UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 25 September 2015

CASE NO.: 2012-BLA-05162

In the Matter of:

RAYMOND DAVIS,
Claimant,

v.

ADVENT MINING, LLC.,
Employer,

and

ROCKWOOD CASUALTY INSURANCE COMPANY, INC.,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party In Interest.

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (the "Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as "black lung," is a disease of the lungs resulting from coal dust inhalation.

Raymond Davis ("Claimant") filed this claim for benefits on October 14, 2010. DX 4. On September 21, 2011, the District Director issued a proposed Decision and Order awarding benefits. DX 25. Advent Mining, LLC. ("Employer") requested a formal hearing. DX 26.

This case was referred to the Office of Administrative Law Judges for a formal hearing. DX 29.[1] Subsequently, the case was assigned to me. I issued a Notice of Hearing on February 6, 2015. The hearing was held before me in Owensboro, Kentucky on July 7, 2015, at which time the parties had full opportunity to present evidence and argument. The decision that follows is based upon an analysis of the record,[2] the arguments of the parties,[3] and the applicable law.

I. ISSUES

The following issues are presented for adjudication:

(1) whether the Claimant suffers from pneumoconiosis;
(2) whether his pneumoconiosis, if any, arose from coal mine employment;
(3) whether the Claimant is totally disabled;
(4) whether the Claimant's total disability, if any, is due to pneumoconiosis; and
(5) whether the Claimant has established a change in a condition of entitlement pursuant to § 725.309(c).

Tr. 6.

II. STIPULATIONS

(1) The claim was timely filed;
(2) Claimant is a miner;
(3) Claimant worked as a miner after December 31, 1969;
(4) Employer stipulated to twenty seven years of coal mine employment while Claimant stipulated to thirty one years of coal mine employment;
(5) Claimant had one dependent for the purpose of augmentation until his wife passed away on July 6, 2013;
(6) Employer is the Responsible Operator;
(7) Insurance. Employer has secured the payment of benefits; and
(8) Claimant's most recent period of cumulative employment of not less than one year was with Employer.

Tr. 6, 31-32; Er. Br. at 1-2; Cl. Br. at 2; Joint Pre-Trial Stipulations at 1-2.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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[1] The following abbreviations are used in this Decision: "AJX" refers to Administrative Law Judge's Exhibit's; "DX" refers to Director's Exhibits; "CX" refers to Claimant's Exhibits; "EX" refers to Employer's Exhibits; "Tr." refers to the transcript of the hearing.

[2] At the hearing I admitted AJX 1 – 3; DX 1 – DX 31; EX 1 – EX 13 and CX 1 – CX 3.

[3] Claimant filed a post-hearing brief ("Cl. Br.") on August 28, 2015 and Employer filed a post-hearing brief ("Er. Br.") on September 8, 2015.

A. Claimant's Testimony

Claimant testified (under oath) at the hearing. He stated that he was born in 1948. Tr. 15. He was married until July 6, 2013, when his wife passed way. *Id.* He is not currently married. *Id.* Until his wife passed away, they lived together. *Id.* Without his wife, he no longer has dependents. *Id.*

Claimant believes he worked in coal mines for about thirty one years. *Id.* 16. All of his coal mine employment was underground. *Id.*

Claimant last worked in October 2010 for Advent Coal Company ("Advent"). *Id.* 16. He started working for Advent in 2005 and worked regularly at the company and for about five years. *Id.* 25-26. Other than taking three or four days off at the beginning of his employment with Advent, he did not miss any extended periods. *Id.* He worked between fifty-five to sixty hours per week. *Id.* 17.

Claimant spent half of his nine hour work-day around the face of the mine. *Id.* He testified that it "was dusty at the face and sometimes at the feeder, where you dumped the coal." *Id.* 17-18. Conditions were dustier when "we cut header holes for the header belt." *Id.* 18. It was not dusty when "we wouldn't run coal," which was not very often. *Id.* When he finished his shift at the mine, he would be "[d]irty, covered with coal dust." *Id.* He had to shower at the mine site every day, unless there was no hot water. *Id.* Even after he showered, he would find dust in his ears and nose. *Id.* About seventy-five percent of the time he worked he wore a breathing mask. *Id.* 27-28. The mask fit around his mouth but he was not fit for it specifically. *Id.*

Claimant drove a car (later, a ram car) at Advent, hauling coal from the face to the belt. *Id.* 16-17. As a car driver, Claimant had to lift heavy objects, such as miner bits and miner cable. *Id.* 19. He explained, "You had a miner cable and water hose together, and you got to hang it and pull underneath it." *Id.* He dealt with these items about fifteen to twenty times per day. *Id.*

At mines other than Advent, Claimant worked as a roof bolter and continuous miner. *Id.* As a roof bolter, he put pins in the roof to hold the top up. *Id.* This position required him to be on his feet or knees all day. *Id.* 19-20. Running a continuous miner involves cutting coal; a continuous miner "has got bits on the head, and it turns and cuts the coal." *Id.* 20.

Claimant testified that he has breathing problems and coughs when he wakes up in the morning. *Id.* These problems have worsened over time. *Id.* Due to his breathing problems, he has trouble walking far and climbing steps and can no longer haul his own hay. *Id.* 22. He has also has trouble sleeping in that he "sleep[s] maybe two or three hours, then I wake up and I can't go back to sleep. When I do go back to sleep, I'll sleep maybe an hour, then wake back up." *Id.* 23-24.

Claimant believes he can no longer do any of the work he did in the mines. *Id.* 20. He retired at age sixty two for this reason. *Id.* He does not think he could hang cable or walk because "I get out of breath." *Id.* He can lift up to twenty pounds without getting out of breath,

although not on a repetitive basis. *Id.* 23. He can walk up to thirty yards without getting out of breath and climb up to ten steps before getting out of breath. *Id.*

Claimant was diagnosed with diabetes in 2003 or 2004. *Id.* 28. He is on medication for diabetes, blood pressure, knee pain, and cholesterol. *Id.* 24. He was prescribed breathing medication but he stopped taking it because "I hate taking medicine and stuff." *See id.* 26-27. Since he stopped working he has lost thirty pounds, although it has not helped his breathing. *Id.* 30. He was hospitalized for a breathing condition when he was "younger" but not in the last twenty years. *Id.* 28.

Claimant smoked cigarettes for only a year and a half. *Id.* 21. He started smoking in 1969, quit after half a year, restarted in 1974 and quit again in 1975. *Id.* 21-22.

B. Relevant Medical Evidence

On November 11, 2010, Dr. Chavda conducted the pulmonary evaluation required under § 725.406, in conjunction with the Claimant's claim. Employer offered the deposition testimony of Dr. Chavda. EX 7.

In support of his affirmative case, the Claimant presented the following evidence:

1. Dr. Westerfield's November 8, 2006 reading of the November 4, 2006 x-ray. DX 2 at 72.
2. Dr. Ahmed's March 27, 2014 reading of the July 21, 2011 x-ray. CX 1.
3. Dr. Simpao's November 6, 2006 pulmonary function test. DX 2 at 72.
4. Dr. Selby's July 21, 2011 blood gas study. EX 1.
5. Dr. Simpao's November 20, 2006 physician's opinion. DX 2 at 90.

To rebut Employer's July 21, 2011 x-ray, Claimant presented Dr. DePonte's March 26, 2015 reading. CX 3. To rebut the Department-sponsored November 4, 2010 x-ray, Claimant presented Dr. Crum's September 30, 2013 reading. CX 2.

In support of its affirmative case, Employer presented the following evidence:

1. Dr. Meyer's November 15, 2011 reading of the July 21, 2011 x-ray. EX 3.
2. Dr. Selby's July 21, 2011 reading of the July 21, 2011 x-ray. EX 1.
3. Dr. Selby's July 21, 2011 pulmonary function test. EX 1.
4. Dr. Selby's July 21, 2011 blood gas study. EX 1.
5. Dr. Selby's July 21, 2012 physician's opinion. EX 1.
6. Dr. Jarboe's May 15, 2012 physician's opinion. EX 5.
7. Treatment records from the Department of Veterans' Affairs. EX 4.

To rebut the Department-sponsored November 4, 2010 x-ray, Employer presented Dr. Shipley's April 30, 2012 reading. EX 5. For rebuttal of the Department-sponsored pulmonary function study, Employer offered Dr. Renn's October 13, 2011 assessment. DX 12.

C. The Miner's Smoking History

Claimant testified that he smoked cigarettes for a year and a half (for half a year starting in 1969 and for one year from 1974 to 1975). Tr. 21. Claimant's testimony is generally corroborated by the smoking history recorded by the physicians. Dr. Chavda recorded a smoking history of ¼ pack per day from 1968 to 1970. DX 12. Dr. Selby noted that Claimant smoked four to five cigarettes per day for one year while Claimant was in the army.[4] EX 1. At his deposition, Dr. Selby testified that Claimant smoked "only a fourth a pack of cigarettes for a year or so" and characterized this history as "fairly minimal." EX 1 (Dep. at 11). Dr. Jarboe noted that Claimant smoked ¼ pack of cigarettes from 1968 to 1970. EX 6 at 2. Accordingly, I find that Claimant smoked ¼ pack of cigarettes for one and a half years.

D. Subsequent Miner's Claim

This is Claimant's third claim for benefits.[5] Because this claim is a subsequent claim, it must be denied unless the Claimant can demonstrate that one or more applicable conditions of entitlement have changed since the denial of the prior claim. § 725.309(c). However, if the Claimant establishes a change in one or more of the conditions of entitlement, he still bears the burden of proving the remaining conditions of entitlement. § 725.309(c)(3). *See National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002).

As § 725.309(c) states, the following rules pertain to the adjudication of subsequent claims:

> (2) Any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (3) For purposes of this section, the applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. For example . . . if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
>
> (4) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.

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[4] Dr. Selby also noted that Claimant chewed tobacco for two to three years. EX 1. However, he did not provide the basis for his notation, there is nothing in the record substantiating his claim, and his note is an outlier.

[5] Claimant filed his first claim for benefits on February 24, 2000, which was denied by the Director on May 8, 2000. DX 1. Claimant filed his second claim for benefits on September 25, 2006. DX 2. The Director issued a Proposed Decision and Order, denying benefits on April 26, 2007. *Id.*

Claimant was previously denied benefits because the evidence failed to show that the miner was totally disabled and that he was totally disabled due to pneumoconiosis. DX 2 at 9. If Claimant can show that a material change has occurred in light of new evidence, then the entire record must be considered in determining whether the Claimant is entitled to benefits. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996) (en banc)), rev'g 57 F.3d 402 (4th Cir. 1995), cert. den. 117 S.Ct. 763 (1997); *see also Grundy Mining Co. v. Flynn*, 353 F.3d 467 (6th Cir. 2003). If Claimant establishes the existence of that element, he has demonstrated, as a matter of law, a material change.

As explained below, I find that Claimant has established a material change in condition of one of the elements previously adjudicated against the Miner in denial. That is, Claimant has established that he is totally disabled from a respiratory perspective as defined by the Act.

Consequently, the entire record must be reviewed *de novo* to determine Claimant's eligibility for benefits. § 725.309(c)(2). However, medical evidence generated in conjunction with the miner's prior two claims pre-dates evidence submitted in this claim by three or more years. Given that pneumoconiosis is a progressive and irreversible disease process, evidence generated for the current claim will be accorded the most weight as it provides a more accurate depiction of the Claimant's current physical condition. *See Gillespie v. Badger Coal Co.*, 7 B.L.R. 1-839 (1985). As a result, this tribunal will focus on analyzing the most recent evidence in detail.

E. Entitlement

Because Claimant filed this claim after January 19, 2001, Claimant's entitlement to benefits is evaluated under the revised regulations set forth at 20 C.F.R. Part 718. The Act provides for benefits for miners who are totally disabled due to pneumoconiosis. § 718.204(a). In order to establish an entitlement to benefits under Part 718, the Claimant bears the burden to establish the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) the miner is totally disabled; and (4) the miner's total disability is caused by pneumoconiosis. *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). As the miner last engaged in coal mine employment in Kentucky, appellate jurisdiction of this matter lies with the U.S. Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (en banc).

In any claim filed after January 1, 2005, which is pending on or after March 23, 2010, Claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis if the miner demonstrates: (1) fifteen or more years of qualifying coal mine employment, and (2) a totally disabling respiratory impairment under 20 C.F.R. § 718.204. 20 C.F.R. § 718.305.

As Claimant must first establish total disability and fifteen or more years of qualifying coal mine employment before invoking the presumption under § 718.305, I will next address the issues of the length and character of Claimant's coal mine employment and Claimant's total disability.

a. *Length and Character of Coal Mine Employment*

Under § 718.305, the rebuttable presumption is applicable where a miner has 15 years or more of underground coal mine employment, or worked under conditions "substantially similar to conditions in an underground mine." Where aboveground employment occurs at an underground mine, the employment is deemed "qualifying" for purposes of invoking the 15 year presumption at § 718.305. *Muncy v. Elkay Mining Co.*, 25 B.L.R. 1-21 (2011) (citing *Alexander v. Freeman United Coal Mining Co.*, 2 B.L.R. 1-497 (1979)).

Employer stipulated to twenty seven years of coal mine employment. Claimant alleges that he worked in coal mine employment for thirty one years. Since the parties have not actually reached a stipulation as to the length of Claimant's coal mine employment, I must make a finding. Absent stipulation by the parties as to the length of coal mine employment, the fact-finder must make a specific, complete finding on this issue. *Boyd v. Director, OWCP, 11 B.L.R. 1-39 (1988); J.R. v. C.R. & R. Trucking Co., Inc.*, BRB No. 07-0463 BLA (21 Feb. 2008)(unpub.). The Claimant bears the burden of establishing the length of coal mine employment. *Shelesky v. Director, OWCP*, 7 B.L.R. 1-34 (1984)*; Niccoli v. Director, OWCP*, 6 B.L.R. 1-910 (1984); *Hartley v. C.J. Langenfelder & son, Inc.*, BRB No. 00-0823 BLA (15 May 2001)(unpub.).

Under the governing regulation, if the evidence establishes that a miner worked in or around coal mines during at least 125 working days during a calendar year or partial periods totaling one year, then the Claimant has worked one year in coal mine employment. If a miner worked fewer than 125 days in a year, then the miner has worked a fractional year based on ratio of the actual number of days worked to 125. § 725.101(a)(32)(i). If the evidence is insufficient to establish beginning and ending dates of a year's employment, then an administrative law judge may divide the miner's yearly income by the amount of the average yearly income for miners for that year reported by the Bureau of Labor Statistics. § 725.101(a)(32)(iii).

Calculating the length of coal mine employment may be based on any reasonable method so long as it is supported by substantial evidence in the record considered as a whole. *Clayton v. Pyro Mining Co*., 7 B.L.R. 1-551 (1984); *Schmidt v. Amax Coal Co.*, 7 B.L.R. 1-489 (1984); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). In determining length of employment in the coal mines, it is proper to consider evidence from a variety of sources, including affidavits of co-workers, Social Security records, sworn testimony, written statements of the miner (including the Form CM-911a), records of the employer, and pension records. § 725.101(a)(32)(ii); *Muncy*, 25 B.L.R. 1-21 (finding that the formula set forth at § 725.101(a)(32)(iii) may be used, but it is not mandatory; it was proper to use the miner's Social Security records, employment history form, and records from former employers).

I find there is insufficient evidence to establish the beginning and ending dates of the Miner's coal mine employment. However, Claimant's earnings are set out in his Social Security records. DX 8. I find these are the most accurate evidence regarding the dates of the Miner's coal mine employment. Therefore, using the method set out in § 725.101(a)(32)(iii), and

applying the average yearly income reported by the Bureau of Labor statistics,[6] I find the Claimant's total coal mine employment, in the years 1972 to 2009 inclusive, was 27.24 years.

The following table indicates my calculations:

YEAR	EMPLOYER(S)	EARNINGS	INDUSTRY AVERAGE	TOTAL CME (YEARS)
1972	Island Creek Coal Company	3,236.31	5,576.25	.58
1973	Island Creek Coal Company Heritage Coal Company	9,320.82 + 885.83 = 10,206.65	5,898.75	1
1974	Island Creek Coal Company Heritage Coal Company	8,176.62 + 4632.42 = 12,809.04	6,080.00	1
1975	Island Creek Coal Company	14,100.00	7,405.00	1
1976	Island Creek Coal Company	15,300.00	8,008.75	1
1977	Island Creek Coal Company	16,500.00	8,987.50	1
1978	Island Creek Coal Company	16,555.58	10,038.75	1
1979	Island Creek Coal Company	22,707.88	10,878.75	1
1980	Island Creek Coal Company	25,100.17	10,927.50	1
1981	Island Creek Coal Company	26,168.09	12,100.00	1
1982	Island Creek Coal Company	29,012.17	12,698.75	1
1983	Island Creek Coal Company	16,796.55	13,720.00	1
1984	Island Creek Coal Company Lovilia Coal Company	202.36 + 27,288.85= 27,491.21	14,800.00	1
1985	Lovilia Coal Company	8820.66	15,250.00	.58
1986	Island Creek Kentucky Mining	31,394.04	15,390.00	1
1987	Island Creek Kentucky Mining	42,189.08	15,750.00	1
1988	Island Creek Kentucky Mining	39,669.33	15,940.00	1

[6] Exhibit 610 – "Average Earnings of Employees in Coal Mining," is accessible at http://www.dol.gov/owcp/dcmwc/exh610.htm. *See Crum v. Champion Coal Co.*, BRB No. 13-0207 BLA (27 Feb. 2014) (unpub.) (affirming an ALJ who compared Exhibit 610 to Miner's coal mine income as derived from his Social Security earnings statement to compute his years of coal mine employment for the purposes of invoking a presumption); *see also Stiltner v. A & K Transportation, Inc.*, BRB No. 14-0010 BLA (29 Aug. 14) (unpub.) at *6, n. 9 (holding in dicta that, because the record contained sufficient evidence and testimony to buttress an ALJ's use of Exhibit 610, the "utilization of the tables at Exhibit 610, in the [ALJ's] discretion, would constitute a reasonable method of calculating the length of claimant's coal mine employment, consistent with 20 C.F.R. § 725.101(a)(32)"). *But see Conn v. Steven Lee Enterprises, Inc.*, BRB No. 12-0319 BLA (23 Jan. 2013) (unpub.) (Stating that Exhibit 610 was the "incorrect" table to use in this regard).

1989	Island Creek Kentucky Mining	37,759.68	16,250.00	1
1990	Island Creek Kentucky Mining	41,781.13	16,710.00	1
1991	Island Creek Kentucky Mining	36,791.49	17,080.00	1
1992	Island Creek Kentucky Mining	42,033.52	17,200.00	1
1993	Island Creek Kentucky Mining Roberts Bros Coal Co.	1,919.40 + 23,381.07= 25,300.47	17,260.00	1
1994	Roberts Bros Coal Co.	21,286.23	17,760.00	1
1995	Roberts Bros Coal Co.	42,748.20	18,440.00	1
1996	Roberts Bros Coal Co. Chevron Mining Inc.	11,675.75 + 26,028.99= 37,704.74	18,740.00	1
1997	Chevron Mining Inc.	39,344.97	19,010.00	1
1998	Chevron Mining Inc.	39,344.07	19,160.00	1
1999	Chevron Mining Inc. Island Creek Coal Company	2,798.78 + 9960.16= 12,758.94	19,340.00	.66
2005	Advent Mining LLC	25,994.75	22,060.00	1
2006	Advent Mining LLC	60,649.13	21,940.00	1
2007	Advent Mining LLC	57,711.90	21,960.00	1
2008	Advent Mining LLC	61,855.01	23,270.00	1
2009	Advent Mining LLC	57,454.82	26,140.00	1
			TOTAL:	27.24

Claimant credibly testified that all of his coal mine employment was underground. Employer has not presented any evidence or argument disputing Claimant's testimony. Therefore, I find that all of Claimant's coal mine employment was underground, and the evidence establishes 27.24 years of underground coal mine employment.

b. *Whether Claimant is Totally Disabled*

The Claimant bears the burden to establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) states that a miner shall be considered totally disabled "if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner: (i) from performing his or her usual coal mine work; or (ii) from engaging in gainful employment … requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." Nonpulmonary and nonrespiratory conditions, which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability," shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. § 718.204(a). *See also Beatty v. Danri Corp.*, 16 B.L.R. 1-11 (1991); *Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999).[7]

[7] *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, (6th Cir. 2000); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 239 (4th Cir. 2004); *Beatty v. Danri Corp.*, 49 F.3d 993 (3d Cir. 1995).

The regulation provides that, in the absence of contrary probative evidence, the following may be used to establish a miner's total disability: pulmonary function tests with values below a specified threshold; arterial blood gas tests with results below a specified threshold; a finding of pneumoconiosis with evidence of cor pulmonale with right-sided congestive heart failure. § 718.204(b)(2)(i)(ii) and (iii). Where the above do not demonstrate total disability, or appropriate medical tests are contraindicated, total disability may nevertheless be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in his usual coal mine employment. § 718.204(b)(2)(iv).

1) Pulmonary Function Tests

A claimant may establish total disability based upon pulmonary function tests. In order to demonstrate total respiratory disability on the basis of the pulmonary function tests, the studies must, after accounting for gender, age, and height, produce a qualifying value for the forced expiratory volume (FEV_1) test and, in addition, produce a qualifying value in at least one of the following: the forced vital capacity (FVC) test; the maximum voluntary volume (MVV) test; or the ratio of the FEV_1 value divided by the FVC value that is less than or equal to 55%. § 718.204(b)(2)(i). "Qualifying values" for the FEV_1, FVC, and the MVV tests are results measured at less than or equal to the values listed in the appropriate tables of Appendix B to Part 718. Courts have recognized that pulmonary function testing is effort-dependent and spurious low values can result, but spurious high values are not possible. *See Andruscavage v. Dir., OWCP*, No. 93-3291 (3rd Cir. 1994) (unpub.); s*ee, e.g., Greer v. Dir., OWCP*, 940 F.2d 88, 91 (4th Cir. 1991) ("[P]neumoconiosis is a chronic condition, and, on any given day, it is possible to do better, and indeed to exert more effort, than one's typical condition would permit); *F. K. v. Dir., OWCP*, BRB No. 07-0817 BLA (27 Jun. 2008) (unpub.).[8]

The record contains the following pulmonary function test results designated by Employer and Claimant:

Date of Test/ Exh. No.	Physician	Age/Height	FEV_1	FVC	MVV	FEV_1/FVC ratio	Valid? [9]
DX 12 / November 4, 2010	Chavda	62/67	2.18	2.47	71	88	No

[8] *See also Gower v. Earner Associated Coal Co.,* BRB No. 13-0558 (July 29, 2014(unpub.)(Board held that it was proper for the ALJ to rely on the Preamble to the 1980 regulations, which states that, although the use of a pulmonary function test bronchodilator may aid in determining the presence or absence of pneumoconiosis, it "does not provide an adequate assessment of the miner's disability. . . ." 45 FED. REG. 13, 678, 13, 682 (Feb. 29, 1980).

[9] A "Yes" indicates that the test appears to conform to the requirements of 20 C.F.R. Pt. 718, App. B, para. 2. Under the regulation, the accepted degree of variability between the two greatest FEV_1 values is 100 ml, or 5% of the larger value, whichever is greater. The regulation also requires that at least three trials be administered.

July 21, 2011 / EX 1	Selby	62/67	2.65 2.18*	3.19 2.56*	n/a	83 85*	Yes

*post-bronchodilator[10]

Claimant was 62 years old at the time these tests were performed. His height was uniformly listed at 67 inches.

For a 62 year old male who is 67 inches tall,[11] the qualifying FEV_1 value is 1.81, the qualifying FVC value is 2.31, and the qualifying MVV value is 72.

Dr. Chavda's November 4, 2010 pulmonary function study did not produce qualifying values. In his report, Dr. Chavda noted "Good patient effort & cooperation. The results of this test meet the ATS standards for acceptability and repeatability." DX 12 at 14. Employer challenges the validity of this pulmonary function study. Dr. Joseph J. Renn, III, reviewed Dr. Chavda's November 4, 2010 pulmonary function study and concluded that it is invalid based upon the American Thoracic Society/European Respiratory Society criteria for accurate interpretations or for the derivation of significant data with which to assess his true ventilatory function. EX 2 at 1. He explained that the source of the reference values has not been indicated on the report; the volume vs. time graphs for the FVC maneuvers reveal obstruction of the mouthpiece, such as with the tongue; there were no satisfactory FVC maneuvers performed, rather than the requisite three; none of the FVC maneuvers were continued for the requisite six seconds; and the practical limit of eight FVC maneuvers was not provided to result in three acceptable studies. *Id.* Additionally, Dr. Thomas Jarboe stated, in his medical report, that this study is invalid because the time volume curves indicate that Claimant prematurely terminated his flow after two to four seconds of expiration. EX 6 at 4. Claimant has presented no evidence contradicting this evidence of invalidity. Consequently, I find Dr. Renn's opinion as to the

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[10] In *Maynard v. Pen Coal Corp., et al*, BRB No. 09-0599 (July 27, 2010)(unpub.), the Board held:

> [I]n making disability determinations, the question is whether the miner is able to perform his job, not whether he is able to perform his job after he takes medication. 20 C.F.R. section 718.204(b)(1). Thus, the results of a post bronchodilator PFS are not necessarily dispositive of the issue of total disability. *See* 45 Fed. Reg. 13682 (1980)(Although the use of a bronchodilator does not provide an adequate assessment of the miner's disability, it may aid in determining the presence of pneumoconiosis.)

[11] The Table in Appendix B, 20 C.F.R. Pt. 718, does not provide values for the height of 67 inches. Rather, it provides values for heights of 66.9 and 67.3 inches. Consistent with Board precedent, one cannot round down a miner's height, as that would result in a lower FEV_1 qualifying value. To do so would reduce the window of eligibility in a given case, making it less likely for the miner to qualify for benefits; therefore, I will use the values from the tables 67.3 inches. *See Bolyard v. Peabody Coal Co.,* 6 B.L.R. 1-767 (1984); *Sexton v. Peabody Coal Co.*, 7 B.L.R. 1-411, 1-412 n. 2 (1984); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 114, 19 BLR 2-70, 2-84 n. 6 (4th Cir. 1995) (discussing a case where the Solicitor referenced the Department's "OWCP Program Manual, Coal Mine (BLBA) Procedure Manual, BLBA Bulletin No. 84-6 (April 11, 1984)," which specifically mandated using the closest *greater* height when a miner's actual height falls between two listed heights); *see also Gower v. Eastern Associated Coal Corp.*, B.R.B. 12-0101 BLA (Dec. 19. 2012) (unpub.) (ALJ erroneously rounded down a FEV_1/FVC value of 55.27% to 55%, thus finding the results qualifying).

study's validity is more probative than Dr. Chavda's brief statement to the contrary. Therefore, I find that the study is not valid.

Dr. Selby's July 21, 2011 pulmonary function study did not produce qualifying values.

As none of the pulmonary function studies produced qualifying values, I find that Claimant cannot establish total disability under this provision.

2) Arterial Blood Gas Tests

A claimant may also establish total disability based upon arterial blood gas tests. In order to establish total disability, the test must produce a qualifying value, as set out in Appendix C to Part 718. § 718.204(b)(2)(ii). Appendix C lists values for percentage of carbon dioxide (PCO_2) and percentage of oxygen (PO_2), based upon several gradations of altitudes above sea level. At a specified gradation (e.g., 2,999 feet above sea level or less), and PCO_2 level, a qualifying value must be less than or equivalent to the PO_2 listed in the table.

The record contains the following arterial blood gas test results:

Date of Test/ Exh. No.	Physician	PCO_2	PO_2	PCO_2 (post-exercise)	PO_2 (post-exercise)	Altitude
November 9, 2011	Chavda	37.7	92.9	20.7	73.4	0-2999
March 29, 2011/DX 12 at 27	Chavda	25.2	72.9	36.5	72.3	0-2999
EX 1/July 21, 2011	Selby	39.1	67	33.3	67	0-2999[12]

Dr. Chavda's November 9, 2011 blood gas study produced non-qualifying values at exercise. For a PCO_2 value of 38, at an altitude of 2,999 feet or less, the qualifying PO_2 value must be equal to or less than 62. For a PCO_2 value of 25 or below, at an altitude of 2,099 feet or less, the qualifying PO_2 value must be equal to or less than 75. Since the PO_2 value at exercise is less than 75, the exercise values are qualifying.

Dr. Mettu reviewed this blood gas study and determined it was not valid due to technical reasons. DX 12 at 22. Claimant accepts that Dr. Chavda's November 9, 2011 blood gas study results "were considered unacceptable for technical reasons." Cl. Br. at 12. Accordingly, this blood gas study will not be given any weight.

Dr. Chavda performed a second blood gas study on March 29, 2011, which produced qualifying values at rest and non-qualifying values at exercise. For a PCO_2 value of 26, at an

[12] Per 29 C.F.R. § 18.201, I may take official notice of adjudicative facts. The record does not reflect the altitude at which the test was administered, but does reflect the test was administered in Henderson, KY. *See* EX 1. The altitude of Henderson, KY is 400 feet. *See* http://www.city-data.com/city/Henderson-Kentucky.html.

altitude of 2,999 feet or less, the qualifying PO_2 value must be equal to or less than 74. For a PCO_2 value of 37, at an altitude of 2,099 feet or less, the qualifying PO_2 value must be equal to or less than 63. Since the PO_2 value at rest is less than 74, the at rest values are qualifying. Since the PO_2 value at exercise is greater than 63, the values at exercise are not qualifying.

Dr. Mettu determined that this blood gas study is technically acceptable. DX 12 at 21. Dr. Jarboe, on the other hand, stated that this blood gas study "exhibit[s] the same flaw that the gases of 11/9/2010 showed." EX 6 at 6. He explained:

> The PCO2 at rest was 25.2 with a pH of 7.373. At peak exercise, the PCO2 was 36.5 with an unchanged pH of 7.371. With the marked increase in PCO2 at peak exercise, one would have expected a change in the pH.

Id. Therefore, he considers the study invalid. *Id.* at 9. I find that Dr. Jarboe's opinion is insufficient to undermine Dr. Mettu's assessment of the second blood gas study's validity. It is unclear if Dr. Chavda's second blood gas study exhibited the same flaws of his first study, as Dr. Jarboe claims. In determining that the second blood gas study is invalid, Dr. Jarboe found it significant that the PCO_2 at peak exercise increased without a change in the pH in the second study. The second study differed from the first, however, in that the PCO_2 at exercise *decreased* in the first study without a change in the pH. *See* DX 12 at 32. Dr. Jarboe insufficiently elucidated whether or not this distinction is material. Based on Dr. Mettu's assessment, I find that this study is valid. I note that Employer does not argue in its brief that this study is invalid.

Dr. Selby performed a blood gas study on July 21, 2011. EX 1. Claimant contends that Dr. Selby's July 21, 2011 blood gas study produced qualifying values at exercise and points to Dr. Chavda's deposition testimony for support. Cl. Br. at 12. Dr. Chavda testified that Dr. Selby's blood gas study is qualifying at exercise. EX 7 at 34. In determining whether the exercise values are qualifying, Claimant and Dr. Chavda apparently rounded down Claimant's PCO_2 at exercise from 33.3 to 33. Claimant, in his summary of the evidence in his brief, states that the appropriate P02 disability standard for Dr. Selby's exercise values is 67 or less, which is the disability standard for a PCO_2 of 33. *See* Cl. Br. at 4. Similarly, Dr. Chavda described Dr. Selby's study as producing a PCO_2 of 33, not 33.3. EX 7 at 34. However, blood gas tables at Appendix C of Part 718 do not permit "rounding up" or "rounding down" of PCO_2 or PO_2 values to determine whether the test is qualifying; rather, each value must be "equal to or less than" the applicable table value. *Tucker v. Director, OWCP*, 10 B.L.R. 1-35 (1987).

Contrary to Claimant's and Dr. Chavda's contention, Dr. Selby's blood gas study produced non-qualifying values at exercise. For a PCO_2 value of 40, at an altitude of 2,999 feet or less, the qualifying PO_2 value must be equal to or less than 60. Dr. Selby's at rest values are not qualifying because the PO_2 value is greater than 60. Appendix C provides that, for a PCO_2 of 34 or below, the PO_2 must be equal to or less than 66. As the PO_2 at exercise of Dr. Selby's study is 67, the exercise values are not qualifying.

Of the two valid blood gas studies, only the values at rest in Dr. Chavda's study are qualifying. As the greater number of studies produced non-qualifying values, numerical superiority of the blood gas studies does not support a finding of total disability. *See Schetroma v. Director, OWCP*, 18 B.L.R. 1- (1993) (use of numerical superiority upheld in weighing blood gas

studies). Moreover, since Dr. Selby's non-qualifying blood gas study is the most recent, it is entitled to greater weight. More weight may be accorded to the results of a recent blood gas study over one which was conducted earlier. *Schretroma v. Dir., OWCP*, 18 B.L.R. 1-17 (1993). Therefore, I find Claimant has failed to establish total disability by this provision.

3) Cor Pulmonale

A miner may demonstrate total disability with, in addition to pneumoconiosis, medical evidence of cor pulmonale with right-sided congestive heart failure. § 718.204(b)(2)(iii). In Claimant's case, there is no evidence of cor pulmonale with right-sided congestive heart failure. Accordingly, I find that Claimant has not established total disability under this provision.

4) Physician Opinion

The final method of determining whether the Claimant is totally disabled is through the reasoned medical judgment[13] of a physician that the Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable gainful employment. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. § 718.204(b)(2)(iv). A reasoned opinion is one that contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-217 (2002); *see also Belcher v. Eastern Assoc. Coal Corp.*, BRB No. 04-0714 BLA (26 Apr. 2005) (unpub.) Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. *Id.* An unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989).

A physician's opinion must demonstrate an adequate understanding of the exertional requirements of Claimant's usual coal mine employment. § 718.204(b); *see also Brigance v. Peabody Coal Co.*, 23 B.L.R. 1-170 (2006) (en banc). Here, the Administrative Law Judge is required to compare the degree of respiratory impairment diagnosed in the medical opinion with the exertional requirements of the Miner's last, usual coal mine work. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48 (1986) (en banc), *aff'd*, 9 B.L.R. 1-104 (1986) (en banc). In order to do so, the administrative law judge must make a specific finding as to the nature of miner's usual coal mine work and the physical requirements associated with that work. *Stanley v. Eastern Assoc. Coal Corp.*, 6 B.L.R. 1-1157 (1984). It is the Claimant's burden to establish the exertional requirements of the miner's usual coal mine employment to provide a basis of comparison for the administrative law judge to evaluate a medical assessment and reach a conclusion regarding total disability. *McMath v. Dir., OWCP*, 12 B.L.R. 1-6 (1988); *W.C. v. Whitaker Coal Corp.*, 24 B.L.R. 1-21 (2008). Specifically, the exertional requirements from the miner's last coal mining job of one year's duration must be compared to the physical limitations noted by medical experts in this claim.

Claimant credibly testified that he last worked in coal mine employment as a car driver, which required lifting heavy objects, such as miner bits and miner cable, about fifteen to twenty

[13] A finding that a physician's opinion is not well-reasoned on one issue does not necessarily indicate the opinion cannot be credited on a separate issue. *See Luketich v. Dir., OWCP*, 8 B.L.R. 1-477 (1986).

times per day.[14] Tr. 19. Claimant provided additional detail about this position in his Description of Coal Mine Work and Other Employment form; he wrote that he "made trips in a shuttle or ram cars from the Continuous Miner to the Feeder . . . continuously throughout each shift . . . ." DX 6. Claimant's description of his position is consistent with the employment histories recorded by the physicians, as described below. Employer has presented no evidence contradicting Claimant's description of the physical demands of his last coal mine employment. Accordingly, I find that Claimant's position as a car driver required heavy labor.[15]

Claimant argues that I should consider Dr. Valentine Simpao's November 6, 2006 medical opinion, which was considered in the prior claim, in determining whether Claimant has established he suffers from a totally disabling respiratory or pulmonary impairment. Cl. Br. at 12-13. Since Claimant can establish a change in condition (in this case, total disability) only through new evidence, Dr. Simpao's medical report will not be considered on the issue of total disability in this claim.

Claimant also relies on the opinion of Dr. Chavda to establish total disability. *See* Cl. Br. at 12-13. Dr. Chavda is Board-certified in internal medicine, pulmonary medicine and sleep medicine.[16] EX 7 at 4. Dr. Chavda performed the Department of Labor-sponsored evaluation of Claimant on November 9, 2010, and obtained a chest x-ray, pulmonary function study, and blood gas study. DX 12. He also considered Claimant's medical history (noting, for example, pneumonia as a child, pleurisy, attacks of wheezing at night and exertion for six years, arthritis, diabetes mellitus, and high blood pressure, and hospitalization in 2005 for kidney infection) and symptoms (noting, for example, sputum daily in the morning, 1 tsp of white sputum for last four years, wheezing at night and with exertion, dyspnea with exertion such as walking for five to six years, productive cough in the morning for four years, chest pain with exertion for five years, orthopnea/"sleep with 2 pillows 10 yrs," and paroxysmal nocturnal dyspnea once per night). *Id.* at 37. Dr. Chavda indicated that Claimant last worked in coal mine employment as a "shuttle driver," which required that Claimant:

> lift and hang cables which weighted at least 50 pounds. He was required to sit/lay in the car which was operated by manual levers. The ceiling height was 48 to 50 inches, therefore he was not able to stand upright.

Id. at 36.

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[14] Dr. Chavda noted that the cables Claimant was required to lift and hang weighed at least fifty pounds. DX 12 at 36.

[15] I take judicial notice of The Dictionary of Occupational Titles (4th Ed., Rev. 1991), Appendix C, which defines heavy work as: "Exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Medium Work." *See* http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM.

[16] A physician's qualifications are relevant in assessing the respective probative value to which their opinions are entitled. *Burns v. Dir., OWCP*, 7 B.L.R. 1-597 (1984).

Based on the November 4, 2010 pulmonary function study showing FEV1 of 2.18 and FVC of 2.47, Dr. Chavda concluded that Claimant has a mild obstructive and restrictive impairment. DX 12 at 40. However, Claimant does not have a total pulmonary disability because "[w]ith this lung function [Claimant] could be employed in the coal mines at the present time from a pulmonary point of view." *Id.*

The Department of Labor sent Dr. Chavda a letter on March 7, 2011, requesting that he address how his November 9, 2010 arterial blood gas test, which produced values meeting the regulatory standards to establish total disability, contributes to Claimant's impairment from a pulmonary point of view. *Id.* at 2. Dr. Chavda responded on March 10, 2011, stating that Claimant does have a totally disabling pulmonary impairment because the exercise values of the November 9, 2010 blood gas study show exercise induced hypoxia, which "meets the federal criteria for pulmonary disability." *Id.* at 1.

Dr. Chavda provided testimony at a deposition dated March 14, 2014. EX 7. He testified that Claimant's March 2011 blood gas study "puts him on disability because [the values] meet[] the [federal disability] criteria." *Id.* at 28. Dr. Chavda also testified that, based on Dr. Selby's July 21, 2011 blood gas study, which produced a PO_2 "in 67 range" at exercise and showed hypoxia, Claimant "has disabling pulmonary disease" and is not able to perform his last job in coal mine employment. *Id.* at 32. According to Dr. Chavda, a PO_2 of 67 is "definitely considered hypoxic." *Id.* at 28. Moreover, if Claimant's PO_2 does not increase with exercise,

> that means he has definitely underlying lung problem and most likely – sometimes with exercise you may see mild increase, but, if you have some underlying chronic lung problem and his lung not able to extract more lung with exercise, then we can say that he has diffusion problem in his lungs; and, if he has to do exercise, he will definitely feel shortness of breath or not be able to perform the exertion-induced work that he's supposed to do it.

Id. at 29. Dr. Selby's blood gas study values at exercise meet the criteria for total pulmonary disability because the study produced a PCO_2 of 33 and a PO_2 of 67. *Id.* at 34. However, even if Dr. Selby's exercise blood gas study did not meet the DOL's criteria for disability, "if you look into a practical purpose, the guy, in my clinical opinion, is totally disabled." *Id.* at 32-33. The exercise blood gas study values show that if Claimant "has to exert himself, he is not able to perform the job." *Id.* at 34-35.

Dr. Jeff Selby conducted a physical examination on behalf of Employer and discussed his conclusions in a medical report dated July 21, 2011. EX 1. Dr. Selby is Board-certified in internal medicine and pulmonology. *Id.* His examination included a chest x-ray, pulmonary function test and arterial blood gas test; he also took a medical history (noting, for example, that Claimant has shortness of breath which is worse when walking, wheezing and coughing but not every day, occasional productive cough of yellow phlegm, and Claimant sleeps three to four hours per night then has to get up and sleep in a recliner) and work history. *Id.* at 2-4. Dr. Selby noted Claimant last worked in coal mine employment as a car driver. *Id.* at 2.

Dr. Selby found that Claimant has bronchial asthma based on his history of coughing and wheezing and dyspnea on exertion arising in the past few years. *Id.* Claimant also has "mild clinically insignificant hypoxia but no exercise induced hypoxia," as demonstrated by the July 21, 2011 blood gas study. *Id.* at 4. Claimant has no pulmonary or respiratory impairment and retains the pulmonary or respiratory capacity to perform any and all coal mine duties required of him in the past including working as a car driver. *Id.* Obesity is the most likely cause of Claimant's shortness of breath and mild hypoxia and Claimant may have sleep apnea, which can be a serious cause of shortness of breath and hypoxia. *Id.*

Dr. Selby elaborated on his conclusions in a deposition dated March 24, 2014. *Id.* (Dep. 1). He testified that Claimant had normal spirometry, normal exercise testing, normal examination, and normal X-ray. *Id.* at 25. Claimant was "able to complete a minute into stage 3 or 13 minutes of total exercise time [in his exercise blood gas study], which is essentially uninhibited, from a pulmonary standpoint." *Id.* at 20. Dr. Selby interpreted the blood gas study as showing an uninhibited ability to perform exercise because Claimant's

> oxygen level, though starting out a little low, stays the same with peak exercise; and if there was significant, clinically-significant pulmonary disease, there would be a decline in the PO2. Even so, this PO2 does not show any physiologic impairment from a pulmonary standpoint, because a PO2 of 67 is not going to be impairing and will not be felt clinically by the subject.

Id. at 21. In Dr. Selby's opinion, Claimant has no total and impairing lung disease and retains the capacity to perform his usual coal-mine work from a pulmonary standpoint. *Id.* at 25-26.

Dr. Jarboe reviewed medical records on behalf of Employer and issued a medical report dated May 15, 2012. EX 6. Dr. Jarboe is Board-certified in internal medicine. *Id.* He noted Claimant last worked as a car driver for Advent Coal Company. *Id.* at 1. In Dr. Jarboe's opinion, Claimant is not totally disabled from a pulmonary standpoint. *Id.* at 11. He explained that Claimant's pulmonary function studies from 2000 to 2011 show no evidence of restriction or obstruction. *Id.* at 9. The blood gas studies have been variable; the oxygen tension on Dr. Simpao's March 2000 was completely normal but increased significantly with exercise, Dr. Simpao's November 2006 blood gas study produced normal values; and Dr. Chavda's two blood gas studies were not valid. *Id.* Dr. Selby's July 2011 blood gas study did show mild hypoxemia at rest and the "peak exercise blood gases are qualifying based on the federal tables (PO2 at or below 67 with a PCO2 of 33)." *Id.* However, "when all of the data is taken into consideration, specifically all of the previous valid measurements of arterial blood gases, I do not feel that [Claimant] is totally and permanently disabled due to an impairment of gas exchange." *Id.* at 11. Rather, "the overall evidence indicates that he retains the functional respiratory capacity to perform his last coal mining job or one of similar physical demand in a dust-free environment." *Id.*

Employer argues that Claimant has failed to demonstrate total disability partly because Dr. Chavda testified, at his deposition, that Claimant is not totally disabled and retains the pulmonary function to perform the job he previously performed. *See* Er. Br. at 14-15. Employer, however, mischaracterizes Dr. Chavda's testimony. At the time Dr. Chavda stated

that Claimant is not totally disabled, he had not yet reviewed Dr. Selby's blood gas study. After reviewing Dr. Selby's study, Dr. Chavda clarified that he does believe Claimant is totally disabled due to the hypoxia shown on the study's values at exercise.

Dr. Chavda ultimately found that Claimant has a pulmonary or respiratory impairment which is disabling. He did so based upon relevant histories (including a detailed, accurate account of Claimant's last coal mine employment job duties), physical examination and objective testing. While Dr. Chavda initially based his conclusion that Claimant is totally disabled on a blood gas study later determined to be invalid, Dr. Chavda ultimately relied on Dr. Selby's valid blood gas study.[17] In addition, Dr. Chavda's erroneous description of Dr. Selby's blood gas study as producing qualifying values at exercise does not taint his opinion as he also stated that Claimant is totally disabled even if the results do not meet the DOL's criteria for disability. Thus, his opinion is based on reliable objective testing and is consistent with the evidence available to him. I therefore find his opinion on disability to be documented and reasoned.

In contrast, the opinions of Drs. Selby and Jarboe are not supported by the evidence and are poorly reasoned. Unlike Dr. Chavda, neither Dr. Jarboe nor Dr. Selby demonstrated adequate understanding of Claimant's last coal mine employment duties, which required heavy labor. Drs. Selby and Jarboe both reviewed various documents which featured detailed accounts of Claimant's last coal mine employment job duties (e.g., Dr. Chavda's medical report). However, in his own summary of Claimant's employment history, Dr. Selby noted only that Claimant last worked as a "car driver," without providing any detail about the position. EX 1. Similarly, Dr. Selby noted that Claimant last worked as a "car driver," without describing what that position entails. *See* EX 6 at 1. Neither discussed Claimant's job duties, beyond stating his job title, in reaching their conclusions. Drs. Selby and Jarboe both determined that Claimant has mild hypoxemia based on Dr. Selby's blood gas study; yet neither sufficiently explained how they determined Claimant can perform the duties of his last coal mine employment notwithstanding his hypoxemia.

Despite finding that Dr. Selby's blood gas study produced values at exercise that "are qualifying based on the federal tables," Dr. Jarboe concluded that Claimant is not totally and permanently disabled due to an impairment of gas exchange "[w]hen all of the data is taken into consideration, specifically all of the previous valid measurements of arterial blood gases." EX 6 at 11. The only two blood gas studies Dr. Jarboe considered other than Dr. Selby's were Dr. Simpao's March 2000 study (noting "resting oxygen tension was completely normal and increased significantly with exercise)" and Dr. Simpao's November 6, 2006 study (noting "resting arterial blood gases showed a PO2 of 81.7 and a pH is 39.6, again normal values").[18] *Id.* at 9. It is unclear how Dr. Jarboe weighed these studies against Dr. Selby's much more recent study to determine that Claimant's hypoxemia is not totally disabling. An unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R.

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[17] As discussed above, I found that Dr. Chavda's second blood gas study is valid. Even if I credited Dr. Jarboe's opinion and found it to be invalid, I would still find that Dr. Chavda's medical opinion is based on reliable evidence as he also relied on Dr. Selby's July 21, 2011 blood gas study.

[18] Dr. Jarboe considered Dr. Chavda's two blood gas studies to be invalid.

1-149 (1989)(en banc); *see also Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986) (an internally inconsistent and inadequately reasoned report may be entitled to little probative value).

Dr. Selby reasoned that Claimant's blood gas study values at exercise shows Claimant is "essentially uninhibited, from a pulmonary standpoint" because Claimant's oxygen level stayed the same with peak exercise and "the PO2 does not show any physiologic impairment from a pulmonary standpoint, because a PO2 of 67 is not going to be impairing and will not be felt clinically by the subject." EX 1 at 21. However, Drs. Jarboe and Chavda both viewed the values at exercise as close enough to satisfy the Department of Labor's standards for disability. Drs. Jarboe and Chavda also agreed that Dr. Selby's values at exercise show hypoxemia. Their statements suggest that Dr. Selby's opinion, that Claimant had "normal exercise testing," is inconsistent with his own study.

Although the credentials of Drs. Selby and Jarboe are impressive, their opinions are entitled to less weight because they are inadequately reasoned and documented. I give greater weight to the reasoned and documented medical opinion of Dr. Chavda. Consequently, I find that Claimant has established, through Dr. Chavda's medical opinion, that his respiratory or pulmonary condition prevents him from performing his usual coal mine employment as a car driver, which involved heavy labor.

Once it is demonstrated that the miner is unable to perform his usual coal mine work a *prima facie* finding of total disability is made and the burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the party opposing entitlement, as defined pursuant to 20 C.F.R. § 718.204(b)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Employer has not presented such evidence. Accordingly, I find that Claimant has established, by a preponderance of the evidence, that he is totally disabled due to a respiratory or pulmonary condition.

c. Rebuttal of 15-Year Presumption

Because Claimant has established at least fifteen years of qualifying coal mine employment, and also has established that he is totally disabled from a respiratory perspective, Claimant may invoke the rebuttable presumption that he is disabled due to pneumoconiosis, located at § 718.305. The party opposing entitlement may rebut the presumption by:

> (i) Establishing both that the miner does not, or did not, have:
>
> (A) Legal pneumoconiosis as defined in §718.201(a)(2); and
>
> (B) Clinical pneumoconiosis as defined in §718.201(a)(1), arising out of coal mine employment (*see* §718.203); or
>
> (ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201.

20 C.F.R. §718.305(d)(1)(i),(ii). The presumption cannot be rebutted by establishing "the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin." 20 C.F.R. §718.305(d)(3).

I will first address whether the Employer has rebutted the presumption of § 718.305 by establishing that the Claimant does not have pneumoconiosis. I will then turn to whether the Employer has rebutted the presumption by establishing that no part of the Claimant's disabling impairment was caused by pneumoconiosis as defined in § 718.201.

1. Whether the Employer has rebutted the presumption by establishing that the Claimant does not have pneumoconiosis

Section 718.201(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." This definition includes both medical or "clinical" pneumoconiosis, and statutory, or "legal" pneumoconiosis, which themselves are defined in that subparagraph at (1) and (2). "Clinical" pneumoconiosis consists of diseases recognized by the medical community as pneumoconioses, characterized by permanent deposition of substantial amounts of particulates in the lungs, and the fibrotic reaction of the lung tissue, caused by dust exposure in coal mine employment. "Legal" pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. Further, § 718.201(b) states: "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

There are four means of establishing the existence of pneumoconiosis, set forth at §§ 718.202(a)(1) through (a)(4):

(1) X-ray evidence: § 718.202(a)(1).
(2) Biopsy or autopsy evidence: § 718.202(a)(2).
(3) Regulatory presumptions: § 718.202(a)(3).[19]
(4) Physician opinion based upon objective medical evidence: § 718.202(a)(4).

(a)(1): X-ray Evidence

Section 718.202(a)(1) states that a chest X-ray conducted and classified in accordance with § 718.102, using the classification system of the International Labour Organization (ILO), may form the basis for a finding of the existence of pneumoconiosis. ILO Classifications 1, 2, 3, A, B, or C shall establish the existence of pneumoconiosis; Category 0, including subcategories 0/0 and 0/1, does not establish pneumoconiosis. Category 1/0 is ILO Classification 1, and therefore can support a finding of pneumoconiosis. *See Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.).

[19] A determination of the existence of pneumoconiosis may also be made using the presumptions described in §§ 718.304 or 718.305. I find the provision of § 718.304 is not applicable as I find there is no evidence of complicated pneumoconiosis. However, above I determined that the Claimant is entitled to the rebuttable presumption of § 718.305 and I will not address it further in this section of the opinion.

The current record contains the following chest X-ray evidence:

Date of X-Ray	Date Read	Ex. No.	Physician[20]	Radiological Credentials	Interpretation
November 6, 2006	November 8, 2006	DX 2	Westerfield	B	1/1, q/t
November[21] 4, 2010	November 8, 2010	DX 12	Myers	B/BCR	Negative
November 4, 2010	April 30, 2012	EX 5	Shipley	B/BCR	Negative
November 4, 2010	September 30, 2013	CX 2	Crum	B/BCR	1/0, q/q
July 21, 2011	March 27, 2014	CX 1	Ahmed	B/BCR	1/0, p/p
July 21, 2011	March 26, 2015	CX 3	DePonte	B/BCR	1/0, p/p
July 21, 2011	November 15, 2011	EX 3	Meyer	B/BCR	Negative
July 21, 2011	July 21, 2011	EX 1	Selby	B	Negative

Where two or more X-ray reports conflict, consideration shall be given to the radiological credentials of the physicians interpreting the X-rays. § 718.202(a)(1). It is well established that the interpretation of an X-ray by a B reader may be given additional weight by the fact-finder. *Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32, 34 (1985). The Benefits Review Board has also held that the interpretation of an X-ray by a physician who is a Board-certified radiologist as well as a B reader may be given more weight than that of a physician who is only a B reader. *Scheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128, 131 (1984). Additionally, a finder of fact is not required to accord greater weight to the most recent X-ray evidence of record. Rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to consider. *McMath v. Dir., OWCP*, 12 B.L.R. 1-6 (1988); *Pruitt v. Dir., OWCP*, 7 B.L.R. 1-544 (1984).

The first x-ray, dated November 6, 2006, was interpreted as positive for pneumoconiosis by Dr. Westerfield, a B-reader. As Dr. Westerfield's is the only reading of this x-ray, I find this film is positive.

The next x-ray, dated November 4, 2010, was interpreted as positive for pneumoconiosis by Dr. Crum, a Board-certified B-reader, and negative by Drs. Myers and Shipley, also Board-

[20] Unless otherwise noted, professional credentials are found in the same exhibit as the physician's interpretation.

[21] Dr. Peter Barrett conducted a quality reading of this x-ray on December 2, 2010, indicating "1" for film quality. DX 12 at 3.

certified B-readers. As the greater number of dually qualified readers interpreted the x-ray as negative for clinical pneumoconiosis, I find this film is negative.

The most recent x-ray, dated July 21, 2011, was interpreted as positive by the dually qualified Drs. Ahmed and Deponte and negative by Dr. Meyer, also dually qualified, and Dr. Selby, a B-reader. As the two physicians who read this x-ray as positive are dually qualified while of the two physicians who read it as negative only one is dually qualified, I find that this film is positive.

I find that the most recent x-ray (July 1, 2011) is entitled to greater weight. Generally, it is proper to accord greater weight to the most recent x-ray study of record. *Clark, supra; Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-6 (1983). More than nine months separates the November 4, 2010 x-ray from the July 21, 2011 x-ray, which I find is a significant amount of time. *See Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983) (indicating that a seven month time period between x-ray studies is sufficient to apply the "later evidence" rule). As the July 1, 2011 x-ray is positive and is entitled to greater weight than the negative November 4, 2010 x-ray, Employer has failed to carry its burden to demonstrate that Claimant does not have clinical pneumoconiosis by x-ray evidence.

(a)(2): Biopsy or Autopsy Evidence

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). The current record contains no such evidence.

(a)(4): Physician Opinion

The fourth way to establish the existence of pneumoconiosis is based on physician opinion. A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. The regulation requires that any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion. As stated above, the definition in § 718.201(a) of pneumoconiosis includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis, and so a physician opinion may be expected to discuss either "clinical" pneumoconiosis, or "legal" pneumoconiosis, or both.

A medical opinion is reasoned if the underlying documentation and data are adequate to support the findings of the physician. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Generally, a medical opinion is well documented if it provides the clinical findings, observations, facts and other data the physician relied on to make a diagnosis. *Id.* A medical opinion that is unreasoned or undocumented may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989); *see also Duke v. Dir., OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how the underlying documentation supports his or her diagnosis). An opinion based on a physical examination, symptoms, and a

patient's work and social histories may be found to be adequately documented. *Hoffman v. B. & G Construction Co.*, 8 B.L.R. 1-65 (1985).

Claimant designated Dr. Simpao's November 20, 2006 medical report as one of its two medical reports in support of its position and argues in his brief that Dr. Simpao's and Dr. Chavda's medical reports prove the existence of legal pneumoconiosis in this claim. Cl. Br. at 9. Dr. Simpao performed the Department of Labor-sponsored evaluation of Claimant in the prior claim, and obtained a chest x-ray, pulmonary function study, and blood gas study. DX 2 at 89. He also reviewed Claimant's employment history, medical history (noting pneumonia as a child, pleurisy for four years, attacks of wheezing for two to three years), smoking history (noting Claimant smoked ¼ pack of cigarettes per day from 1968 to 1970) and symptoms. *Id.* at 89-90.

Dr. Simpao diagnosed Claimant with clinical pneumoconiosis based on Dr. Westerfield's November 6, 2006 x-ray reading. *Id.* at 92. Dr. Simpao found that Claimant has legal pneumoconiosis as his "27 years of underground coal dust exposure has significantly contributed to his pulmonary impairment." *Id.* He noted pulmonary function test values "reveal a decrease in vital capacity and flow volume curve," the blood gas study "reported a borderline resting Aa gradient of 19," and on physical assessment, Claimant was "slightly plethoric and his breath sounds were distant." *Id.* He further noted that Claimant has been coughing up yellow thick secretions for the past five months, wheezing at night, experiencing chest pain on exertion for the last year, has to sleep on two pillows and experiences paroxysmal nocturnal dyspnea especially in the last year. *Id.* In Dr. Simpao's opinion, Claimant's impairment "is in whole due to his 27 years of coal dust exposure from working in the underground coalmines" as he does not have a smoking history nor does he have any significant history of other respiratory exposures. *Id.*

In his November 11, 2010 medical report, Dr. Chavda declined to diagnose Claimant with clinical pneumoconiosis, reasoning that that the "x-ray does not show any coal worker's pneumoconiosis changes." DX 12 at 39-40. Noting that the pulmonary function studies showed mild obstructive and restrictive airway disease and Claimant has coughing, wheezing, and daily respiratory symptoms, Dr. Chavda diagnosed Claimant with legal pneumoconiosis due to his "symptoms, PFT findings, and work exposure to coal dust." *Id.* at 40. *Id.* In reaching his conclusion as to the etiology of Claimant's respiratory impairment, Dr. Chavda relied on the following employment history: Claimant worked "in the coal mines with exposure to coal dust for 27 years, 24 at the face, all 27 above ground." *Id.* In his response to the Department of Labor's March 7, 2011 letter requesting additional information, Dr. Chavda wrote that Claimant's hypoxia, as seen on his blood gas study, constitutes legal pneumoconiosis, as it "is substantially caused and aggravated by working in the coal mines with exposure to coal dust." *See* DX 12 at 44.

At his deposition, Dr. Chavda reiterated that "There was no pneumoconiosis seen on x-rays." EX 7 at 15-16. Dr. Chavda explained that he diagnosed Claimant with legal pneumoconiosis because "his symptoms, abnormal finding – finding on the PFT's and exposure to coal dust, so he does have, you know, some criteria that could we say that he had legal pneumoconiosis, and his x-ray was negative; yes." *Id.* at 22. If the pulmonary functions studies were normal, "then probably he doesn't meet the criteria to say that he had legal pneumoconiosis," since he did not have "any other objective evidence like x-ray finding, or PFT

finding, or abnormal ABG." *Id.* When asked if the hypoxemia demonstrated by Dr. Selby's blood gas study is related to coal dust exposure, Dr. Chavda testified

> Well, definitely one part, you know, he had diagnosis of legal pneumoconiosis. We saw he has a reduction in lung functions, he has restrictive airway disease, so we can definitely say one of the diagnoses that could cause hypoxia would be the legal pneumoconiosis.

Id. at 29.

In Dr. Chavda's opinion, Claimant's legal pneumoconiosis would be a significant contributor to his hypoxia. *Id.* In addition, Claimant's wheezing and attacks are also related to coal dust exposure, a condition caused by coal dust exposure could also be causing pleurisy, and chronic bronchitis "is a part of the disease caused by coal dust exposure." *Id.* at 29-30. Finally, Dr. Chavda testified that Claimant wore a mask ninety percent of the time he worked in coal mine employment, which cuts down on the amount of dust people are exposed to; however, wearing a mask "does not make you a hundred percent proof that you will not develop pneumoconiosis. It will make you less, but it's still chances are there that wearing a mask, still a miner could get pneumoconiosis." *Id.* at 10-11, 30-31.

In his July 21, 2011 medical report, Dr. Selby opined that Claimant does not have clinical or legal pneumoconiosis. He noted that a "chest x-ray with B-reading enclosed" is "negative for parenchymal and pleural abnormalities due to pneumoconiosis, in particular coal worker's pneumoconiosis." EX 1 at 3. The x-ray "shows an uncoiled aorta and multiple calcified and noncalcified granulomas, likely histoplasmosis." *Id.* Dr. Selby diagnosed Claimant with mild hypoxia, based on the July 21, 2011 blood gas study, and concluded that Claimant "likely has bronchial asthma," based on his history of coughing, wheezing and dyspnea on exertion. *Id.* at 4. However, Claimant's significant obesity is the most likely cause for his shortness of breath and mild hypoxia. *Id.* In addition, Claimant is deconditioned and out of shape, which is "a competing or leading cause of shortness of breath with exertion" and Claimant may have obstructive sleep apnea, which "can lead to occult cardiac disease and be a serious cause of shortness of breath and hypoxia." *Id.* Dr. Selby noted that Claimant worked in underground coal mine employment from 1972 to 1998 and from 2005 to September 30, 2010. *Id.* at 1-2.

At his deposition, Dr. Selby testified that "there was no positive findings for pneumoconiosis [on the x-ray he read]. In particular, the lung parenchyma or tissue of the lung and the lung lining or pleura showed no abnormality." EX 1 (Dep. at 16). He explained that his finding of an "uncoiled aorta" was "not anything really significant." *Id.* He reviewed Dr. Meyer's interpretation of the same x-ray, which also showed no evidence of coal workers' pneumoconiosis. *Id.* at 16-17. He determined Claimant does not have clinical pneumoconiosis because "There is no evidence of it;" Claimant has "normal spirometry; he has a normal power output. There's nothing radiographic. The whole theme is that there is really no total and impairing lung disease in this gentleman for any reason." *Id.* at 24-25. Claimant does not have legal pneumoconiosis because he has "normal spirometry, normal exercise testing, normal examination, and normal x-ray." *Id.* at 25.

Dr. Jarboe opined that Claimant does not have clinical or legal pneumoconiosis. EX 6 at 8-9. Dr. Jarboe discounted clinical pneumoconiosis because "all of the readings by highly qualified Board Certified Radiologists and B Readers have been negative for coal workers pneumoconiosis." *Id.* Although Dr. Selby's July 21, 2011 blood gas study showed mild hypoxemia, "the exact cause of this hypoxemia is not clear." *Id.* at 9. "Based on the fact that [Claimant] demonstrates no ventilatory impairment or impairment of diffusion capacity which has resulted from his occupation as a coal worker," Dr. Jarboe concluded that "it would be highly unlikely that the mild hypoxemia has been caused by the presence of coal workers pneumoconiosis or the inhalation of coal mine dust." *Id.* at 10. Instead, "more likely causes include possible obstructive sleep apnea." *Id.* Dr. Jarboe explained that sleep apnea, especially when associated with obesity, will cause significant pulmonary hypertension which would explain mild hypoxemia and a widened A-a gradient with exercise. *Id.* Bronchial asthma would also cause these findings. *Id.* Dr. Jarboe noted the length of coal mine employment stated by Claimant in his claim for benefits (thirty two years) and recorded by the other physicians in their medical reports. *See id.* at 1-4.

Other Evidence

The presence of pneumoconiosis may be demonstrated through use of "other evidence," as set forth at 20 C.F.R. § 718.107. Evidence submitted under § 718.107 includes, but is not limited to, CT-scans. A party proffering evidence under this regulatory provision must also satisfy the requirements of 20 C.F.R. § 718.107(b) and present medical evidence "that the test or procedure is medically acceptable and relevant" to establishing or refuting a claimant's entitlement to benefits. 20 C.F.R. § 718.107. Notably, "other evidence" is weighed under 20 C.F.R. § 718.202(a)(4) along with medical reports and treatment and hospitalization records. *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123 (2006)(en banc) (J. Boggs, concurring).

The record does not contain "other evidence," such as CT-scans, but does contain numerous treatment records from the Department of Veterans Affairs, dated July 2, 2002 to February 11, 2011. EX 4; *see* § 725.414(a)(4) ("[A]ny record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for respiratory or pulmonary or related disease, may be received into evidence."); *see also Dempsey v. Sewell Coal Co.*, 23 BLR 1-53 (2004). The records document Claimant's treatment for hypertension, diabetes, GERD and hypercholesterolemia. *See* EX 4.

Discussion

Dr. Simpao's opinion, that Claimant has clinical and legal pneumoconiosis, is based on significantly older evidence (e.g., x-ray, pulmonary function study, and blood gas study dated November 6, 2006) than the data relied upon by the other physicians. Therefore, his opinion will be accorded less weight. *See Gillespie v. Badger Coal Co.*, 7 B.L.R. 1-839 (1985).

Dr. Chavda's determination that Claimant does not have clinical pneumoconiosis is based on Dr. Meyer's reading of the November 4, 2010 x-ray. DX 12. As discussed above, I found that Employer failed to demonstrate by x-ray evidence that Claimant does not have clinical pneumoconiosis. Specifically, I found that the most probative x-ray, dated July 21, 2011, is

positive for pneumoconiosis. Dr. Chavda did not have the opportunity to review the July 21, 2011 x-ray. As Dr. Chavda's opinion is inconsistent with the medical evidence, I do not credit his opinion that Claimant does not have clinical pneumoconiosis.

In concluding that Claimant has legal pneumoconiosis, Dr. Chavda relied on a pulmonary function study later determined to be unreliable. *See* EX 7 at 22. If the pulmonary function studies were normal, Dr. Chavda testified that he would not diagnose Claimant with legal pneumoconiosis in the absence of other objective evidence. *Id.* Although he later testified that Claimant has hypoxia, as shown by Dr. Selby's blood gas study, he did not specifically state that Claimant's hypoxia is due to coal dust exposure. *Id.* at 29. He stated only that Claimant's legal pneumoconiosis is a significant contributor to his hypoxia. *Id.* Since Dr. Chavda's diagnosis of legal pneumoconiosis depended on an unreliable study, his opinion will be accorded little weight.

The burden, however, is on Employer to demonstrate that Claimant does not have clinical or legal pneumoconiosis. Their opinions, that Claimant does not have legal or clinical pneumoconiosis, are entitled to little weight as they are poorly reasoned and inadequately documented.

Relying on the x-ray evidence developed at the time of his report, Dr. Jarboe found it significant that "all of the readings by highly qualified Board Certified Radiologists and B Readers have been negative for coal workers pneumoconiosis." EX 6 at 8-9. Dr. Jarboe did not address the subsequent readings by dually certified readers who read the films as positive, including the July 21, 2011 x-ray I found to be positive for clinical pneumoconiosis. Since Dr. Jarboe's opinion is not supported by the medical documentation, I do not credit his opinion that Claimant does not have clinical pneumoconiosis.

Dr. Jarboe's opinion, that Claimant does not have legal pneumoconiosis, is flawed because he erred in relying on the pulmonary function study results to exclude coal dust exposure as a cause of Claimant's mild hypoxemia. Dr. Jarboe reasoned that it is highly unlikely coal dust exposure is a cause of Claimant's hypoxemia because he "demonstrates no ventilatory impairment or impairment of diffusion capacity which has resulted from his occupation as a coal worker." *Id.* at 10. However, blood gas studies and ventilatory studies measure different types of impairment. *Sheranko v. Jones and Laughlin Steel Corp*., 6 B.L.R. 1-797, 1-798 (1984). As the U.S. Court of Appeals for the Sixth Circuit has noted, the Board holds the results of blood gas and pulmonary function testing "may consistently have no correlation since coal workers' pneumoconiosis may manifest itself in different types of pulmonary impairment.'" *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993) (citing *Gurule v. Director, OWCP*, 2 B.L.R. 1-772, 1-777 (1979), *aff'd.*, 653 F.2d 1368 (10th Cir. 1981)).

Secondly, Dr. Jarboe diagnosed Claimant with "possible" bronchial asthma to the exclusion of legal pneumoconiosis. Yet asthma and asthmatic bronchitis may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *See Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983); *see also Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134, 1-139 (1999). Beyond stating

that coal dust not cause bronchial asthma, Dr. Jarboe did not offer a reason for excluding coal dust as a substantially aggravating factor.

Having interpreted the July 21, 2011 x-ray as negative, Dr. Selby opined that Claimant does not have clinical pneumoconiosis. As discussed above, I found that Dr. Selby's reading was outweighed by the readings of the other, better-qualified physicians, who read the x-ray as positive. Consequently, I will give less weight to his opinion that Claimant does not have clinical pneumoconiosis.

At his deposition, Dr. Selby appeared to discount legal pneumoconiosis on the basis that Claimant does not have any respiratory or pulmonary impairment at all. In response to the question of whether there is any basis to diagnose Claimant with legal pneumoconiosis, he answered no, explaining, "Again, normal spirometry, normal exercise testing, normal examination, and normal x-ray. . . . All those things being normal, and after seeing him personally, there's no question." EX 1 (Dep. at 25). He also stated, in discussing whether Claimant has pneumoconiosis, that "The whole theme is that there is really no total and impairing lung disease in this gentleman for any reason." *Id.* If Dr. Selby reasoned that Claimant does not have legal pneumoconiosis because he does not have a respiratory or pulmonary impairment, his opinion is internally inconsistent as he also found that Claimant has mild hypoxia.

Like Dr. Jarboe, Dr. Selby diagnosed Claimant with hypoxemia but attributed it to his obesity and possible sleep apnea rather than to coal dust exposure. However, even if Claimant's obesity and sleep apnea caused Claimant's hypoxemia, Dr. Selby insufficiently explained how he concluded that coal mine dust exposure did not substantially aggravate Claimant's hypoxemia. In other words, he failed to account for the possibility that Claimant's hypoxemia is due to both his twenty seven years of coal dust exposure and to his obesity and sleep apnea. Dr. Selby also found that Claimant has bronchial asthma but did not adequately explain how he concluded that Claimant's asthma was not aggravated by his coal dust exposure.[22]

On examining Claimant's throat, Dr. Selby found that Claimant shows "Mallampati class 2." EX 1 at 3. This refers to "the shape of the oral pharynx, the back of the throat, as concerns whether somebody may have difficulty being intubated for a procedure or may develop sleep apnea" and Class 2 is "mildly abnormal, towards the development of sleep apnea." *Id.* (Dep. at 12). However, Dr. Selby could state only that Claimant "may have" obstructive sleep apnea. *Id.* at 4. There is no sleep study or other documentation in the record substantiating the contention that Claimant has sleep apnea. As a result, I find the opinions of Drs. Selby and Jarboe, that Claimant's hypoxemia is due to sleep apnea rather than coal dust exposure, to be speculative and inadequately documented.

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[22] Dr. Selby did testify that Claimant's pulmonary function studies, which over time have gone from "abnormal to normal," are consistent with asthma but not pneumoconiosis because pneumoconiosis "is a progressive or static disease. It's not something that improves" while asthma "can be bad on a given day and better a day or a week or a month or a year later." EX 1 (Dep. at 22-23). He did not discuss whether Claimant's blood gas studies are inconsistent with bronchial asthma arising from coal dust exposure.

Considering the evidence as a whole, I find that Employer has not met its burden of proof in establishing that Claimant does not suffer from either clinical or legal pneumoconiosis.

Furthermore, I find that Employer has failed to demonstrate that Claimant's clinical pneumoconiosis did not arise out of his coal mine employment. Dr. Selby found that the July 21, 2011 x-ray is "negative for parenchymal and pleural abnormalities due to pneumoconiosis in particular coal worker's pneumoconiosis" and noted that the x-ray "shows an uncoiled aorta and multiple calcified and noncalcified granulomas, likely histoplasmosis." EX 1 at 3. Dr. Selby did not explain how these findings are inconsistent with pneumoconiosis arising out of coal mine employment. Moreover, Dr. Selby's assertion, that the findings are likely due to histoplasmosis, is speculative in that there is nothing in the treatment records documenting a history of histoplasmosis. As a result, I find his opinion to be insufficiently reasoned and inadequately documented.

Having declined to diagnose Claimant with clinical pneumoconiosis, Drs. Jarboe and Chavda did not render opinions as to whether Claimant's clinical pneumoconiosis arose out of his coal mine employment. Therefore, their opinions are not probative on this issue. Employer has not presented any other evidence that establishes Claimant's pneumoconiosis arose out of causes other than coal mine employment.

Since Employer has failed to establish that Claimant does not have legal pneumoconiosis or clinical pneumoconiosis, arising out of his coal mine employment, Employer cannot rebut the presumption the first way.

2. Whether the Claimant's Disability is Due to Pneumoconiosis

Under § 718.305, the party opposing entitlement may rebut the element of disability causation by establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. *See Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA (Apr. 21, 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013)(an employer must show under the rule-out standard that "the [miner's] coal mine employment played no part in causing the [miner's] total disability. . .. .).

Dr. Chavda opined that Claimant's legal pneumoconiosis is a significant contributor to his hypoxia. EX 7 at 29. He explained that Claimant "has a reduction in lung functions, he has restrictive airway disease, so we can say definitely one of the diagnoses that could cause hypoxia would be the legal pneumoconiosis." *Id.*

Dr. Jarboe opined that Claimant does not have a "disabling impairment that has been caused in whole or in part by the presence of coal workers pneumoconiosis." EX 6 at 11-12. Although Dr. Jarboe declined to diagnose Claimant with pneumoconiosis, he stated that, even if Claimant were found to have pneumoconiosis, his "opinion regarding the degree and cause of any respiratory impairment or disability would not change." *Id.* at 12. Dr. Jarboe explained that Claimant's ventilatory function was normal and several measurements of blood gases show no hypoxemia and only mild hypoxemia when examined by Dr. Selby. *Id.* Any impairment of gas exchange Claimant may have "has been caused by factors other than the inhalation of coal mine

dust or the presence of coal workers pneumoconiosis." *Id.* "Based on the fact that [Claimant] demonstrates no ventilatory impairment or impairment of diffusion capacity which has resulted from his occupation as a coal worker," Dr. Jarboe believes "it would be highly unlikely that the mild hypoxemia has been caused by the presence of coal workers pneumoconiosis or the inhalation of coal dust." *Id.* at 10. Rather than to pneumoconiosis, Dr. Jarboe attributed Claimant's hypoxemia to bronchial asthma, obesity, and sleep apnea. *Id.* at 10-11. Neither obstructive sleep apnea nor bronchial asthma are conditions that "are caused by the inhalation of coal mine dust or the presence of coal workers pneumoconiosis." *Id.* at 11.

Dr. Selby opined that Claimant does not have clinical or legal pneumoconiosis. Although he found that Claimant has hypoxia and asthma (based on Claimant's history of coughing, wheezing and dyspnea on exertion), Dr. Selby attributed Claimant's hypoxia and shortness of breath to Claimant's obesity, Claimant's being "deconditioned or 'out of shape,'" and possible sleep apnea, which "can lead to occult cardiac disease and be a serious cause of shortness of breath and hypoxia." EX 1 at 4. According to Dr. Selby, Claimant would have the same or worse respiratory function even if he had never set foot in a coal mine. *Id.*

As with his diagnosis of legal pneumoconiosis, Dr. Chavda's opinion, that Claimant's legal pneumoconiosis is a significant cause of his disabling hypoxemia, is based on an unreliable pulmonary function study. Consequently, his opinion will be given little weight on this issue. Employer, however, has the burden to demonstrate that Claimant's pneumoconiosis played no part in causing his totally disabling respiratory or pulmonary impairment.

Drs. Jarboe and Selby both found that Claimant does not have clinical or legal pneumoconiosis, contrary to my finding that Employer failed to disprove clinical and legal pneumoconiosis. Therefore, I discount their opinions that pneumoconiosis played no part in causing his totally disabling respiratory or pulmonary impairment. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063 (6th Cir. 2013) (holding that an administrative law judge permissibly discounted the employer's disability causation opinions because its physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that the employer failed to disprove legal pneumoconiosis).

Dr. Jarboe did state that, even if Claimant were found to have pneumoconiosis, his "opinion regarding the degree and cause of any respiratory impairment or disability would not change." EX 6 at 12. However, Dr. Jarboe's and Dr. Selby's reasons for excluding coal dust exposure as a cause of Claimant's totally disabling hypoxemia mirror their reasons for determining that no part of Claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. For the same reasons I discounted their opinions that Claimant does not suffer from legal pneumoconiosis, I discount their opinions that Claimant's pneumoconiosis played no part in his totally disabling impairment.

Dr. Jarboe impermissibly relied on pulmonary function studies to conclude that Claimant's hypoxemia, as shown on his blood gas studies, is not due to pneumoconiosis. Dr. Jarboe also attributed Claimant's hypoxemia to asthma rather than pneumoconiosis without sufficiently explaining how he concluded that Claimant's asthma was not substantially aggravated by coal dust exposure (that is, that it does not itself constitute legal pneumoconiosis).

Dr. Selby did not adequately explain how he concluded that pneumoconiosis played no part in causing Claimant's hypoxemia, even if obesity, deconditioning and sleep apnea also played a role. Finally, their opinions, that Claimant's impairment is caused by possible sleep apnea rather than pneumoconiosis, is speculative and not grounded in the record.

Accordingly, I find Employer has failed to meet its burden of proving that no part of Claimant's total respiratory or pulmonary disability was caused by pneumoconiosis.

IV. CONCLUSION

Claimant has met his burden of showing a change in an applicable condition of entitlement since the prior claim was denied. Upon *de novo* review of the entire record, I find that Claimant has established that he had fifteen years of underground coal mine employment, and that he is totally disabled by a pulmonary or respiratory impairment. Employer has failed to rebut the presumption that Claimant is totally disabled due to pneumoconiosis. Accordingly, Claimant is entitled to benefits under the Act.

V. EFFECTIVE DATE

Benefits are payable from the date the medical evidence first establishes that the miner became totally disabled due to pneumoconiosis or, if such a date cannot be determined from the record, the month in which the miner filed the present claim. 20 C.F.R. § 725.503; *Carney v. Director, OWCP*, 11 B.L.R. 1-32 (1987); *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990). In the case of a subsequent claim, however, the regulations state that "no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(c)(6). For purposes of the date of onset, the first medical evidence of record indicating total disability does not establish the onset date; rather, such evidence only indicates the miner became totally disabled at some prior point in time. *Tobrey v. Director, OWCP*, 7 B.L.R. 1-407, 1-409 (1984); *Hall v. Consolidation Coal Co.*, 6 B.L.R. 1-1306, 1-1310 (1984).

Because no specific onset date of disability is evident from the record, benefits will begin on the first day of the month in which Claimant filed this claim, which is October 2010.

VI. ATTORNEY'S FEE

No award of attorney's fees for services provided to the Claimant is made herein because no fee application has been received. Within 30 days, Claimant's counsel shall submit a fee application, in conformance with §§ 725.365 and 725.366 of the regulations. The application

must be served on all parties, and a service sheet documenting such service must accompany the application. Parties have 30 days following the receipt of any application within which to file any objection. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

The Claimant's claim for benefits under the Act is **AWARDED**.

SO ORDERED.

Digitally signed by Colleen Geraghty
DN: CN=Colleen Geraghty,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Boston, S=MA, C=US
Location: Boston MA

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the Administrative Law Judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479.

The address of the Board is: Benefits Review Board, U.S. Department of Labor, PO Box 37601, Washington, DC 20013-7601, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed. At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481. If an appeal is not timely filed with the Board, the Administrative Law Judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).