. Employer's Brief at 18-22. We disagree.

The ALJ noted that although Drs. Broudy and Rosenberg generally cited the Knudson formula, "there is no evidence in the record that extrapolating" the table values listed in Appendix B of 20 C.F.R. Part 718 "illustrates the most accurate state of Claimant's pulmonary condition" and his ability to perform heavy manual labor. Decision and Order at 12-13. Based on the absence of any chart setting forth the extrapolated values or any studies in the record to support their opinion, the ALJ permissibly found Drs. Broudy's and Rosenberg's reliance on the Knudson equation unsupported. Decision and Order at 12-14; *see 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); *Rowe*, 710 F.2d at 255.

Conversely, the ALJ noted Dr. Ajjarapu "cited a medical study that compared the prediction equations put forth by Crapo, Knudson, Morris and the [National Health and Nutrition Examination Survey (NHANES)] 111" to support her conclusion that extrapolating values for an eighty-six year old miner using Knudson is unreliable. Decision and Order at 10, *citing* Director's Exhibit 23. Specifically, Dr. Ajjarapu indicated there is "significant discordance between the prediction equations put forth by Crapo, Knudson,

Morris, and the NHANES III" and "data suggest[ing] that the diagnostic reclassification of many patients undergoing pulmonary function testing will occur when ATS/ERS guidelines are implemented" in conjunction with those equations. Director's Exhibit 23 at 3-4. "Discordance was most common when the results from prediction equations by Knudson and Morris were compared to those of NHANES." *Id*. The ALJ permissibly found Dr. Ajjarapu's opinion credible because she "supported her opinion on the issue." Decision and Order at 10; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

Employer asserts the opinions of Drs. Broudy and Rosenberg "are well reasoned and based in medical knowledge." Decision and Order at 20. It also argues Drs. Broudy and Rosenberg are more qualified than Dr. Ajjarapu. *Id*. Employer's argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ's finding that the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

Employer also argues the ALJ erred in finding the medical opinions establish total disability. Employer's Brief at 18-22. Dr. Ajjarapu opined Claimant is totally disabled by a severe pulmonary impairment demonstrated by pulmonary function testing and mild hypoxemia evidenced by arterial blood gas testing. Director's Exhibit 15. The ALJ found her opinion well-reasoned and documented. Decision and Order at 10. Drs. Broudy and Rosenberg opined Claimant has an obstructive impairment which is not disabling when the Knudson equation is applied to Claimant's pulmonary function testing. Director's Exhibit 21; Employer's Exhibits 1-3. Because the ALJ found their opinions unpersuasive with respect to applying the Knudson equation and extrapolating values for a miner over the age of seventy-one, he concluded their total disability opinions merited no weight. Decision and Order at 10-12.

Employer raises no specific arguments regarding the ALJ's weighing of Drs. Broudy's and Rosenberg's opinions, other than its contention that extrapolating values based on the Knudson equation establishes the October 2, 2017 study is non-qualifying. Employer's Brief at 18-22. We have already rejected this argument. We therefore affirm the ALJ's finding that the medical opinions of Drs. Broudy and Rosenberg are not credible. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10-12.

With respect to Dr. Ajjarapu, Employer asserts her opinion is not reasoned and documented because she incorrectly diagnosed Claimant with chronic bronchitis and failed to discuss Claimant's post-bronchodilator pulmonary function testing. Employer's Brief

at 20-21. It also reiterates its contention that she is less qualified than Drs. Broudy and Rosenberg. *Id*. We again consider Employer's argument to be a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. As it is supported by substantial evidence, we affirm the ALJ's finding Claimant established total disability based on Dr. Ajjarapu's opinion. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 8-13.

We further affirm the ALJ's conclusion that the evidence, when weighed together, establishes total disability. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 13-14. Thus, we affirm the ALJ's finding Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.305(b)(1), 725.309. As Employer has not challenged the ALJ's determination that it did not rebut the presumption, we also affirm this finding and therefore the award of benefits. *See Skrack*, 6 BLR at 1-711; Decision and Order at 15-18.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge