U.S. Department of Labor

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

BRB No. 21-0479 BLA

WILLIAM H. ROSE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY, LLC	)	
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	DATE ISSUED: 02/27/2023
	)	
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 Noran J. Camp, Administrative Law Judge, United States Department of Labor.

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

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Noran J. Camp's Decision and Order Awarding Benefits (2018-BLA-05013) rendered on a subsequent claim filed on September 14, 2015, pursuant the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ found Heritage Coal Company, LLC (Heritage), is the responsible operator and Peabody Energy Corporation (Peabody Energy) is the responsible carrier. He credited Claimant with nineteen years of underground coal mine employment based on the parties' stipulation and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he concluded Claimant established a change in an applicable condition of entitlement at 20 C.F.R §725.309(c)[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] The ALJ further found Employer did not rebut the presumption and awarded benefits.

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[1] Claimant filed three prior claims but withdrew his third claim. Director's Exhibits 1-3. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306. The district director denied Claimant's second claim on June 23, 2011, for failure to establish total disability, and Claimant did not pursue further action on that claim. Decision and Order at 2-3.

[2] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(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 the district director denied Claimant's second claim for failure to establish total disability, Claimant had to submit evidence establishing this element in order to obtain review of the merits of his current claim. *Id.*

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling

On appeal, Employer argues the ALJ erred in finding Peabody Energy is the liable carrier. It further challenges the validity of a Department of Labor (DOL) pilot program allowing certain miners to obtain a supplemental report from the doctor who performs the DOL-sponsored complete pulmonary evaluation. It also contends the ALJ erred in concluding Claimant established a totally disabling respiratory or pulmonary impairment, thereby invoking the Section 411(c)(4) presumption. Alternatively, Employer asserts the ALJ erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's determination that Employer is liable for benefits.[4]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Responsible Carrier

Employer does not challenge the ALJ's findings that Heritage is the correct responsible operator and it was self-insured through Peabody Energy on the last day Heritage employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 28. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (Trust Fund).

Patriot was initially another Peabody Energy subsidiary. Director's Brief at 2. In 2007, after Claimant ceased his coal mine employment with Heritage, Peabody Energy transferred a number of its other subsidiaries, including Heritage, to Patriot. Director's

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

[4] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant established nineteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 23.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5 n.9.

Exhibits 10 at 5, 38; Director's Brief at 2. That same year, Patriot was spun off as an independent company. Director's Exhibit 38; Director's Brief at 2. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. Director's Exhibit 74; Director's Brief at 2. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Heritage, Patriot later went bankrupt and can no longer provide for those benefits. Director's Brief at 2. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Heritage when Peabody Energy owned and provided self-insurance to that company. Decision and Order at 28 (citing *Gregory v. Heritage Coal Co.,* BRB Nos. 19-0337 BLA and 19-0338 BLA (Sept. 30, 2020) (unpub.)); Director's Brief at 2.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 25-77 (unpaginated). It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) the district director is an inferior officer not properly appointed under the Appointments Clause;[6] (2) the regulatory scheme requiring the district director to determine the liability of a responsible operator and its carrier when, at the same time, the DOL administers the Trust Fund creates a conflict of interest that violates its due process right to a fair hearing; (3) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (4) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot provided to secure its self-insurance status; (5) the DOL released Peabody Energy from liability; (6) Black Lung Benefits Act (BLBA) Bulletin No. 16-01[7] contradicts liability rules under the Act, was issued without notice and comment, and violates the Administrative Procedure Act (APA); (7) the Director is equitably estopped from imposing liability on Peabody Energy; (8) the ALJ's reliance on 20 C.F.R. §§725.495(a)(2)(i) and 725.493(b)(2) is misplaced; (9) 20 C.F.R. §725.456(b)(1) violates the Longshore and Harbor Workers' Compensation Act and the APA; and (10) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and

[6] Employer raised this argument for the first time its post-hearing brief. Decision and Order at 4.

[7] The BLBA Bulletin No. 16-01 is a memorandum the Director of the Division of Coal Mine Workers' Compensation issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

failing to monitor Patriot's financial health.[8] Employer's Brief at 26-77 (unpaginated). It maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released Peabody Energy from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure.

The Board has previously considered and rejected these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at (Oct. 25, 2022), *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022), and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. Thus, we affirm the ALJ's determination that Heritage and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.[9]

Evidentiary Issue - Pilot Program Challenge

ALJs are afforded significant discretion in rendering evidentiary orders. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). Such orders may be overturned only if the party challenging them demonstrates the ALJ's action was an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

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[8] Employer also states it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 64 (unpaginated). Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986).

[9] Employer argues the ALJ erred in excluding the depositions of David Benedict and Steven Breeskin, two former Department of Labor (DOL) Division of Coal Mine Workers' Compensation officials. Employer's Brief at 27-37 (unpaginated). In *Bailey*, the same depositions were admitted and the Board held they do not support Employer's argument that the DOL released Peabody Energy from liability when it authorized Patriot to self-insure and released a letter of credit that Patriot financed under Peabody Energy's self-insurance program. *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n.17 (Oct. 25, 2022). Given that the Board has previously held these depositions do not support Employer's argument, any error in excluding them here is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer contends the ALJ erred in admitting Dr. Chavda's supplemental report obtained as part of DOL's pilot program.[10] However, while this case was pending before the ALJ, Employer raised no objection to the admission or consideration of Dr. Chavda's supplemental report, contained at Director's Exhibit 27. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 937 F.3d 581, 591 (6th Cir. 2021) (issues must be raised before the ALJ to preserve review before the Board); May 17, 2019 Telephonic Conference at 7 (Employer affirming it had no objection to the admission of Director's Exhibits 1-96); Employer's Closing Brief. Nor does Employer allege on appeal that the ALJ's consideration of Dr. Chavda's supplemental report affected his disposition of the case.[11] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 62 (unpaginated). Nonetheless, Employer generally challenges the validity of the pilot program, summarily asserting that the submission of supplemental reports by the DOL examining physician violates both regulatory procedure and evidentiary limitations. Employer's Brief at 62 (unpaginated). We decline to address this issue as it was not raised below and is inadequately briefed. *See* 20 C.F.R. §802.211(b); *Davis*, 937 F.3d at 591; *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986).

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

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. Statutory presumptions may assist a claimant in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP,* 11 BLR 1-26, 1-27 (1987); *Perry v.*

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[10] The DOL established the pilot program to provide for the supplementation of the physician's report of the miner's complete pulmonary evaluation. It applies when the miner had fifteen or more years of coal mine employment, the DOL-sponsored pulmonary evaluation indicated the miner is entitled to benefits, and the employer submitted evidence contrary to a claims examiner's initial proposed finding of entitlement. *See* BLBA Bulletin 14-05 (Feb. 24, 2014); Director's Brief at 34-35. The program became standard procedure in 2019. *See* BLBA Bulletin No. 20-01 (Oct. 24, 2019); Director's Brief at 34-35.

[11] We note moreover, the ALJ did not credit Dr. Chavda's opinion as sufficient, in and of itself, to establish any element of entitlement.

Director, OWCP, 9 BLR 1-1 (1986) (en banc). Employer challenges the ALJ's finding that Claimant is totally disabled and thus is entitled to the Section 411(c)(4) presumption that his total disability is due to pneumoconiosis. Employer's Brief at 10-19 (unpaginated).

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies, qualifying arterial blood gas studies,[12] 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).[13] The ALJ must consider all relevant evidence and weigh the evidence supporting total disability against the 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 contends the ALJ erred in finding Claimant established total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole. We disagree.

Medical Opinions

The ALJ credited the parties' stipulation that Claimant's usual coal mine work required heavy labor[14] and Claimant's testimony as to daily coughing, wheezing, and shortness of breath upon walking fifty feet.[15] Decision and Order at 4, 6-7; Hearing

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[12] 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 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[13] The ALJ found the record contains a non-qualifying pre-bronchodilator pulmonary function study, a non-qualifying resting and exercise blood gas study, and no evidence of cor pulmonale with right-sided congestive heart failure; therefore, Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 8-8, 21.

[14] The ALJ observed the parties stipulated that Claimant's usual coal mine employment was working as a longwall shield operator which "required heavy lifting between 50 to 75 pounds, moving overhead ramps and equipment and estimated walking of four miles per day." Decision and Order at 4.

[15] Employer asserts the record does not establish Claimant's symptoms included wheezing, but Dr. Chavda specifically noted expiratory wheezing during his physical

Transcript at 16-18. He then considered four medical opinions. Decision and Order at 10-22.

Dr. Chavda performed the DOL's complete pulmonary evaluation of Claimant on October 20, 2015; he issued an initial report on that date and a supplemental report on July 5, 2016. Director's Exhibits 18, 27. Based on the results of the pre-bronchodilator pulmonary function study he obtained, Dr. Chavda diagnosed Claimant with a moderate obstructive and restrictive impairment that precludes him from performing his usual coal mine work. Director's Exhibit 18 at 2. Noting Claimant's FEV1 is "very close" to qualifying and his FVC is qualifying, Dr. Chavda concluded the values are "low enough" to preclude Claimant's work as a longwall shield operator. *Id.* at 3.

Dr. Krefft issued a consultative report on April 26, 2019, based on her review of Dr. Chavda's examination report. Claimant's Exhibit 5. She agreed Claimant's October 16, 2015 pulmonary function study shows a moderate obstructive and restrictive impairment. *Id.* at 4-5. In addition, she noted Dr. Chavda reported wheezing during Claimant's physical examination. *Id.* at 6. Based on these findings, Dr. Krefft stated she would expect Claimant to experience "significant breathlessness and functional limitations" when lifting items weighing more than twenty pounds and opined that he is totally disabled. *Id.* She explained Claimant would be unable to achieve the 8-10 metabolic equivalents (METS) needed to perform the heavy lifting required of his usual work, as walking requires only three METS and he reported shortness of breath after ambulating only fifty feet. *Id.* at 6-7.

Dr. Broudy prepared a consultative report on May 11, 2016, and was deposed on January 9, 2019. Director's Exhibit 28; Employer's Exhibit 7. He interpreted Dr. Chavda's pulmonary function test as demonstrating moderate restriction only and opined it does not preclude Claimant from performing his usual work. Director's Exhibit 28 at 4-5; Employer's Exhibit 7 at 12-14.

Dr. Rosenberg also prepared a consultative report on March 26, 2018, and was deposed on April 10, 2019. Employer's Exhibits 5, 6. He stated Dr. Chavda's pulmonary function study shows a "significant reduction in FEV1" and "a degree" of restriction. Employer's Exhibit 5 at 2; Employer's Exhibit 6 at 20, 36. He opined that Claimant is not disabled from a pulmonary perspective and could perform the exertional requirements of his job – including walking up to four miles and lifting seventy pounds – because "[his]

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examination of Claimant and Dr. Broudy indicated Claimant's wheezing could be indicative of asthma. Moreover, Employer identifies no error in the ALJ's crediting of Claimant's testimony as to any of his respiratory symptoms. *See Skrack*, 6 BLR at 1-711; Employer's Brief at 16 (unpaginated).

FEV1 is 67% predicted, well above qualifying values" and his gas exchange is preserved. Employer's Exhibits 5 at 3, 6 at 20, 43.

The ALJ found Dr. Chavda's opinion too "simplistic" to independently satisfy Claimant's burden to establish total disability but was otherwise supportive of Dr. Krefft's opinion. Decision and Order at 22. He specifically found Dr. Krefft's opinion reasoned and documented because she gave full consideration to Claimant's objective test results and respiratory symptoms, and her "analysis of Claimant's ventilatory capacities in terms of metabolic equivalents in relation to the specific exertional demands of the long wall operator job [is] more thorough, better reasoned and reflect[s] a higher level of scientific sophistication than any of the other opinions." *Id*.

By contrast, the ALJ found Dr. Broudy's opinion inadequately explained as to how he concluded Claimant could return to his previous coal mine work and "somewhat equivocal" as to whether Claimant could perform certain duties required of that job. Decision and Order at 22. The ALJ found Dr. Rosenberg's opinion unpersuasive because he "never adequately reconciled his opinion [that the FEV1 is the best measure of a patient's ability to do work] with his acknowledgement that Claimant has a 'pretty significant reduction' in his FEV1." *Id.* Thus, relying on Dr. Kreft's opinion, as supported by Dr. Chavda's opinion, the ALJ concluded Claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Initially, we reject Employer's assertion that Dr. Krefft's opinion is legally insufficient to establish total disability because she also recommended that Claimant have no further dust exposure. Employer's Brief at 12. Although an opinion that merely advises against further dust exposure does not support a finding of total disability, Dr. Krefft specifically based her diagnosis of total disability on the degree of impairment shown on Claimant's pulmonary function studies, his respiratory symptoms, and his inability to perform the specific exertional requirements of his job. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); Claimant's Exhibit 5 at 6-7. Because the ALJ acted within his discretion in finding Dr. Krefft's opinion reasoned and documented, we affirm his determination. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 478 (6th Cir. 2011); *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983); Decision and Order at 20.

We further see no error in the ALJ's determination to discount the opinions of Drs. Broudy and Rosenberg. Although Employer asserts Dr. Broudy's opinion is not equivocal, Employer fails to explain how the ALJ erred in finding Dr. Broudy's opinion less persuasive than Dr. Krefft's, because Dr. Krefft provided the most thorough, scientifically-sophisticated opinion whereas Dr. Broudy "did not provide any specific explanation for his opinion that Claimant could return to work as a long wall operator despite his respiratory

impairment." *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 22; Employer's Brief at 16-18 (unpaginated).

Similarly, Employer generally asserts Dr. Rosenberg's opinion is well-reasoned but identifies no specific error in the ALJ's finding that he failed to adequately explain the effects of Claimant's significantly reduced FEV1 on pulmonary function testing with his ability to perform heavy manual labor in his usual coal mine work. *See* 20 C.F.R. §802.211(b); *Cox*, 791 F.2d at 446-47; Decision and Order at 22; Employer's Brief at 18-19 (unpaginated). We thus affirm the ALJ's determination to discount the opinions of Drs. Broudy and Rosenberg. *See Morrison*, 644 F.3d at 478; *Rowe*, 710 F.2d at 254-55; Decision and Order at 22.

Employer's arguments on appeal are a request to reweigh the evidence, which we are not empowered to do. *Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 352-353 (6th 2007); *Anderson*, 12 BLR at 1-113. Having permissibly credited Dr. Krefft's total disability diagnosis and discounted the contrary opinions of Drs. Broudy and Rosenberg, we affirm the ALJ's findings that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and in consideration of the evidence as a whole.[16] Decision and Order at 22. Consequently, we affirm the ALJ's findings that Claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c) and invoked the Section 411(c)(4) presumption. *Id.* at 22-23.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[17] or that "no

[16] Employer contends the ALJ erred in giving any weight to Dr. Chavda's opinion because it is not reasoned. We consider any error by the ALJ regarding Dr. Chavda's opinion to be harmless, as substantial evidence supports his total disability finding based on Dr. Krefft's reasoned and documented opinion that Claimant is totally disabled. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 16 (unpaginated).

[17] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the

part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer rebutted the presumption of clinical pneumoconiosis but failed to rebut the presumption of legal pneumoconiosis and disability causation. Decision and Order at 24-27.

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 v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, requires Employer to establish Claimant'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 on the opinions of Drs. Broudy and Rosenberg to disprove legal pneumoconiosis. Director's Exhibit 28; Employer's Exhibits 5-7. The ALJ found their opinions not well-reasoned and thus insufficient to satisfy Employer's burden of proof. Decision and Order at 25-26. Employer argues the ALJ did not give permissible reasons for discrediting Dr. Rosenberg's opinion.[18] We disagree.

Dr. Rosenberg opined Claimant does not suffer from legal pneumoconiosis, but has an "extrinsic" restriction unrelated to parenchymal lung disease. Employer's Exhibit 6 at 24. He explained coal dust does not cause "pure restriction absent advanced parenchymal changes related to a pneumoconiosis, with associated worsening gas exchange in association with exercise." *Id*. Because Claimant's blood gas study was non-qualifying and did not show an impairment of gas exchange with exercise, he eliminated coal mine dust exposure as a causative factor of Claimant's restrictive respiratory impairment and attributed it solely to obesity. Employer's Exhibits 5 at 3, 6 at 24. Although he

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).

[18] We affirm, as unchallenged, the ALJ's finding that Dr. Broudy's opinion is insufficient to disprove legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 26.

acknowledged Claimant is "not majorly obese," Dr. Rosenberg nonetheless stated his impairment "has something to do with his obesity combined with his body habitus, just the structure of his body, which is normal to him, but causing the reduced lung volume." *Id.* at 24-25.

Contrary to Employer's contention, the ALJ permissibly found Dr. Rosenberg's opinion unpersuasive, in part, because he did not adequately explain his reliance on an overly narrow definition of legal pneumoconiosis. As the ALJ stated, Dr. Rosenberg based his opinion on the belief that "a miner with a restrictive lung impairment can only be diagnosed with legal pneumoconiosis when there is an abnormal arterial blood gas study showing a 'marked' reduction in pO2;" however, "[t]he regulations defining legal pneumoconiosis contain no such requirement." *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *Morrison*, 644 F.3d at 478; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 26; Employer's Exhibit 6 at 24. He further permissibly found Dr. Rosenberg's explanation that Claimant's restriction is purely extrinsic from the lungs inadequately explained because the physician stated obesity was only "one factor" for Claimant's restriction but "failed to discuss or identify what other extrinsic factors are responsible." *See Barrett*, 478 F.3d at 356; Decision and Order at 26.

Employer's arguments on legal pneumoconiosis amount to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113. Therefore, we affirm the ALJ's conclusion that Employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 26.

Disability Causation

The ALJ next addressed whether Employer established no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. *See* 20 C.F.R. §718.305(d)(1)(ii); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1069-70 (6th Cir. 2013); Decision and Order at 27. The ALJ permissibly found Dr. Broudy's opinion does not support Employer's burden at causation as he did not exclude pneumoconiosis as cause of Claimant's disability. *See Ogle*, 737 F.3d at 1069-70; Decision and Order at 27; Employer's Exhibit 7 at 16. He further permissibly discredited Dr. Rosenberg's causation opinion because he did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the disease.[19] *See Ogle*, 737 F.3d at 1074; Decision and Order at 27. We therefore affirm the ALJ's conclusion that

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[19] Dr. Rosenberg did not address whether legal pneumoconiosis caused Claimant's total respiratory disability independent of his conclusions that Claimant does not have the disease. Employer's Exhibits 5, 6.

Employer failed to establish no part of Claimant's respiratory disability was caused by legal pneumoconiosis.[20] 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 27.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[20] We reject Employer's conclusory assertion that it was denied a meaningful opportunity to defend against the claim because Dr. Chavda did not conduct a post-bronchodilator pulmonary function study as part of the DOL's complete pulmonary evaluation of Claimant. *See Samons v. Nat'l Mines Corp.*, 25 F.4th 455, 466-67 (6th Cir. 2022); Employer's Brief at 25-26 (unpaginated). Moreover, as Claimant correctly notes, the applicable regulations do not specifically require physicians to administer a bronchodilator as part of a pulmonary function test. Claimant's Brief at 20 (citing 20 C.F.R. §718.103(b)(8) (setting forth requirements "*if* a bronchodilator is administered") (emphasis added)).