U.S. Department of Labor

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

BRB No. 23-0021 BLA

EVANS RATLIFF, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	DATE ISSUED: 05/14/2024
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 Stewart F. Alford, Administrative Law Judge, United States Department of Labor.

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

Jeffrey S. Goldberg (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 appeals Administrative Law Judge (ALJ) Stewart F. Alford's Decision and Order Awarding Benefits (2019-BLA-05647) rendered on a subsequent claim[1] filed on December 15, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 10.99 years of coal mine employment based on the parties' stipulation and thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] Considering entitlement under 20 C.F.R. Part 718, the ALJ found Claimant established clinical and legal pneumoconiosis[3] and is totally disabled due to legal pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(b)(2), (c). He therefore found Claimant established a change in an applicable condition of entitlement,[4] 20 C.F.R. §725.309(c), and awarded benefits.

[1] This is Claimant's second claim for benefits. On May 4, 2006, the district director denied his prior claim, filed on June 6, 2005, for failure to establish any element of entitlement. Director's Exhibit 1 at 5-6. Claimant filed another claim for benefits on June 8, 2015, which he later withdrew. Director's Exhibit 38 at 5. A withdrawn claim is considered not to have been filed. *See* 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) 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] "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). "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).

[4] When a claimant 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); *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 ALJ lacked the authority to hear and decide this case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution[5] and because the removal provisions applicable to ALJs render his appointment unconstitutional. On the merits, Employer challenges the ALJ's findings that Claimant established pneumoconiosis, total disability, and total disability due to pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging rejection of Employer's constitutional challenges. Employer has replied to the Director, reiterating its contentions on those issues.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

Appointments Clause and Removal Protections

Employer urges the Board to vacate the ALJ's Decision and Order and remand this case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*,

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§725.309(c)(3). Because the district director denied Claimant's prior claim for failing to establish any element of entitlement, Claimant had to establish at least one element of entitlement to obtain review of the merits of this claim. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[6] 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 4; Hearing Transcript at 21.

585 U.S. , 138 S. Ct. 2044 (2018).[7] Employer's Brief at 22-30. It argues the ALJ's appointment is invalid because Department of Labor (DOL) ALJs are selected by staff at the agency after the Office of Personnel Management screens the applicants. *Id.* at 23. It also challenges the constitutionality of the removal protections afforded DOL ALJs. *Id.* at 19-23.

Initially, even assuming Employer sufficiently raised its arguments,[8] it has not explained how the ALJ's appointment is in violation of the Appointments Clause. Congress authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Before this claim was referred to ALJ Alford, the Secretary specifically appointed him as an ALJ at the DOL to "execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office." Secretary's September 12, 2018 Letter to ALJ Alford (citing U.S. Cons. art. II, § 2, cl. 2; 5 U.S.C. §3105).

Employer's arguments appear to be based on alleged non-compliance with Executive Order 13843, arguing *if* ALJ Alford is a part of the competitive service, then his adjudication of this claim violates the Appointments Clause. Employer's Brief at 25. Yet, Employer admits "[by] all appearances, ALJ Alford is not part of the competitive service." *Id.* Based on the foregoing, we reject Employer's argument that the ALJ's appointment

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

[8] The Director argues that while Employer raised the Appointments Clause and removal protection issues before the district director, it did not do so before the ALJ; thus, he contends Employer forfeited these arguments. Director's Brief at 2-3. While Employer listed the issues in its Response to the ALJ's Notice of Hearing and Pre-Hearing Order and referenced this document at the hearing, it did not address the issues in its closing brief. *See Edd Potter Coal Co., Inc. v. Director, OWCP*, 39 F.4th 202 (4th Cir. 2022) (Appointments Clause challenge forfeited if not timely raised); *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (party forfeits constitutional challenge when it "cho[oses] to identify the issue but not to press it"); Hearing Transcript at 8; Employer's Reply at 1-2.

violates the Appointments Clause. *See K&R Contractors, LLC v. Keene*, 86 F.4th 135, 144 (4th Cir. 2023).

Employer further generally argues the removal provisions for ALJs contained in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 25-27. In addition, it relies on the United States Supreme Court's holding in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. , 141 S. Ct. 1970 (2021). Employer's Brief at 25-30.

In *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307 (2022) (applying *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022), the Board rejected similar arguments in part because the employer did not sufficiently allege "it suffered any harm due to the ALJ's removal protections." Subsequently, the United States Court of Appeals for the Fourth Circuit, whose law applies to this case, held that "the Board has no authority to remedy the alleged separation-of-powers violation." *Keene*, 86 F.4th at 145. The court nevertheless denied the employer's request for a new hearing because, as in *Howard*, the employer did not show that the alleged "constitutional violation caused [it] harm." *Id.* at 149. So too here. Thus, even if the Board had authority to remedy the violation presented by Employer's removal protections arguments, we would decline to do so because Employer has failed to identify a harm.

Entitlement Under 20 C.F.R. Part 718

To be entitled to benefits under the Act,[9] Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a

[9] As noted above, the ALJ accepted the parties' stipulation that Claimant had 10.99 years of coal mine employment and thus rationally found Claimant could not invoke the Section 411(c)(4) presumption. Decision and Order at 35; 20 C.F.R. §718.305; *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Director's Exhibits 4, 8. The ALJ also permissibly determined the single x-ray reading identifying complicated pneumoconiosis was insufficient to establish the disease given the other "numerous" readings that did not make such findings. Decision and Order at 34. We thus affirm, as supported by substantial evidence, the ALJ's finding that Claimant could not invoke the Section 411(c)(3) irrebuttable presumption that he is totally disabled due to complicated pneumoconiosis. 30

totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Smoking History

The ALJ considered Claimant's statements to physicians, his treatment records, and his hearing testimony to find Claimant had an insignificant smoking history that is "sporadic" and "remote." Decision and Order at 5-6. Specifically, the ALJ noted the varying smoking histories provided to physicians for purposes of litigation: Claimant reported no smoking history to Drs. Ajjarapu and Fino, "an occasional cigarette" in the "remote past" to Dr. Rosenberg, and nine pack years to Dr. Rasmussen in his prior claim. *Id.* at 5; Director's Exhibits 1, 13; Employer's Exhibits 3, 6. The ALJ also considered the various smoking histories recorded in Claimant's treatment records and found they are inconsistent and often had "no explanation." Decision and Order at 5. Dr. Sutherland, one of Claimant's treating physicians, reported "a pack or less" smoking history, some treatment records reported Claimant denied tobacco use, and yet others stated his smoking status was unknown. *Id.*; Director's Exhibit 14*;* Claimant's Exhibits 6, 7.

At the hearing, Claimant testified he does not currently smoke and, while he did so previously, he never got "in the habit of it," indicating he would borrow cigarettes on occasion when in public. Hearing Transcript at 19. When asked about Dr. Rasmussen's report indicating he smoked a half a pack per day from 1972 to 1990, Claimant stated he "might have smoked a half a pack of cigarettes, not a half a pack of cigarettes a day" and he "never smoked a half a pack a day in [his] life." *Id.* at 24. The ALJ found Claimant's testimony credible and supported a finding of no significant smoking history. Decision and Order at 6.

Employer contends the ALJ erred in finding Claimant does not have a significant smoking history based on his hearing testimony rather than relying on statements he made to doctors. Employer's Brief at 13-14. We disagree.

As the trier of fact, it is the ALJ's function to determine the length and extent of a miner's smoking history. *See Maypray v. Island Creek Coal Co*., 7 BLR 1-683, 686 (1985) (ALJ is responsible for making a factual determination as to the length and extent of a

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U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304; *see Compton*, 211 F.3d at 207-08; *Hicks*, 138 F.3d at 528; Decision and Order at 34.

miner's smoking history). Further, it is the ALJ's function to determine the credibility of evidence, including witness testimony. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (declining to reweigh witness testimony on smoking history in spite of alleged inconsistencies that the employer identified); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989).

Here, the ALJ considered the relevant evidence of record, noted the varying and sometimes unexplained smoking histories in the record, and permissibly credited Claimant's specific testimony regarding his smoking history over the other evidence. Decision and Order at 5-6. Thus, we affirm, as supported by substantial evidence, the ALJ's finding that Claimant has an insignificant smoking history. *Id.* at 6; *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must establish he suffers from 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).

Dr. Ajjarapu conducted the DOL's complete pulmonary evaluation of Claimant and diagnosed legal pneumoconiosis in the form of chronic bronchitis which she attributed to Claimant's coal mine dust exposure. Director's Exhibit 13 at 7. Dr. Sutherland opined Claimant had chronic obstructive pulmonary disease (COPD) "as a direct result" of his exposure to coal mine dust. Director's Exhibit 14 at 115. Treatment notes from Dr. Jawad, Claimant's treating pulmonologist, stated Claimant has coal workers' pneumoconiosis based on his moderate COPD with "frequent exacerbations." *Id.* at 94-114.

Conversely, Drs. Fino and Rosenberg opined Claimant does not have legal pneumoconiosis. Employer's Exhibits 3, 6, 8, 10, 13. Specifically, Dr. Rosenberg opined Claimant's pulmonary impairments are related to various issues, including asthma and bronchitis, which are "whole person" disorders unrelated to coal mine dust exposure. Employer's Exhibits 6, 10. Dr. Fino did not opine that Claimant has any specific condition but acknowledged Claimant's pulmonary function study tracings suggest obstruction[10] unrelated to his coal mine dust exposure. Employer's Exhibits 3, 8, 13 at 17-18.

[10] As discussed in more detail below, Dr. Fino opined that all the pulmonary function studies of record are invalid and therefore stated there is no objective evidence of obstruction. Employer's Exhibit 13 at 19.

The ALJ found Dr. Ajjarapu's opinion well-reasoned and supported by Claimant's treatment and hospitalization records, which demonstrate he was treated and hospitalized multiple times for symptoms consistent with chronic bronchitis and exacerbations of COPD. Decision and Order at 36. He found Dr. Sutherland's opinion is undermined given his misunderstanding of the length of Claimant's coal mine employment but is nonetheless consistent with Dr. Ajjarapu's diagnosis of chronic bronchitis. *Id.* at 37. Finally, he found Drs. Rosenberg's and Fino's opinions are not well-reasoned and are inconsistent with the principles underlying the preamble to the 2001 revised regulations. *Id.* at 37-39. According significant weight to Dr. Ajjarapu's opinion, as consistent with Dr. Jawad's treatment records and Claimant's hospitalization records, the ALJ found Claimant established legal pneumoconiosis. *Id.* at 40.

Employer argues the ALJ erred in crediting Dr. Ajjarapu's opinion as supported by Dr. Jawad's treatment notes. Employer's Brief at 13. Specifically, it contends the ALJ erred in according Dr. Jawad's diagnoses significant weight based solely on his status as a treating physician, particularly given he treated Claimant over only a four-month period. *Id*. It also contends Dr. Jawad's diagnosis of pneumoconiosis is based on evidence not of record and the ALJ failed to consider the physician's diagnosis of asthma. *Id*. Employer's arguments are not persuasive.

Initially, even assuming Employer is correct that Dr. Jawad did not treat Claimant for a sufficient period of time to accord his opinion greater weight as a treating physician,[11] his notations that Claimant suffers from shortness of breath, wheezing, and COPD with frequent exacerbations are consistent with Claimant's hospitalization records indicating the same. Decision and Order at 36; Claimant's Exhibits 6, 7. We reject Employer's contention that Dr. Jawad's opinion cannot be credited because his pneumoconiosis diagnosis relies on a computed tomography (CT) scan not in the record. Employer's Brief at 13. The doctor's comments regarding nodules consistent with coal workers' pneumoconiosis on a CT scan is relevant to the issue of clinical pneumoconiosis, not legal pneumoconiosis, particularly given that the doctor separately diagnosed coal workers'

[11] We note that Dr. Jawad did not provide a medical opinion under 20 C.F.R. §718.104(d); only his treatment records of Claimant are of record. Director's Exhibit 14; Claimant's Evidence Summary Form. In any event, although Employer contends four months is not a significant period of time to accord Dr. Jawad's diagnoses additional weight as a treating physician, the ALJ permissibly credited the doctor's diagnoses because the physician regularly saw Claimant for ongoing treatment specifically related to Claimant's respiratory and pulmonary complaints, and the physician explained his diagnoses. *See Hicks*, 138 F.3d at 528; Decision and Order at 36.

pneumoconiosis in the form of moderate obstruction. *See, e.g.*, Director's Exhibit 14 at 95.

But even excluding Dr. Jawad's conclusions regarding the etiology of Claimant's respiratory condition, the ALJ permissibly found Dr. Ajjarapu's diagnosis of chronic bronchitis is consistent with Claimant's treatment and hospitalization records, which, as noted above, demonstrate treatment for an obstructive disease.[12] *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (as the trier of fact, the ALJ must evaluate the evidence, weigh it, and draw his own conclusions); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993).

Moreover, while the ALJ found Dr. Ajjarapu's opinion consistent with Claimant's treatment and hospitalization records, he also credited her diagnosis because she understood Claimant's symptoms, coal mine employment history, and insignificant smoking history -- findings we affirm as uncontested by Employer. Decision and Order at 36; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Based on the foregoing, we affirm the ALJ's findings that Dr. Ajjarapu's opinion that Claimant has legal pneumoconiosis is well-reasoned and well-documented. Decision and Order at 40.

Next, Employer contends the ALJ erred in discrediting Drs. Rosenberg's and Fino's opinions. Employer's Brief at 18, 20-21. It contends the ALJ erred in finding their opinions contrary to the medical literature underlying the preamble, as both physicians acknowledged pneumoconiosis can be a latent and progressive disease, albeit in rare cases. *Id.* at 20-21. Employer also argues the ALJ erred in finding their opinions undermined for relying on an overestimated smoking history, as neither expert opined Claimant's disease was due to cigarette smoking. *Id.* at 18.

[12] Employer argues the ALJ failed to consider that Dr. Jawad noted Claimant was hospitalized and treated for asthma, not pneumoconiosis. Employer's Brief at 13. Initially, Dr. Jawad notes asthma as well as coal workers' pneumoconiosis in the form of obstructive disease in his treatment notes. Director's Exhibit 14 at 94-114. Further, Employer has not explained why Claimant's asthma diagnosis precludes a finding of legal pneumoconiosis. *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"); *see* 65 Fed. Reg. 79,920, 79,937-39 (Dec. 20, 2000) (recognizing that asthma is a form of chronic obstructive pulmonary disease that can constitute legal pneumoconiosis if it is significantly related to or substantially aggravated by coal mine dust exposure).

Contrary to Employer's argument, the ALJ permissibly found Drs. Rosenberg's and Fino's opinions not well-reasoned because both physicians indicated pneumoconiosis is a latent and progressive disease only in rare cases, but neither doctor adequately explained why they believed Claimant was not one of those allegedly rare cases. *See* 20 C.F.R. §718.201(c); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987) ("pneumoconiosis is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure"); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (medical opinion not in accord with the accepted view that pneumoconiosis can be latent and progressive may be discredited); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (ALJ may find medical opinion unpersuasive if based on statistical generalities rather than specifics of the claimant's case); Decision and Order at 38, 40.

The ALJ also permissibly discredited Dr. Rosenberg's opinion because he failed to explain why, even if Claimant had a number of "whole person" disorders, including asthma and bronchitis, coal dust did not significantly contribute to or substantially aggravate those conditions. *See* 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 555 (4th Cir. 2013); *Hicks*, 138 F.3d at 533; Decision and Order at 40.

Finally, the ALJ permissibly discredited Dr. Fino's opinion because he relied in part on Claimant having a significant smoking history to find legal pneumoconiosis is not present, contrary to the ALJ's finding that Claimant's smoking history was insignificant.[13] *See Hicks*, 138 F.3d at 533; *Maypray*, 7 BLR at 686; Decision and Order at 38-39.

[13] Employer argues the ALJ erred in discrediting Drs. Fino and Rosenberg because they did not rely on Claimant's smoking history in opining that he does not have legal pneumoconiosis. Employer's Brief at 13-14. First, the ALJ did not discredit Dr. Rosenberg's opinion based on his understanding of Claimant's smoking history. Decision and Order at 39. Second, while not specifically opining that Claimant's lung disease was due to cigarette smoking, Dr. Fino believed Claimant's smoking history was of a "sufficient period of time for an individual to develop lung disease from smoking." Employer's Exhibit 13 at 12-13. He further indicated there was not "an accurate history of smoking or exposure to something else outside of the mines," and explained the smoking history was relevant based on his belief that "we had to have some other insult to his lungs" to explain the post-2005 deterioration in his lung function. *Id.* at 28. Thus, we reject Employer's argument that the ALJ erred in discrediting Dr. Fino on this basis. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988) (ALJ has discretion in determining the effect of an inaccurate smoking history on the credibility of a medical opinion).

Therefore, we affirm the ALJ's determination that Claimant established legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 40.

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. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical 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).

The ALJ found Claimant established total disability based on the pulmonary function studies, medical opinion evidence, and the evidence as a whole.[14] Decision and Order at 42-46.

Pulmonary Function Studies

The ALJ considered four pulmonary function studies dated February 14, 2018, October 16, 2018, April 5, 2019, and July 8, 2019. Decision and Order at 8, 43. All of the studies produced qualifying values[15] before and after bronchodilators.[16] Director's Exhibit 13 at 10; Claimant's Exhibit 5 at 1; Employer's Exhibits 3 at 12, 6 at 12. The ALJ found Drs. Fino's and Rosenberg's opinions that all the pulmonary function studies are invalid is unsupported by the record. Decision and Order at 43-44. Even if he discounted the studies Employer's physicians conducted (the October 16, 2018 and July 8, 2019 studies), the ALJ

[14] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 42, 44.

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

[16] Bronchodilators were not administered during the April 5, 2019 study. Claimant's Exhibit 5.

indicated that the remaining qualifying studies would still support a finding of total disability. *Id.*

When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards. 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); 20 C.F.R. Part 718, Appendix B. Thus, the party challenging the validity of a study has the burden to establish the results are unreliable. *See Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984). 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 West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-92 (2008) (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 still determine, however, if 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. at 79,928.

Employer contends the ALJ erred by failing to address relevant medical opinions regarding the validity of certain pulmonary function studies, pointing to Dr. Fino's opinion that the April 5, 2019 study is invalid and Dr. Rosenberg's similar opinion regarding the February 14, 2018 study. Employer's Brief at 15-17. We disagree.

Contrary to Employer's argument, the ALJ considered Dr. Fino's opinion regarding the validity of the April 5, 2019 study. Employer's Brief at 15. The ALJ noted Dr. Fino's opinion that Claimant did not give "maximum effort" but permissibly found it insufficient to invalidate the study, as it was outweighed by the other evidence: specifically, the administering technician's notation of good effort and cooperation and Dr. Forehand's indication that the study he performed was acceptable and valid. *See Vivian*, 7 BLR at 1-361 (party challenging the validity of a study has the burden to establish the results are suspect or unreliable); *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987) (ALJ determines the probative weight to assign to a study as the fact-finder); *see also Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997) (ALJ may rely on the opinion of the physician who actually administered the ventilatory study over those who reviewed the results); Decision and Order at 43; Claimant's Exhibit 5.

Further, even if we were to accept Employer's argument that the ALJ should have found the February 14, 2018 study invalid given Dr. Rosenberg's opinion, Employer's Brief at 16, that study would not "constitute evidence of the presence or absence of a respiratory or pulmonary impairment." 20 C.F.R. §718.103(c). Under that circumstance,

the valid and qualifying April 5, 2019 study, not contradicted by any valid non-qualifying studies, would continue to support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); *see Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

Thus, we affirm the ALJ's determination that the April 5, 2019 study is valid and the pulmonary function study evidence supports a finding of total disability.[17] *See* 20 C.F.R. §718.204(b)(2)(i); *see also Compton*, 211 F.3d at 207-08; Decision and Order at 44.

Medical Opinion Evidence

The ALJ next considered the opinions of Drs. Ajjarapu, Sutherland, Rosenberg, and Fino. Drs. Ajjarapu, Sutherland, and Rosenberg opined that Claimant is totally disabled from a pulmonary or respiratory impairment. Director's Exhibits 13, 14; Employer's Exhibits 6, 10. Dr. Fino initially opined that Claimant was not totally disabled because there were no valid pulmonary function studies in the record and no evidence of a blood gas impairment. Employer's Exhibit 3. Upon reviewing Dr. Rosenberg's opinion and Claimant's treatment records showing frequent hospitalizations to treat his respiratory ailments, Dr. Fino indicated Claimant "may" be disabled but again emphasized the absence of valid objective testing. Employer's Exhibits 8; 13 at 19, 25.

The ALJ discredited Dr. Fino's opinion as "contradicted by the overwhelming weight of the evidence," including Claimant's medical records and the other medical experts' opinions. Decision and Order at 45. The ALJ then accorded each of the medical opinions diagnosing total disability at least some weight. *Id.* at 45-46. Thus, he found the medical opinion evidence supports a finding of total disability. *Id.* at 46.

[17] Employer contends the ALJ erred in finding the 2005 non-qualifying study obtained in Claimant's prior claim was not admitted into evidence. Employer's Brief at 16-17. While the ALJ found it was not "introduced" into evidence, the context of his statement indicates he meant that this prior claim evidence was not *designated* by the parties in the current claim. *See* Decision and Order at 43 n.19; Evidence Summary Forms. This is evident, as the ALJ considered the 2005 study, but permissibly found it did not change his conclusions, as the more recent pulmonary function studies in the current claim are "more pertinent" to assessing the claim. *See Hicks*, 138 F.3d at 533; *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (a later test is a "more reliable indicator of a miner's condition than an earlier one" where "a miner's condition has worsened" given the "progressive nature of pneumoconiosis"); Decision and Order at 48-50.

Employer argues the ALJ erred in his evaluation of the medical opinion evidence. It first contends Drs. Sutherland's and Ajjarapu's opinions cannot be credited because they are based solely on Claimant's reported symptoms of "coughing and shortness of breath" and invalid objective testing. Employer's Brief at 17. Employer next asserts the ALJ erred in finding Dr. Fino's opinion undermined because he did not consider Claimant's treatment records, arguing the doctor credibly opined there is no objective evidence of total disability. *Id.* at 18. We disagree.

Contrary to Employer's argument, a physician may base a diagnosis of total disability on a miner's respiratory symptoms. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physician's identification of the miner's symptoms of "shortness of breath," "acute shortness of breath," and "mild shortness of breath" with various activities constitutes a "reasoned medical opinion"); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989) (physician's "recitation of [the miner's] symptoms" constituted relevant evidence that the ALJ must consider absent a specific "basis for a finding that the listed limitations are the patient's rather than the doctor's conclusions").

The ALJ explained that Drs. Ajjarapu's and Sutherland's opinions-- as well as Dr. Rosenberg's opinion-- are consistent with Claimant's medical records which document hospitalizations for respiratory distress beginning in 2017, regular hospitalizations in 2018 for exacerbations of COPD, and continued hospitalizations for such issues and use of supplemental oxygen in 2019. Decision and Order at 45-46; Director's Exhibit 14; Claimant's Exhibits 6 at 1, 7. He also found the record reflects additional examples of Claimant's respiratory distress limiting his ability to speak in more than short phrases; the "increased work of breathing" causing his heart rate to increase; and difficulty walking due to shortness of breath. Decision and Order at 45; Claimant's Exhibits 6 at 1; 7 at 14, 18; Director's Exhibit 14.

Further, given this evidence, the ALJ permissibly found Dr. Fino's opinion, to the extent he found no total disability, to be unreasoned and worthy of no weight. Decision and Order at 44-45; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) (it is the province of the ALJ to evaluate the physician's opinions); *Grizzle*, 994 F.2d at 1096. Moreover, we note the ALJ accorded weight to Dr. Rosenberg's opinion, which also diagnosed Claimant as totally disabled based on his medical records demonstrating treatment for recurrent infections related to airways disease and hospitalizations for airway exacerbations. Employer's Exhibit 6 at 6. Employer has not challenged the ALJ's according Dr. Rosenberg's opinion some weight; thus, it is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 45; Employer's Exhibit 6.

Thus, we affirm the ALJ's findings that Claimant established a totally disabling pulmonary or respiratory impairment based on the medical opinion evidence.[18] 20 C.F.R. §718.204(b)(2)(iv). Given our affirmance of the ALJ's determination that the pulmonary function study evidence also supports a finding of total disability, we further affirm his finding that Claimant established total disability based on a weighing of the evidence as a whole. 20 C.F.R. §718.204(b)(2); Decision and Order at 46.

Disability Causation

To prove total disability due to pneumoconiosis, Claimant must establish pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). Pneumoconiosis is a substantially contributing cause if it has a "material adverse effect on the miner's respiratory or pulmonary condition" or it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii); *Gross v. Dominion Coal Co.*, 23 BLR 1-8, 1-17 (2003).

Employer's arguments regarding the ALJ's consideration of its experts' opinions on disability causation rely on those it raised regarding legal pneumoconiosis, which we have rejected. Employer's Brief at 18-22. It also contends that no doctor explicitly found pneumoconiosis substantially contributed to Claimant's disabling impairment and that the ALJ erroneously shifted the burden of proof to Employer. *Id.* at 18-21.

Initially, contrary to Employer's assertion, the ALJ correctly placed the burden of persuasion on Claimant to demonstrate by a preponderance of the evidence that pneumoconiosis is a substantially contributing cause of his total disability. Decision and Order at 46; Employer's Brief at 18. Further, the ALJ explained throughout his decision that Claimant's medical records overwhelmingly demonstrate disabling COPD. Decision and Order at 11-15, 36-38, 45. He permissibly found Dr. Ajjarapu's opinion that Claimant has legal pneumoconiosis in the form of chronic bronchitis, including shortness of breath, due to coal mine dust exposure-- in conjunction with the overwhelming evidence Claimant

[18] As discussed, we have affirmed the ALJ's findings that the April 5, 2019 pulmonary function study is valid and qualifying; the pulmonary function study evidence overall supports a finding of total disability; Dr. Rosenberg's total disability diagnosis is entitled to some weight; and Dr. Fino's contrary diagnosis is entitled to no weight. Given those determinations, any error by the ALJ in also crediting Drs Ajjarapu's and Sutherland's total disability diagnoses would be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

has a totally disabling obstructive impairment-- supports the conclusion that Claimant's legal pneumoconiosis substantially contributed to his total disability. *Id.* at 36, 45; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997 (it is the province of the ALJ to evaluate the evidence, weigh it, and draw his own conclusions). Although the ALJ recognized Dr. Ajjarapu did not explicitly state the cause of Claimant's impairment, he rationally found this is the most logical conclusion to draw from the facts and the physician's conclusions. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668-69 (6th Cir. 2015); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 1-255-57 (2019); Decision and Order at 46.

Further, the ALJ permissibly discounted the opinions of Drs. Fino and Rosenberg because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding legal pneumoconiosis was established. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding the physician's view on disability causation is independent of his or her erroneous opinion on pneumoconiosis); Decision and Order at 47.

We therefore affirm the ALJ's finding that Claimant's legal pneumoconiosis was a substantially contributing cause of his totally disabling impairment, and thus he established a change in an applicable condition of entitlement.[19] 20 C.F.R. §§718.202, 718.204(b), (c), 725.309; Decision and Order at 47-48.

[19] As we have affirmed the ALJ's determination that Claimant is totally disabled due to legal pneumoconiosis, we need not address Employer's challenges to the ALJ's finding that Claimant also established clinical pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 8-12.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge