U.S. Department of Labor

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

BRB No. 21-0169 BLA

FLOYD D. WHITT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA "B" MINING COMPANY	)	
	)	DATE ISSUED: 5/16/2022
Employer-Petitioner	)	
	)	
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 Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Kendra R. Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits (2018-BLA-05071) rendered on a subsequent claim filed on November 22, 2011,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C.

[1] Claimant filed two prior claims. ALJ Christine M. Moore denied his most recent claim on June 28, 1995, because he failed to establish any element of entitlement. Director's Exhibit 2.

§§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.

On February 23, 2015, ALJ Linda S. Chapman issued a Decision and Order Denying Benefits because she found Claimant failed to establish any element of entitlement and thus did not establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309; Director's Exhibit 24. Pursuant to Claimant's appeal, the Board vacated ALJ Chapman's Decision and Order and remanded the case to the district director to provide Claimant with a Department of Labor (DOL)-sponsored complete pulmonary evaluation. 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *Whitt v. Sea "B" Mining Co.*, BRB No. 15-0209 BLA (Feb. 23, 2016). Thereafter the district director transferred the case back to the Office of Administrative Law Judges, which assigned it to ALJ Annos (the ALJ).

In his Decision and Order Awarding Benefits that is the subject of the current appeal, the ALJ found Claimant established 25.76 years of coal mine employment, with at least fifteen years in underground coal mines. He also found Claimant has 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. He further found Employer did not rebut the presumption and awarded benefits.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant failed to establish any element of entitlement in his prior claim, he had to submit new evidence establishing at least one element of entitlement to obtain review of his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption.[4] It also contends he erred in finding it did not rebut the presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief.

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 (1965).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ found Claimant established total disability based on the pulmonary function studies, arterial blood gas studies, medical opinions, and the record as a whole.[6] 20 C.F.R. §718.204(b)(2)(i), (ii), (iv); Decision and Order at 17-25. Employer

[4] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established 25.76 years of coal mine employment, with at least fifteen years in underground coal mines. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 17; Hearing Tr. at 6, 14.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Tr. at 13-14.

[6] The ALJ found there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 24.

argues the ALJ erred in weighing the pulmonary function study, blood gas study, and medical opinion evidence. Employer's Brief at 3-13. We disagree.

Pulmonary Function Studies

The ALJ weighed nine newly submitted pulmonary function studies dated November 7, 2011, January 9, 2012, February 1, 2012, June 13, 2012, January 9, 2013, March 14, 2013, January 13, 2014, August 29, 2016, and January 31, 2019. Decision and Order at 18-22; Director's Exhibits 14-16, 41, 45, 78; Claimant's Exhibit 3. He found the February 1, 2012, June 13, 2012, March 14, 2013, and January 31, 2019 studies invalid. Decision and Order at 18-22. He found the November 7, 2011, January 9, 2012, January 9, 2013, and January 13, 2014 studies valid and produced qualifying[7] values for total disability. *Id*. at 18-20, 22. He also found the August 29, 2016 study valid, but produced non-qualifying results. *Id.* at 21. Because a majority of the valid pulmonary function studies produced qualifying values, the ALJ found the pulmonary function study evidence establishes total disability.[8] *Id*. at 21-22.

Employer argues the ALJ erred in finding the November 7, 2011, January 9, 2012, January 9, 2013, and January 13, 2014 qualifying studies are valid.[9] Employer's Brief at 8-12. We disagree.

[7] A "qualifying" pulmonary function study or blood gas study yields values equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields values in excess of those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The ALJ also considered several pulmonary function studies Claimant performed from 1972 to 1999 contained in the records from his prior claims. Decision and Order at 10, 21; Director's Exhibits 1, 2. He permissibly assigned greater weight to the pulmonary function studies from the current claim because they are "more reflective of the Claimant's current condition" than the much older studies. Decision and Order at 21; *see Adkins v. Director, Office of Workers' Compensation Programs*, 958 F.2d 49, 51 (4th Cir. 1992); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc).

[9] Employer also asserts the "June 21, 2017 [pulmonary function study] was qualifying but invalid, the August 28, 2017 and January 9, 2018 [studies] were non-qualifying, and the February 7, 2019, April 1, 2019, and April 6, 2019 [studies] were qualifying but invalid." Employer's Brief at 9. However, the record does not include any pulmonary function studies taken on these dates.

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards.[10] 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are unreliable); 20 C.F.R. Part 718, Appendix B. If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b).

The quality standards, however, do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing included as part of a miner's treatment). An ALJ must nevertheless determine if a miner's treatment record pulmonary function studies are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

The ALJ found Claimant performed the November 7, 2011, January 9, 2012, January 9, 2013, and January 13, 2014 studies as part of his medical treatment and not in anticipation of litigation. Decision and Order at 10. Employer does not challenge this finding; thus we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus the quality standards are not applicable to these studies. *Stowers*, 24 BLR at 1-92.

The ALJ considered Employer's argument that Dr. Fino's opinion is sufficient to invalidate these studies. Dr. Fino opined "[a]ll of the [] pulmonary function studies" Claimant performed after 1997 are invalid. Director's Exhibit 16 at 8. As the ALJ correctly found, however, Dr. Fino did not state in his report that he actually reviewed the November 7, 2011 and January 9, 2012 qualifying studies, nor did he discuss them in his depositions. Decision and Order at 18-19; *see* Director's Exhibits 16, 50; Employer's Exhibit 11. With respect to the January 9, 2013 and January 13, 2014 studies, Dr. Fino summarily testified

[10] An ALJ must consider a reviewing physician's opinion regarding a miner's effort in performing a pulmonary function study and whether the study is valid and reliable. *See Revnack v. Director, OWCP*, 7 BLR 1-771, 1-773 (1985). A physician's opinion regarding the reliability of a pulmonary function study may constitute substantial evidence for an ALJ's decision to credit or reject the results of the study. *Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985).

that these studies are invalid, but he did not discuss any specific aspect of them. Director's Exhibit 50 at 20-22. Contrary to Employer's argument, the ALJ permissibly found Dr. Fino's opinion insufficient to invalidate the November 7, 2011, January 9, 2012, January 9, 2013, and January 13, 2014 studies because he did not explain why they are invalid. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997).

In addition, the ALJ noted the technicians who conducted the November 7, 2011, January 9, 2012, January 9, 2013, and January 13, 2014 studies stated the results were reproducible and Claimant gave "good effort and cooperation." Decision and Order at 18-21, *citing* Director's Exhibits 14, 45, 78. Further, the ALJ found Dr. Craven reviewed these studies and "signed off" on them, and thus the doctor did not question their validity or Claimant's effort quality. *Id*. Based on the foregoing, the ALJ permissibly found the November 7, 2011, January 9, 2012, January 9, 2013, and January 13, 2014 studies reliable. *Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; *Underwood*, 105 F.3d at 949; *Stowers*, 24 BLR at 1-92; Decision and Order at 18-21.

As it is supported by substantial evidence, we affirm the ALJ's finding the preponderance of the pulmonary function study evidence establishes total disability.[11] Decision and Order at 21-22.

Arterial Blood Gas Studies

The ALJ weighed five arterial blood gas studies dated November 28, 2007, June 13, 2012, March 14, 2013, August 29, 2016, and May 1, 2018. Decision and Order at 10-11, 22-23; Director's Exhibits 16, 41, 78; Claimant's Exhibit 4. The May 1, 2018 study produced qualifying values at rest, but the remaining studies produced non-qualifying values at rest. Director's Exhibits 16, 41, 78; Claimant's Exhibit 4. Only the June 13, 2012

[11] Employer argues Dr. Renn invalidated the March 14, 2013 pulmonary function study, Dr. Forehand invalidated the August 29, 2016 study, and Dr. McSharry opined the June 13, 2012 study does not demonstrate a lung impairment when corrected for lung volumes. Employer's Brief at 10-11. It also asserts the January 31, 2019 study is invalid. *Id*. It argues the ALJ erred by failing to consider whether these studies are invalid or do not support total disability. *Id*. The ALJ, however, found the June 13, 2012, March 14, 2013, and January 31, 2019 studies invalid, and he found the August 29, 2016 non-qualifying study outweighed by the valid qualifying studies. Decision and Order at 21-22. Thus there is no merit to Employer's argument.

and August 29, 2016 studies included testing conducted during exercise, and both exercise studies produced non-qualifying results. Director's Exhibits 16, 78.

The ALJ found the May 1, 2018 qualifying study valid. Decision and Order at 22-23. He further assigned this qualifying study the most weight because it was taken more recently than the non-qualifying studies. *Id.*

Employer contends the ALJ erred in finding the May 1, 2018 blood gas study is valid. Employer's Brief at 6. We disagree. In questioning the validity of the qualifying May 1, 2018 study, Dr. Fino noted its results are "not consistent" with the non-qualifying studies taken years earlier. Employer's Exhibit 9. He opined this raises the "question" of whether "there was venous blood contamination" of the May 1, 2018 blood gas sample. *Id*. During his deposition, Dr. Fino testified he "wonder[s] in this particular case [if] there [was] venous contamination" considering the conflicting blood gas results.[12] Employer's Exhibit 11 at 17.

The ALJ noted there is no indication on the May 1, 2018 study itself that any venous blood contamination occurred, and Drs. McSharry and Habre cited the study as a basis for diagnosing total disability. Decision and Order at 23, *citing* Claimant's Exhibits 4, 5; Employer's Exhibit 8. The ALJ rationally found Dr. Fino's rationale for invalidating the study speculative and unpersuasive as the doctor failed "to account for the fact that pneumoconiosis is a 'latent and progressive' disease," which could explain Claimant's

[12] Dr. Fino further elaborated in his deposition as follows:

> [The study] showed a p02 of 53, and a pC02 of 59. Now, when I see a blood gas like that, and especially realizing that every blood gas prior to that did not show pC02 levels that were higher than 45 or 46, and no blood gases showed p02 levels less than 65, I wonder in this particular case was there venous contamination. Why I say that is, when we do a blood gas we want arterial blood. However, right near the artery in the wrist, the radial artery where blood gases are obtained are veins, and you can pick up a little bit of venous blood, just a drop or less on an arterial blood gas stick. . . . [J]ust [one] drop of venous blood [is] going to dilute the oxygen and elevate the carbon dioxide level in that sample. This to me appears to be a venous blood gas contamination example, and the arterial blood gas in this case is invalid.

Employer's Exhibit 11 at 17.

deteriorating lung function from 2016 to 2018 rather than possible venous blood contamination. *Id*.; *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *U. S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389 (4th Cir. 1999); *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992).

Employer asserts the ALJ mechanically credited the May 1, 2018 blood gas study based on its recency. Employer's Brief at 4-7. Contrary to Employer assertion, the ALJ permissibly noted that as pneumoconiosis is a progressive and irreversible disease, he may credit the more recent qualifying study over the prior non-qualifying studies because it shows a worsening of Claimant's condition. *See Adkins*, 958 F.2d at 51-52; *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *see also Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993).

Employer finally argues the ALJ should have found the preponderance of the blood gas studies insufficient to establish total disability because the exercise results are non-qualifying, and the May 1, 2018 study includes only resting results. Employer's Brief at 4-7. While the ALJ may give greater weight to exercise study results, he is not required to do so. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984) (it is within the ALJ's discretion to find a particular study more probative than another study); 20 C.F.R. § 718.105(b) ("If the results of the blood-gas test at rest do not satisfy the requirements of Appendix C to this part, an exercise blood-gas test shall be offered to the miner unless medically contraindicated."). We consider Employer's argument to be a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

As it is supported by substantial evidence, we affirm the ALJ's finding the arterial blood gas studies establish total disability. *See* 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 23.

Medical Opinions

The ALJ finally considered the medical opinions of Drs. Fino, Forehand, Habre, and McSharry. Decision and Order at 24-25; Director's Exhibits 16, 41, 50, 51, 78; Employer's Exhibits 8, 9, 11; Claimant's Exhibit 5. He found all four doctors opined Claimant is totally disabled by a respiratory or pulmonary impairment. Decision and Order at 24-25. Although he found Dr. Forehand's opinion not credible and entitled to little weight, he found the opinions of Drs. Fino, Habre, and McSharry reasoned and documented and entitled to great weight. *Id*.

Employer argues the ALJ mischaracterized Dr. Fino's opinion as supportive of total disability. Employer's Brief at 12-13. The record belies Employer's argument. Dr. Fino initially opined Claimant is not totally disabled. Director's Exhibits 16, 50. He subsequently conceded in his September 25, 2019 deposition, however, that Claimant "does have a disabling problem from a respiratory standpoint." Employer's Exhibit 11 at 19. He indicated the disability is due to either obesity or sleep apnea, and explained both conditions "can restrict the lung[s] from adequately inhaling or exhaling." *Id*. He reiterated Claimant has a "secondary respiratory disability" because his lungs are being affected by extrinsic factors such as obesity and heart disease. *Id*. at 23-25.

The ALJ correctly found Dr. Fino's opinion supports a finding of total disability. Decision and Order a 24-25. The relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §§718.202(a)(4), 718.204(c), or in consideration of rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989). As Employer does not dispute the ALJ's finding that Dr. Fino's opinion is reasoned and documented, we affirm it. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40; *Skrack*, 6 BLR at 1-711; Decision and Order at 24-25.

Employer argues the ALJ did not explain why he discredited Dr. McSharry's opinion. Employer's Brief at 12. To the contrary, the ALJ found Dr. McSharry's opinion reasoned, documented, and entitled to great weight. Decision and Order at 24-25. Thus he found Dr. McSharry's opinion supports a finding of total disability.[13] *Id*. As Employer does not challenge the ALJ's finding that Dr. McSharry's opinion is reasoned and documented, we affirm it. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-40; *Skrack*, 6 BLR at 1-711; Decision and Order at 24-25.

Because it is supported by substantial evidence, we affirm the ALJ's finding Claimant established total disability based on the medical opinion evidence.[14] 20 C.F.R.

[13] In his initial report, Dr. McSharry opined Claimant's respiratory impairment is not disabling. Director's Exhibit 41 at 2. But he issued a supplemental report after reviewing Claimant's May 1, 2018 arterial blood gas study, and opined Claimant is totally disabled by hypoxemia and hypercarbia. Employer's Exhibit 8 at 4.

[14] As Claimant established total disability based on the medical opinions of Drs. Fino and McSharry, we need not address Employer's argument that the ALJ erred in crediting Dr. Habre's opinion. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 13.

§718.204(b)(2)(iv). We further affirm the ALJ's finding that Claimant established total disability when considering the record as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order at 25. We therefore affirm the ALJ's finding that Claimant established a change in an applicable condition of entitlement and invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.305, 725.309.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[15] or "no 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 did not establish rebuttal by either method.[16]

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 ALJ weighed the opinions of Drs. Fino and McSharry on the issue of legal pneumoconiosis. Director's Exhibits 16, 41, 50, 51; Employer's Exhibits 8, 9, 11.

Dr. Fino opined Claimant has no "intrinsic pulmonary disease, meaning a disease of the actual lung," and thus does not have legal pneumoconiosis. Employer's Exhibit 11 at 7, 23-25. He opined Claimant's pulmonary function and arterial blood gas studies are

[15] "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).

[16] The ALJ found Employer rebutted the existence of clinical pneumoconiosis. Decision and Order at 27-28.

either invalid or do not demonstrate a respiratory impairment. *Id*. at 7-9, 12-17, 23-25. Assuming Claimant's May 1, 2018 blood gas study is valid, he stated its reduced values are due to Claimant's sleep apnea and not coal mine dust exposure. *Id*. at 17-18. He further opined any respiratory impairment Claimant exhibits would be due to the effects of obesity and heart disease on his lungs, and not coal mine dust exposure. *Id*. at 7-9, 23-25.

Dr. McSharry opined Claimant has a restrictive lung impairment evidenced by pulmonary function testing and hypoxemia/hypercarbia demonstrated by arterial blood gas testing. Employer's Exhibits 8 at 3. He opined these impairments are due to Claimant's obesity and unrelated to coal mine dust exposure. *Id*. He further opined the "abrupt change in arterial blood gas results in 2018" was caused by Claimant's "decompensating obstructive sleep apnea." *Id*.

The ALJ discredited the opinions of Drs. Fino and McSharry because he found they are inadequately reasoned. Decision and Order at 28-31. He also found Dr. McSharry's opinion contrary to the regulations. *Id*.

Employer argues the ALJ applied the wrong legal standard when discrediting Drs. Fino's and McSharry's opinions, contending he required each doctor to explain how they "ruled-out coal dust exposure as a contributing factor" to Claimant's impairments. Employer's Brief at 22. We disagree. The ALJ correctly stated "an employer can rebut legal pneumoconiosis by proving that a miner does not have a lung disease 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment' by a preponderance of the evidence." Decision and Order at 26, *quoting* 20 C.F.R. §718.201(b). Moreover, he discredited their opinions because he found them inadequately reasoned and therefore insufficient to support their own conclusions, not because they failed to meet a heightened legal standard. *See Minich*, 25 BLR at 1-155 n.8; Decision and Order at 28-31.

Next, Employer argues the ALJ erred in discrediting their opinions. Employer's Brief at 16-22. We disagree. The ALJ recognized Dr. Fino excluded legal pneumoconiosis because "there is no evidence of 'any intrinsic lung disease' and [] Claimant has chronic problems with sleep apnea and heart disease, which affect his breathing." Decision and Order at 28, *quoting* Director's Exhibit 16. But the ALJ determined Dr. Fino's opinion is contradicted by Claimant's "treatment records, which consistently show" Claimant was diagnosed with, and treated for, chronic obstructive pulmonary disease (COPD). *Id*. at 28-29, *citing* Director's Exhibits 14, 41, 46, 49; Claimant's Exhibits 6-9; Employer's Exhibits 2-7. Furthermore, the ALJ permissibly found Dr. Fino's exclusion of legal pneumoconiosis unpersuasive because he failed "to discuss, or even acknowledge, Claimant's COPD" when excluding legal pneumoconiosis. *Id*.; *see Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; *Underwood*, 105 F.3d at 949. Similarly, the ALJ permissibly found Dr. McSharry's

opinion unpersuasive because he also failed to "take into account" or discuss Claimant's "consistent diagnosis of and treatment for COPD" when excluding legal pneumoconiosis. Decision and Order at 30-31; *see Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; *Underwood*, 105 F.3d at 949.

Dr. McSharry also acknowledged Claimant has "significant exposure" to coal mine dust, but he excluded legal pneumoconiosis because the "radiographic evidence is not suggestive of injury to the lungs related to pneumoconiosis." Employer's Exhibit 8 at 3. The ALJ permissibly found Dr. McSharry's opinion unpersuasive because the regulations provide that legal pneumoconiosis may be present even in the absence of a positive x-ray for clinical pneumoconiosis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012) (regulations "separate clinical and legal pneumoconiosis into two different diagnoses" and "provide that no claim for benefits shall be denied solely on the basis of a negative chest x-ray") (internal quotations omitted); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (ALJ properly concluded the regulations provide legal pneumoconiosis may exist in the absence of clinical pneumoconiosis); 20 C.F.R. §§718.201, 718.202(a)(4), 718.202(b); Decision and Order at 30-31.

In addition, although Dr. McSharry opined Claimant's restrictive impairment and hypoxemia/hypercarbia are consistent with obesity, the ALJ permissibly found this reasoning unpersuasive because the doctor did not "adequately explain how Claimant's [twenty-five] plus years of coal [mine] dust exposure could not also contribute to Claimant's lung disease." Decision and Order at 30; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673-74 n.4 (4th Cir. 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); 20 C.F.R. §718.201(a)(2), (b).

Employer generally argues Drs. Fino's and McSharry's opinions are well-reasoned and documented, and therefore sufficient to rebut legal pneumoconiosis. Employer's Brief at 17-21. Employer's argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113.

Because the ALJ permissibly discredited the opinions of Drs. Fino and McSharry,[17] the only opinions supportive of Employer's burden on rebuttal, we affirm his finding

[17] Because the ALJ provided valid reasons for discrediting Dr. McSharry's opinion, we need not address Employer's additional arguments regarding the weight that the ALJ assigned to his opinion. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 17-22.

Employer did not disprove legal pneumoconiosis.[18] Decision and Order at 31. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "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)(1)(ii); Decision and Order at 31-32. He permissibly discredited the opinions of Drs. Fino and McSharry on disability causation because they were premised on the belief that Claimant does not have legal pneumoconiosis, contrary to his finding that Employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 32. We therefore affirm the ALJ's finding that Employer failed to prove that no part of Claimant's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

[18] As Drs. Forehand and Habre diagnosed legal pneumoconiosis, their opinions cannot support Employer's burden to disprove the disease; we therefore need not address Employer's contentions regarding the ALJ's consideration of their opinions. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 22-23.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge