U.S. Department of Labor

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

BRB No. 24-0108 BLA

BILLY BAYLESS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL MINING COMPANY, LLC	)	
Self-Insured through CONSOL ENERGY,	)	
INCORPORATED	)	DATE ISSUED: 11/22/2024
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Victoria Yee (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy 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) Joseph E. Kane's Decision and Order Awarding Benefits (2021-BLA-05275) rendered on a claim filed on December 24, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established sixteen years of underground coal mine employment and 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,[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ's delay in issuing his Decision and Order prejudiced it and thus liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund (Trust Fund). On the merits of entitlement, Employer argues the ALJ erred in finding Claimant established total disability and thus invoked the Section 411(c)(4) presumption. Alternatively, it argues the ALJ erred in finding it failed to rebut the presumption.[2] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to reject Employer's arguments that liability for the payment of benefits should transfer to the Trust Fund and the ALJ erred in finding it failed to rebut the Section 411(c)(4) presumption.

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 369 (1965).

[1] 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.

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

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Tennessee. *See*

Procedural Challenge - 20 C.F.R. §725.476

Employer argues the ALJ erred in failing to timely issue his Decision and Order. Employer's Brief at 19-20. Specifically, Employer points to 20 C.F.R. §725.476, which states that "the [ALJ] shall issue a decision and order with respect to the claim" within twenty days after the hearing is officially terminated. *Id*. at 19. It contends the ALJ's delay in issuing his Decision and Order prejudiced[4] it "as the passage of time requires more time be used to review and prepare pleadings," Claimant's "health may have changed," the applicable "caselaw has developed and changed since [the] submission of the initial case," "the parties are unable to have witnesses address any changes in the caselaw," and changes in the personnel of its law firm "over the course of years" makes it "more difficult for preparation of a cogent position." *Id*. at 19-20. Further, it asserts the ALJ's "exceeding [of] the regulatory standard" by "more than two years after the hearing and 658 days after the record closed" is "*per se* enough" to show prejudice. *Id*. at 20. It thus contends the Trust Fund should be liable for the payment of benefits. *Id*.

The Director responds, arguing that the twenty-day language found at 20 C.F.R. §725.476 "is directory, not mandatory or jurisdictional," and therefore the ALJ's failure to comply with the regulatory directive does not relieve Employer of liability. Director's Brief at 4 (quoting *Maryland Casualty Co. v. Cardillo*, 99 F.2d 432, 434 (D.C. Cir. 1938)). He further argues that even if compliance with 20 C.F.R. §725.476 were mandatory, Employer waived this argument because it failed to raise the twenty-day requirement before the ALJ. *Id*. Additionally, he notes Employer has not established it suffered any prejudice as it "does not specify any challenge or new caselaw that would have affected the ALJ's decision." *Id*.

The ALJ held a telephonic hearing on November 9, 2021. Hearing Tr. at 1, 4. Employer filed a post-hearing brief on February 10, 2022. Employer's Post-Hearing Brief. Although the ALJ closed the evidentiary record on February 10, 2022, he did not issue his Decision and Order until November 30, 2023. Hearing Tr. at 26-27.

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Tr. at 12-15.

[4] Although Section 725.476 does not specify any recourse in cases where the 20-day period is not followed, the Board has held a delay in issuing a decision may warrant remand for a new hearing if "the aggrieved party shows prejudice caused by the delay." *Williams v. Black Diamond Coal Mining Co.*, 6 BLR 1-188, 1-191 (1983); *Tobin v. Pagnotti Enterprises*, 5 BLR 1-16, 1-22 (1982); *see* 20 C.F.R. §725.476.

We agree with the Director's argument that Employer forfeited any objection to the ALJ's failure to comply with 20 C.F.R. §725.476. As in *Cardillo*, Employer did not request a prompt decision at any time while the case was before the ALJ. *See, e.g.*, *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995). Moreover, Employer has not established a due process violation or otherwise explained how it was prejudiced by the delay in a manner that would warrant transfer of the claim to the Trust Fund. *See Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009) ("The basic elements of procedural due process are notice and opportunity to be heard."); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999) (to establish a due process violation, party must demonstrate it was deprived of a fair opportunity to mount a meaningful defense against the claim); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807-08 (4th Cir. 1998) (delay in notifying the employer of a claim deprived it of due process and warranted the transfer of liability to the Trust Fund).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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 employment. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function and arterial blood gas studies,[5] 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).

[5] A "qualifying" pulmonary function study or arterial blood gas study yields results that are equal to or less than the applicable table values listed in Appendices B and C 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), (ii).

The ALJ found Claimant established total disability based on the pulmonary function studies, the medical opinions, and the evidence considered as a whole.[6] 20 C.F.R. §718.204(b)(2)(i), (iv); Decision and Order at 6-7.

Pulmonary Function Studies

The ALJ considered the results of three pulmonary function studies dated November 14, 2018, March 17, 2020, and February 22, 2021. Decision and Order at 5-6. The November 14, 2018 study produced non-qualifying results before and after the administration of bronchodilators. Employer's Exhibit 2. The March 17, 2020 study produced qualifying results before the administration of bronchodilators, and non-qualifying results after the administration of bronchodilators. Director's Exhibit 10. The February 22, 2021 study produced qualifying results before and after the administration of bronchodilators. Employer's Exhibit 3. The ALJ found the November 14, 2018 and March 17, 2020 studies valid but the February 22, 2021 study invalid. Decision and Order at 6. He further found the qualifying pre-bronchodilator results of the March 17, 2020 study entitled to greater weight than the non-qualifying pre-bronchodilator results of the November 14, 2018 study based on its recency. *Id*. He thus concluded the pulmonary function study evidence supports a finding of total disability. *Id*.

As the ALJ's finding that the February 22, 2021 pulmonary function study is invalid is unchallenged, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

We further affirm, as unchallenged, the ALJ's crediting of Drs. Gaziano's and Basheda's opinions that the March 17, 2020 pulmonary function study is valid.[7] *See Skrack*, 6 BLR at 1-711; Decision and Order at 6. Employer argues, however, that the ALJ failed to "acknowledge" that Dr. Forehand questioned the validity of the study and did not "explain" why Dr. McSharry's opinion invalidating the study is not credible. Employer's Brief at 8-10. We disagree.

[6] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 4, 6.

[7] Dr. Gaziano reviewed the March 17, 2020 pulmonary function study and determined its vents are acceptable. Director's Exhibit 13 at 1. Similarly, Dr. Basheda determined the pre- and post-bronchodilator FEV_1 and FVC results of the study have "acceptable reproducibility." Employer's Exhibit 8 at 6.

When considering pulmonary function study evidence, the ALJ must determine whether the studies are in substantial compliance with the quality standards.[8] 20 C.F.R. §§718.101(b), 718103(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). 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). "In the absence of evidence to the contrary, compliance with the [regulatory quality standards] shall be presumed." 20 C.F.R. §718.103(c). Thus, 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).

In determining whether the March 17, 2020 pulmonary function study is valid, the ALJ considered the medical opinions of Drs. Forehand, Gaziano, Basheda, and McSharry. Decision and Order at 5-6. He found Dr. McSharry's opinion that the study is invalid outweighed by Drs. Forehand's, Gaziano's, and Basheda's contrary opinions. *Id*. at 6.

Dr. Forehand conducted the March 17, 2020 pulmonary function study and noted on an accompanying report that Claimant demonstrated good cooperation and ability to understand instructions. Director's Exhibit 10 at 11. During his deposition, Dr. Forehand was asked to offer his opinion on the results of the November 14, 2018 and March 17, 2020 pulmonary function studies. Director's Exhibit 26 at 22-26. Although he expressed uncertainty as to whether the March 17, 2020 study is "a true representation" of Claimant's lung function, particularly as it relates to whether he has asthma, the physician nevertheless stated that the study "was validated" and provides "helpful information" that is "to be used" in assessing his impairment. *Id*. at 23-25. When Employer's counsel asked him how certain he was that Claimant has a totally disabling impairment from coal mine dust exposure, Dr. Forehand stated Claimant "had a similar pattern of impairment [in 2018,]" the 2020 study "is worse," and there was no "question in [his] mind" that Claimant's impairment was caused by coal mine dust exposure. *Id*. at 26.

Because Dr. Forehand determined the March 17, 2020 pulmonary function study had been validated and relied on it in formulating his opinion that the pulmonary function studies demonstrate total disability, we see no error in the ALJ's finding that the doctor's

[8] 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).

opinion supports the validity of the study, along with the credited opinions of Drs. Gaziano and Basheda. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6h Cir. 2005); Decision and Order at 6.

We also reject Employer's argument that the ALJ erred in weighing Dr. McSharry's opinion. Dr. McSharry stated the FEV_1 results of the March 17, 2020 pulmonary function study are "likely unreliable" based on the flow-volume loops. Employer's Exhibit 11 at 27. He also stated that because the loops are poorly reproduced, he couldn't "say very much about it" but "the loops don't look very good and the absolute values varied . . . [s]o they were not reproducible or repeatable as a criterion for validity." *Id*. at 27-28. Further, he stated he is "not sure" whether the FVC results "would be impacted by that testing or not, but the FEV_1 [result] is likely unreliable based on those flow volume loops." *Id*. at 27. Contrary to Employer's assertion, the ALJ permissibly found Dr. McSharry's opinion equivocal and entitled to little weight. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882 (6th Cir. 2000) (ALJ may discredit an equivocal opinion); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (same); Decision and Order at 6. As the trier-of-fact, the ALJ has the discretion to weigh the medical evidence and draw his own inferences therefrom. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-77 (6th Cir. 2013); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482-83 (6th Cir. 2012); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002). The Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Nor are we persuaded by Employer's argument that the ALJ erred by applying table values for a seventy-one-year-old miner even though Claimant was seventy-six years old at the time he performed the November 14, 2018, March 17, 2020 and February 22, 2021 tests. Employer's Brief at 8. Employer asserts the ALJ should have considered Drs. Forehand's, Basheda's, and McSharry's opinions regarding "the impact of age on the testing and [the Department of Labor (DOL)] disability tables." *Id*.

Contrary to Employer's argument, absent contrary probative evidence, the values for a seventy-one-year-old miner listed in Appendix B of the regulations is to be used to determine if pulmonary function studies of miners over the age of seventy-one qualify for total disability. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008).

Drs. Forehand, Basheda, and McSharry noted that DOL's predicted values for disabling pulmonary function study results are not adjusted for age beyond seventy-one. However, they did not set forth what they considered to be appropriate predicted values for the March 17, 2020 study based on his age of seventy-six at the time he performed the test, for comparison with the values for a seventy-one-year-old miner listed at Appendix B. Director's Exhibit 26 at 18-19; Employer's Exhibits 10 at 14; 11 at 19. Because they do

not explain their general assertions that the Appendix B table values might be less reliable for miners over the age of seventy-one,[9] we decline Employer's request to remand this case for further consideration of their opinions under *Meade.*

Moreover, while Employer's post-hearing brief to the ALJ raised various challenges to the pulmonary function study evidence, it did not allege the table values for a seventy-one-year-old should not be used to determine whether Claimant's pulmonary function testing is qualifying at 20 C.F.R. §718.204(b)(2)(i). We therefore affirm the ALJ's reliance on the table values for a seventy-one-year-old at Appendix B in assessing whether the pulmonary function studies are qualifying for total disability. *Meade,* 24 BLR at 1-147.

Employer next argues that the ALJ erred in relying on the pre-bronchodilator results of the March 17, 2020 pulmonary function study because, it asserts, he failed to acknowledge that the regulations "do not differentiate between" the pre- and post-bronchodilator pulmonary function testing. It also asserts that "Drs. Basheda and McSharry explained why the post-bronchodilator testing was indeed more informative."[10] Employer's Brief at 10. We disagree.

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[9] Dr. McSharry stated the DOL is not "justified" in applying table values for a seventy-one-year-old to older miners because lung function continues to decline with age. Employer's Exhibit 11 at 19. Dr. Basheda stated it is "unfortunate" that predicted values are not available "for elderly folks" because "there could be some differences [in values] that may be the normal manifestations of aging." Employer's Exhibit 10 at 14. In response to Employer's counsel characterizing a predicted value age limit of seventy-one in the DOL tables as "invalid," Dr. Forehand stated he "understand[s] where [counsel is] coming from" because in a "lab you would extrapolate to the age[.]" Director's Exhibit 26 at 19.

[10] Employer also contends the ALJ erred in failing to consider that Drs. Basheda and McSharry explained that Claimant's pulmonary function studies demonstrate a "trend in an inability to do the testing and rendering the pulmonary function test results, an effort dependent test, less informative of the real pulmonary condition." Employer's Brief at 7. We disagree. In support of its contention, Employer generally cites the depositions of Drs. Basheda and McSharry, Employer's Brief at 7, but does not specifically identify any portion of their reports or depositions that supports its contention, and we are unable to do so on our own review of the record. Because Employer has not identified what specific evidence of record the ALJ allegedly failed to consider, we reject its argument. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); 20 C.F.R. §702.211(b); Employer's Brief at 7.

Contrary to Employer's argument, the ALJ permissibly found the March 17, 2020 study's qualifying pre-bronchodilator results entitled to more weight than its non-qualifying post-bronchodilator results, as the relevant inquiry when making disability determinations is "whether the miner is able to perform his job, not whether the miner is able to perform the job after he takes medication." Decision and Order at 6; *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("the use of a bronchodilator [during pulmonary function testing] does not provide an adequate assessment of disability"); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

The ALJ thus permissibly found the pulmonary function study evidence supports a finding of total disability based on the more recent qualifying pre-bronchodilator results of the March 17, 2020 study.[11] *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (quoting *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (given the progressive nature of pneumoconiosis, an ALJ may credit a "later test or exam" as a "more reliable indicator of [a] miner's condition than an earlier one" where a "miner's condition has worsened")); *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-49-52 (2023); Decision and Order at 6.

Because it is supported by substantial evidence, we affirm the ALJ's finding that the pulmonary function study evidence supports a finding of total disability. *See Martin*, 400 F.3d at 305; 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 6.

Medical Opinions

The ALJ considered the medical opinions of Drs. Forehand, Basheda, and McSharry. Decision and Order at 6-7. Dr. Forehand opined Claimant is totally disabled, while Drs. Basheda and McSharry opined he is not. Director's Exhibits 10 at 4; 26 at 27; Employer's Exhibits 3 at 5; 5 at 5; 8 at 21; 10 at 22-23; 11 at 29-30. The ALJ found Dr. Forehand's opinion well-reasoned but found Drs. Basheda's and McSharry's opinions

[11] Employer argues the ALJ erred in failing to consider the results of the January 6, 2012 and November 21, 2014 pulmonary function studies included in Claimant's treatment records. Employer's Brief at 6; *see* Employer's Exhibit 1 at 57-65. Contrary to its argument, the ALJ acknowledged these earlier studies but permissibly assigned greater weight to the more recent studies. Decision and Order at 6 n.23; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-405-07 (1982). Employer does not challenge the ALJ's assigning greater weight to the more recent studies.

unpersuasive. Decision and Order at 6-7. He thus found the medical opinion evidence supports a finding of total disability based on Dr. Forehand's opinion.

Employer argues the ALJ erred in crediting Dr. Forehand's opinion because, it asserts, "the clinical testing resulted in contradictory indications as to disability." Employer's Brief at 11.

Contrary to Employer's argument, the regulations explicitly permit a physician to offer a reasoned medical opinion diagnosing total disability even where one or more of the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 277 F.3d 569, 578 (6th Cir. 2000). Dr. Forehand opined Claimant has a mixed obstructive-restrictive impairment that leaves him with insufficient respiratory capacity to meet the physical demands of his last coal mine job. Director's Exhibit 10 at 4. He concluded the results of the November 14, 2018 and March 17, 2020 pulmonary function studies demonstrate progressive worsening of Claimant's impairment. Director's Exhibits 10 at 4; 26 at 23-26. The ALJ found Dr. Forehand based his opinion on "Claimant's symptoms, exertional requirements and his qualifying [pulmonary function study]" and permissibly determined his opinion is reasoned and entitled to great weight.[12] *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 7.

We also reject Employer's argument that the ALJ did not provide a valid reason for finding Drs. McSharry's and Basheda's opinions not credible. Employer's Brief at 11-15.

Dr. McSharry opined Claimant has a mild pulmonary impairment attributable to asthma. Employer's Exhibits 3 at 5; 11 at 29-31. He based his opinion on Claimant's pulmonary function testing, which he found uniformly normal or improved to normal after use of a bronchodilator. *Id*. Dr. Basheda did not clearly address in his report whether Claimant has a totally disabling impairment because he questioned the validity of the February 22, 2021 pulmonary function study, which he found demonstrated an impairment.

[12] Employer argues the ALJ erred in failing to consider a part of Dr. Forehand's deposition testimony in which, it contends, the doctor "retracted his absolute assessment of total disability" after considering the 2018 and 2020 pulmonary function studies. Employer's Brief at 11-12 (citing Director's Exhibit 26 at 23-24). However, Dr. Forehand opined during his deposition that the pulmonary function studies demonstrate progression of a pulmonary impairment and he had no question that Claimant has a disabling impairment related to coal mine dust exposure. Director's Exhibit 26 at 23-26. As Dr. Forehand's testimony supports the ALJ's finding that the doctor opined Claimant is totally disabled, any error in failing to specifically address Dr. Forehand's deposition is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer's Exhibit 8 at 18-19. He also acknowledged the March 17, 2020 pulmonary function study produced "abnormal" values. Employer's Exhibit 8 at 20. During his deposition, he again found the March 17, 2020 pulmonary function study produced abnormal values and concluded that while Claimant may have uncontrolled asthma, any impairment is due to non-pulmonary causes because Claimant "has no significant pulmonary disease on his chest x-ray." Employer's Exhibit 10 at 21.

The ALJ found that although Drs. Basheda and McSharry acknowledged the qualifying pre-bronchodilator results of the March 17, 2020 pulmonary function study, they "seemed to place greater weight" on Claimant's older, non-qualifying pulmonary function study results. Decision and Order at 7. He thus found their opinions unpersuasive because they did not adequately consider the qualifying pre-bronchodilator results of the March 17, 2020 study, which the ALJ found most credible among the pulmonary function studies.[13] Decision and Order at 7. As those findings are rational and supported by substantial evidence, we affirm them. *See Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

Employer raises no further arguments on total disability. We thus affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability based on Dr. Forehand's opinion. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 7. Further, we affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole, 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and therefore invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); Decision and Order at 7.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[14] or that "no part of [his] respiratory or pulmonary total disability

[13] Because the ALJ provided a valid reason for discrediting Dr. Basheda's opinion, we decline to address Employer's arguments that the ALJ erred in discrediting the doctor's opinion on other grounds. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 13-14.

[14] "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

was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305. The ALJ found Employer did not establish rebuttal by either method.[15] Decision and Order at 14-15.

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 considered the medical opinions of Drs. Basheda and McSharry.[16] Decision and Order at 11-13. They opined Claimant does not have legal pneumoconiosis but has asthma unrelated to coal mine dust exposure. Employer's Exhibits 3 at 5; 8 at 19-20; 11 at 32. The ALJ found their opinions not reasoned or documented and thus insufficient to disprove legal pneumoconiosis. Decision and Order at 13.

We initially reject Employer's assertions that the ALJ erred in relying on the preamble to the revised 2001 regulations when weighing the opinions of Drs. Basheda and McSharry and that he improperly treated it as a binding rule or regulation. Employer's Brief at 16-19. Federal circuit courts have consistently held that an ALJ may evaluate expert opinions in conjunction with the preamble, as it sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830-31 (10th Cir. 2017); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP*

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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).

[15] The ALJ found Employer disproved the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order at 11.

[16] The ALJ also considered the medical opinion of Dr. Forehand that Claimant has legal pneumoconiosis, but he correctly determined Dr. Forehand's opinion does not aid Employer in rebutting the presumption. Decision and Order at 11.

[*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008).

Additionally, contrary to Employer's contention, the ALJ did not treat the preamble as binding in a manner requiring notice and comment. *Adams*, 694 F.3d at 801-02; Employer's Brief at 19. Rather, he permissibly evaluated the opinions of Drs. Basheda and McSharry in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble. *See Sterling*, 762 F.3d at 491; *Adams*, 694 F.3d at 801-02; Decision and Order at 11-13.

We also reject Employer's argument that the ALJ erred in discrediting Dr. McSharry's opinion because, it asserts, the ALJ concluded "all asthma is [chronic obstructive pulmonary disease (COPD)] and must be legal pneumoconiosis." Employer's Brief at 15-19. Dr. McSharry excluded a diagnosis of legal pneumoconiosis because coal mine dust exposure does not cause asthma. Employer's Exhibits 3 at 5; 11 at 32. However, the ALJ noted that the DOL, in the preamble to the 2001 revised regulations, recognized that COPD includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema, and asthma. Decision and Order at 12 (citing 65 Fed. Reg. at 79,939). Further, the DOL concluded that the prevailing view of the medical community is that COPD may be caused by coal mine dust exposure. 65 Fed. Reg. at 79,939. The ALJ thus permissibly found Dr. McSharry did not adequately explain why Claimant's coal mine dust exposure did not substantially contribute to, or aggravate, his asthma. *See Sterling*, 762 F.3d at 491; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 12-13.

We further reject Employer's argument that the ALJ erred in discrediting Dr. Basheda's opinion. Employer's Brief at 15. Dr. Basheda diagnosed Claimant with asthma based on his bronchodilator response demonstrated in pulmonary function tests. Employer's Exhibits 8 at 19-20. He opined Claimant's asthma is unrelated to coal mine dust exposure because he did not have symptoms of the disease during his coal mining career or have respiratory symptoms persist after leaving his coal mine employment. *Id.* The ALJ permissibly discredited Dr. Basheda's rationale because the regulations provide that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *see also Peabody Coal Co. v. Odom*, 342 F.3d 486, 491 (6th Cir. 2003); Decision and Order at 13. Additionally, he permissibly found Dr. Basheda's opinion unpersuasive because the physician did not explain why Claimant's coal mine dust exposure "could not have had at least an additive effect on [his] asthma." Decision and Order at 13; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

Because the ALJ permissibly discredited Drs. Basheda's and McSharry's opinions, the only medical opinions supportive of Employer's burden on rebuttal, we affirm his finding that Employer did not disprove legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Employer does not challenge the ALJ's finding that it failed to establish no part of Claimant's respiratory or pulmonary total disability was caused by pneumoconiosis; thus, we affirm it. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 14-15.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge