U.S. Department of Labor

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

BRB No. 21-0005 BLA

DON JONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
QUEEN ANNE COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 02/24/2022
	)	
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 Evan H. Nordby, Administrative Law Judge, Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Sarah M. Hurley (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 ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order Awarding Benefits (2017-BLA-06271) rendered on a claim filed on August 22, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with eight years and ten months of coal mine employment and thus found he could not invoke 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).[1] Considering entitlement under 20 C.F.R. Part 718,[2] the ALJ found Claimant established he is totally disabled due to legal pneumoconiosis and awarded benefits. 20 C.F.R. §§718.202(a), 718.204(b)(2), (c).

On appeal, Employer argues the ALJ lacked authority to preside over the case because he has not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2, and that the removal provisions applicable to the ALJ render his appointment unconstitutional.[3] On the merits, Employer argues the ALJ erred

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is 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.

[2] The ALJ found no evidence of complicated pneumoconiosis; therefore, Claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 16 n.11.

[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

in finding Claimant established legal pneumoconiosis, a totally disabling pulmonary impairment, and disability causation. The Director, Office of Workers' Compensation Programs (the Director), filed a response urging the Benefits Review Board to reject Employer's assertions concerning the ALJ's authority to decide the case. Claimant filed a response, urging affirmance on the merits. Employer filed a reply to the Director's response.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance 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, 362 (1965).

Appointments Clause

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[5] Employer's Brief at 9-13; Employer's Reply at 1-5. It acknowledges the Secretary of Labor (the Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[6] but maintains the

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> be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his last coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 8.

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

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

ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 11-13; Employer's Reply at 2-6.

The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought his appointment into compliance with the Appointments Clause. Director's Brief at 4-5. We agree with the Director's argument.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 4 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Further, ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). Ratification is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co.*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Moreover, under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Congress authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Nordby and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to ALJ Nordby. The Secretary

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> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Nordby.

further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Nordby "as an Administrative Law Judge." *Id*. In so doing, the Secretary unequivocally accepted responsibility for the ALJ's prior appointment.[7]

Employer does not assert the Secretary had no "knowledge of all the material facts" but generally speculates that he did not make a "genuine, let alone thoughtful, consideration" when he ratified ALJ Nordby's appointment. Employer's Brief at 10-12; Employer's Reply at 3. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification is insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment.[8] *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals were valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" its earlier actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. Employer's Brief at 15-17. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United

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[7] Employer's assertion that the Secretary, in his December 21, 2017 letter to ALJ Nordby, "did not approve the ALJ's appointment as his own," ignores the Secretary explicitly approved the ALJ's prior appointment "in [his] capacity as head of the Department of Labor." Employer's Brief at 11; *c.f.* Secretary's December 21, 2017 Letter to ALJ Nordby.

[8] While Employer notes the Secretary's ratification letter was "signed in autopen" and that the ALJ's ratification was unaccompanied by any ceremony or formality, Employer's Brief at 11-12; Employer's Reply at 3, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act"). We thus agree with the Director: "Employer's belief that the action varied from internal government guidance and lacked sufficient pomp and circumstance is wholly irrelevant." Director's Brief at 5 n.5.

States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of ALJ Nordby's appointment, which we have held constituted a valid exercise of his authority, thereby bringing the ALJ's appointment into compliance with the Appointments Clause.

Thus, we reject Employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 13-17; Employer's Reply at 5-8. Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 15-16. Employer also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 9-16; Employer's Reply at 1-8.

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1136 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, in *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB] . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch where the CFPB was an

"independent agency led by a single Director and vested with significant executive power."[9] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. at 1988. The Court explained "the *unreviewable authority* wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* at 1985 (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established the removal provisions at 5 U.S.C. §7521 are unconstitutional. *Pehringer*, 8 F.4th at 1136.

Entitlement - 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-

[9] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove he has 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). The United States Court of Appeals for the Sixth Circuit, whose law applies to this case, has held a miner can establish legal pneumoconiosis by showing coal dust exposure contributed "in part" to his respiratory or pulmonary impairment. *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99, 600 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a *de minimis* contribution' and instead 'a contributing cause of some discernible consequence.'"). The ALJ credited Dr. Green's opinion that Claimant has legal pneumoconiosis over the contrary opinions of Drs. Vuskovich and Rosenberg.

Smoking History

Employer contends the ALJ erred in assessing the credibility of the medical opinions at legal pneumoconiosis based on an erroneous determination that Claimant has a twenty pack-year smoking history. Employer alleges the ALJ ignored the treatment records and Dr. Vuskovich's carboxyhemoglobin study, which show Claimant smoked at a rate greater than one pack a day.

Employer's arguments are without merit, as the ALJ appropriately addressed the relevant evidence of record and rendered a finding supported by substantial evidence. He noted Claimant testified to a smoking history of about a pack per day for fifteen to twenty years. Decision and Order at 16; Hearing Transcript (Hr. Tr.) at 24. The ALJ further noted that, while Claimant's treatment records suggest he previously smoked more than one pack a day, they do not specify when he did so or for how long. Decision and Order at 12; Claimant's Exhibit 2 at 1. He also considered Dr. Vuskovich's comment that Claimant's carboxyhemoglobin levels measured on October 12, 2018 indicated Claimant smoked three packs of cigarettes that morning. The ALJ permissibly gave little weight to Dr. Vuskovich's statement because it does "not provide evidence for assuming that the

Claimant smoked this heavily over a long continuous period."[10] Decision and Order at 16-17.

Other than arguing the ALJ exceeded his purview, Employer does not explain why the ALJ could not reasonably credit Claimant's testimony as to the rate and duration of his smoking history. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (ALJ has discretion to assess witness credibility and the Board will not disturb his or her findings unless they are inherently unreasonable). We therefore affirm the ALJ's permissible determination that, taking into consideration all the evidence, Claimant has a smoking history of twenty pack-years.[11]

Medical Opinions

The ALJ considered four medical opinions. All of the physicians considered a coal mine employment history of between eight and nine years. Director's Exhibit 13; Claimant's Exhibit 5; Employer's Exhibits 5, 6, 8, 9.

Dr. Forehand considered a seven to ten pack-year smoking history, opining Claimant has legal pneumoconiosis in the form of a mixed obstructive and restrictive lung disease due to coal mine dust exposure and smoking. Director's Exhibit 13 at 2, 4. Dr. Green considered a smoking history of at least thirty pack-years and diagnosed legal pneumoconiosis in the form of "chronic airflow obstruction with hypoxemia" due to coal mine dust exposure and smoking. Claimant's Exhibit 5 at 2. Dr. Vuskovich considered a sixty to one hundred pack-year smoking history and diagnosed mild resting hypoxemia due to smoking only. Employer's Exhibits 5 at 3, 8 at 9-10. Dr. Rosenberg considered a fifteen to twenty-year history of smoking "over a pack of cigarettes per day" and diagnosing

[10] The ALJ observed Claimant's treatment records state Clamant "used to smoke nine packs per day" but smoked one or 1.5 packs per day in 2016, and had "ongoing tobacco abuse" in 2017. Decision and Order at 12; Claimant's Exhibits 1, 2.

[11] We agree with Employer that the ALJ did not explain his basis for concluding smokers are more likely to "overstate rather than understate" their smoking histories. Employer's Brief at 22. However, the ALJ's error is harmless as he weighed all the evidence and permissibly credited Claimant's testimony as to his smoking history. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

emphysema and a variable gas-exchange abnormality due to smoking only. Employer's Exhibits 6 at 3, 9 at 2.

Having affirmed the ALJ's determination that Claimant had a twenty pack-year smoking history, we see no error in the ALJ's finding that Dr. Vuskovich's opinion on legal pneumoconiosis is less credible because he relied on a "vastly" overinflated smoking history. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255.

We also reject Employer's contention the ALJ erred in crediting Dr. Green's opinion over Dr. Rosenberg's opinion.[12] Employer contends Dr. Green's opinion is insufficient to satisfy Claimant's burden of proof because the physician noted he was unable to rule out coal mine employment as a factor in causing Claimant's obstructive impairment; therefore, Employer argues his opinion improperly presumes a causal connection between Claimant's obstruction and coal mine employment. Employer's Brief at 18-21. We disagree.

Dr. Green indicated Claimant has disabling airflow obstruction and hypoxemia based on the objective studies and he attributed Claimant's total disability to both smoking and coal mine dust exposure.[13] Claimant's Exhibit 5 at 2; Decision and Order at 16, 22. Dr. Green specifically stated Claimant's exposure to coal mine dust "contributes substantially to the diagnosis of [] chronic airflow obstruction with hypoxemia" based on Claimant's eight years and ten months of underground coal mine employment as a roof

[12] Dr. Forehand conducted the DOL's complete pulmonary evaluation on October 18, 2016. He noted Claimant smoked a pack a day for seven to ten years and considered the nine years of coal mine employment documented on Claimant's claim form. Dr. Forehand diagnosed legal pneumoconiosis in the form of a mixed obstructive and restrictive lung disease due to coal mine dust exposure and smoking. Director's Exhibit 13 at 2, 4. The ALJ found Dr. Forehand's opinion entitled to "reduced weight" because he understated Claimant's smoking history and did not explain the role that Claimant's smoking had on his overall lung condition. Decision and Order at 16, 18-19. Employer does not challenge this finding.

[13] Further, the ALJ explained why Dr. Green's consideration of an inflated, thirty pack-year smoking history does not reduce the reliability of his conclusions: "Even with the longer smoking history, Dr. Green explained that coal and rock dust exposure was 'an additional contributing and aggravating factor that contributes substantially to the diagnoses of [] chronic airflow obstruction with hypoxemia.'" Decision and Order at 16 (quoting Claimant's Exhibit 5 at 2). Employer raises no specific challenge to this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

bolter with "heavy coal and rock dust exposure." Claimant's Exhibit 5 at 1; *see* Decision and Order at 8; Hr. Tr. at 15. Thus, we affirm the ALJ's determination that Dr. Green's opinion is reasoned and sufficient to support a finding that Claimant has legal pneumoconiosis.[14] *See* 20 C.F.R. §718.201(b); *Young*, 947 F.3d at 407; *Groves*, 761 F.3d at 598-600.

We next reject Employer's assertion that the ALJ improperly acted as a medical expert in reviewing the Attfield and Hodous study Dr. Rosenberg cited to support his opinion that coal dust exposure played no more than a de minimis role in Claimant's respiratory impairment. Employer's Brief at 22-24. The ALJ acted within his discretion in considering the documentation underlying Dr. Rosenberg's reasoning and permissibly found he did not adequately explain his opinion. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Groves*, 761 F.3d at 601; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-03 (6th Cir. 2012). Moreover, the ALJ's assessment of the Attfield and Hodous study is consistent with DOL's position in the preamble to the 2001 revised regulations and undermines Dr. Rosenberg's rationale. 65 Fed. Reg. 79,920, 79,940-41 (Dec. 20, 2000) (statistical averaging can hide the effect of coal mine dust exposure in individual miners); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Thus, we affirm the ALJ's rejection of Dr. Rosenberg's opinion. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Because the ALJ provided valid reasons for crediting Dr. Green's diagnosis of legal pneumoconiosis over the contrary opinions of Drs. Vuskovich and Rosenberg, we affirm the ALJ's finding that Claimant established he has legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Total Disability

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

[14] We agree with Employer that the ALJ misstated that Dr. Green "examined the Claimant in person." Decision and Order at 8; Employer's Brief at 18. However, the ALJ did not find Dr. Green's opinion well-reasoned and documented for this reason, and Employer does not explain why the error makes a difference to the outcome of this case. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

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 Claimant established total disability based on the arterial blood gas studies and his weighing of the evidence as a whole.[15] Decision and Order at 19-22; *see* 20 C.F.R. §718.204(b)(2)(4).

Blood Gas Studies

The ALJ considered four resting blood gas studies. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 20-21. The October 18, 2016,[16] October 12, 2018, and October 17, 2018 studies produced qualifying results, while the September 14, 2018 study produced non-qualifying values.[17] Director's Exhibit 13; Claimant's Exhibits 2, 3; Employer's Exhibit 2. The ALJ found all four blood gas studies valid and reliable. Decision and Order at 21; Employer's Exhibits 5 at 8, 8 at 8. Because a preponderance of the studies is qualifying, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 21. Employer asserts the ALJ erred in finding the qualifying studies to be valid and reflect total respiratory disability. Employer's Brief at 25-26.

Employer contends the ALJ erred in finding Dr. Forehand's October 18, 2016 qualifying study is valid despite Dr. Vuskovich's opinion that the test was not properly conducted. We disagree. The ALJ considered Dr. Vuskovich's opinion that the study is invalid because it assessed venous, rather than arterial blood, in conjunction with Dr. Gaziano's opinion that the test was technically acceptable.[18] Decision and Order at 21; Director's Exhibit 17; Employer's Exhibit 5 at 8. The ALJ found Dr. Vuskovich's conclusion speculative and insufficient to cast doubt on Dr. Gaziano's validation of the

[15] The ALJ found the pulmonary function studies were in equipoise, and therefore neither support nor refute a finding of total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 20.

[16] Dr. Gaziano validated the October 18, 2016 study as technically acceptable. Director's Exhibit 17.

[17] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[18] Dr. Gaziano's report validating the October 2016 study did not state venous blood was used. Director's Exhibit 17.

study because Dr. Vuskovich drew "an inference from a diagnosis that Dr. Forehand did not make."[19] Decision and Order at 21.

In challenging this finding, Employer asserts only that Dr. Gaziano's opinion is not well-reasoned and documented; Employer does not challenge the ALJ's finding that Dr. Vuskovich's conclusion is speculative. Employer's Brief at 25-26. Contrary to Employer's implication, however, the party challenging the validity of a study has the burden to establish the results are invalid or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361-62 (1984). Further, an ALJ cannot credit a purely speculative opinion. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997) (physician's opinion must be based on more than "mere speculation"); *U. S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389 (4th Cir. 1999) (ALJ may not credit purely speculative opinion); *White v. Apfel*, 167 F.3d 369, 375 (7th Cir. 1999) ("Speculation is, of course, no substitute for evidence, and [an agency] decision based on speculation is not supported by substantial evidence" (citations omitted)). As Employer does not challenge the ALJ's finding that Dr. Vuskovich's opinion is speculative, we affirm his credibility determination. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255. We therefore affirm the ALJ's determination that the October 18, 2016 qualifying study is valid and supports a finding of total disability. *See Vivian*, 7 BLR at 1-361-62.[20]

We also reject Employer's contention the ALJ acted as medical expert in discrediting the opinions of Drs. Vuskovich and Rosenberg that Dr. Green's October 12 and October 17, 2018 blood gas studies should be viewed as non-qualifying given the difference in barometric pressure between Dr. Green's test site in Norton, Virginia, and Dr. Dahhan's facility in Harlan, Kentucky, where Dr. Dahhan obtained non-qualifying values in September 2018. Employer's Brief at 26; Employer's Exhibits 8 at 8, 9 at 2. The ALJ permissibly found Drs. Vuskovich's and Rosenberg's interpretations of the test values unpersuasive because the regulations already account for the effects of elevation in Appendix C to Part 718. *Alley*, 897 F.2d at 1055; *Vivian*, 7 BLR at 1-361-62; Decision and

[19] Dr. Vuskovich explained the October 2016 study's oxygenation values indicated the test used venous, rather than arterial, blood because "[i]f [Claimant]'s *arterial blood* PaO_2 had been 48mmHg, then [he] would have been severely cyanotic," and Dr. Forehand indicated Claimant was not. Employer's Exhibit 5 at 8 (emphasis in original).

[20] As it is Employer's burden to establish the results of the October 18, 2016 study are unreliable, and the ALJ permissibly found Employer's evidence insufficient, any alleged error the ALJ may have made in crediting Dr. Gaziano's validation is harmless. *See Larioni*, 6 BLR at 1-1278.

Order at 21; *see also Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], 93 Fed.Appx. 551, 560 (4th Cir. 2004) (upholding ALJ's discrediting an opinion that contradicts Appendix C). Because Employer does not otherwise challenge the ALJ's finding that these studies are valid and produced qualifying values in accordance with Appendix C, we affirm his determination that the October 12, and October 17, 2018 blood gas studies support a finding of total disability.

Nor is there merit to Employer's argument that the ALJ improperly based his finding of total disability at 20 C.F.R. §718.204(b)(2)(ii) solely on a head count. Employer's Brief at 27. Contrary to Employer's characterization, the ALJ properly performed a qualitative and quantitative analysis of the blood gas studies, taking into consideration that they are all valid, and permissibly concluded that the preponderance of blood gas study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Woodward v. Director, OWCP*, 991 F.2d 314, 319 (6th Cir. 1993); Decision and Order at 21. We therefore affirm his finding.

Medical Opinions

The ALJ considered four medical opinions. He accurately observed Drs. Forehand and Green diagnosed total respiratory disability; Dr. Vuskovich opined Claimant has the respiratory capacity to return to his usual coal mine work; and Dr. Rosenberg opined that Claimant was not totally disabled but also has "potential respiratory disability unrelated to coal mine dust exposure." Director's Exhibit 13; Claimant's Exhibit 5; Employer's Exhibits 5, 6, 8, 9; Decision and Order at 21. The ALJ found Dr. Rosenberg's opinion as to a "potential respiratory disability" equivocal. Decision and Order at 21. He discredited Drs. Vuskovich's and Rosenberg's opinions that Claimant is not totally disabled because they predicated their opinions on Dr. Dahhan's September 2018 non-qualifying blood gas study, which the ALJ found outweighed by the qualifying studies at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 21. Having affirmed the ALJ's finding that the preponderance of blood gas studies is qualifying, we affirm the ALJ's discrediting of Drs. Vuskovich's and Rosenberg's opinions.[21]

[21] Although Employer challenges the ALJ's characterization of Dr. Rosenberg's opinion as equivocal, it does not challenge the ALJ's finding that his opinion is less credible because he relied on non-qualifying blood gas studies. Employer's Brief at 27; *see Shinseki*, 556 U.S. at 413; *Kozele*, 6 BLR at 1-382 n.4.

Disability Causation

To prove he is totally disabled due to pneumoconiosis, Claimant must establish pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause if it has "a material adverse effect on his respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii). The ALJ found Dr. Green's opinion merited determinative weight because he "provided a convincing causal explanation for the relationship between coal dust exposure and cigarette smoking, and the contribution of both to the Claimant's current [disabling] lung disease." Decision and Order at 23.

Employer raises no specific allegations of error regarding the ALJ's causation findings, other than its general contention that Claimant did not establish legal pneumoconiosis or total respiratory disability. Employer's Brief at 28; *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Having rejected this contention, we affirm the ALJ's finding that Claimant established his total disability is caused by legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 23.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge