U.S. Department of Labor

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

BRB No. 23-0338 BLA

JENNY RUTH HALL (Survivor of JAMES E. HALL)	)	
Claimant-Respondent	)	
v.	)	
ELKHORN JELLICO COAL COMPANY	)	**NOT-PUBLISHED**
and	)	
OLD REPUBLIC INSURANCE COMPANY, INCORPORATED	)	DATE ISSUED: 10/25/2024
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits on Modification of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Michael A. Pusateri and Brian Straw (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Olgamaris Fernandez (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, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Granting Benefits on Modification (2021-BLA-05190) rendered on a survivor's claim[1] filed on March 7, 2019,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited the Miner with 16.39 years of qualifying coal mine employment. He further found the Miner had a totally disabling pulmonary or respiratory impairment, 20 C.F.R. §718.204(b)(2), and therefore found Claimant invoked the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018). Thus, he found Claimant established a mistake in a determination of

[1] Claimant is the widow of the Miner, who died on January 31, 2019. Director's Exhibit 3. Because the Miner did not establish entitlement to benefits during his lifetime, Claimant is not eligible for derivative survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).

[2] The district director denied Claimant's claim because she did not establish the Miner's death was due to pneumoconiosis. Director's Exhibit 32. Thereafter, Claimant timely requested modification. Director's Exhibit 39. The district director determined Claimant did not establish a mistake in a determination of fact and denied the request for modification. Director's Exhibit 41. Claimant timely requested a hearing and the claim was transferred to the Office of Administrative Law Judges. Director's Exhibits 47, 48.

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

fact for purposes of modification. 20 C.F.R. §725.310(a). The ALJ further determined Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution.[4] It further asserts the removal provisions applicable to the ALJ render his appointment unconstitutional. On the merits, Employer argues the ALJ erred in finding Claimant established fifteen years of qualifying coal mine employment and total disability, thereby invoking the Section 411(c)(4) presumption. Employer further argues the ALJ erred in finding it did not rebut the presumption.

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director) also filed a response, asserting the ALJ had authority to decide the case, correctly found more than fifteen years of coal mine employment established, appropriately determined the Miner's surface coal mine employment constituted qualifying coal mine employment for invoking the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305, and permissibly relied on the preamble to the 2001 revised regulations in weighing the medical opinions. Employer has filed reply briefs to both the Claimant's and Director's response briefs, addressing the arguments raised in each.

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.[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).

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[4] 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.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky.

Appointments Clause/Removal Protections

Employer urges the Board to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. 237 (2018).[6] Employer's Brief at 44, 46-47. It references the Secretary of Labor's ratification of the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] but maintains the "ratification policy" was insufficient to cure the constitutional defect in the ALJ's prior appointment and violates the rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. §553(b), and the Act. *Id.* at 46-47; Employer's Reply to Director at 2-6. It also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 44-46.

Initially, we agree with the Director that Employer forfeited its Appointments Clause and removal protection arguments as it failed to raise these claims before the ALJ. *See Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 587 (6th Cir. 2021) ("Black lung benefits adjudication regulations require that litigants raise issues before the ALJ as a prerequisite to review by the [Board]."); *Edd Potter Coal Co. v. Director, OWCP*, 39 F.4th 202 (4th Cir. 2022) (Appointments Clause challenge forfeited

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See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 17-18.

[6] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. 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. 237, 251 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) 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.

[7] The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's Dec. 21, 2017 Letter to ALJ Jason A. Golden.

if not timely raised); Director's Response at 9. Further, even if Employer had timely raised its challenges to the ratification of the ALJ's appointment and to the removal protections afforded DOL ALJs, we reject Employer's arguments for the reasons set forth in *Johnson v. Apogee Coal Co.*, 26 BLR 1-1, 1-57 (2023) and *Howard v. Apogee Coal Co*., 25 BLR 1-301, 1-307-08 (2022). *See K&R Contractors, LLC v. Keene*, 86 F.4th 135, 144-45 (4th Cir. 2023).

Modification

The sole basis for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *See* 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). An ALJ has broad discretion to grant modification based on a mistake of fact, including the ultimate fact of entitlement to benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Moreover, a party need not submit new evidence on modification because an ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); 20 C.F.R. §725.310(c) (ALJ must consider whether the evidence of record demonstrates a mistake of fact "regardless of whether the parties have submitted new evidence").

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment, and had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011).

Length of Coal Mine Employment

Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

In evaluating the length of the Miner's coal mine employment, the ALJ considered the Miner's Social Security Earnings Statement (SSES) and the Employment History forms completed by Claimant and the Miner. Decision and Order at 6. The ALJ found the

evidence insufficient to determine the beginning and ending dates of the Miner's employment with any of his coal mine employers. *Id.* He used two different methods for calculating the length of the Miner's coal mine employment. First, for the years prior to 1978, the ALJ credited the Miner with a quarter of a year of coal mine employment for each quarter in which he earned at least $50.00 from coal mine operators. *Id.* at 6; *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 n.2 (1984). On this basis, he credited the Miner with 11.5 years of coal mine employment between 1966 and 1977. Decision and Order at 6.

For 1978 onward, the ALJ applied the "fourth method" the United States Court of Appeals for the Sixth Circuit articulated in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406 (6th Cir. 2019), in its analysis of 20 C.F.R. §725.101(a)(32)(iii).[8] Decision and Order at 5-6. For each year in which the Miner's earnings met or exceeded the average yearly earnings of coal miners as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*, the ALJ credited the Miner with a full year of coal mine employment. Decision and Order at 6. For the years in which the Miner's earnings fell short of 125 days, the ALJ credited him with a fractional year, calculated by dividing his annual earnings by the Exhibit 610 average yearly earnings. *Id*. Applying this formula, the ALJ credited the Miner with 4.89 years from 1978 until 1983. *Id.* at 6-7. Adding those 4.89 years to the Miner's 11.5 pre-1978 years, the ALJ credited the Miner with a total of 16.39 years of coal mine employment. *Id.* at 7.

Employer argues the ALJ erred in finding Claimant established at least fifteen years of coal mine employment. Specifically, Employer asserts the "$50-per-quarter method" is derived from the Social Security Act and is neither included nor incorporated into the Black Lung Benefits Act or its regulations. Employer's Brief at 18. It further contends crediting

[8] Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of a miner's coal mine employment cannot be ascertained or the miner's coal mine employment lasted less than a calendar year, the ALJ may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual* (titled *Average Earnings of Employees in Coal Mining*) sets forth the average "daily earnings" of miners and the "yearly earnings (125 days)" by year for employees in coal mining, as reported by the BLS.

a full quarter for each in which the Miner earned at least $50.00 fails to "examine all evidence in the record."[9] *Id.* at 19. We disagree.

Contrary to Employer's argument, the ALJ permissibly applied the $50.00-per-quarter method to calculate the length of the Miner's pre-1978 coal mine employment. *See Tackett*, 6 BLR at 1-841 n.2; Employer's Brief at 17-21. The Sixth Circuit has not precluded the application of the *Tackett* method. Rather, it has instructed that this "previously applicable quarter method cannot be used" if the ALJ concludes that "the miner was not employed by a coal mining company for a full calendar quarter." *Shepherd*, 915 F.3d at 406. With respect to the $50.00 threshold, it advised that "as quarterly income approaches that floor of $50.00, it seems reasonable to conclude that the miner did not work in the mines most days in the quarter." *Id.* at 405-06. In the present claim, consistent with *Shepherd*, the ALJ found the specific beginning and ending dates of employment could not be ascertained, and the quarters for which he credited the Miner show earnings well above the "floor" of $50.00. Other than identifying fluctuations in the Miner's income across quarters, Employer has not explained how the ALJ's calculations are unreasonable.[10] *See id.*; *Muncy*, 25 BLR at 1-27.

Employer next asserts the ALJ erred in finding 125 days is sufficient to establish one year of coal mine employment, as it contends this determination comes from dicta in *Shepherd*. Employer's Brief at 15-16. It contends *Shepherd* held only that "all evidence" of record must be assessed in determining a miner's years of coal mine employment. *Id.* at 15. The Director responds that the court's determination in *Shepherd* that 125 working days constitutes a year of coal mine employment is not dicta and, as this case falls under the Sixth Circuit's jurisdiction, *Shepherd* is binding. Director's Response at 4-5. We agree with the Director's position.

In *Shepherd*, the court expressly instructed the ALJ to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)" when evaluating a miner's length of coal mine employment. 915 F.3d at 407. It concluded that if a miner establishes "at least 125 working days," the regulation "unambiguously" allows the miner to be "credited with a year of coal mine employment, regardless of the actual duration of employment for the year." *Id*. at 402. Thus, regardless of Employer's disagreement with the Sixth Circuit's

[9] Employer notes varying earnings between quarters in the same year, which it contends demonstrates less coal mine employment in those quarters with less earnings. Employer's Brief at 18-19.

[10] The quarter with earnings closest to the $50.00 floor that Employer cites is the fourth quarter of 1977, in which the Miner earned $218.75. Employer's Brief at 19.

interpretation of the regulation, the ALJ was bound by the holding in *Shepherd*. As the ALJ was bound by *Shepherd*, we also reject Employer's additional arguments about the correct interpretation of what constitutes "a year" of coal mine employment. Employer's Brief at 15-17.

As the ALJ provided reasonable calculations and properly applied the applicable law, we affirm his findings that Claimant established the Miner had 16.39 years of coal mine employment and thus that a mistake in a determination of fact was made in the prior decision. *See* 20 C.F.R. §725.310(a); Decision and Order at 7; *see also Shepherd*, 915 F.3d at 402; *Muncy*, 25 BLR at 1-27.

Nature of Coal Mine Employment

For the Miner's employment to constitute qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption, it must have been performed underground or in conditions "substantially similar" to those in an underground mine. U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(i). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that the [M]iner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015).

The ALJ considered Claimant's testimony to determine the nature of the Miner's surface coal mine employment. He found that Claimant's uncontradicted testimony[11] supports a finding that the Miner was regularly exposed to coal mine dust in his surface coal mine work. Decision and Order at 8. Thus, he found Claimant established that the Miner's 16.39 years of coal mine employment is qualifying for purposes of invoking the Section 411(c)(4) presumption. *Id.*

Employer argues Claimant failed to establish the Miner's surface mine work was performed in conditions where "coal dust exposure was as severe and regular as what

[11] Claimant indicated all the Miner's coal mine employment was performed aboveground and she was uncertain whether any took place at an underground mine. Hearing Transcript at 14-15. Regarding the Miner's exposure to coal mine dust, the ALJ noted Claimant testified that the Miner returned home from his shifts covered in "dark" coal dust. Decision and Order at 8; Hearing Transcript at 15. She further explained the Miner was exposed to something "real dark" that was "hard to get out of his clothes" and responded affirmatively when asked if the Miner coughed up coal dust often. Hearing Transcript at 15.

miners experience underground," and thus the ALJ violated the APA[12] in finding the Miner's coal mine employment was qualifying. Employer's Brief at 21-23. It further contends that even assuming the Miner's dust exposure was comparable to that in an underground mine, Claimant's testimony is inadequate to demonstrate he was regularly exposed to coal mine dust in all of his coal mine employment. *Id.* at 23-27. We disagree.

Initially, contrary to Employer's assertion, a claimant is not required to prove the conditions aboveground were the same as those in underground mines. *See Kennard*, 790 F.3d at 664-65; 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013); Employer's Brief at 21-23; Director's Response at 6-7. Instead, a claimant need only establish a miner was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2).[13]

Further, while Employer now also argues on appeal that Claimant's testimony is insufficient to establish that the Miner was "regularly" exposed to coal mine dust for the entirety of his coal mine employment, Employer raised no such argument before the ALJ. Employer's Closing Argument at 40 (stating only that it contends that "Claimant has failed to establish that the Miner's exposure was comparable to underground mining"). As Employer failed to adequately raise this issue below, we decline to address it. *See Davis*, 937 F.3d at 591; *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (party forfeits argument when it "cho[oses] to identify the issue but not to press it").

Thus, we affirm the ALJ's finding that the Miner was regularly exposed to coal mine dust in his coal mine employment and thus it qualifies for invoking the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(b)(2); *see also Kennard*, 790 F.3d at 664 ("uncontested lay testimony" regarding dust conditions "easily supports a finding" of regular dust exposure); *Bonner v. Apex Coal Corp.*, 25 BLR 1-277, 1-282-83 (2022) (widow's credible testimony regarding a miner's appearance and the dust on his clothes

[12] The APA requires the ALJ to consider all relevant evidence in the record, and to set forth his "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[13] Insofar as Employer suggests that 20 C.F.R. §718.305(b)(2) is invalid, we reject this argument. Employer's Brief at 25-27. The Sixth Circuit and the United States Court of Appeals for the Tenth Circuit have rejected similar arguments and upheld the validity of the regulation. *See Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 301-03 (6th Cir. 2018); *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018).

when he returned home from work may be sufficient to establish the miner was regularly exposed to coal mine dust); Decision and Order at 8.

Total Disability

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.305(b)(1)(i). A miner is considered to have been totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work.[14] *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 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 medical opinion evidence and the evidence as a whole.[15] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 12. With respect to the medical opinions, the ALJ considered Dr. Sood's opinion that the Miner was incapable of performing his usual coal mine employment prior to his death, and Dr. Jarboe's opinion that total disability could not be assessed because the pulmonary function studies of record are invalid. Decision and Order at 11-12; Claimant's Exhibit 1; Employer's Exhibit 3. The ALJ found Dr. Sood's opinion well-reasoned and documented and that it outweighed Dr. Jarboe's opinion. Decision and Order at 11-12. Thus, the ALJ found the medical opinion evidence supports a finding of total disability. *Id.* at 12.

Employer argues the ALJ erred in finding Dr. Sood's medical opinion establishes total disability because it relies on pulmonary function studies the ALJ found were invalid. Employer's Brief at 27-30. We disagree.

[14] We affirm, as unchallenged on appeal, the ALJ's finding that the Miner's usual coal mine employment as a truck driver required heavy labor. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

[15] The ALJ found Claimant did not establish total disability based on the pulmonary function or 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)(i)-(iii); Decision and Order at 8, 10-11.

Initially, contrary to Employer's characterization of the ALJ's findings, he did not "reject" the pulmonary function study evidence as invalid.[16] Employer's Brief at 28. The ALJ found the pulmonary function studies did not meet all the quality standards set forth in the regulations, noting they did not have three tracings. Decision and Order 9; *see* 20 C.F.R. §718.103. However, as the ALJ correctly observed, the quality standards 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); Decision and Order at 9-10. The ALJ further correctly explained that he must still determine 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. 79,920, 79,928 (Dec. 20, 2000). The party challenging a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

The ALJ noted all the pulmonary function studies were developed as part of the Miner's treatment and not in anticipation of litigation; thus, they are not subject to the quality standards. Decision and Order at 9; Director's Exhibit 39 at 98. Employer has not contended that these studies were obtained in anticipation of litigation.

In considering whether the studies are sufficiently reliable to determine the presence of disability, the ALJ acknowledged the issues with the studies highlighted by the technicians' comments and Dr. Jarboe's opinion, including the Miner's inability to fully exhale or keep a tight seal around the mouthpiece during the lung volume measurements. Decision and Order at 10; Employer's Exhibit 3 at 10; Director's Exhibit 13. He further noted Dr. Sood's opinion that the studies are sufficiently reliable to diagnose total disability, and the technician's comments that the Miner gave "the best possible effort" during the tests and was unable to exhale completely on the flow volume loop due to his shortness of breath. Decision and Order at 10.

The ALJ gave great weight to the technician's observation that the Miner could not physically perform the full extent of the testing due to his shortness of breath, not due to a lack of effort. *Id.* As a result, the ALJ found the Miner's performance issues during the

[16] Further, contrary to Employer's implication, the ALJ did not find that the pulmonary function studies do not support total disability because they are invalid. Employer's Brief at 28. Rather, when weighing the conflicting evidence together, he found the evidence insufficient to meet Claimant's burden under 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 10.

testing likely reflected his poor pulmonary condition. *Id.*; *see also* 20 C.F.R. Part 718, Appendix B(2)(ii)(G) (allowing studies with excessive variability to be submitted in certain circumstances, recognizing that "individuals with obstructive disease or rapid decline in lung function will be less likely to achieve [a] degree of reproducibility"). Thus, contrary to Employer's argument, after considering the relevant evidence, the ALJ provided sufficient reasoning for determining the study could be relied upon as evidence of total disability. Decision and Order at 10; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002) (it is within the purview of the ALJ to weigh the evidence, draw inferences, and determine credibility); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Vivian*, 7 BLR at 1-361.

Thus, the ALJ was not required to find that Dr. Sood's reliance on the most recent July 29, 2015 pulmonary function study undermined his opinion. Claimant's Exhibit 6 at 7, 12-13. Consequently, the ALJ permissibly found Dr. Sood's opinion – that the Miner was unable to perform the heavy labor required by his last coal mine job because the reduced FVC values on pulmonary function testing showing less than fifty percent of expected lung volume demonstrated severe disability – was well-reasoned and supported by the objective testing and the Miner's treatment records. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 12.

Finally, the ALJ permissibly found Dr. Jarboe's opinion that total disability could not be assessed was undermined as he did not discuss the Miner's respiratory symptoms and physical limitations consistently set forth in the Miner's treatment records beginning in 2014. Decision and Order at 11; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

As the ALJ's findings are supported by substantial evidence, and Employer raises no further challenges regarding the weighing of the evidence, we affirm the ALJ's determination that the medical opinion evidence supports a finding of total disability, and the evidence, when weighed together, establishes total disability. *Martin*, 400 F.3d at 305; 20 C.F.R. §718.204(b)(2). We therefore affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) rebuttable presumption of death due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b)(1)(iii).

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

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

[17] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment

part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The ALJ found Employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015). The Sixth Circuit requires Employer to establish the Miner's "coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "An employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Id*. at 407 (citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014)).

Employer relied on Dr. Jarboe's opinion to disprove legal pneumoconiosis.[18] Employer's Brief at 35-43. Dr. Jarboe opined "it is not appropriate to diagnose legal pneumoconiosis" because the presence of obstruction or restriction cannot be established as all the Miner's pulmonary function studies are invalid. Employer's Exhibit 3 at 14. However, he acknowledged the Miner had emphysema with "bronchial hyperresponsiveness," likely due to his smoking history and unrelated to his coal mine dust exposure. *Id.* at 11-12, 14-15. The ALJ found Dr. Jarboe's opinion not well-reasoned and insufficient to rebut the presumption of legal pneumoconiosis. Decision and Order at 17.

Employer contends the ALJ misapplied the preamble to the revised 2001 regulations in discrediting Dr. Jarboe's opinion, improperly treating the preamble as a binding rule that created an "insurmountable" burden of proof. Employer's Brief at 35-41; Employer's

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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).

[18] As the ALJ indicated, Dr. Sood's opinion that the Miner had legal pneumoconiosis in the form of chronic obstructive pulmonary disease due in part to coal mine dust exposure does not support Employer's rebuttal burden. Decision and Order at 16; Claimant's Exhibit 1 at 10.

Reply to Director at 8-10. The Director responds, arguing the ALJ did not treat the preamble as binding but permissibly consulted it in evaluating Dr. Jarboe's opinion. Director's Response at 7-8. We agree with the Director's position.

The Sixth Circuit has held that an ALJ may evaluate expert opinions in conjunction with the preamble, using it as interpretative guidance or to resolve evidentiary disputes, as long as it is not treated as legally binding.[19] *Wilgar Land Co. v. Director, OWCP* [*Adams*], 85 F.4th 828, 838-39 (6th Cir. 2023); *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).

Here, the ALJ permissibly evaluated Dr. Jarboe's opinion in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble to determine whether Dr. Jarboe's opinion satisfied Employer's burden by credibly explaining his opinion that the Miner did not have legal pneumoconiosis. *See Adams*, 85 F.4th at 838-39; *Sterling*, 762 F.3d at 491; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 15-18.

As the ALJ observed, Dr. Jarboe indicated the pulmonary function study results were insufficiently reliable to prove a restrictive or obstructive impairment, yet he also acknowledged multiple diagnoses of chronic obstructive pulmonary disease (COPD) in the Miner's treatment records and diagnosed the Miner with emphysema. Decision and Order at 16; Employer's Exhibit 3 at 14-15. Dr. Jarboe opined the Miner's disease was likely due to his smoking history because "bronchial hyperresponsiveness" is inconsistent with coal mine dust exposure, and, while he did not know the cause of the Miner's variably reduced oxygen saturation, he indicated it was "not typical of a coal dust-induced disease." Employer's Exhibit 3 at 12, 14-15. In light of the DOL's recognition that the effects of smoking and coal mine dust can be additive, the ALJ permissibly found the physician failed to adequately explain why the Miner's coal mine dust exposure did not substantially aggravate his COPD, even if it were primarily due to smoking. *See Adams*, 85 F.4th at 840; *Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,939-41; Decision and Order at 17.

Moreover, the ALJ permissibly found Dr. Jarboe's opinion also undermined given his reliance on an underestimated length of the Miner's coal mine employment, and the physician's emphasis on his assumption that the Miner did not have significant exposure

[19] Contrary to Employer's contention, the preamble is not a legislative ruling requiring notice and comment. *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Employer's Brief at 38.

to coal mine dust because he worked in surface mines, contrary to the ALJ's findings. *See Huscoal, Inc., v. Director, OWCP* [*Clemons*], 48 F.4th 480, 491 (6th Cir. 2022); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); Employer's Exhibit 3 at 14-15; Decision and Order at 16-17.

Because the ALJ provided valid reasons for discrediting Dr. Jarboe's opinion, the only medical opinion supportive of Employer's rebuttal burden, we affirm his finding that Employer failed to disprove legal pneumoconiosis.[20] *See Minich*, 25 BLR at 1-155 n.8.

Therefore, we affirm his finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing the Miner did not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i)(A); Decision and Order at 17. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the Miner did not have pneumoconiosis.[21] 20 C.F.R. §718.305(d)(2)(i).

Death Causation

The ALJ next considered whether Employer established "no part of the [M]iner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); Decision and Order at 18-19. Contrary to Employer's argument, the ALJ permissibly discredited Dr. Jarboe's death causation opinion because he did not diagnose legal pneumoconiosis, contrary to the ALJ's finding that Employer failed to disprove the Miner had the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 18; Employer's Brief at 42-43. We therefore affirm the ALJ's finding that Employer failed to establish no part of the Miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii).

[20] Thus, we need not consider Employer's argument that the ALJ erred in finding Dr. Jarboe's opinion undermined for being inconsistent with the principle set forth in the regulations that pneumoconiosis can be a latent and progressive disease. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 39-41.

[21] Therefore, we need not address Employer's contentions of error regarding the ALJ's findings relevant to clinical 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"); Decision and Order at 17; Employer's Brief at 31-35.

Thus, we affirm the ALJ's findings that Employer did not rebut the Section 411(c)(4) presumption, 20 C.F.R. §718.305(d)(2), and Claimant established a mistake in a determination of fact. 20 C.F.R. §725.310; Decision and Order at 18-19. We further affirm, as unchallenged, the ALJ's finding that granting modification would render justice under the Act. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19.

Accordingly, we affirm the ALJ's Decision and Order Granting Benefits on Modification.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge