U.S. Department of Labor

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

BRB No. 23-0278 BLA

DAVID L. HAIRE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 06/28/2024
	)	
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 Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Ryan Bennett Driskill, Greenville, Kentucky, for Claimant.

Kevin Shanahan (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer L. Jones, Deputy Associate Solicitor; Andrea J.

Appel, Counsel for Administrative Appeals) for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Timothy J. McGrath's Decision and Order Awarding Benefits (2020-BLA-05756) rendered on a subsequent claim[1] filed June 28, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had at least twenty-two years of underground coal mine employment, 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 therefore 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 therefore awarded benefits.

[1] Claimant filed two prior claims for benefits. Director's Exhibits 65, 66. He filed his first claim in 1993. Director's Exhibit 65 at 9-10. He filed his previous claim on March 6, 2002. The Board affirmed ALJ Robert L. Hillyard's denial of Claimant's prior claim because Claimant failed to establish the existence of clinical pneumoconiosis or a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. Director's Exhibit 66 at 48, 54, 83, 99, 103; *Haire v. Island Creek Coal Co.*, BRB Nos. 05-0748 BLA and 05-0748 BLA-A (June 22, 2006) (unpub.).

[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); *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 they find 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); *see 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.

On appeal, Employer argues the delay by the Office of Workers' Compensation Programs (OWCP) in producing the records from Claimant's prior claims, and the district director's failure to consider those records, violated its due process rights. It therefore maintains liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund (the Trust Fund). On the merits, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Alternatively, it argues 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, filed a brief urging the Benefits Review Board to reject Employer's due process argument. Employer replied to the Director's response brief, reiterating its contentions.

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 (1965).

Due Process and Procedural Challenges

Employer argues that its due process rights have been violated both because the district director did not consider the records from Claimant's two prior claims when proposing an award of benefits in this subsequent claim, and due to the OWCP's delay in producing the records from Claimant's prior claims. Employer's Brief at 4-7; Employer's Reply Brief at 1-5. Therefore, it asserts any liability for benefits must transfer to the Trust Fund. *Id*. Employer further argues the ALJ's finding that there was no prejudice caused by the delayed production of the records did not satisfy the explanatory requirements of the Administrative Procedure Act (APA). *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165

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§725.309(c)(3). Because Claimant failed to establish the existence of clinical pneumoconiosis or total disability due to pneumoconiosis in his prior claim, he had to submit new evidence establishing these elements to obtain review of the merits of his current claim. *Id*.; *see White*, 23 BLR at 1-3.

[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 Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 17.

(1989);[5] Employer's Brief at 6-7; Employer's Reply Brief at 5. The Director argues Employer's due process rights were not violated and the ALJ's finding was sufficiently explained. Director's Response at 1-3. We agree with the Director's arguments.

In the absence of deliberate misconduct, "the mere failure to preserve evidence—evidence that may be helpful to one or the other party in some hypothetical future [Black Lung Act] proceeding—does not violate [a party's right to due process]." *Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (rejecting coal mine operator's argument that due process is violated whenever the Department of Labor loses or destroys evidence from a miner's prior claim). Instead, Employer must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consol Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999). Employer has not made such a demonstration in this case.

Claimant filed the instant claim for benefits on June 28, 2019. Director's Exhibit 3. The district director issued a Proposed Decision and Order awarding benefits on April 29, 2020. Director's Exhibit 58. Employer timely appealed on May 12, 2020. Director's Exhibit 59. Prior to the case's assignment to an ALJ, the claims examiner preparing the case for referral to the Office of Administrative Law Judges wrote a memorandum stating that the records from Claimant's prior claims had been moved to a Federal Records Center (FRC). Director's Exhibit 1. The memo further stated that the claims examiner had requested the files be returned from the FRC but "received correspondence from FRC stating that the files in question were no longer at their facility and have been destroyed." *Id*. The case was then assigned to the ALJ on July 7, 2020. Director's Exhibit 59.

Employer filed a Motion to Compel with the ALJ on August 31, 2020, seeking to compel the district director to produce x-rays dated March 23, 2002, and August 31, 1993, developed in connection with Claimant's prior claims. August 31, 2020 Motion to Compel Office of Workers' Compensation Programs to Produce X-Rays. Specifically, Employer indicated it had requested the x-rays from OWCP on August 26, 2020, and OWCP responded on the same day, stating the x-rays were at an FRC which had been temporarily closed due to the COVID-19 pandemic and OWCP would comply with Employer's request upon its re-opening. *Id.*; *see also* December 1, 2021 Hearing Transcript at 8-9.

[5] The Administrative Procedure Act provides 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).

The OWCP Director ultimately submitted the records from Claimant's prior claims as Director's Exhibits 65 and 66 on May 17, 2022. Director's Submission of Director's Exhibits 65 & 66. The final hearing for the instant claim took place on June 22, 2022, *see* Hearing Transcript, and the ALJ issued his Decision and Order on September 29, 2022. Decision and Order at 1.

Initially, we reject Employer's contention that it was prejudiced by the delay in production of the records from Claimant's prior claims, or by the claims examiner's initial statement that the records had been destroyed. Employer's Brief at 5-7; Employer's Reply Brief at 1-3. Although there was substantial delay, and the claims examiner apparently misstated or was misinformed that the files had been destroyed, Employer ultimately was able to challenge this claim based on consideration of the full record. Moreover, Employer was the designated Responsible Operator, and represented by the same counsel, in each of Claimant's claims. *See* Director's Exhibits 65 at 21-24; 66 at 107-111, 285, 331. Employer has not alleged it was not provided with those records while the earlier claims were pending, nor has it explained why it subsequently lost access to those files. Furthermore, the delay notwithstanding, the district director submitted the records Employer requested more than one month prior to the hearing for the instant claim, and four months prior to the ALJ's issuance of his Decision and Order. Employer did not request additional time to consider or conduct further discovery or prepare for the hearing in response to the production of the records.

Thus we reject Employer's argument as it has not demonstrated that the delayed production deprived it of a fair opportunity to mount a meaningful defense against the claim. *See Holdman*, 202 F.3d at 883-84.

Employer further asserts it was prejudiced because the Proposed Decision and Order the district director issued in this case "failed to include consideration as to whether there has been a necessary change in condition, a prerequisite for the consideration of a subsequent claim." Employer's Brief at 4; Employer's Reply Brief at 4-5. Contrary to Employer's contention, however, the district director explicitly recognized that the instant claim is a subsequent claim because it was filed more than one year after the denial of Claimant's prior claim. Director's Exhibit 58 at 11. The district director further found that Claimant successfully invoked the Section 411(c)(4) presumption that his total disability was caused by pneumoconiosis,[6] and thus found the claim "approved pursuant to 20 C.F.R.

[6] As noted above, the Board affirmed ALJ Hillyard's denial of Claimant's prior claim for failure to establish the presence of clinical pneumoconiosis or that his totally disabling respiratory or pulmonary impairment was due to pneumoconiosis. Director's Exhibit 66 at 48, 54, 83, 99, 103; *Haire*, BRB Nos. 05-0748 BLA and 05-0748 BLA-A.

[§]725.309(c)[,]" as Claimant established a change in an applicable condition of entitlement.[7] *Id.* Furthermore, Employer has not identified—and does not allege—any specific prejudice it suffered. Even if the district director erred as Employer contends, any harm was remedied as the ALJ conducted a *de novo* evaluation of the full evidentiary record. 20 C.F.R. §725.455(a).

Therefore, Employer has failed to demonstrate any prejudice it suffered resulting from the delayed production of Claimant's prior claims records in this case. We thus reject its argument that its due process rights were violated.

We also reject Employer's assertion that the ALJ failed to sufficiently explain his finding there was no prejudice caused by the delayed production of Claimant's prior claims records. Employer's Brief at 6; Employer's Reply Brief at 5. The ALJ acknowledged Employer's argument but found it failed to show it suffered any prejudice, as Employer was ultimately provided with the records and given adequate opportunity to evaluate and address the records which were made part of the evidentiary record before the ALJ and were considered by him. Decision and Order at 4. Thus, contrary to Employer's argument, the ALJ adequately explained his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165; Decision and Order at 4.

We therefore find Employer's due process and procedural arguments unpersuasive, and accordingly reject its assertion that liability for benefits should transfer to the Trust Fund.

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A miner may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary

[7] Employer also argues the ALJ erred in considering total disability and the Section 411(c)(4) presumption rather than the existence of pneumoconiosis and/or disability causation, elements Claimant failed to prove in his prior claim. *See* Employer's Brief at 7 n.1. Nevertheless, as noted above, the ALJ's findings that Claimant established total disability and invoked the Section 411(c)(4) presumption, 20 C.F.R. §718.305, presumptively establishes the existence of pneumoconiosis and total disability due to pneumoconiosis and, thus, also establish Claimant has shown a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a)(3), 718.305(c)(1).

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 upon the pulmonary function study and medical opinion evidence, and in consideration of the evidence as a whole. Decision and Order at 5-13. Employer argues the ALJ erred in finding Claimant established total disability. Employer's Brief at 4-7. We disagree.

Pulmonary Function Studies

The ALJ considered five pulmonary function studies, conducted in connection with the present claim, dated September 8, 2016, December 27, 2016, July 24, 2019, November 27, 2019, and July 9, 2020. Decision and Order at 6-7. He accurately noted the September 8, 2016 and July 9, 2020 studies produced qualifying[8] values pre- and post-bronchodilator, the December 27, 2016 and July 24, 2019 studies produced qualifying values pre-bronchodilator, and the November 27, 2019 study produced non-qualifying values pre- and post-bronchodilator. *Id.*; *see* Director's Exhibits 15, 26, 27, 29; Employer's Exhibit 2.

In addition, the ALJ considered three pulmonary function studies dated March 23, 2002, February 4, 2003, and November 11, 2003, from Claimant's most recent prior claim. Decision and Order at 7; Director's Exhibit 66 at 238-39, 360, 386. He noted the March 23, 2002 study produced qualifying pre-bronchodilator values, the February 4, 2003 study produced qualifying results both pre- and post-bronchodilator, while the November 11, 2003 study produced qualifying results pre-bronchodilator and non-qualifying results post-bronchodilator. Decision and Order at 7. Finally, the ALJ also considered one pulmonary function study, dated August 31, 1993, from Claimant's 1993 claim that produced non-qualifying values. Director's Exhibit 65 at 39-40.

The ALJ assigned greater weight to the pulmonary function study evidence submitted in connection with the present claim as he found it most representative of Claimant's current condition; ultimately, he found the weight of those studies supports a finding of total disability as "Claimant has produced qualifying [pulmonary function study] results since the [prior claim's] denial with the exception of one test." Decision and Order at 7-8.

[8] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i).

Employer initially argues the ALJ erred in finding the July 24, 2019 pulmonary function study produced qualifying results. Employer's Brief at 8. It asserts that while the FEV1 results are qualifying, neither the FVC nor FEV1/FVC ratio values are qualifying and the MVV result, which is qualifying, is invalid due to inadequate effort.[9] *Id*. We disagree.

Pulmonary function studies are presumed to be in substantial compliance with the quality standards in the absence of evidence to the contrary. 20 C.F.R. §718.103(c). The party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984); *see* 20 C.F.R. §§718.101(b), 718.103(c). In support of its contention that the July 24, 2019 MVV is invalid, Employer cites Dr. Jarboe's testimony that the MVV portion of the *subsequent* July 9, 2020 study is invalid due to inadequate rate and tidal volume. Employer's Brief at 8, *citing* Employer's Exhibit 5 at 28-29. As Dr. Jarboe did not provide an opinion regarding the validity of the MVV portion of July 24, 2019 study which Employer is challenging, and because Employer has not otherwise identified any evidence to support its assertion, we reject its argument. *See Vivian*, 7 BLR at 1-361; *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985) (physician's opinion regarding reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Employer further argues the ALJ erred by failing to consider whether Dr. Jarboe's opinion indicates that the July 9, 2020 study does not support a finding of total disability when accounting for Claimant's age. Employer's Brief at 9. Again, we disagree.

As the ALJ properly noted, studies conducted on a miner more than seventy-one years old must be treated as qualifying if the values would be qualifying for a seventy-one-year-old, unless the party opposing entitlement submits medical evidence to establish that the qualifying values for a seventy-one-year-old miner are not indicative of disability in an older miner. *K. J. M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008); Decision and Order at 6 n.5. In support of its contention, Employer cites Dr. Jarboe's deposition testimony wherein he opined there is a negative correlation between age and pulmonary function, and that rather than relying on the values for seventy-one-year-old miners,

[9] A pulmonary function study constitutes evidence of total disability if it produces both a qualifying FEV1 value and one of the following: a qualifying FVC or MVV value, or an FEV1/FVC ratio equal to or less than fifty-five percent. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C).

qualifying values should ideally be calculated for older ages. Employer's Brief at 9; Exhibit 5 at 30-31.

However, Dr. Jarboe did not calculate such values nor did he actually opine the July 9, 2020 study would have produced non-qualifying results or weighed against total disability if adjusted for Claimant's age. *See* Employer's Exhibit 5 at 30-31. Although he stated the study showed "no significant airflow obstruction as the FEV1/FVC ratio is within normal limits for a 74-year-old-man[,]" he concluded the July 9, 2020 study produced valid and qualifying results based on the FEV1 and FVC results. Employer's Exhibits 2 at 9, 13; 5 at 29-30, 46-47. Thus we reject Employer's argument that the ALJ erred in considering the study qualifying and supportive of a finding of total disability.

Consequently, because it is supported by substantial evidence, we affirm the ALJ's determination that the pulmonary function study evidence supports a finding of total disability. 20 C.F.R §718.204(b)(2)(i); Decision and Order at 7-8.

Medical Opinions

The ALJ considered the opinions of Drs. Baker, Majmudar, and Sood that Claimant is totally disabled, and the contrary opinions of Drs. Selby and Jarboe. Decision and Order at 9-13. He assigned more weight to the opinions of Drs. Selby, Jarboe, and Sood as they based their opinions on a comprehensive review of Claimant's medical records, including the most recent objective testing; conversely, he assigned little weight to the opinions of Drs. Baker and Majmudar as they did not consider more recent testing. Decision and Order at 13 & n.7. He ultimately found Dr. Sood's opinion better-reasoned than those of Drs. Jarboe and Selby, and thus found the medical opinion evidence supports a finding of total disability. *Id*.

Employer argues the ALJ erred in weighing the opinions of Drs. Selby, Jarboe, and Sood. Employer's Brief at 11-13. We disagree.

Drs. Selby and Jarboe

Dr. Selby opined Claimant has a mild respiratory impairment which shows signs of improving over time based on the pulmonary function studies, and concluded Claimant is not totally disabled. Director's Exhibit 27 at 4-5, 18-19. Dr. Selby testified Claimant's pulmonary function studies "almost always [demonstrated] an improvement in spirometry over time[,]" stating the November 27, 2019 study produced non-qualifying results, and further opined Claimant is not totally disabled as he believed Claimant would "have completely normal pulmonary function testing under the right treatment" for his asthma. Employer's Exhibit 4 at 20, 27-28.

Dr. Jarboe opined Claimant "exhibits changing function over relatively short periods of time" based on the differing results of the November 27, 2019 and July 9, 2020 pulmonary function studies. Employer's Exhibits 2 at 11, 6 at 3. He concluded Claimant's pulmonary function would "remain above the disability standards" with aggressive asthma treatment, and thus opined Claimant is not totally disabled. *Id*. Subsequently, he reiterated his opinion at his deposition, stating he would not consider Claimant disabled because, while the July 9, 2020 study indicated disability, the November 27, 2019 study did not. Employer's Exhibit 5 at 30-31.

The ALJ found both physicians based their opinions that Claimant suffers only transient, fluctuating impairment upon only two of the five pulmonary function studies they considered. Decision and Order at 13. He thus permissibly found their opinions inadequately reasoned as they failed to explain why the five pulmonary function studies conducted in connection with this claim—of which four, including the most recent study, were qualifying—did not indicate consistent total disability, but instead showed a transient impairment with a trend toward improvement. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

Further, the ALJ found their reliance on the single non-qualifying study unpersuasive as it is possible Claimant was able to "'exert more effort' in one [pulmonary function study] than his 'typical condition would permit.'" Decision and Order at 7, 13, *quoting Greer v. Director, OWCP*, 940 F.2d 88, 91 (4th Cir. 1991) (rejecting theory that higher pulmonary function study results are more reliable than lower ones because, given the chronic nature of pneumoconiosis, "it *is* possible to do better, and indeed to exert more effort than one's typical condition would permit.") (emphasis in original).

Dr. Sood

Dr. Sood opined Claimant's pulmonary function studies "largely demonstrate[] obstruction, from 2002 onwards . . . of moderately severe to severe impairment." Claimant's Exhibit 2 at 5. He concluded Claimant is totally disabled by chronic obstructive pulmonary disorder (COPD)/legal pneumoconiosis based in part on "multiple spirometry tests demonstrating airflow obstruction[,]" and "diffusing capacity measurement showing reduced values[.]" *Id*. at 12, 14.

The ALJ permissibly credited Dr. Sood's opinion over Drs. Selby's and Jarboe's as he found Dr. Sood's better-supported by the entirety of the pulmonary function study evidence of record. *See Napier*, 301 F.3d at 712-14; *Crisp*, 866 F.2d at 185; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985) (ALJ may properly credit medical opinions that are consistent with the objective evidence); Decision and Order at 13.

Employer also alleges the ALJ erred in finding Dr. Sood had an opportunity to consider "the full array of Claimant's medical records" when Dr. Sood did not consider the July 9, 2020 pulmonary function study. Employer's Brief at 10-11. We disagree.

First, a medical opinion need not be discounted simply because the physician did not review additional medical evidence of record. *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986) (ALJ properly considered whether the objective data offered as documentation adequately supported the opinion). Moreover, notwithstanding any alleged error in finding Dr. Sood considered the "full array" of medical records, he also found Dr. Sood's opinion that the pulmonary function studies demonstrate moderate to severe obstruction and concomitant restriction, and indicate Claimant is totally disabled, was more consistent with the overall pulmonary function study evidence of record. Decision and Order at 13. Consistent with Dr. Sood's opinion, the July 9, 2020 study demonstrated restrictive and obstructive defects, and produced qualifying values both pre- and post-bronchodilator. *See* Employer's Exhibits 2 at 11; 4 at 23-24; 5 at 26-27. Employer has not explained how Dr. Sood's not reviewing that study would make a difference, particularly as it produced qualifying results. *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). Thus, we reject Employer's argument.

Thus, because it is supported by substantial evidence, we affirm the ALJ's finding the medical opinion evidence supports finding total disability.[10] 20 C.F.R. §718.204(b)(2)(iv); *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 13. We further affirm his finding that Claimant established total disability based on the pulmonary function study, medical opinion evidence, 20 C.F.R. §718.204(b)(2), and the evidence as a whole, and thereby invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); Decision and Order at 13. Consequently, we also affirm his finding Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

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

[10] Because the ALJ provided valid reasons for crediting the opinion of Dr. Sood and discrediting those of Drs. Selby and Jarboe, we reject Employer's argument that the ALJ erred in failing to address the portions of their opinions relating to Claimant's diffusion capacity. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1984); Employer's Brief at 9-10.

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[11] or that "no part of [his] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(c)(2)(i), (ii). The ALJ found Employer did not establish rebuttal by either method. Decision and Order at 19.

Legal Pneumoconiosis

Employer argues the ALJ erred in finding it failed to rebut the presumption of legal pneumoconiosis. Employer's Brief at 11-14. We disagree. To disprove legal pneumoconiosis, Employer must establish Claimant did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

The ALJ weighed the opinions of Drs. Jarboe and Selby that Claimant does not have a lung disease or impairment significantly related to, or substantially aggravated by, coal mine dust exposure. Decision and Order at 15-19. Substantial evidence supports the ALJ's finding their opinions unpersuasive.

Dr. Selby opined Claimant has obstructive lung disease caused by tobacco smoke exposure and asthma, but unrelated to coal dust exposure, as he opined Claimant's impairment showed reversibility and arose long after Claimant left coal mine employment. Director's Exhibit 27 at 4, 18; Employer's Exhibit 4 at 27-28. Employer generally contends the ALJ's discrediting of Dr. Selby's opinion is inadequately explained. Employer's Brief at 11-12. We disagree.

The ALJ permissibly assigned Dr. Selby's opinion little weight, finding it conclusory and lacking adequate explanation because Dr. Selby did not explain why Claimant's exposure to coal mine dust did not aggravate Claimant's obstructive lung

[11] "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 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).

disease, nor did he explain how he determined coal mine dust exposure did not affect Claimant's asthma and obstructive lung disease. Decision and Order at 18.

Dr. Jarboe opined Claimant has a primarily restrictive pulmonary impairment caused by tobacco smoke exposure and asthma based on the variability in Claimant's pulmonary function study results and reversibility with bronchodilators. Employer's Exhibit 2 at 9-10; 5 at 33-39; 6 at 3. He opined that, after accounting for contributions from tobacco smoke and asthma, any contribution from coal mine dust exposure to Claimant's impairment would be *de minimis*. *Id*. Employer generally contends the ALJ's discrediting of Dr. Jarboe's opinion is also inadequately explained. Employer's Brief at 12-13. We again disagree.

The ALJ permissibly found Dr. Jarboe's opinion unpersuasive, noting the physician did not adequately explain why variability in Claimant's pulmonary function studies is necessarily inconsistent with impairment due to coal mine dust exposure. *See Napier*, 301 F.3d at 712-14; *Crisp*, 866 F.2d at 185; Decision and Order at 18-19. The ALJ stated the variable results, in and of themselves, do not disprove legal pneumoconiosis, as "courts have recognized that [pulmonary function study] results can be varied in patients with pneumoconiosis." *Id.*; *see also* Decision and Order at 7, 13, *citing Greer*, 940 F.2d at 91. Further, the ALJ found Dr. Jarboe did not adequately explain why coal dust exposure is only a "*de minimis*" cause of Claimant's acknowledged impairment, even if asthma and tobacco smoke exposure were more likely or more impactful contributors. *See Napier*, 301 F.3d at 712-14; *Crisp*, 866 F.2d at 185; Decision and Order at 19. It is for the ALJ to weigh the evidence, draw inferences, and determine credibility. *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

Because the ALJ permissibly discredited the only opinions supportive of Employer's burden on rebuttal, we affirm his finding Employer did not disprove legal pneumoconiosis. Decision and Order at 19. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant did not have pneumoconiosis;

thus we need not consider Employer's arguments that the ALJ erred in finding it failed to disprove clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Employer's Brief at 13-14. Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 19.

We further affirm, as unchallenged on appeal, the ALJ's finding Employer did not rebut the presumption by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(ii); *See Skrack*, 6 BLR at 1-711; Decision and Order at 19-20.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge