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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-9520

[Filed April 2, 2019]

ROCKWOOD CASUALTY INSURANCE COMPANY, insurer of Hidden Splendor Resources, Inc.,	)
Petitioner,	)
v.	)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, et al.,	)
Respondents.	)

ORDER

Before **BRISCOE**, **MATHESON**, and **BACHARACH**, Circuit Judges.

Petitioner's petition for rehearing is denied.

Entered for the Court

/s/Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-9520

[Filed March 5, 2019]

ROCKWOOD CASUALTY INSURANCE COMPANY, insurer of Hidden Splendor Resources, Inc.,	)
Petitioner,	)
v.	)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; TONY KOURIANOS,	)
Respondents.	)

Petition for Review from an Order
of the Benefits Review Board
(Benefits No. 17-0323 BLA)

Cheryl L. Intravaia, Feirich/Mager/Green/Ryan, Carbondale, Illinois, for Petitioner.

Victoria S. Herman (Joseph E. Wolfe, with her on the brief), Wolfe Williams & Reynolds, Norton, Virginia, for Tony N. Kourianos, Respondent.

William M. Bush (Kate S. O'Scannlain, Solicitor of Labor, Kevin Lyskowski, Associate Solicitor, Gary K. Stearman, Counsel for Appellate Litigation, and Rita A. Roppolo, Attorney, on the brief), U.S. Department of Labor, Washington, D.C., for Director, Office of Workers' Compensation Programs, Respondent.

Before **BRISCOE**, **MATHESON**, and **BACHARACH**, Circuit Judges.

MATHESON, Circuit Judge.

Congress enacted the Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§ 901-944, in 1969 to compensate miners with pneumoconiosis, commonly known as "black lung disease." *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1335 (10th Cir. 2014). The BLBA provides benefits to coal miners who become totally disabled from pneumoconiosis caused by their mining work. *Id.*

Tony N. Kourianos worked as a coal miner for more than 27 years before filing a claim for benefits under the BLBA. His claim was reviewed through a three-tiered administrative process. Ultimately, the Benefits Review Board ("BRB") found that he was entitled to benefits. The BRB also found that Mr. Kourianos's last

employer, Hidden Splendor Resources, Inc. ("Hidden Splendor"), was the "responsible operator" liable for paying those benefits. Hidden Splendor's insurer, Rockwood Casualty Insurance Company ("Rockwood"), petitions this court for review of the BRB's decision. Along with Mr. Kourianos, the Director of the Office of Workers' Compensation Programs ("OWCP" or "Director") is a respondent in this case. *See* 20 C.F.R. § 725.360(a)(5) (stating that the Director will be a party "in all proceedings relating to a claim for benefits").

Rockwood challenges the BRB's decision on two grounds. First, it argues the BRB incorrectly affirmed the administrative law judge's ("ALJ") decision prohibiting Hidden Splendor from withdrawing its responsible operator stipulation. Second, it argues the BRB incorrectly found that Mr. Kourianos was totally disabled and entitled to benefits.

Exercising jurisdiction under 30 U.S.C. § 932(a) and 33 U.S.C. § 921(c), we deny Rockwood's petition.

I. **BACKGROUND**

We describe the legal framework governing Mr. Kourianos's claim for benefits and then recount the specific factual and procedural history of his case.

A. ***Legal Background***

A claim for BLBA benefits contemplates two critical questions. First, which operator is responsible for paying benefits under the BLBA? Second, is the claimant entitled to benefits under the Act? The following presents the law applicable to these two

questions and the Department of Labor's three-tiered administrative process for deciding BLBA claims.

1. **The Responsible Operator Determination**

The BLBA provides that individual coal mine operators are liable for a miner's benefits if the miner's disability or death arose "at least in part" from coal mine employment with the operator. 30 U.S.C. § 932(c); 20 C.F.R. § 725.494(a).[1] To ensure coal mine operators can pay their miners' benefits, Congress imposed workers' compensation insurance requirements on them. 30 U.S.C. § 933(a); 20 C.F.R. § 726.1. As a fallback alternative, Congress created the Black Lung Disability Trust Fund, which assumes liability for miners' benefits if "there is no operator who is liable for the payment of such benefits." 26 U.S.C. § 9501(d)(1)(B).

To implement the BLBA, Congress directed the Department of Labor to promulgate regulations "for determining whether pneumoconiosis arose out of employment in a particular coal mine or mines." 30 U.S.C. § 932(h). Under the regulations, a coal mine operator is a "potentially liable operator" if (i) the miner's disability or death arose out of employment with the operator; (ii) the entity was an operator after

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[1] Because Mr. Kourianos filed his claim after January 19, 2001, the current version of the BLBA regulations apply to his claim. 20 C.F.R. § 725.2 ("This part applies to all claims filed after January 19, 2001 and all benefits payments made on such claims."); *see Antelope Coal*, 743 F.3d at 1341-42 (holding that 2013 amendments to BLBA regulations applied retroactively to claim filed before amendments were promulgated); *see also Consolidation Coal Co. v. Dir., OWCP*, 864 F.3d 1142, 1151 (10th Cir. 2017).

June 30, 1973; (iii) the miner worked for the operator for at least one year; (iv) the miner's employment with the operator included at least one working day after December 31, 1969; and (v) the operator is financially capable of assuming liability for the claim. 20 C.F.R. § 725.494(a)-(e). The regulations state that the "operator responsible for the payment of benefits . . . shall be the potentially liable operator . . . that most recently employed the miner." *Id.* § 725.495(a)(1).

The BLBA defines a miner as "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. § 902(d); *see also* 20 C.F.R. § 725.202(a). To meet the statutory definition of a "miner," the claimant must establish that he or she (1) worked "in or around a statutorily defined coal mine (the 'situs' test)," and (2) performed "duties involv[ing] the extraction or preparation of coal, or involv[ing] appropriate coal mine construction or transportation (the 'function' test)." *Falcon Coal Co. v. Clemons*, 873 F.2d 916, 921 (6th Cir. 1989) (citing 30 U.S.C. § 802(h)(2) and surveying case law).[2]

In sum, under the BLBA, the responsible operator is the last coal mine operator to have employed the claimant as a "miner" for more than one year. 20 C.F.R. §§ 725.494(c), 725.495(a)(1).

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[2] We applied the "situs" and "function" tests in *Wackenhut Corp. v. Hansen ex rel. Hansen*, 560 F. App'x 747, 750 (10th Cir. 2014) (unpublished) (cited for persuasive value under Fed. R. App. P. 32.1, 10th Cir. R. 32.1).

2. **The Benefits Determination**

To obtain benefits under the BLBA, a claimant must prove

(1) he or she suffers from pneumoconiosis (disease),

(2) the pneumoconiosis arose out of coal mining employment (disease causation),

(3) he or she is totally disabled due to a respiratory or pulmonary impairment (disability), and

(4) pneumoconiosis is a substantially contributing cause of the total disability (disability causation).

Energy W. Mining Co. v. Estate of Blackburn, 857 F.3d 817, 822 (10th Cir. 2017); *see also* 30 U.S.C. §§ 902, 921; 20 C.F.R. §§ 725.202(d)(2), 718.204(c)(1).

Below, we discuss four additional aspects of a BLBA claim: (a) the "15-year presumption," (b) the difference between clinical and legal pneumoconiosis, (c) the 10-year presumption and the disease causation element, and (d) the showing necessary to demonstrate a "total disability."

a. *The 15-year presumption and rebuttal*

The BLBA created a rebuttable "presumption that a miner is disabled due to pneumoconiosis when he or she has worked for 15 years in underground coal mines or substantially similar conditions and is totally

disabled from a respiratory or pulmonary condition (the '15-year presumption')." *Antelope Coal*, 743 F.3d at 1335; *see* 30 U.S.C. § 921(c)(4). "In other words, a miner who proves 15 years of coal mine work and total disability is entitled to a presumption that the remaining elements of his claim are established." *Antelope Coal*, 743 F.3d at 1335; *see Blackburn*, 857 F.3d at 822 (stating that a claimant's burden is "soften[ed]" when he has worked for at least 15 years as a miner).

The party opposing an award of benefits under the BLBA may rebut the 15-year presumption by establishing that (1) the claimant does not have pneumoconiosis or (2) pneumoconiosis did not cause any part of the miner's respiratory or pulmonary total disability. 20 C.F.R. § 718.305(d). In other words, once a claimant establishes the 15-year presumption, the operator must rebut the existence of (1) the disease, or (2) the disease or disability causation. *Blackburn*, 857 F.3d at 822. "The presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin." 20 C.F.R. § 718.305(d).

b. *Clinical and legal pneumoconiosis*

"The BLBA recognizes two types of pneumoconiosis: clinical and legal." *Antelope Coal*, 743 F.3d at 1335. The 15-year presumption applies to both classifications of the disease. *Consolidation Coal Co. v. Dir., OWCP*, 864 F.3d 1142, 1144 (10th Cir. 2017).

Clinical pneumoconiosis refers to diseases the medical community has recognized as pneumoconiosis, including "conditions characterized by . . . the fibrotic reaction of the lung tissue to . . . deposition [of particulate matter] caused by dust exposure in coal mine employment." 20 C.F.R. § 718.201(a)(1).

Legal pneumoconiosis, on the other hand, is defined as any "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b); *see* 20 C.F.R. § 718.201(a)(2) ("This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment."). To show legal pneumoconiosis, a claimant therefore "must satisfy both the *Disease* and *Disease causation* elements" of a BLBA claim. *Blackburn*, 857 F.3d 817. Legal pneumoconiosis encompasses "a broader class of lung diseases that are not pneumoconiosis as the term is used by the medical community." *Andersen v. Dir., OWCP*, 455 F.3d 1102, 1104 (10th Cir. 2006). In other words, a claimant may have legal pneumoconiosis without ever receiving a formal medical diagnosis of "pneumoconiosis." *See id.*

c. *The 10-year presumption and disease causation*

The 15-year presumption establishes the second element of a BLBA claim—the pneumoconiosis arose out of coal mining employment. *See Blackburn*, 857 F.3d at 822. The second element also may be established under the BLBA's 10-year presumption. *See* 30 U.S.C. § 921(c)(1).

"Arising out of coal mine employment" means the relevant lung disease or impairment is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). "If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment." 30 U.S.C. § 921(c)(1); *see* 20 C.F.R. § 718.203(b). The 10-year presumption overlaps with the 15-year presumption because both presumptions shift the burden to the employer to submit evidence to disprove that a claimant's pneumoconiosis arose out of coal mine employment. Because the 15-year presumption addresses the element of disability causation in addition to disease causation, however, the 10-year presumption is effectively subsumed by the 15-year presumption.

d. *Total disability*

One of the elements to establish the 15-year presumption is proof of total disability from a respiratory or pulmonary condition. A miner is considered "totally disabled" if he or she has "a pulmonary or respiratory impairment which," on its own, prevents the miner from (i) "performing his or her usual coal mine work" and (ii) "engaging in gainful employment in the immediate area of his or her residence requiring the skills or 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." 20 C.F.R. § 718.204(b)(1).

The BLBA regulations provide that a miner can qualify for a total disability determination by submitting evidence from (1) pulmonary function tests, (2) arterial blood gas tests, or (3) medical evidence of right-side congestive heart failure. 20 C.F.R. § 718.204(b). In addition, when total disability cannot be shown by these three categories of testing, the regulations provide that "total disability may nevertheless be found 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 . . . the miner from engaging in [the claimant's usual] employment." 20 C.F.R. § 718.204(b)(2). Arterial blood gas studies and medical opinions provide the key evidence of "impairment" in this case.

The BLBA regulations provide standards for evaluating arterial blood gas studies. *See* 20 C.F.R. pt. 718, App. C. These standards are depicted in "Appendix C," which "contains three tables of 'qualifying' values for arterial-blood gas studies . . . . A test that produces 'qualifying' values is deemed, in the absence of contrary evidence, indicative of a totally disabling respiratory or pulmonary impairment." Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits, 77 Fed. Reg. 19456, 19464 (Mar. 30, 2012).

Appendix C incorporates three categories of data: (1) the altitude at which the test was taken, (2) a partial pressure of oxygen ("PO2") reading, and (3) a partial pressure of carbon dioxide ("PCO2") reading.

See 20 C.F.R. pt. 718, App. C. First, Appendix C consists of three charts, each based on a different altitude range and each with a different set of PO2 and PCO2 values: (1) 0 to 2,999; (2) 3,000 to 5,999; and (3) 6,000 or more feet above sea level. *Id.* Second, Appendix C compares the blood's carbon dioxide pressure levels (PCO2) with the oxygen pressure levels (PO2) to determine how fast the subject's lungs are producing oxygen. *See id.*; Suppl. App. 17-18. Third, at each PCO2 reading in the chart, Appendix C sets a "qualifying" PO2 value, below which the miner will be deemed impaired in the absence of contrary evidence. *Id.* For example, in the 3,000-to-5,999-foot altitude range, a claimant with a PCO2 level of 26 would qualify as "impaired" if his or her PO2 level was 69 or lower. We reproduce the chart for the 3,000-to-5,999 category below:

> (2) For arterial blood-gas studies performed at test sites 3,000 to 5,999 feet above sea level:

Arterial PCO2 (mm Hg)	Arterial PO2 equal to or less than (mm Hg)
25 or below	70
26	69
27	68
28	67
29	66
30	65

31.	64
32.	63
33.	62
34.	61
35.	60
36.	59
37.	58
38.	57
39.	56
40-49	55
Above 50	(2)

[2] Any value.

20 C.F.R. Pt. 718, App. C.

3. **Procedures for Claims Under the BLBA**

Claims under the BLBA are subject to three levels of administrative review.[3] First, the OWCP district director[4] receives and develops documentary evidence and issues a proposed decision and order ("PDO") regarding benefits and liability. 20 C.F.R. §§ 725.414, 725.418. Second, if a party wishes to challenge the PDO, it may request a hearing before an ALJ who

[3] The Secretary of Labor has a discretionary right to undertake a fourth level of review, but he did not do so here. *See* 20 C.F.R. § 726.317(a).

[4] The "district director" should not be confused with the Director of OWCP, the Department of Labor official charged with administering the BLBA program. *See* 20 C.F.R. § 1.1(a).

reviews evidence—including oral testimony—and issues a "decision and order." *Id.* §§ 725.419(a), 725.476. Third, a party dissatisfied with the ALJ's decision may appeal to the BRB, which reviews the hearing record for error and issues its own decision. 33 U.S.C. § 921(b)(3); 20 C.F.R. § 725.481. Aggrieved parties-in-interest may appeal BRB orders to an appropriate circuit court. *See* 33 U.S.C. § 921(c); 30 U.S.C. § 932(a); 20 C.F.R. § 725.482.

a. *District director review*

Once a miner files a claim for benefits under the BLBA, the OWCP district director investigates the claim and determines whether one or more operators are potentially liable. 20 C.F.R. § 725.407(a). The district director then notifies each potentially liable operator of the claim and sends "a copy of the claimant's application and a copy of all evidence obtained by the district director relating to the miner's employment." *Id.* § 725.407(c).

Each notified operator has 30 days to accept or contest its designation as a potentially liable operator. *Id.* § 725.408(a)(1). "If the operator contests its identification, it shall . . . state the precise nature of its disagreement" in its response. *Id.* § 725.408(a)(2). The operator may submit documentary evidence in support of its disagreement within 90 days of receiving the OWCP notice. *Id.* § 725.408(b)(1). The regulations further provide, "No documentary evidence relevant to [the operator's potential liability] may be admitted in any further proceedings unless it is submitted within" the 90-day time limit. *Id.* § 725.408(b)(2).

After receiving a potentially liable operator's response, the district director develops and reviews the relevant medical evidence and issues a "schedule for the submission of additional evidence" ("SSAE"), which includes a preliminary determination of the miner's entitlement to benefits. *Id.* § 725.410(a). The SSAE also states which of the potentially liable operators has been identified as the responsible operator for the claim. *Id.* § 725.410(a)(3). Once identified, the designated responsible operator has 30 days to accept or contest its designation. *Id.* § 725.412(a)(1). If the operator accepts its responsible operator designation or fails to file a timely response, the operator "shall be deemed to have accepted the district director's designation with respect to its liability, and to have waived its right to contest its liability in any further proceeding conducted with respect to the claim." *Id.* § 725.412(a)(2).

At the end of this initial level of proceedings, the district director makes a final recommendation of entitlement to benefits, designates the responsible operator, and issues a written proposed decision and order ("PDO"). 20 C.F.R. § 725.418(d). When it issues the PDO, the district director must "dismiss, as parties to the claim, all other potentially liable operators." *Id.*

b. A*dministrative law judge proceedings*

Parties-in-interest who wish to contest a PDO's findings or conclusions may request a hearing before an ALJ. *Id.* § 725.419(a). Upon receiving a party's request, the district director refers the case to the Office of Administrative Law Judges. *Id.* An ALJ then holds a formal hearing and may take oral testimony. *Id.*

§ 725.455. With one exception not relevant here, "[t]he district director may not notify additional operators of their potential liability after a case has been referred to the Office of Administrative Law Judges." *Id.* § 725.407(d).

"Except as otherwise provided in this section, the hearing shall be confined to those contested issues which have been identified by the district director or any other issue raised in writing before the district director." *Id.* § 725.463(a) (citation omitted). One exception is critical here:

> *An administrative law judge may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director.* Such new issue may be raised upon application of any party, or upon an administrative law judge's own motion, with notice to all parties, at any time after a claim has been transmitted by the district director to the Office of Administrative Law Judges and prior to decision by an administrative law judge. If a new issue is raised, the administrative law judge may, in his or her discretion, either remand the case to the district director with instructions for further proceedings, hear and resolve the new issue, or refuse to consider such new issue.

20 C.F.R. § 725.463(b) (emphasis added).

After the hearing, the ALJ issues a decision and order resolving the claim. *Id.* § 725.476.

c. *Proceedings before the BRB*

"Any party dissatisfied with a decision and order issued by an [ALJ] may . . . appeal the decision and order to the [BRB.]" *Id.* § 725.481. The BRB does not receive new evidence. 33 U.S.C. § 921(b)(3); 20 C.F.R. § 802.301(b). Instead, a panel of three ALJs considers the record and issues a decision. *See* 20 C.F.R. §§ 802.301-802.309. The panel may hold oral argument, but it need not do so. *Id.* § 802.304. The Secretary of Labor has discretion to review the BRB's decisions. *Id.* § 726.317(a).

B. ***Procedural History***

In 2012, Mr. Kourianos's claim started making its way through the three-tiered administrative review outlined above.

1. **Proceedings Before the OWCP District Director**

After receiving the claim, the OWCP district director used Mr. Kourianos's Social Security earnings report to identify two potentially liable operators: Hidden Splendor and West Ridge Resources, Inc. Suppl. App. at 47-52.[5] The district director then sent each potentially liable operator a "Notice of Claim." *Id.* Hidden Splendor initially denied it was the responsible

[5] The Government filed a Supplemental Appendix ("Suppl. App.") containing the key documents from the administrative review process. Within the administrative record, we cite the director's exhibits as "DX" and the Employer's (Rockwood/Hidden Splendor's) exhibits as "EX." We cite the transcript of the ALJ's hearing as "ALJ Hrg. Tr."

operator, arguing that it employed Mr. Kourianos as a miner for less than one year. Approximately one month after its initial response, however, Hidden Splendor filed an amended response admitting that it was "the responsible operator within the meaning of the [BLBA]." *Id.* at 58.

On February 6, 2013, approximately three months after its amended response, a Hidden Splendor "senior staff accountant" faxed the district director a document with the heading "Hire Dates for Tony Kourianos." *Id.* at 46. The one-page document listed three periods of employment for Mr. Kourianos: (1) "December 26, 2006 to April 11, 2007 – In the Mine"; (2) "November 16, 2010 to January 21, 2011 – In the Mine"; and (3) "April 5, 2011 to October 14, 2011 – Outside at the Loadout." *Id.*

After reviewing the documentary evidence, the district director issued an SSAE, which made the following preliminary conclusions: (1) Mr. Kourianos "would be entitled to benefits if [the district director] issued a decision at this time," and (2) Hidden Splendor "is the responsible operator liable for the payment of benefits." *Id.* at 60. Hidden Splendor responded to the SSAE, stating, "You will find Hidden Splendor has accepted the designation of Responsible Operator but contests Claimant's entitlement for benefits." *Id.* at 73. The district director then issued its PDO, which adopted the preliminary conclusions in the SSAE and dismissed West Ridge as a potentially responsible operator.

Hidden Splendor sought ALJ review of the district director's determination that Mr. Kourianos was

entitled to benefits. In its "statement of contested issues," Hidden Splendor "advise[d] the parties that [it] does *not* dispute its designation as the Responsible Operator in this claim." *Id.* at 83 (emphasis in original).

2. **Proceedings Before the ALJ**

The ALJ issued two orders, one confirming Hidden Splendor's designation as the responsible operator and a second finding Mr. Kourianos was entitled to benefits.

a. *Responsible operator determination*

The ALJ held a formal hearing in Price, Utah, on August 12, 2014. Mr. Kourianos testified and explained his job duties at Hidden Splendor. He testified that during the first two periods with the company listed on the staff accountant's fax, he worked as an instructor and a fire boss in the mine. During the last period of employment, however, he worked "at the loadout," Suppl. App. at 46, performing "night watchman" duties to ensure that people did not trespass or take materials from the mine. ALJ Hrg. Tr. at 51, 55. He noted that he did not mine or provide instruction to miners during that time. For some of his time as a night watchman, the mine was not operational.

Because Mr. Kourianos's testimony suggested that he did not work as a "miner" for a full year at Hidden Splendor, Rockwood's counsel moved to withdraw the stipulation that Hidden Splendor was the responsible operator for the claim. The ALJ permitted the parties to file supplemental briefing on whether Hidden Splendor should be allowed to withdraw its responsible operator stipulation.

The ALJ denied Rockwood's motion. He applied 20 C.F.R. § 725.463(b), which, as noted above, states that an ALJ "may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director." Suppl. App. at 2-3. The ALJ found that the evidence of Mr. Kourianos's work was "reasonably ascertainable" when the claim was pending before the district director, noting:

> While I appreciate that Claimant's testimony at the hearing concerning his job duties for Employer came as a surprise, I note that one significant piece of written documentation related to the [responsible operator] issue, the "Hire Dates for Tony Kourianos" fax, was submitted by Employer. Furthermore, this piece of evidence, which Employer states in its brief was prepared by Employer's "staff accountant," distinguished between the periods when Claimant worked "in the mine" and "at the Loadout." Thus, Employer might have ascertained what job duties Claimant performed, and thereby determined whether Hidden Splendor should have been named the [responsible operator], by interviewing its own agent regarding the evidence it submitted.

Suppl. App. at 3 (citations omitted).

b. *Entitlement to benefits*

The ALJ issued his Decision and Order on February 28, 2017. The order addressed the following issues:

> (1) The length of Mr. Kourianos's coal mine employment;
>
> (2) Whether Mr. Kourianos suffer[ed] from pneumoconiosis, as defined by the Act and regulations;
>
> (3) If so, whether Mr. Kourianos's pneumoconiosis arose from his coal mine employment;
>
> (4) Whether Mr. Kourianos [was] totally disabled; and
>
> (5) If so, whether Mr. Kourianos [was] totally disabled due to pneumoconiosis.

Id. at 7.

i. Employment and smoking history

The ALJ found that Mr. Kourianos was a miner for 27.27 years.[6] During this time, Mr. Kourianos "worked in various capacities as a coal miner," but his "usual coal mine work" was working as a "fire boss." Suppl. App. at 14-15. As a fire boss, Mr. Kourianos conducted frequent examinations of the mine and carried a tool belt that weighed at least 30 to 32 pounds. Accordingly, the ALJ found that Mr. Kourianos's usual mine work qualified as "medium work" under 20 C.F.R. § 404.1567(c) (describing classifications of physical stress involved in different kinds of work). The ALJ

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[6] The ALJ did not include Mr. Kourianos's time as a Hidden Splendor "security guard" in this calculation. Suppl. App. at 9.

further found that Mr. Kourianos smoked an average of 7.5 cigarettes per day for approximately 44 years.

Rockwood's petition does not contest the ALJ's employment classification or Mr. Kourianos's smoking history.

ii. Medical tests

The ALJ considered X-rays, which showed no pulmonary irregularities. He also reviewed "pulmonary function tests," which likewise did not show evidence of legal pneumoconiosis. *Id.* at 17.

The ALJ next examined Mr. Kourianos's "arterial blood gas studies," which measure the ability of the lungs to oxygenate blood. Under 20 C.F.R. § 718.204(b)(2)(ii), such tests may be used to establish total disability. The ALJ explained,

> A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the partial pressure of oxygen ("PO2") and the partial pressure of carbon dioxide ("PCO2") in the blood. A lower level of oxygen ("O2") compared to carbon dioxide ("CO2") indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled.

Id. at 17-18.

As discussed above, Appendix C provided the framework for the ALJ's analysis of Mr. Kourianos's arterial blood gas studies. 20 C.F.R. pt. 718, App. C. To

read the results of these studies, the ALJ (1) selected the correct altitude range from Appendix C, (2) identified Mr. Kourianos's PCO2 readings, and (3) identified the threshold PO2 value corresponding to the PCO2 reading. If Mr. Kourianos's PO2 level was below the threshold value, he would qualify as "impair[ed]." *See id.* If it fell above the impairment threshold, he would not.

The ALJ considered results from two sets of Mr. Kourianos's arterial blood gas tests taken at Castleview Hospital in Price, Utah. Price sits at approximately 5,566 feet above sea level, and the tests therefore accounted for an altitude of 3,000-5,999 feet. Mr. Kourianos's 2010 test yielded a PO2 level of 60 at rest, which, when measured against his PCO2 level of 43, did not qualify him as impaired under Appendix C (the threshold impairment level was a PO2 level of 55). His 2012 test showed a resting PCO2 level of 39 and a corresponding PO2 level of 68, which also did not qualify him as impaired under Appendix C because the threshold PO2 level was 56. *Id.* But the 2012 test revealed a PO2 level of 59 after exercise, which fell below the threshold of 62 (at a PCO2 level of 33) announced in Appendix C and therefore qualified him as impaired. *Id.*

The ALJ detailed the results in the following chart:

Exhibit/ Date of Test	Physician	Altitude (feed)	PCO2	PO2	Qualify ?
DX 16 8/23/ 2012	Dr. Gagon	3,000-5,999	39 (rest-ing) 33 (exercis e)	68 (resting) 59 (exercis e)	No Yes
EX 8 at 72 5/26/ 2010	Castle-view Hospital	3,000-5,999	43 (rest-ing)	60 (resting)	No

Suppl. App. at 18.

iii. Medical reports and opinions

The ALJ also considered reports and depositions from three doctors. Mr. Kourianos selected Dr. Shane Gagon to perform the medical screening for his BLBA claim. Rockwood engaged Drs. George Zaldivar and Jeff Selby to examine and comment on Mr. Kourianos's medical records. Neither Dr. Zaldivar nor Dr. Selby examined Mr. Kourianos in person.

In brief, Dr. Gagon concluded that Mr. Kourianos was totally disabled, while Drs. Zaldivar and Selby opined that Mr. Kourianos did not suffer from pneumoconiosis and was not totally disabled. Drs. Zaldivar and Selby further attributed Mr. Kourianos's respiratory issues to his history of smoking, while Dr. Gagon believed that smoking and coal mine work

contributed equally to Mr. Kourianos's respiratory impairment. After receiving Dr. Zaldivar's report, Dr. Gagon filed a supplemental report, discussed below.

1) Dr. Gagon

Dr. Gagon examined Mr. Kourianos in August 2012, conducted arterial blood gas testing, and issued his report shortly thereafter. Dr. Gagon found that Mr. Kourianos "suffered from moderate impairment with subjective chronic shortness of breath with minimal exertion and PO2 with exercise." Suppl. App. at 18 (quotations omitted). He diagnosed Mr. Kourianos with chronic bronchitis and a significant drop in PO2 levels with exercise. Dr. Gagon concluded the bronchitis was likely caused by "coal dust exposure and smoking" and that both factors "probably" contributed equally to the impairment. *Id.* (quotations omitted).

Dr. Gagon initially opined that Mr. Kourianos "would be able to work in the coal mine" but "not at the same degree with someone with no abnormalities" and "as long as his job was fairly sedentary." Suppl. App. at 19 (quotations and brackets omitted). The ALJ summarized Dr. Gagon's disability determination: "But based on Claimant's description of the more physical job he performed in his usual coal mine work as a fire boss . . . Claimant would not be able to perform the described job duties." *Id.*

Dr. Gagon performed the 2012 arterial gas tests on Mr. Kourianos. In his deposition, Dr. Gagon affirmed that the results were "normal" for Price, Utah. EX 12 at 12. But he affirmed that "it was abnormal that the PO2s dropped" so much from resting to exercise. *Id.*

Dr. Gagon submitted a supplemental report. It stated: (1) the blood gas studies took into account the altitude of Price, Utah; (2) the barometric pressure for the blood gas test was likely incorrect, but the error was probably a scrivener's error that would not change the results of the test; (3) the blood gas equipment reads the results of the test at the altitude of Price, Utah, and there had been no errors in the past; (4) "[t]he ABG values indicate hypoxemia with exercise meeting the requirements of disability set forth by Black Lung [regulations] at the altitude of Price, UT"; (5) Dr. Saldivar "seems to be contradicting himself" by stating that smoking was probably the cause of Mr. Kourianos's low O2 levels because, "with the miner's significant exposure to coal dust, this is also a significant contributing factor"; (6) Mr. Kourianos's bronchiolitis could be caused by coal dust or by smoking; (7) "Mr. Kourianos could work as long as the work is sedentary" but that "with his significant hypoxemia with exercise, he would be limited with any exertion"; and (8) "[b]ased on the table set forth [in Appendix C,] he meets the requirments [sic] of disability based on his hypoxemia at the altitude range of 3000-5999." Doc. 10612740 at 4-8.[7]

2) Dr. Zaldivar

Dr. Zaldivar did not examine Mr. Kourianos in person. The opinions in his report and deposition were based on a review of Mr. Kourianos's medical records,

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[7] The Director submitted this document in response to this court's sua sponte order because it was missing from the original appendix.

which did not include a work history. Dr. Zaldivar stated, "My opinion[] considering the totality of the case is that pneumoconiosis is not present." Suppl. App. at 20 (quotations omitted). He said that "if there is any pulmonary condition at all, it is bronchiolitis caused by smoking." *Id.* (quotations omitted). In support, he explained that "coal miners are human beings subject to all diseases and conditions of human beings and are affected by habits such as smoking just as the population at large is affected by it." *Id.* (quotations omitted). Thus, if Mr. Kourianos suffered from chronic bronchitis, Dr. Zaldivar concluded that it was caused by smoking. *Id.* at 21.

Dr. Zaldivar also concluded that Mr. Kourianos was not disabled. In response to Dr. Gagon's report and Mr. Kourianos's arterial blood gas studies, Dr. Zaldivar acknowledged that Mr. Kourianos's blood gas PO2 levels appeared "very low" but noted they "were not [low] when taking into consideration the altitude of Price, UT." *Id.* at 19 (quotations omitted). He "explained that normal PO2 values are expected to drop linearly as altitude increases." *Id.* at 24. Therefore, as the ALJ recounted, Dr. Zaldivar opined that the Department of Labor regulations did not "accurately reflect the drop in PO2 values that occurs at higher altitudes." *Id.* at 21.

3) Dr. Selby

Dr. Selby also did not examine Mr. Kourianos. The ALJ noted that, after reviewing medical records, Dr. Selby similarly concluded that Mr. Kourianos "did not suffer from clinical or legal pneumoconiosis." *Id.* at 22. Dr. Selby acknowledged that the PO2 level was "a bit

low at first glance at rest, and then the PO2 decreased with exercise." *Id.* (quotations omitted). Like Dr. Zaldivar, he concluded that, given the altitude in Price, Utah, the range of disability "would be more accurately defined toward the PO2 of 57 value." *Id.* at 21 (quotations omitted). In other words, he believed that the Appendix C threshold was too high when applied to the altitude of Price.

Dr. Selby stated that the low PO2 values could be "undiagnosed asthma," "chronic bronchitis from smoking," or "congestive heart failure." *Id.* at 22 (quotations omitted). He also stated that the drop in Mr. Kourianos's PO2 values could mean he suffered from "some form of disease," but he discounted the severity of the disease because the PO2 levels were normal for the altitude of Price. *Id.* at 22 (quotations omitted). Dr. Selby also stated that "working in coal mines prohibits the inhalation of cigarette smoking, thus actually protecting the lungs." *Id.* at 26 (quotations omitted).

iv. Analysis of evidence

1) Total disability and 15-year presumption

Based on the evidence described above, the ALJ found that Mr. Kourianos was totally disabled. The ALJ noted that the "pulmonary function tests and the arterial blood gas studies yield equivocal results." *Id.* at 24. Regarding the medical opinions, he stated as follows:

> I find that the medical opinion evidence does establish that Claimant is totally disabled from working as a fire boss. I give great

weight to Dr. Gagon's opinion, because he is the only physician who discussed (in his deposition) the specific duties Claimant performed as a fire boss. His opinion regarding disability is well-documented and well-reasoned, and he was in a better position to determine whether Claimant could exert the physical effort required to perform a fire boss's duties than the other physicians. *See Killman v. Director, OWCP*, 415 F.3d 716, 722 (7th Cir. 2005).

I give little weight to Dr. Zaldivar's and Dr. Selby's findings that Mr. Kourianos is not disabled. Neither doctor's finding was informed by details of Claimant's usual coal mine employment. Furthermore, Dr. Zaldivar and Dr. Selby both stated in their reports and testified at their depositions that the arterial blood gas studies did not properly account for Price, Utah's altitude: because the test was conducted at a relatively high altitude, they stated, and because PO2 values could be expected to drop linearly as altitude increased, the low PO2 value should not be considered to show disability. Appendix C to 20 C.F.R. Part 718, however, requires that administrative law judges analyze arterial blood gas studies according to three ranges of altitude: from sea level to 2,999 above sea level; from 3,000 to 5,999 above sea level; and over 6,000 feet above sea level. The testing was performed in the second range, from 3,000 to 5,999 feet above

> sea level. The regulations do not contemplate further dividing testing results into narrower ranges, nor am I permitted to do so. Because Dr. Zaldivar's and Dr. Selby's statements are inconsistent with the regulations, I give their opinions regarding Claimant's disability little weight.

Id. at 24. Thus, he found that Mr. Kourianos had met element three of a BLBA claim—the disability element. Because he found that Mr. Kourianos was totally disabled and had worked as a miner for more than 15 years, the ALJ applied the 15-year presumption.

2) No rebuttal of presumption

Element One—the ALJ initially found that Hidden Splendor had rebutted the presumption of clinical pneumoconiosis because Mr. Kourianos did not submit evidence of clinical pneumoconiosis. But based on Dr. Gagon's diagnosis of chronic bronchitis that was caused in part by coal dust, the ALJ concluded that Hidden Splendor could not rebut the presumption that Mr. Kourianos suffered from legal pneumoconiosis (the disease element).

Although Mr. Kourianos had a history of smoking, the ALJ found that none of the doctors established a sufficiently precise connection between smoking and Mr. Kourianos's respiratory problems. Specifically, the ALJ gave "little weight to Dr. Gagon's conclusion that coal dust exposure and cigarette smoke equally contributed to his respiratory condition, because his diagnosis is conclusory and not well documented." *Id.* at 26. The ALJ also "g[a]ve little weight to Dr.

Zaldivar's conclusion that Claimant's respiratory condition was caused solely by smoking" because (1) Dr. Zaldivar implied that "blood gas studies alone could not indicate the presence of coal workers' pneumoconiosis, but that pneumoconiosis *must* be seen via pulmonary function testing or x-rays—a position inconsistent with the regulations"; and (2) his conclusions about smoking were "based on an analysis of the general population, and not on an analysis specific to the miner." *Id.* Finally, the ALJ gave "little weight to Dr. Selby's finding that Mr. Kourianos suffered from asthma and that his asthma was unrelated to his coal mining and exacerbated by his smoking" for two reasons: (1) Dr. Selby was the only doctor to diagnose Mr. Kourianos with asthma, and he did not adequately document or explain his diagnosis; and (2) "Dr. Selby's statement that 'working in coal mines prohibits the inhalation of cigarette smoking, thus actually protecting the lungs' is contrary to the central purpose and function of the [BLBA]." *Id.*

Element Two—because Hidden Splendor argued only that Mr. Kourianos did not have pneumoconiosis (disease) and did not dispute that coal mining caused his pneumoconiosis (disease causation), the ALJ found that it had not rebutted the presumption of disease causation. In doing so, the ALJ acknowledged the 10-year presumption,[8] noting that the BLBA "regulations provide for a rebuttable presumption that pneumoconiosis arose out of coal mine employment if a miner with pneumoconiosis was employed in the mines

[8] As noted above, a claimant who has established the 15-year presumption does not need the benefit of the 10-year presumption.

for ten or more years." *Id.* at 27 (citing 30 U.S.C. § 921(c)(1); 20 C.F.R. § 718.203(b)).

Element Four[9]—the ALJ found that Hidden Splendor had not rebutted the presumption that pneumoconiosis caused Mr. Kourianos's disabling respiratory or pulmonary impairment (disability causation). *Id.* at 27. The ALJ reasoned, "[N]either Dr. Zaldivar nor Dr. Selby diagnosed pneumoconiosis, and Employer has pointed to no other evidence to rebut the presumption that Mr. Kourianos's pneumoconiosis caused his total disability." *Id.* In other words, because Hidden Splendor's arguments challenged only the existence of a total disability (disability), it did not argue against the disability causation presumption in the alternative.

Finding that Mr. Kourianos had satisfied the four elements of a BLBA claim, the ALJ awarded Mr. Kourianos benefits and found Hidden Splendor liable for those benefits as the responsible operator.

3. **Proceedings before the BRB**

Hidden Splendor appealed to the BRB, arguing the ALJ erred in finding that (1) Hidden Splendor was the responsible operator; (2) the evidence established total disability under 20 C.F.R. § 718.204(b)(2); (3) Mr. Kourianos was entitled to the 15-year presumption;

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[9] As noted above, the ALJ found that element three—total disability—had been satisfied. Together with Mr. Kourianos's 27 years as a coal miner, this established the 15-year presumption, prompting the need for Hidden Splendor to rebut elements one, two, or four.

and (4) Hidden Splendor did not rebut the presumption. *Id.* at 30-31.

In deciding the appeal, the BRB first recited the standard of review, explaining that the ALJ's Decision and Order "must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law." *Id.* at 32 (citing 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a)). It unanimously affirmed on all grounds.[10]

III. **DISCUSSION**

Rockwood raises two issues on appeal.[11] First, did the ALJ err in denying Hidden Splendor's motion to withdraw its responsible operator stipulation? Second, did substantial evidence support the ALJ's determination that Mr. Kourianos is entitled to benefits?

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[10] One member of the panel concurred in the judgment, highlighting that the ALJ did not rely solely on Appendix C of the regulations in making his determination: "Given that he accurately characterized their opinions and provided a rational basis for rejecting them, his additional statement that he was not 'permitted' to consider further altitude adjustments was, at worst, a harmless error, in my view." Suppl. App. at 44.

[11] Rockwood also filed a contested motion to supplement the record with an agreed order between the Director and Consolidated Coal in a separate case. The agreed order was not before the ALJ in this case and we therefore deny Rockwood's motion to supplement the record. *See In re United States*, 138 S. Ct. 371, 372 (2017) (explaining that the administrative record consists of materials relied upon and considered by agency decision makers).

This case has three parties. Rockwood is the petitioner acting as Hidden Splendor's legal representative and agent. Mr. Kourianos and the Director are both respondents. Mr. Kourianos defends both issues on appeal but requests that if "Employer is not the properly named responsible operator," this court should name the Black Lung Trust Fund as liable for his benefits. Kourianos Br. at 11. To defend the interests of the Trust Fund, the Director disputes only the responsible operator issue and takes no position on Mr. Kourianos's eligibility for benefits.

A. ***Standard of Review***

On the first appeal issue—the ALJ's denial of Rockwood's motion to withdraw its responsible operator stipulation—the parties state that our standard of review is abuse of discretion. *See* Pet'r's Br. at 5-6; OWCP's Br. at 20; Kourianos's Br. at 9. But as our discussion of this issue shows, Rockwood's argument appears to challenge not only the ALJ's application of the regulations but also his interpretation of them. Courts review the latter de novo but grant deference to the agency's interpretation of its own regulations. *See Antelope Coal*, 743 F.3d at 1341; *Andersen*, 455 F.3d at 1103. We need not analyze the standard of review further because, under either abuse of discretion or de novo review, we affirm the ALJ's decision on this issue.

On the second appeal issue—the ALJ's benefits determination—we review whether "substantial evidence" supported the ALJ's decision. *Hansen v. Dir., OWCP*, 984 F.2d 364, 368 (10th Cir. 1993). Substantial evidence is "such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *see Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1217 (10th Cir. 2009). We do not reweigh the evidence presented to the ALJ. *Antelope Coal*, 743 F.3d at 1341. "[W]here medical professionals . . . disagree[ ], the trier of fact is in a unique position to determine credibility and weigh the evidence." *Id.* (quotations omitted). Thus, "the task of weighing conflicting medical evidence is within the sole province of the ALJ." *Hansen*, 984 F.2d at 368.[12]

B. ***The Responsible Operator Determination***

The ALJ did not determine whether Mr. Kourianos worked as a miner at Hidden Splendor for a full year. Rather, Hidden Splendor admitted to the Director that it was the responsible operator, and the ALJ accepted that admission as conclusive. Rockwood therefore challenges the ALJ's refusal to allow Hidden Splendor to withdraw its stipulation.

1. **Additional Legal Background**

The Department of Labor's regulations prescribe the process for determining the responsible operator. They generally call for the district director—not the ALJ—to decide the responsible operator question. *See* 20 C.F.R. § 725.418(d) (providing that the district director must

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[12] Although we formally review the BRB's decision, the BRB's deferential standard of review of ALJ decisions requires us to examine the ALJ's findings of fact. *Antelope Coal*, 743 F.3d at 1341 n.13; *Blackburn*, 857 F.3d at 822; *see also* 33 U.S.C. § 921(b)(3) (stating that on review by the BRB, the ALJ's findings of fact are "conclusive if supported by substantial evidence").

"dismiss, as parties to the claim, all other potentially liable operators" when it issues its PDO); *id.* § 725.407(d) (prohibiting the district director from "notify[ing] additional operators of their potential liability after a case has been referred" to an ALJ). The Department of Labor explained the rationale for this rule when it promulgated updated BLBA regulations in 2010:

> The Department agrees that the revised regulations place additional burdens on coal mine operators who have, in the past, routinely filed form controversions of their liability for benefits and waited until the case was referred to the Office of Administrative Law Judges to develop their defenses. . . . As revised, the regulations will permit the district director to refer a case to the Office of Administrative Law Judges with no more than one operator as a party to the claim, the responsible operator as finally designated by the district director. The regulations prohibit the remand of cases for the identification of additional potentially liable operators, or to allow the district director to designate a new responsible operator, thereby reducing delay in the adjudication of the merits of a claimant's entitlement. This change also places the risk that the district director has not named the proper operator on the Black Lung Disability Trust Fund, however. The Department believes that the additional demands placed upon potentially liable operators are not unreasonable. In addition,

> the Department does not accept the criticism that the regulation sets traps for unwary litigants. The nature of the evidence required by the Department, and the time limits for submitting that evidence, are clearly set forth in the regulations, and will be communicated to potentially liable operators who are notified of a claim by the district director.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79920-01, 79985 (Dec. 20, 2000) (citations omitted).

Accordingly, even if the district director incorrectly identifies the responsible operator and refers the case to an ALJ, a new responsible operator may not be named. *Appleton & Ratliff Coal Corp. v. Ratliff*, 664 F. App'x 470, 473 (6th Cir. 2016) (unpublished) ("The appeal to an ALJ is the point of no return on the responsible operator designation."). "If subsequent proceedings determine the director's designation is not supported, the matter is not remanded to find a different responsible operator and, instead, the Trust Fund pays benefits." *Id.*

Against this backdrop, we apply the general rule that "stipulations and concessions bind those who make them." *Consolidation Coal Co. v. Dir., OWCP* ("*Burris*"), 732 F.3d 723, 730 (7th Cir. 2013). In this case, the potential exception to that rule is 20 C.F.R. § 725.463(b), which provides that "[a]n administrative law judge may consider a new issue only if such issue was not reasonably ascertainable by the parties at the

time the claim was before the district director." *See also Marfork Coal Co. v. Weis*, 251 F. App'x 229, 236 (4th Cir. 2007) (denying operator's motion to belatedly introduce x-ray evidence because the x-ray was not previously hidden; it "was waiting to be found").

2. **Analysis**

Hidden Splendor conceded its responsible operator status (1) in its amended response to the district director's notice of claim, in which it stated that it was "the responsible operator within the meaning of the [BLBA]," Suppl. App. at 58; (2) in its response to the district director's SSAE, in which it stated that "Hidden Splendor has accepted the designation of Responsible Operator," *id.* at 73; and (3) in its initial submission to the ALJ, in which it stated that Hidden Splendor "does *not* dispute its designation as the Responsible Operator," *id.* at 83.

As the ALJ noted, Hidden Splendor's senior staff accountant had reported in a fax to the district director that Mr. Kourianos worked "outside at the loadout"—not "in the mine"—during his last months at Hidden Splendor. *Id.* at 46. But notwithstanding the fax's suggestion that Mr. Kourianos was not "in the mine" for a full year at Hidden Splendor, Rockwood failed to investigate Mr. Kourianos's employment and did not dispute the responsible operator question until the ALJ's hearing more than two years after Mr. Kourianos filed his claim. These facts undercut any argument that responsible operator evidence was not "reasonably ascertainable" while Mr. Kourianos's claim was pending before the district director. 20 C.F.R. § 725.463(b).

Hidden Splendor could have "reasonably ascertain[ed]" Mr. Kourianos's job duties in a number of ways. *See id.* As the BRB noted, Hidden Splendor "determined the terms of claimant's work and therefore normally would have records relevant to the nature of his employment (job title, etc.). Employer has not averred that it had no records or access to relevant personnel with the requisite information." Suppl. App. at 34 n.5. In addition, neither Hidden Splendor nor Rockwood has suggested that they sought to speak to Mr. Kourianos or his co-workers about his duties at Hidden Splendor. Moreover, if Hidden Splendor had checked its operating records, it would have found its mine was closed for part of the time that Mr. Kourianos worked there. Any of these steps would have been reasonable, but Rockwood did not take them. Mr. Kourianos's employment was not only "reasonably ascertainable" but was easily ascertainable through a simple phone call or a review of Hidden Splendor's records. 20 C.F.R. § 725.463(b).

Rockwood's excuses for Hidden Splendor's failure to investigate are not convincing. Rockwood appears to argue that the regulations' timeline prevented it from submitting new evidence after 90 days of receiving the district director's notice of claim. *See* Pet'r's Br. at 18. The regulations show otherwise. *See* 20 C.F.R. § 725.417(b) ("In appropriate cases, the district director may permit a reasonable time for the submission of additional evidence following a conference . . . ."); *id.* § 725.410(b) ("The [SSAE] shall allow *all parties* not less than 60 days within which to submit additional evidence, including evidence relevant to the claimant's eligibility for benefits and evidence *relevant to the*

liability of the designated responsible operator." (emphasis added)). In addition, Hidden Splendor did not ask to submit additional evidence or suggest that it wanted to challenge its responsible operator status before the district director.

Rockwood also suggests that the available documentary evidence about Mr. Kourianos's employment was misleading. It was not. Mr. Kourianos's Social Security earnings statement showed that he was a Hidden Splendor employee and stated how much money he made working for the company, but it said nothing about his job duties. In addition, the accountant's "Hire Dates for Tony Kourianos" fax showed that Mr. Kourianos did not work "in the mine" for at least part of his time with the company. Suppl. App. at 46.

Finally, Rockwood's reliance on *Morrison v. Hurst Drilling Co.*, 512 P.2d 438, 439-40 (Kan. 1973) is misplaced. In *Morrison*, an employee's wife filled out her husband's workers' compensation claim and erroneously listed the place of injury as Kansas. *Id.* at 440-41. Relying on the employee's wife's statement, the defendant employer stipulated that the injury occurred in Kansas. *Id.* at 440. After the employee's testimony and other documentation revealed the injury had occurred at a work site in Oklahoma (a finding that deprived the Kansas court of jurisdiction), the employer sought to withdraw its stipulation. *Id.* The claim examiner granted the employer's motion.

On appeal, the Kansas Supreme Court recited the applicable rule as follows:

> The general rule is that a stipulation having all the binding force of a contract cannot be set aside on grounds other than those justifying the setting aside of contracts generally, such, for instance, as fraud, collusion, mistake, accident, surprise, undue influence, false representations innocently made, inadvertence or improvidence in making the stipulation, or some other ground of the same nature.

Id. at 441 (quotations omitted). Applying that rule, the court then held that the defendant relied on the employee's wife's misstatement when it entered the stipulation, noted that the plaintiff would not suffer any prejudice from an order withdrawing the stipulation because he could simply re-file his workers compensation claim in Oklahoma, and allowed the defendant to withdraw its stipulation. *Id.* at 442.

Unlike the employee in *Morrison*, 512 P.2d at 440, whose wife misstated a material fact in the workers' compensation claim, Mr. Kourianos never suggested that he was a coal miner the entire time he worked at Hidden Splendor. To the contrary, he stated at the hearing that he "kn[e]w by law that we have to blame [Hidden Splendor]" for his disability, but he explained forthrightly that he did not do "miner" work for a full year with the company. ALJ Hrg. Tr. at 35, 56-62.

In addition, Rockwood's discussion of *Morrison* is misguided because Mr. Kourianos's claim involved the

application of the BLBA regulations rather than state common law. As discussed above, the regulations place the burden on employers to challenge their responsible operator designation before the district director. *See Ratliff*, 664 F. App'x at 473. If they fail to do so and the ALJ ultimately finds they were wrongly named as the responsible operator, that decision does not shift liability to another operator. *Id.* Instead, the Black Lung Trust Fund must step in to replace the operator as the party liable for paying the miner's benefits. *See* 26 U.S.C. § 9501(d)(1). Under this statutory scheme, the Department of Labor has declared—through its regulations—that the district director should resolve responsible operator issues in the first instance, *see* 20 C.F.R. § 725.407(d), and the ALJ properly applied the Department's regulations, *see* Suppl. App. at 2-3.

* * * *

In sum, the nature of Mr. Kourianos's employment at Hidden Splendor was "reasonably ascertainable" the entire time his claim was pending before the district director. *See* 20 C.F.R. § 725.463(b). With due diligence, Hidden Splendor could have obtained all the necessary information about Mr. Kourianos's work responsibilities before the claim ever reached the ALJ. Because it failed to do so, the ALJ did not err in denying Hidden Splendor's motion to withdraw its responsible operator stipulation.[13]

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[13] We decline to address the Director's argument that responsible operator liability can never be raised as a "new issue" in the ALJ hearing when the operator has conceded liability before the district director. *See* OWCP Br. at 25-26. We hold only that, in this case,

C. *The Benefits Eligibility Determination*

The ALJ's benefits eligibility determination rests on factual findings. We uphold those findings when substantial evidence supports them. *See Antelope Coal*, 743 F.3d at 1341.

1. **BLBA Claims Framework**

As previously discussed, to prevail on a BLBA benefits claim, the claimant must establish four elements:

> (1) the claimant suffers from pneumoconiosis (disease),
>
> 2) the claimant's pneumoconiosis arose out of coal mine employment (disease causation),
>
> (3) the claimant is totally disabled because of a respiratory or pulmonary impairment (disability), and
>
> (4) claimant's pneumoconiosis is a substantially contributing cause of the miner's total disability (disability causation).

Blackburn, 857 F.3d at 821.

Mr. Kourianos worked as a miner for more than 27 years. To invoke the 15-year presumption, therefore, he needs to show only that he suffered from a totally

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the ALJ properly denied Rockwood's motion to re-open the issue under the "new issue" rule. 20 C.F.R. § 725.463(b).

disabling respiratory or pulmonary impairment. 20 C.F.R. §§ 718.204, 718.305(b)(1); *see Antelope Coal*, 743 F.3d at 1344. And once he has done so, the other three elements of a BLBA claim are presumptively established. The presumption therefore "softens [Mr. Kourianos's] burden" and places a heavier burden on Rockwood. *Blackburn*, 857 F.3d at 822. On appeal, Rockwood primarily seeks to avoid the application of the 15-year presumption by arguing the ALJ incorrectly determined that Mr. Kourianos was totally disabled due to a respiratory or pulmonary impairment.

The following analysis concludes that substantial evidence supported the ALJ's determination that the 15-year presumption applied to Mr. Kourianos's claim. We further conclude that Hidden Splendor did not rebut the presumption by disproving that (1) pneumoconiosis caused Mr. Kourianos's pulmonary impairment or that (2) Mr. Kourianos's pneumoconiosis caused his total disability.

2. **Analysis**

a. *Total disability*

As noted above, the ALJ relied on two types of evidence in reaching his total disability determination. First, he considered arterial blood gas studies under 20 C.F.R. § 718.204(b)(2)(ii). Second, finding the studies "equivocal," he considered the medical opinions discussed above. *Id.* § 718.204(b)(2)(iv).

i. Arterial blood gas testing

Mr. Kourianos's 2012 arterial blood gas test yielded a PCO2 level of 33 and a PO2 level of 59 during exercise, thus bringing him below the impairment threshold PO2 level of 62 on the Appendix C chart. All three doctors, however, including Dr. Gagon, stated that Mr. Kourianos's PO2 value of 59 at Price, Utah, was "normal." *See* EX 12 at 11-12; Suppl. App. at 38. This view stemmed from the altitude of Price, Utah, falling in the upper end of the 3,000-5,999-foot range and the fact that "normal PO2 levels are expected to drop linearly as altitude increases." Suppl. App. at 38. Accordingly, Rockwood argues that the blood gas studies did not provide evidence of Mr. Kourianos's disability and could not support the ALJ's finding that the medical tests were "equivocal." Pet'r's Br. at 28. We disagree.

First, Mr. Kourianos's 2012 arterial blood gas testing yielded a PO2 level that qualified him for impairment under the regulations. *See Erie Boulevard Hydropower, LP v. FERC*, 878 F.3d 258, 269 (D.C. Cir. 2017) ("It is axiomatic that an agency is bound by its own regulations." (quotations and alterations omitted)). As Dr. Gagon stated in his supplemental report, "I cannot change the 'rules of the game.' Based on the table set forth [in Appendix C], [Mr. Kourianos] meets the requirements of disability based on his hypoxemia at the altitude range of 3000-5999." Doc. 10612740 at 8. Irrespective of how altitude may affect test results within a range, Appendix C still qualified Mr. Kourianos for a pulmonary or respiratory impairment. The ALJ therefore properly considered Appendix C—as

well as the medical opinions—in making his ultimate disability determination. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1479 (10th Cir. 1989) (declaring that "an ALJ must consider all evidence relevant to the issue of total disability" in deciding whether 15-year presumption applies).

Second, Dr. Gagon testified that "it was abnormal that the PO2s dropped" with exercise, and neither of the other doctors contested his conclusion. EX 12 at 11-12; *see* EX 5 at 10-11; EX 2 at 8-9.[14] Accordingly, even if the PO2 levels were "normal" for Price, Utah, the test still revealed a notable abnormality that suggested some degree of respiratory impairment.

ii. Medical opinions

The ALJ appeared to rely in part on the arterial blood gas studies for his total disability decision, but because he also found them to be "equivocal," and not sufficient to find total disability on their own, he relied further on the three doctors' medical opinions for his ultimate disability determination. Suppl. App. at 24; *see* 20 C.F.R. § 718.204(b)(2)(iv). As we discuss below, substantial evidence supported the ALJ's evaluation of the medical opinions. *See Hansen*, 984 F.2d at 368 ("[T]he task of weighing conflicting medical evidence is within the sole province of the ALJ.").

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[14] In this respect, Rockwood misconstrues the record when it states that "all of Mr. Kourianos'[s] testing values were normal." Pet'r's Br. at 45. Mr. Kourianos's arterial blood gas testing was abnormal under the regulations, and the drop in his PO2 values from resting to exercise was also "abnormal." Suppl. App. at 37-38 & n.13.

All three doctors found that Mr. Kourianos had respiratory problems, which qualified his impairment as legal pneumoconiosis to the extent they were "chronic." *See Antelope Coal*, 743 F.3d at 1335; 20 C.F.R. § 718.201(a)(2) (legal pneumoconiosis includes "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment" (quotations omitted)). Dr. Gagon diagnosed Mr. Kourianos with chronic bronchitis, a chronic productive cough, and a significant drop in PO2 levels with exercise. Suppl. App. at 18. Dr. Zaldivar noted that Mr. Kourianos showed "symptoms of chronic bronchitis for one-and-a-half years and night wheezing" and explained that his "[l]ungs showed decreased breath sounds." *Id.* at 19 (quotations omitted). Dr. Selby noted that Mr. Kourianos's symptoms of "wheezing, productive cough, and decreased PO2, indicated a very strong presentation for the diagnosis of asthma." *Id.* at 21 (quotations omitted). The doctors therefore disagreed about the severity rather than the existence of Mr. Kourianos's impairment.

The ALJ compared Mr. Kourianos's disability to his job duties, as 20 C.F.R. § 718.204(b)(1) required. Weighing the evidence, he gave greater weight to Dr. Gagon's testimony because "he [was] the only physician who discussed (in his deposition) the specific duties Claimant performed as a fire boss." Suppl. App. at 24. He discounted Dr. Zaldivar's and Dr. Selby's findings that Mr. Kourianos was not disabled because their opinions were not "informed by details of Claimant's usual coal mine employment." *Id.* We do not reweigh evidence, and the ALJ considered all the evidence before him and explained his conclusion fully. *See*

Blackburn, 857 F.3d at 826-28 (upholding BRB decision when ALJ credited one doctor's causation testimony against the testimony of two other doctors); *see also Hansen*, 984 F.2d at 368 (noting that the ALJ is in a unique position to judge the credibility of medical professionals). The total disability determination was supported by substantial evidence. *See* 33 U.S.C. § 921(b)(3).

b. *Rockwood has not overcome the 15-year presumption*

Because substantial evidence supported the ALJ's total disability determination—the third element of a BLBA claim—the 15-year presumption provided that the disease, disease causation, and disability causation elements were presumptively met. The burden thus shifted to Rockwood to disprove any of those elements. We conclude it failed to do so.

i. No rebuttal of presumption of pneumoconiosis or disease causation

Because substantial evidence supported the ALJ's determination that Mr. Kourianos was totally disabled and because Mr. Kourianos worked for more than 27 years as a coal miner, the ALJ was required to presume that he had legal pneumoconiosis caused by his coal mine work.

Rockwood attempts to rebut the presumptions that Mr. Kourianos suffered from pneumoconiosis and that it arose from coal mining by pointing to Mr. Kourianos's history of smoking as an alternative cause of his impairment. All three doctors suggested that smoking contributed, at least in part, to Mr.

Kourianos's respiratory problems. Suppl. App. at 26. But the ALJ gave limited weight to their opinions because they all spoke about the general dangers of smoking without linking smoking to any of Mr. Kourianos's particular problems.

The ALJ noted that Dr. Gagon's opinion that smoking and coal dust were equal contributors to Mr. Kourianos's problems was "conclusory and not well-documented." *Id.* The ALJ discredited Dr. Zaldivar's causation opinion because it was "based on an analysis of the general population, and not on an analysis specific to the miner." *See id.* at 26. And he discredited Dr. Selby's opinion, in part because his "statement that 'working in the coal mines prohibits the inhalation of cigarette smoking, thus actually protecting the lungs' [was] contrary to the central purpose and function of the act." *Id.* (quoting Dr. Selby Depo.). The ALJ did not find this reasoning convincing, and we do not disturb that determination when it is based on reasoned judgment. *See Antelope Coal*, 743 F.3d at 1345-46 (upholding ALJ's rejection of an operator's reliance on statistical data to prove the effects of smoking on a coal miner); *see also Blackburn*, 857 F.3d at 826-28 (upholding ALJ's determination that employer did not rebut presumption of pneumoconiosis when doctors provided inconsistent testimony about smoking).

The 15-year presumption shifts the burden to the employer, who must present evidence to rebut the existence of or the causation of pneumoconiosis. The ALJ concluded Hidden Splendor did not rebut these presumptions. We find that substantial evidence supported that decision. *See* 20 C.F.R. § 718.305(d)

("The presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.").

ii. No rebuttal of presumption of total disability due to pneumoconiosis

Rockwood also argues that Mr. Kourianos's disability cannot be attributed to pneumoconiosis, but it relies on the same arguments it uses to challenge that Mr. Kourianos is totally disabled. We have rejected these arguments. Moreover, Rockwood does not point to evidence of any other ailment—e.g., lung cancer from cigarettes—that might have caused Mr. Kourianos's total disability. As the ALJ noted, "Employer has pointed to no other evidence to rebut the presumption that Mr. Kourianos's pneumoconiosis caused his total disability." Suppl. App. at 27. We find that substantial evidence supports this determination.

* * * *

In sum, the ALJ properly found that the 15-year presumption applied because Mr. Kourianos was (1) totally disabled as a result of a respiratory impairment and (2) worked for more than 15 years in a mine. *See Antelope Coal*, 743 F.3d at 1335. The burden thus fell on Rockwood to rebut the presumptions that Mr. Kourianos had pneumoconiosis, that coal mining caused it, and that his pneumoconiosis caused his total disability. *See id.* at 1336. The ALJ concluded that it had not done so, and we find that substantial evidence supports that conclusion.

III. **CONCLUSION**

Because the ALJ did not err in denying Hidden Splendor's motion to withdraw its responsible operator stipulation, and because the ALJ's substantive benefits determination was well reasoned and supported by substantial evidence, we deny Rockwood's petition.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-9520
(Benefits No. 17-0323 BLA)
(Benefits Review Board)

[Filed March 5, 2019]

ROCKWOOD CASUALTY INSURANCE COMPANY, insurer of Hidden Splendor Resources, Inc.,	)
Petitioner,	)
v.	)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; TONY KOURIANOS,	)
Respondents.	)

JUDGMENT

Before **BRISCOE**, **MATHESON**, and **BACHARACH**, Circuit Judges.

This petition for review originated from the Benefits Review Board and was argued by counsel.

It is the judgment of this Court that the action of the Benefits Review Board is affirmed.

Entered for the Court

/s/Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX C

U.S. DEPARTMENT OF LABOR
Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0323 BLA

[Filed March 29, 2018]

TONY N. KOURIANOS	)
	)
Claimant-Respondent	)
	)
v.	)
	)
HIDDEN SPLENDOR RESOURCES, INCORPORATED	)
	)
and	)
	)
ROCKWOOD CASUALTY INSURANCE COMPANY	)
	)
Employer/Carrier-Petitioners	)
	)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)
	)
Party-in-Interest	)

NOT-PUBLISHED

DATE ISSUED: 03/29/2018

DECISION and ORDER

Appeal of the Decision and Order of Paul R. Almanza, Administrative Law Judge United States Department of Labor.

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

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer/carrier.

Rita Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order (2014-BLA-05171) of Administrative Law Judge Paul R. Almanza awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on June 27, 2012.

After crediting claimant with 27.27 years of underground coal mine employment,[1] the administrative law judge found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it is the responsible operator. Employer also contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it did

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[1] Claimant's coal mine employment was in Utah. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's designation of employer as the responsible operator. In separate reply briefs, employer reiterates its previous contentions of error.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-55 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Responsible Operator

Employer initially challenges its designation as the responsible operator. The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R.

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[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of 27.27 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

§725.494(a)-(e), one of which is that the operator must have employed the miner for a cumulative period of not less than one year.

Procedural Background

The district director issued a Notice of Claim to employer on October 23, 2012, identifying it as a potentially liable operator. Director's Exhibit 25. Although employer initially disputed that it employed claimant as a miner for a cumulative period of at least one year, it subsequently filed an amended response and accepted liability as the responsible operator. Director's Exhibits 26, 27. On February 6, 2013, employer's Senior Staff Accountant faxed documentation to the district director indicating that claimant worked for employer "[i]n the mine" from December 26, 2006 to April 11, 2007 and then from November 16, 2010 to January 21, 2011. Director's Exhibit 11. Claimant also worked for employer "outside at the loadout" from April 5, 2011 to October 14, 2011. *Id*.

The district director issued a Schedule for the Submission for Additional Evidence on May 8, 2013, identifying employer as the named responsible operator based on its concession.[4] Director's Exhibit 28. The district director also preliminarily determined that

[4] The district director also issued a Notice of Claim to another operator, West Ridge Resources, which disputed that it was a potentially liable operator. Director's Exhibits 23, 25. Based on employer's concession that it was the responsible operator, the district director dismissed West Ridge Resources as a potentially liable operator. Director's Exhibit 31.

claimant was entitled to benefits. *Id*. Employer responded to the schedule and disputed claimant's entitlement to benefits, but again conceded that it was the responsible operator. Director's Exhibit 29. The district director then issued a Proposed Decision and Order, finding that employer was the responsible operator and that claimant was entitled to benefits. Director's Exhibit 30. Employer requested a hearing, and the case was forwarded to the Office of Administrative Law Judges (OALJ) by the district director. Director's Exhibits 32, 37. In sending the case to the OALJ, the district director indicated that the responsible operator issue was uncontested. Director's Exhibit 37.

Before the administrative law judge, claimant testified with respect to the nature of the work that he performed for employer. Specifically, claimant stated that the "very last section" of his employment involved work as a mine security guard and lasted for four to five months. Hearing Transcript (Tr.) at 51-57, 64-71. Claimant also testified that this work did not expose him to coal mine dust because the mine was not operational during this time. *Id*. Based on claimant's testimony, employer requested that the administrative law judge allow it to withdraw its responsible operator concession. Tr. at 60-63, 71-72; Employer's Post-Hearing Motion to Withdraw Responsible Operator Stipulation. Employer argued that it should be dismissed as responsible operator because claimant's time as a mine security guard did not constitute coal mine employment and, once that time was deducted from claimant's time with employer, claimant worked

for employer for a cumulative period of less than one year. *Id*.

In an Order issued on April 12, 2016, the administrative law judge denied employer's request to withdraw its responsible operator concession, finding that the nature of claimant's employment with employer was reasonably ascertainable when the claim was before the district director. April 12, 2016 Order at 2-3. Therefore, the administrative law judge found that he was precluded from reconsidering the responsible operator issue pursuant to 20 C.F.R. §725.463. *Id*.

Discussion

Employer argues that the administrative law judge erred in declining to reconsider the responsible operator issue, notwithstanding its concession to the district director. Employer's Brief at 4-13. We disagree. In any case referred to the OALJ for a hearing, the district director is required to provide a "statement . . . of contested and uncontested issues in the claim." 20 C.F.R. §725.421(b)(7). The regulations further provide that "the hearing shall be confined to those contested issues which have been identified by the district director . . . or any other issue raised in writing before the district director." 20 C.F.R. §725.463(a). An administrative law judge may consider a new issue "only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director." 20 C.F.R. §725.463(b).

The administrative law judge found that the time that claimant worked at the "[l]oadout," as listed on the documentation faxed to the district director by

employer, corresponds with the time that claimant testified that he worked as a security guard. Decision and Order at 4. As the administrative law judge noted, employer's Senior Staff Accountant submitted the document that distinguished the time period that claimant worked "in the mine" and the period he worked "outside at the [l]oadout."[5] April 12, 2016 Order at 2-3; *see* Director's Exhibit 11. Therefore, the administrative law judge found that employer could have ascertained the nature of claimant's job duties "at the [l]oadout" by "interviewing its own agent regarding the evidence it submitted." *Id.* Contrary to employer's argument, the administrative law judge did not abuse

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[5] We reject employer's argument that it did not have time to investigate the nature of claimant's work because of the limited time frame in which to submit evidence before the district director. Employer's Brief at 12-13. Specifically, employer argues that it had ninety days from the issuance of the October 23, 2012 Notice of Claim to submit additional documentary evidence, which corresponds to January 21, 2013. *Id.* Employer contends that the February 6, 2013 fax from its Senior Staff Accountant was brought to the attention of its counsel on May 13, 2013, well past the ninety-day deadline. *Id.* at 13 n.4. However, as the Director, Office of Workers' Compensation Programs, accurately notes, employer never sought an extension of the ninety-day deadline from the district director. Director's Brief at 3. We note further that employer determined the terms of claimant's work and therefore normally would have records relevant to the nature of his employment (job title, etc.). Employer has not averred that it had no records or access to relevant personnel with the requisite information. Rather, it has argued that its counsel lacked timely notice of the relevant information. However, the test is not that the information was not readily ascertainable by counsel, given the information furnished up to that point by the represented party, it is that it was not reasonably ascertainable by the parties. *See* 20 C.F.R. §725.463(b).

his discretion in finding that claimant's job duties with employer were reasonably ascertainable when this matter was before the district director.[6] *Dempsey*, 23 BLR at 1-55; *Clark*, 12 BLR at 1-153; *see* April 12, 2016 Order at 2-3. In light of this finding, the administrative law judge properly found that he was precluded from considering the responsible operator issue after employer conceded it before the district director. 20 C.F.R. §725.463. Therefore, we affirm the finding that employer is the responsible operator.

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

Employer argues that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). A miner is totally disabled if the miner has a respiratory or pulmonary impairment which, standing alone, prevents the miner from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability using any of four types of evidence: pulmonary function study evidence, arterial blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, and medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195,

[6] We note that under the regulation the test is whether the issue was *not* reasonably ascertainable by the parties at the time the claim was before the district director. 20 C.F.R. §725.463(b).

1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge found that the pulmonary function study and arterial blood gas study evidence was "equivocal," and, therefore, insufficient to support a finding of a total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii).[7] Decision and Order at 19. However, the administrative law judge found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer contends that the administrative law judge erred in his consideration of the arterial blood gas study and medical opinion evidence.[8] The

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[7] The administrative law judge did not make a finding pursuant to 20 C.F.R. §718.204(b)(2)(iii). However, a review of the record does not reveal any evidence of cor pulmonale with right-sided congestive heart failure. Claimant is therefore precluded from establishing total disability pursuant to this subsection.

[8] Employer argues that the administrative law judge erred in finding that the pulmonary function study evidence was "equivocal." Employer's Brief at 18. Employer asserts that all of the studies are non-qualifying and, therefore, this evidence unequivocally establishes that claimant has no obstructive respiratory impairment. *Id.* However, as discussed below, the administrative law judge ultimately found that claimant established total disability based upon Dr. Gagon's credible diagnosis of arterial hypoxemia, evidenced by an exercise arterial blood gas study. Decision and Order at 13-14, 19. As pulmonary function studies and arterial blood gas studies measure different types of impairment, the administrative law judge's error, if any, in his consideration of the pulmonary function study evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

administrative law judge considered two arterial blood gas studies conducted on May 26, 2010 and August 23, 2012. Decision and Order at 12-13; Director's Exhibit 16; Employer's Exhibit 8. The administrative law judge found that the May 26, 2010 and August 23, 2012 resting blood gas studies were non-qualifying,[9] but that the exercise blood gas study conducted on August 23, 2012 was qualifying.[10] Decision and Order at 19. The administrative law judge assigned more weight to the more recent blood gas study and found that the arterial blood gas study evidence was "equivocal" on the issue of total disability. *Id*.

Employer argues that the administrative law judge erred in weighing the arterial blood gas study evidence. Employer's Brief at 19. Specifically, employer argues that the administrative law judge erred in finding that the August 23, 2012 exercise blood gas study, which was taken in Price, Utah at an elevated altitude, supported a finding of total disability. *Id*. Although employer concedes that this study produced qualifying values under the table at Appendix C to 20 C.F.R. Part 718 for the applicable altitude range of 3000 to 5,999

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[9] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] The May 26, 2010 blood gas study does not include any exercise blood gas results. Employer's Exhibit 8.

feet,[11] employer argues that Drs. Zaldivar and Selby credibly explained why this study was still "normal." *Id*. Therefore, employer argues that the arterial blood gas study evidence is not "equivocal." *Id*. We disagree. Because the relevant inquiry at 20 C.F.R. §718.204(b)(2)(ii) is whether the arterial blood gas studies "show the values listed in Appendix C to this part," the administrative law judge did not err in finding that the August 23, 2012 exercise blood gas study was qualifying for total disability under the regulations.

In considering the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge initially found that claimant's usual coal mine work was that of a fire boss and that this work required medium exertional labor.[12] Decision

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[11] As the administrative law judge recognized, the August 23, 2012 exercise blood gas study was performed at an altitude of 3,000 to 5,999 feet above sea level and produced an arterial pCO2 value of 33. Decision and Order at 13; Director's Exhibit 16. Under the regulatory criteria, blood gas studies performed at this altitude and with this arterial pCO2 value are qualifying for total disability if they produce a corresponding arterial pO2 value equal to or less than 62. 20 C.F.R. Part 718, Appendix C. The August 23, 2012 exercise blood gas study produced an arterial pO2 value of 59. Director's Exhibit 16.

[12] The administrative law judge found that, as a fire boss, claimant was required to perform pre-shift and weekly examinations of the coal mining operations and coal mining equipment, and wear a tool belt that weighed thirty-two pounds or more. Decision and Order at 10. Because employer does not challenge the administrative law judge's findings that claimant's usual coal mine employment was that of a fire boss and that this position required medium exertional labor, they are affirmed. *See Skrack*, 6 BLR at 1-711.

and Order at 10. The administrative law judge then weighed the medical opinions of Drs. Gagon, Zaldivar, and Selby. *Id*. at 19.

Based on his examination, Dr. Gagon diagnosed a moderate respiratory impairment, evidenced by subjective chronic shortness of breath and a reduction in the pO2 value with exercise on the August 23, 2012 arterial blood gas study. Director's Exhibit 16. In a supplemental report, Dr. Gagon disagreed with Dr. Zaldivar that claimant's exercise pO2 results were normal based on the altitude of the study. Director's Exhibit 39. Dr. Gagon explained that the Department of Labor (DOL) regulations take into account the altitude of arterial blood gas studies, and that the August 23, 2012 arterial blood gas study "indicate[d] hypoxemia with exercise meeting the requirements for disability" at the 3000 to 5,999 altitude range. *Id*. In his deposition, Dr. Gagon conceded that the exercise pO2 value itself would be considered normal based on the range used by Castleview Hospital, where the study was conducted. Employer's Exhibit 12 at 11-12. However, he reiterated that the August 23, 2012 blood gas study was still "abnormal" based on the drop in the pO2 value from the resting to exercise blood gas study. *Id*. After claimant informed Dr. Gagon of the physical work involved in being a fire boss, Dr. Gagon opined that claimant would not be able to perform that physical work and would be totally disabled. *Id*. at 15-17.

In contrast to Dr. Gagon, both Dr. Zaldivar and Dr. Selby opined that claimant was not totally disabled by a respiratory or pulmonary impairment. Employer's

Exhibits 2-5. They acknowledged that claimant's oxygen levels were reduced when he went from rest to exercise on the August 23, 2012 blood gas study, but opined that the exercise value was still not low enough to evidence a respiratory or pulmonary impairment.[13] Employer's Exhibits 2 at 8-9; 5 at 10-11.

In explaining why claimant's exercise blood gas values were normal, Drs. Zaldivar and Selby disputed whether Appendix C and the DOL regulations accurately assess the effects of age, altitude, and barometric pressure on arterial blood gas study results. Employer's Exhibits 2-5. Drs. Zaldivar and Selby explained that the DOL's disability standards in Appendix C do not accurately assess the existence of a respiratory or pulmonary impairment because the standards are based on too broad a range of altitudes within which a single blood gas measurement is considered disabling. Employer's Exhibits 2 at 1-2, 4-9; 3 at 32-33. Both doctors explained that normal pO2 values are expected to drop linearly as altitude increases and, therefore, based on the exact altitude of Price, Utah, one can assess a more precise pO2 value to determine the existence of a respiratory impairment. *Id*. Dr. Zaldivar indicated that the exact altitude of Price, Utah was 5,566 feet and Dr. Selby indicated that the exact altitude was between 5,566 feet and 5957

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[13] Dr. Zaldivar stated that the "only abnormality in these blood gases is the fact that the pO2 dropped with exercise," but opined that the post exercise values were still normal. Employer's Exhibit 2 at 8-9. Dr. Selby indicated that claimant's blood gas values went down, but went from "normal" to "[s]till within normal." Employer's Exhibit 5 at 10-11.

feet. *Id*. Utilizing these altitude figures, Drs. Zaldivar and Selby indicated that the exercise blood gas study was normal, notwithstanding the DOL regulations.[14] *Id*. Therefore, they opined that claimant does not suffer from a respiratory or pulmonary impairment. *Id*.

The administrative law judge assigned "great weight" to Dr. Gagon's opinion because he found that it was well-reasoned and documented, and because he found that Dr. Gagon discussed the specific duties of claimant's job as a fire boss. Decision and Order at 19. The administrative law judge found that neither Dr. Zaldivar nor Dr. Selby demonstrated a clear understanding of the detailed exertional requirements of claimant's work. Further, he found their opinions that claimant's testing results were normal to be inconsistent with the DOL regulations and the table at

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[14] Dr. Zaldivar cited an article entitled *Arterial blood gas reference value for sea level and an altitude of 1,400 meters*, and Table 26 in *Clinical pulmonary function testing, a manual of uniform laboratory procedures, Second Edition* published by the Intermountain Thoracic Society in 1984. Employer's Exhibit 2 at 8-9. The article indicated that at 1400 meters, which is lower than the altitude of Price, Utah where claimant's arterial blood gas study was conducted, normal pO2 is 70.8, plus or minus 4.9.*Id*. The manual indicated that a normal pO2 should fall in the range between 57 and 68. Dr. Selby noted that the Intermountain Thoracic Society is based in Salt Lake City, Utah. *Id*. Dr. Selby explained that the more accurate qualifying pO2 value should be from the table in Appendix C for an altitude above 6000 feet, because the altitude of Price, Utah was close to 6000 feet. Employer's Exhibit 3 at 32-33. Therefore, he applied the value of 57 to assess whether this study supported total disability. *Id*. Because the study produced a pO2 value of 59, both doctors opined that it was normal. Director's Exhibit 16.

Appendix C to 20 C.F.R. Part 718. Therefore, the administrative law judge assigned their opinions little weight. *Id*.

We reject employer's argument that the administrative law judge erred in finding disability established based on his weighing of the medical opinion evidence, as he permissibly found that, in Dr. Gagon's deposition testimony finding disability, Dr. Gagnon considered the specific exertional requirements of claimant's usual coal mine employment, and that Drs. Zaldivar and Selby did not demonstrate that they were aware of claimant's specific job requirements.[15]

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[15] Any error committed by the administrative law judge as a consequence of his determination that the opinions of Drs. Zaldivar and Selby were inconsistent with the regulations relating to qualifying arterial blood gas studies is therefore harmless. *See Larioni*, 6 BLR at 1-1278. We note that a medical opinion is to be evaluated based on its documentation and reasoning. *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024, 24 BLR 2-297, 2-315 (10th Cir. 2010). The regulations and appendix pertaining to qualifying arterial blood gas studies are not dispositive as to the credibility of a doctor's opinion that a given blood gas level is "normal" although they are relevant. Here, Drs. Zaldivar and Selby argued that the qualifying figures in the regulations were insufficiently adjusted for the testing altitude. Dr. Zaldivar argued that other references were better, and Dr. Selby argued that the next referenced qualifying point should be employed. The administrative law judge did not consider the merits of their arguments and their documentation. We observe that in response to comments received before the final version of Appendix C was promulgated, the DOL acknowledged that altitude affects arterial blood gas values, but explained that there is not a "straight-forward linear lowering of arterial blood oxygen tension as the oxygen pressure in the atmosphere decreases with altitude." 45 Fed. Reg. 13,678, 13,712 (Feb. 29, 1980). Consequently, the

See Killman v. Director, OWCP, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-258-60 (7th Cir. 2005). Because the administrative law judge permissibly found that Dr. Gagon's opinion was entitled to greater weight because it was well-reasoned and documented and he displayed a complete understanding of the exertional requirements of claimant's usual coal mine employment while those of employer's doctors did not, we affirm his determination of disability.[16] *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024, 24 BLR 2-297, 2-315 (10th Cir. 2010); *Killman,* 415 F.3d at 721-22, 23 BLR at 2-258-60; *Poole*, 897 F.2d at 893-95, 13 BLR at 2-355-56; *Clark*, 12 BLR at 1-155.

DOL adopted a sliding scale that designated three levels of altitude. *Id*. The DOL also changed the tables of Appendix C to establish a level of arterial oxygen tension below which a miner can be considered to be disabled regardless of age. *Id*. Therefore, the values set forth in Appendix C were determined by the DOL after consideration of elevation and the advanced age of many miners filing claims for benefits. *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-96, 13 BLR 2-348, 2-355-56 (7th Cir. 1990); *Big Horn v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055, 13 BLR 2-372, 2-379 (10th Cir. 1990)(explaining that tables in Appendix C reflect the DOL's best estimate of the extent to which altitude may affect blood gas tests in the black lung context).

[16] Drs. Zaldivar and Selby agreed that there was an abnormality in claimant's blood gas study results because the oxygen level decreased with exercise. Thus, the administrative law judge reasonably looked to whether the physicians adequately understood the exertional demands of claimant's usual coal mine work in declaring him not totally disabled. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-258-60 (7th Cir. 2005).

We also affirm the administrative law judge's conclusion that the evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Shedlock*, 9 BLR at 1-198; Decision and Order at 19. In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[17] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The

[17] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

administrative law judge found that employer failed to establish rebuttal by either method.

In determining whether employer established that claimant does not have legal pneumoconiosis,[18] the administrative law judge considered the medical opinions of Drs. Zaldivar and Selby.[19] Decision and Order at 22-23. Dr. Zaldivar opined that any respiratory or pulmonary impairment evidenced by claimant's arterial blood gas studies would be unrelated to coal mine dust exposure and would be due to pulmonary fibrosis or bronchiolitis caused by cigarette smoking. Employer's Exhibits 2, 4. Dr. Selby opined that claimant "does not have any permanent impairment of a respiratory nature," but that if claimant did suffer from a permanent respiratory or pulmonary impairment based on arterial blood gas testing, it was due to the effects of asthma and would be unrelated to coal mine dust exposure. Employer's Exhibit 3 at 31-32.

The administrative law judge assigned little weight to Dr. Zaldivar's opinion because he found that it was unpersuasive, explaining that it was inconsistent with

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[18] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 20.

[19] Employer argues that the revised regulation at 20 C.F.R. §718.305(d) impermissibly requires a showing that the miner does not have legal pneumoconiosis. Employer's Brief at 23-24 n.6. This argument was recently rejected by the Unites States Court of Appeals for the Tenth Circuit in *Consolidation Coal Co. v. Director, OWCP* [*Noyes*], 864 F.3d 1142, BLR (10th Cir. 2017). For the reasons set forth in *Noyes*, we reject employer's argument.

the regulations and was based on generalities, rather than claimant's specific condition. Decision and Order at 21. The administrative law judge assigned little weight to Dr. Selby's opinion, finding that his diagnosis of asthma was not well-documented and was inconsistent with the other medical evidence of record. *Id.*

In challenging the administrative law judge's finding on the issue of legal pneumoconiosis, employer asserts that the record contains no evidence of a chronic lung disease or impairment that can meet the definition of legal pneumoconiosis. Employer's Brief at 23-25. However, as discussed *supra*, Dr. Gagon's credible medical opinion established that claimant suffers from a disabling moderate respiratory impairment with exercise, as evidenced by his arterial blood gas studies. Therefore, employer was required to establish that this impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Energy W. Mining Co. v. Estate of Blackburn,* 857 F.3d 817, 821-22, BLR (10th Cir. 2017); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1345-46, 25 BLR 2-549, 2-567-68 (10th Cir. 2014); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 154-56 (2015) (Boggs, J., concurring and dissenting); 20 C.F.R. §718.201.

Employer asserts that "[e]ven if there had been a diagnosis of legal pneumoconiosis, both Dr. Zaldivar and Dr. Selby specifically provided opinions as to why [claimant] did not have legal pneumoconiosis." Employer's Brief at 25. Employer, however, alleges no specific error in regard to the administrative law

judge's reasons for discrediting their opinions. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to reweigh the evidence, or to engage in a de novo proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's finding that employer failed to establish that claimant does not suffer from legal pneumoconiosis.[20] *See* 20 C.F.R. §718.305(d)(1)(i).

Employer also argues that the administrative law judge erred in finding that employer failed to establish rebuttal by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). We disagree. The administrative law judge rationally discounted the opinions of Drs. Zaldivar and Selby because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding. *See Goodin*, 743 F.3d at 1346, 25 BLR at 2-579; *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); Decision and Order at 22. We therefore affirm the administrative law judge's finding that employer failed to establish that no part of claimant's

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[20] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

/s/Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

/s/Judith S. Boggs
JUDITH S. BOGGS
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I agree with my colleagues that the administrative law judge's findings and the award of benefits are supported by substantial evidence. I write separately to indicate I am not convinced the administrative law judge simply disregarded the medical opinions of Drs. Selby and Zaldivar because they conflicted with the regulation regarding the qualifying levels for blood gas studies at 20 C.F.R. §718.204(b)(2)(ii). I believe he provided a rationale for finding their opinions unpersuasive and for choosing to apply the regulatory standard when he noted, accurately, that the DOL regulations already account for the effects of elevation

and altitude. *See Big Horn v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055, 13 BLR 2-372, 2-379 (10th Cir. 1990); Decision and Order at 19. Given that he accurately characterized their opinions and provided a rational basis for rejecting them, his additional statement that he was not "permitted" to consider further altitude adjustments was, at worst, a harmless error, in my view. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

/s/Jonathan Rolfe
JONATHAN ROLFE
Administrative Appeals Judge

APPENDIX D

U.S. DEPARTMENT OF LABOR
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Case No. 2014-BLA-05171

[Filed February 28, 2017]

In the Matter of:	)
	)
TONY N. KOURIANOS,	)
Claimant,	)
	)
v.	)
	)
HIDDEN SPLENDOR RESOURCES, INC.,	)
Employer,	)
	)
and	)
	)
ROCKWOOD CASUALTY INSURANCE CO.,	)
Carrier,	)
	)
and	)
	)
DIRECTOR, OFFICE OF WORKERS'	)

COMPENSATION PROGRAMS,)
Party in Interest.)
)

DECISION AND ORDER AWARDING BENEFITS[1]

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. Parts 901-945 (the "Act"), as amended by the Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, Part 1556, and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. 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 disease or coal workers' pneumoconiosis ("CWP"), is a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. 30 U.S.C. § 902(b); 20 C.F.R. § 718.201.

PROCEDURAL HISTORY

Tony Kourianos ("Claimant," "Miner," or "Mr. Kourianos") filed this claim for benefits in June 2012. (DX 2). I held a hearing in this matter on August 12, 2014. Claimant was not represented by counsel at the hearing; counsel appeared on behalf of the Director,

[1] Citations are abbreviated as follows: Hearing Transcript ("Tr."), Director's Exhibits ("DX"), Employer's Exhibits ("EX"), and ALJ Exhibits ("ALJX").

Office of Workers' Compensation Programs ("OWCP"), and on behalf of the Employer. Additional evidence was submitted after the hearing; on November 20, 2015, I issued an evidentiary order closing the record. On April 12, 2016, I issued an Order Denying Employer's Motion to Withdraw Stipulation as Responsible Operator and To Dismiss Hidden Splendor as the Responsible Operator and Supplemental Evidentiary Order and Briefing Schedule (ALJX 4). On May 18, 2016, the Employer filed its Post-Hearing Brief. Neither the Director nor the Claimant filed a post-hearing brief.

I have based my analysis on the entire record, including the exhibits, submitted briefs, and representations of the parties, and given consideration to the applicable statutory provisions, regulations, and case law. I make the following findings of fact and conclusions of law.

APPLICABLE STANDARDS

This claim was filed after January 19, 2001. For this reason, the current regulations at 20 C.F.R. Parts 718 and 725 apply. In order to establish entitlement to benefits under Part 718, the Claimant must establish, by a preponderance of the evidence, that: (1) he suffers from pneumoconiosis; (2) his pneumoconiosis arose out of his coal mine employment; (3) his pneumoconiosis is totally disabling; and (4) his disabling impairment is caused by pneumoconiosis. 20 C.F.R. §§ 718.1, 718.202 (as amended at 74 Fed. Reg. 21612–21613 (Apr. 17, 2014)), 718.203, 718.204, and 725.103. Failure to establish any one of these elements precludes entitlement to benefits. As the miner last engaged in coal mine employment in the State of Utah, appellate

jurisdiction lies with the Tenth Circuit Court of Appeals. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989).

ISSUES

The contested issues in this claim are:

1. The length of Mr. Kourianos's coal mine employment;
2. Whether Mr. Kourianos suffers from pneumoconiosis, as defined by the Act and regulations;
3. If so, whether Mr. Kourianos's pneumoconiosis arose from his coal mine employment;
4. Whether Mr. Kourianos is totally disabled; and
5. If so, whether Mr. Kourianos is totally disabled due to pneumoconiosis.

(Tr. at 8-9).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mr. Kourianos was born on August 15, 1950. (DX 2). He lives in Price, Utah. (DX 2). The parties agree that Mr. Kourianos has one dependent, his wife, for purposes of the augmentation of benefits. (DX 36).

1. Employment History

The Claimant bears the burden of establishing the length of his coal mine employment. *Shelsky v. Director, OWCP*, 7 B.L.R. 1-34 (1984); *Niccoli v. Director, OWCP*, 6 B.L.R. 1-910 (1984). The length of a coal miner's employment is relevant to the applicability of various statutory and regulatory presumptions. In

determining the length of a miner's coal mine employment, an administrative law judge may apply any reasonable method of calculation supported by substantial evidence. *Osborne v. Eagle Coal Co.*, No. 15-0275 BLA, slip op. at 8-10 (BRB Oct. 5, 2016); *Crum v. Champion Coal Co.*, No. 13-0207 BLA, slip op. at 8 (BRB Feb. 27, 2014); *Clark v. Barnwell Coal Co.*, 22 B.L.R. 1-275, 1-280, 1-281 (2003); *Muncy v. Elkay Mining Co.*, 25 B.L.R. 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 B.L.R. 1-430, 1-432 (1986).

There are multiple sources of evidence for Mr. Kourianos's coal mine employment: his testimony at the hearing; his claim for benefits (DX 2); his self-reported employment history (DX 3-4); the Social Security Administration ("SSA") Earnings Statement (DX 12); and records of his employment from various employers (DX 6-11). In evaluating the record, I find that the SSA Earning Statement is the most probative evidence concerning the length of his coal mine employment because it is more detailed than the employment history form submitted by the Claimant or Claimant's testimony. I also find that employment records submitted by the coal companies for which the Miner worked are probative evidence of the Miner's employment history. I will rely on Claimant's testimony to "fill in the gaps," where they exist, in his employment history.

The term "miner" or "coal miner" is defined by the regulations as:

> any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of

> coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility.

20 C.F.R. § 725.202(a). Furthermore, the regulations provide a rebuttable presumption that

> any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:
>
> > (1) The person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or
> >
> > (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

Id.

Mr. Kourianos testified that one portion of his coal mining employment was not spent underground but was spent "working at Joy Mining, cleaning machinery." (Tr. at 44). His SSA Earnings Statement records that he was employed by Joy Technologies, Inc., between 1997 and 2005. (DX 12). Based on Claimant's testimony and the SSA Earnings Statement, the Responsible Operator has rebutted the presumption that during this period Claimant worked as a coal miner because during this period he neither engaged in the extraction, preparation, or transportation of coal, nor worked in or around a coal mine or coal preparation facility. I therefore discount this period of

employment when calculating the length of Claimant's coal mine employment.

Mr. Kourianos also testified that during his "very last section" of employment for Hidden Splendor, he worked as a security guard for a mine, and not as a coal miner, and furthermore, that no extraction or preparation of coal occurred while he worked as a security guard. (Tr. at 51-57, 64-71). Records from Hidden Splendor Resources state that from April 5, 2011, to October 14, 2011, Claimant was employed "Outside at the Loadout." (DX 11). I find that this period corresponds to the period Mr. Kourianos testified he spent as a security guard. I will discount this period in calculating Claimant's length of employment because Employer has rebutted the presumption that during this period Claimant was employed as a coal miner. Accordingly, Claimant's last coal mining employment was performed in January 21, 2011, when he was last employed by Hidden Splendor "in the mine." (DX 11).

I will further examine the record to determine the length of Claimant's coal mine employment. When determining the length of a miner's coal mine employment, an administrative law judge should first determine, if possible, the beginning and ending dates of the miner's period or periods of coal mine employment. 20 C.F.R. § 725.101(a)(32)(ii); *Dawson v. Old Ben Coal Co.*, 11 B.L.R. 1-58 (1988). "The dates and length of [a miner's coal mine] employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings

statements, coworker affidavits, and sworn testimony." 20 C.F.R. § 725.101(a)(32)(ii).

If the evidence is insufficient to establish the beginning and ending dates of a miner's coal mine employment, an administrative law judge may use any reasonable means of calculating the length of the miner's coal mine employment. *Clark v. Barnwell Coal Co.*, 22 B.L.R. 1-275, 1-280, 1-281 (2003). I am unable to determine the exact dates the Miner's employment began and ended because the Social Security earnings records do not provide the month and year the Miner's employment with various employers began or ended. (DX 12).

For years prior to 1978, the Board has held that counting quarters in which a miner's Social Security earnings record show that he earned at least $50.00 from coal mine employment, and not counting quarters in which the earned less than $50.00 from coal mine employment, is a reasonable method of calculating the length of a miner's coal mine employment. *Tackett v. Director, OWCP*, 6 B.L.R. 1-39 (1984); *Crum*, slip op. at 6. Accordingly, I will use the $50.00 per quarter method to determine the length of the Miner's coal mine employment for all years prior to 1978.

For those years between 1978 and the present, if I can determine that the Miner was continuously employed with a single employer for a full calendar year (in this case, in the years 1979-85 and 2008-09), I will credit the miner with one year of coal mine employment if I determine that he worked in or around coal mines at least 125 days during that year by comparing his earnings to the average earnings for a

125-day period, as set out in Exhibit 610.[2] If the Miner's earnings exceeded the industry average for 125 days, he is credited with one year of coal mine employment, but if the Miner's earnings are less than the industry average, I will divide his earnings by the industry average for 125 days to credit the Miner with a portion of a year.

For the years from 1978 to the present where personnel records and Claimant's testimony present a more detailed record showing that the Miner was not employed in coal mine employment continuously for an entire year but instead show when he began and ended each period of coal mine employment (in this case, 1978, 2005, 2006, 2007, 2010, and 2011), I will use this direct evidence to determine the Miner's length of employment. *See Osborne*, slip op. at 9-10 and n. 13 (Board notes preference for use of direct evidence). Under the regulations, a year of coal mine employment is defined as follows:

> *Year* means a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days" . . . .

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[2] Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual, Average Earnings of Employees in Coal Mining*, contains the coal mine industry's average daily earnings for each year and the average earnings for 125 days. *See* http://www.dol.gov/owcp/dcmwc/exh610.htm (last visited Dec. 20, 2016).

> i. If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. If a miner worked fewer than 125 working days in a year, he or she has worked a fractional year based on the ratio of the actual number of days worked to 125. Proof that the miner worked more than 125 working days in a calendar year or partial periods totaling a year, shall not establish more than one year.

20 C.F.R. § 725.101(a)(32). I apply this method to determine the Miner's coal mine employment in 1978, 2005, 2005-07, and 2010-11, the years in which mine personnel records record that Claimant was employed for less than a full calendar year.

For those years between 1978 and the present, if I cannot determine the beginning and ending dates of the Miner's employment, I will compare his earnings from coal mine employment to the daily average earnings of employees in coal mining, as set out in Exhibit 610.[3] That will produce an estimate of the

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[3] Under *Crum*, it was possible to use Exhibit 609 to calculate the length of a miner's coal mine employment in cases in which the beginning and end dates of a miner's coal mine employment could not be established. In *Osborne*, however, the Board held that relying on Exhibit 609 to determine the length of a miner's coal mine employment "is not appropriate because it contains a wage base that is not specific to the coal mine industry." *Osborne*, slip

number of days the Miner actually worked in coal mining that year. The Board has declined to instruct the administrative law judge to use "125 days" as a divisor when calculating a fractional portion of a year. *Osborne*, slip op. at 9. I find that using 250 days as a divisor is a reasonable method of computation when using the Exhibit 610 daily earnings data to calculate a fractional portion of a year of coal mine employment because a coal miner whose earnings from coal mine employment equal 250 days of average daily earnings from coal mine employment will very likely have worked in coal mine employment for a full calendar year.

Specifically, I have determined that 250 days is an appropriate divisor by calculating as follows: 365 calendar days minus 104 weekend days, minus ten days of vacation time, minus 9 federal holidays results in 242 days, plus 8 days to account for overtime work. While of course 250 days is an estimate, and there may be cases (such as those where a miner worked significant overtime, worked many weekend days, and/or took little or no vacation) where a miner worked for less than a calendar year in coal mine employment but had earnings from coal mine employment equal to

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op. at 9 (footnote omitted). While the Board in *Osborne* did not mention *Crum* (or any other case upholding the use of Exhibit 609) by name, it noted that "[t]o the extent that there are prior Board decisions that are inconsistent with our present holding [concerning the use of Exhibit 609], they are overruled." *Id.*, n. 11. I find that using the Exhibit 610 average daily earnings data to calculate fractional portions of a year of coal mine employment in years where I cannot establish the beginning and end dates of a miner's employment is reasonable.

250 days of average daily earnings from coal mine employment, I nevertheless find that this estimate is a reasonable method of calculating a fractional portion of a year of coal mine employment.

Accordingly, for years in which I cannot establish the start and end dates of the Miner's coal mine employment, I will divide the Miner's earnings from coal mine employment by the Exhibit 610 average daily earnings for that year to arrive at an estimate of actual days of coal mine employment, and then will divide that number of days by 250 to calculate a fractional portion of a year of coal mine employment.

1972-1977

Year	Number of Qtrs > $50	Years of CME
1972	2	.5
1973	4	1
1974	4	1
1975	4	1
1976	3	.75
1977	4	1
		Total CME 1972-1977: 5.25 years

1979-85 and 2008-09

Based on Valley Camp of Utah's personnel records, Mr. Kourianos was continuously employed as a coal miner in calendar years 1979-1985. (DX 7). Based on West Ridge Mine's records, he was also continuously employed as a coal miner in calendar years 2008-09.

(DX 9). I find the Miner had the following amounts of coal mine employment using the Exhibit 610 method using the average earnings from 125 days of coal mine employment data:

Year	Total Earnings[4]	Industry Avg. 125 days' CME	Years of CME
1979	$25,807.74	$10,878.75	1
1980	$25,900.00	$10,927.50	1
1981	$29,700.00	$12,100.00	1
1982	$32,400.00	$13,720.00	1
1983	$35,700.00	$14,800.00	1
1984	$37,800.00	$15,250.00	1
1985	$39,600.00	$10,927.50	1
2008	$57,887.04	$23,270.00	1
2009	$91,321.92	$26,140.00	1
			Total CME 1979-85 and 2008-09: 9 Years

1978, 2005-07, and 2010-11

For these years and periods of these years, personnel records (identified in the table *infra*) present a more detailed record showing that the Miner was not employed in coal mine employment continuously for an entire year. I will use this direct evidence to determine

[4] Based on Mr. Kourianos's SSA Earnings Statement. *See* DX 12.

the Miner's length of coal mine employment for these years.

Period of Employment	Days	Calendar Employment Year Credited	Partial Employment Year Credited
1/1/1978-11/8/1978 (DX 6) 11/20/1978-12/31/1978 (DX 7)	312		.85 (312/365 =.85)
9/15/2005-12/31/2005 (DX 9)	108		.3 (108/365 = .3)
1/1/2006-12/18/2006 (DX 9) 12/26-12/31 (DX 11)	358		.98 (358/365 =.98)
1/1/2007-4/11/2007 (DX 11) 4/18/2007-12/31/2007 (DX 9)	359		.98 (359/365 =.98)

1/1/2010-6/8/2010 (DX 9) 11/16/2010-12/31/2010	204		.55 (204/365 =.55)
1/1/2011-1/21/2011	20		.05 (20/365 = .05)
			Total CME 1978, 2005, 2006, 2007, 2010: 3.71 years

1987-97

For these years and periods of these years, the record establishes that the Miner was employed as a coal miner for part of each year, but the start and end dates of his employment cannot be determined. I find the Miner had the following amount of coal mine employment using the Exhibit 610 method using the average daily earnings data, with 250 days as the divisor to calculate a fractional portion of a year:

Year	Total Earnings	Industry Avg. Daily Earnings	Years of CME
1987	$25,619.09	$126.00	.81
1988	$37,804.00	$127.52	1
1989	$47,268.61	$130.00	1
1990	$49,394.88	$133.68	1

1991	$43,292.81	$136.64	1
1992	$46,312.66	$137.60	1
1993	$48,359.99	$138.08	1
1994	$32,117.45	$142.08	.90
1995	$16,462.44	$147.52	.45
1996	$31,181.10	$149.92	.83
1997	$12,124.41	$152.08	.32
			Total CME 1987-97: 9.31 years

Total Coal Mine Employment

I find that Mr. Kourianos has 27.27 years of coal mine employment. This includes 5.25 years from 1972 to 1977 calculated using the $50.00 per quarter method; 9 years (1979-1985 and 2008-09) calculated using the Exhibit 610 method using the average earnings for 125 days data; 3.71 years in the years 1978, 2005, 2006, 2007, 2010, and 2011 calculated using direct evidence; and 9.31 years in 1987-97 calculated using the Exhibit 610 method using the average daily earnings data, with 250 days used as a divisor to calculate a year or a fractional portion of a year. I find all of Mr. Kourianos's coal mine employment to have been underground. (Tr. 43).

Mr. Kourianos Performed "Medium Work" in his "Usual Coal Mine Work"

It is claimant's burden to establish the exertional requirements of the miner's "usual coal mine work", which then provide a basis to evaluate medical

assessments of a miner's capabilities and to reach a conclusion regarding total disability. *Hall v. Carbon River Coal Corp.*, BRB No. 15-0008, slip op. at 5 (BRB Oct. 19, 2015) (*citing McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Cregger v. U. S. Steel Corp.*, 6 BLR 1-1219 (1984)). A miner's usual coal mine work is "the most recent job the miner performed regularly and over a substantial period of time." *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). "This determination must be made on a case by case basis and will vary depending upon the employment history in the individual case." *Id.*

Mr. Kourianos worked in various capacities as a coal miner, and his different duties required different levels of physical exertion. As noted above, I find that the time Claimant spent in 2012 working as a security guard does not qualify as coal mining employment. Prior to working as a security guard, Claimant worked as a contractor for Hidden Splendor Resources. (Tr. at 53-54). As a contractor, Mr. Kourianos would "watc[h] the guys mine" and "critiqu[e] them," as well as load ten pound bags of coal samples. (Tr. at 53). During his deposition of Dr. Shane Gagon (*see infra*), Claimant characterized this work as "a piece of cake," and stated that he could perform those duties "for another ten, fifteen years." (DX 12 at 21). If I found that the work Claimant performed for Hidden Splendor Resources was his usual coal mine employment, then there would be little question that Claimant is not totally disabled.

But I find that the work Claimant performed for Hidden Splendor was not his usual coal mine employment. Claimant testified that he worked in that

position for seven or eight months in 2010 and 2011. (Tr. at 40). He testified that he was employed as a contractor. (Tr. at 54). Hidden Splendor's personnel records indicate that Claimant worked in the mines from November 2011 to January 2012. (DX 11). His SSA Earnings Statement shows that he earned relatively little compensation for his work for Hidden Splendor. (DX 12). And I have credited Claimant with much less than six months of work for the duties he performed at Hidden Splendor during 2010 and 2011. Accordingly, given the short period of time in which he worked, his status as a contractor, and his relatively low earnings, I find that the work Claimant performed for Hidden Splendor was not his usual coal mine work.[5] *See Hall*, slip op. at 5 (affirming administrative law judge's determination that the six months a claimant spent as a truck driver was not his usual coal mine work).

Instead, I find that the work Claimant performed for West Ridge Resources between April 2007 and June 2010, his penultimate coal mining employment, is his usual coal mine work. *See* DX 9. More specifically, I

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[5] This finding is consistent with Hidden Splendor's status as the Responsible Operator. In my April 2016 Order (ALJX 4), I denied Employer's request to withdraw from its stipulation as the Responsible Operator and to be dismissed from the claim because I found that it had previously stipulated to Responsible Operator status, and because I found that the nature of Mr. Kourianos's employment for Hidden Splendor was reasonably ascertainable when this claim was before the District Director. (ALJX 4 at 3). I made no finding in that Order regarding whether the work Claimant performed for Hidden Splendor was his usual coal mine work.

find that the work that Claimant performed as a fire boss between October 2009 and June 2010, the last job title he held as a West Ridge employee (*see* DX 9 at 2), constituted his usual coal mine work. Mr. Kourianos testified that as a fire boss, he performed pre-shift examinations and weekly exams of the coal mine. Examinations involved "visual exams" of the mining operations and equipment. (Tr. at 41). He testified that he wore a tool belt that weighed thirty to thirty-two pounds, or more. (Tr. at 45-46). Accordingly, I find that Claimant's usual coal mine employment qualifies as "medium work" under 20 C.F.R. § 404.1567(c).

2. Mr. Kourianos Has a 16.5 Pack-Year Smoking History

Claimant testified that he began smoking in 1970 and continued to smoke through the date of the hearing, August 2014. (Tr. at 48-50). He testified that he smoked a half-pack of cigarettes during half of this forty-four year period, and a quarter-pack of cigarettes during the other half, for an average of 7.5 cigarettes a day for forty-four years. (Tr. at 50). I find Claimant's testimony to be credible, and largely consistent with the smoking history he provided during a DOL-sponsored medical examination. (DX 16). I therefore credit Claimant with a 16.5 pack-year smoking history.

MEDICAL EVIDENCE

1. ILO-U/C X-rays

When weighing chest X-ray evidence, the provisions at 20 C.F.R. § 718.202(a)(1) require that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the

radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. § 718.202(a)(1). To that end, the Board holds that it is proper to accord greater weight to the interpretation of a B Reader or Board Certified Radiologist over the interpretation of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B Reader and Board Certified Radiologist may be accorded greater weight than a B Reader's interpretation. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984).

This case contains the following X-ray evidence interpreted according to the ILO-U/C classification schema:

Exhibit #	Date of Study	Date of Reading	Physician	Qualifications[6]	Film Quality	Reading
DX 16	8/23/2012	8/28/2012	Dr. Roy C. Hammond	BCR	1	Negative
DX 17/ EX 1	8/23/2012	6/4/2013	Dr. Christopher Meyer	B/BCR	1	Negative
EX 10	8/23/2012	5/8/2014	Dr. Robert Tarver	B/BCR	1	Negative
EX 11	8/23/2012	6/26/2014	Dr. Ralph Shipley	B/BCR	1	Negative

[6] B = B Reader; BCR = Board Certified Radiologist; B Readers and Board Certified Radiologists are deemed the most qualified. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16, (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n. 2 (7th Cir. 1993).

2. Narrative X-rays

The following narrative x-rays were admitted to the record:

- EX 8 at 30: A February 12, 2013 chest x-ray from Castleview Hospital was interpreted to show that "[t]he lungs are clear without focal opacity."
- EX 6 at 77: An October 29, 2009 chest x-ray from Castleview Hospital was interpreted to show "[n]o focal pulmonary infiltrates."
- EX 6 at 88-89: A February 15, 2008 chest x-ray from Castleview Hospital was interpreted to show that "[t]he lung fields are clear" and a "[n]ormal chest."

3. Pulmonary Function Tests

Total disability may be established by a preponderance of qualifying pulmonary function testing. 20 C.F.R. § 718.204(b)(2)(i). Pulmonary function tests are performed to measure obstruction or restriction in the airways of the lungs and the degree of impairment of pulmonary function. Tests most often relied upon to establish disability in black lung claims measure forced vital capacity ("FVC"), forced expiratory volume in one second ("FEV_1") and maximum voluntary ventilation ("MVV").

Pulmonary function testing results may qualify a miner as "totally disabled" if FEV_1 is equal to or lesser than the values listed in appendix B for a miner of similar gender, age, and height, *and* either (1) the MVV or FVC values equal or fall below those values listed at Appendix B, or (2) the result of the FEV_1 divided by the FVC is equal to or less than 55 percent. *See* 20 C.F.R. § 718.204(a)(2)(i). I have listed the highest value

obtained for each category during the test. *See Rhen v. Director, OWCP*, BRB No. 04-0862 BLA (July 27, 2005).

The quality standards for pulmonary function testing are located at 20 C.F.R. § 718.103 and require, in relevant part, that (1) each study be accompanied by three tracings, *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984); (2) the reported FEV_1 and FVC or MVV values constitute the best efforts of three trials; and (3) testing conducted after January 19, 2001 be accompanied by a flow-volume loop. 20 C.F.R. §§ 718.101(b) and 718.103(a) and (b).

Exhibit/ Date of Test/ Physician	**Age/ Height (in.)**	**Cooper-ation/ Compre-hension**	**Tracings and Flow Volume Loop**	**Broncho-dilator (pre/ post)**	**FEV_1**	**FVC**	**MVV**	**FEV_1/ FVC Ratio**	**Qualify"?**
DX 16 8/23/2012 Dr. Gagon	62/72	Good/ Good	Yes/Yes	Pre:	3.8	5.33	123	71	No
EX 8 at 70 5/26/2010 Castleview Hospital	59/70	Good/ Not reported	Yes/Yes	Pre:	3.43	4.39	136	78	No

4. Arterial Blood Gas Studies

Total disability may be established by qualifying blood gas studies under 20 C.F.R. § 718.204(b)(2)(ii). Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the partial pressure of oxygen ("PO_2") and the partial pressure of carbon dioxide ("PCO_2") in the blood. A lower level of oxygen ("O_2") compared to carbon dioxide ("CO_2") indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled.

Blood gas study results may qualify a miner as totally disabled if the PO_2 values corresponding to the PCO_2 values are equal to or less than those found at the tables of Appendix C. 20 C.F.R. § 718.204(b)(2)(ii). Notably, the tables at Appendix C do not permit "rounding up" or "rounding down" of the PCO_2 or PO_2 values; 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). If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. More weight may be accorded to the results of a recent blood gas study over a study that was conducted earlier.

Exhibit/ Date of Test	Physician	Altitude (feet)	PCO_2	PO_2	Qualify?
DX 16 8/23/2012	Dr. Gagon	3,000-5,999	39 (resting) 33 (exercise)	68 (resting) 59 (exercise)	No Yes
EX 8 at 72 5/26/2010	Castleview Hospital	3,000-5,999	43 (resting)	60 (resting)	No

5. Medical Reports

Dr. Gagon

Dr. Shane Gagon examined Claimant on August 23, 2012, and prepared a medical report dated October 9, 2012. (DX 16). Dr. Gagon did not detail Claimant's employment history. (DX 16). He stated that Claimant smoked a half-pack of cigarettes daily. (DX 16). Dr. Gagon noted that Claimant suffered from daily sputum production and daily wheezing, and that he suffered from cough with exertion "or cold." (DX 16).

Dr. Gagon stated that Claimant suffered from "moderate impairment with subjective chronic shortness of breath with minimal exertion and PO_2 with exercise." (DX 16).

Dr. Gagon diagnosed chronic bronchitis with a chronic productive cough and a significant drop in PO_2 levels with exercise. (DX 16). Dr. Gagon stated that Claimant's chronic bronchitis was caused by "coal dust exposure and smoking," and that smoking and coal dust represented "probably equal contributions." (DX 16).

Dr. Gagon prepared a supplemental report dated August 24, 2014, in which he responded to Dr. Zaldivar's criticism that the August 23, 2012 arterial blood gas study did not properly take into account the altitude of Price, Utah (*see infra*). (DX 39). In the report, in response to Dr. Zaldivar's statement that Claimant's "blood gas studies appear very low but they are not when taking into consideration the altitude of Price, UT" (*see* EX 2 at 8), Dr. Gagon stated that the blood gas studies did take into account the altitude, and that based on the regulatory tables Claimant met the requirements for disability. (DX 39). Dr. Gagon stated that he "suspect[ed]" that a technician did not properly record the barometric pressure for the blood gas studies, but that an incorrect barometric pressure recording "does not change the results of the test." (DX 39). He stated that the results of the study "indicate hypoxemia with exercise meeting the requirements for disability" at the 3,000-5,999 foot altitude range. (DX 39). He stated that although "[s]moking probably contributes" to Claimant's drop in exercise PO_2, that exposure to coal dust "is also a significant contributing factor." (DX 39). He stated that he agreed that Claimant "could work as long as the work is sedentary. However, with his significant hypoxemia with exercise, he would be limited with any exertion.' (DX 39).

Dr. Gagon was deposed on February 16, 2016. (EX 12). He initially stated that Claimant "would be able to work in the coal mine," but "not at the same degree with someone with no abnormalities" and "[a]s long as his job was fairly sedentary." (EX 12 at 12). Initially, he stated that although he did not know the specifics of the job duties performed by a fire boss or safety

manager, that he "suspect"-ed that Claimant would be able to perform that job because it was "not as physical" as other coal mining jobs. (EX 12 at 13). But based on Claimant's description of the more physical job he performed in his usual coal mine work as a fire boss at West Ridge during cross-examination, Dr. Gagon stated that Claimant would not be able to perform the described job duties. (EX 12 at 14-15).

Dr. Zaldivar

Dr. George Zaldivar prepared a medical report based on his review of medical records[7] dated June 11, 2013. (EX 2 at 7-10). He stated that Claimant's "complete work history was not given." (EX 2 at 7). He stated that Claimant began smoking in 1970 and continued smoking a half-pack of cigarettes a day at the time of the report. (EX 2 at 7). He noted symptoms of chronic bronchitis for one-and-a-half years and night wheezing. (EX 2 at 7). He also noted that "[l]ungs showed decreased breath sounds." (EX 2 at 7).

Dr. Zaldivar noted Dr. Forehand's interpretation of the August 23, 2012 x-ray, which was read as negative for pneumoconiosis. (EX 2 at 8). Dr. Zaldivar stated that the ventilatory study dated 8/23/2012 from Castleview Hospital was "invalid" because only one tracing showed no hesitation during exhalation; nevertheless, he stated that the results were "normal for a 62 year-old male." (EX 2 at 8).

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[7] Dr. Zaldivar did not note the specific records that he reviewed, other than the evidence included in Dr. Gagon's report. (EX 7).

Dr. Zaldivar noted that in Dr. Gagon's report, the results of Claimant's blood gas study demonstrated a "moderate impairment with subjective chronic shortness of breath on minimal exertion and a drop of PO_2 with exercise." (EX 2 at 7). Dr. Zaldivar stated that the "blood gas studies appear very low but they are not when taking into consideration the altitude of Price, UT." (EX 7 at 8). Dr. Zaldivar stated that the barometric pressure recorded for the blood gas study, 767 mmHg, "could not be correct." (EX 7 at 8).

He stated that "[c]onsidering that the chest x-ray is normal and that the ventilatory study is normal, the only abnormality that could explain this drop in the PO_2 would be a low diffusion capacity of a pulmonary fibrosis or a bronchiolitis of a smoker . . . . My opinions considering the totality of the case is that pneumoconiosis is not present." (EX 2 at 8-9). Dr. Zaldivar also stated that his understanding of the equipment used for the blood gas study required that the equipment be set at "the actual pressure at the altitude of the laboratory. If the actual pressure is not used, the measured results would be inaccurate." (EX 2 at 9).

Based on his review of the records, Dr. Zaldivar concluded that Claimant does not suffer from simple or complicated clinical pneumoconiosis. (EX 2 at 9). Furthermore, he stated that Claimant demonstrated "no pulmonary impairment based on the spirometry or the blood gases," and that Claimant was not disabled, as he did not exhibit "any pulmonary impairment that would prevent him from performing his usual coal mining work." (EX 2 at 9). He stated that Claimant was

not disabled from working his "usual coal mining work." (EX 2 at 9). Furthermore, he stated that "if there is any pulmonary condition at all, it is bronchiolitis caused by smoking." (EX 2 at 9).

Dr. Zaldivar prepared a supplemental report dated September 6, 2013. (EX 2 at 4-6). In that report, he criticized DOL regulations regarding blood gas studies: although he noted that "[t]he law is written the way it is written," he stated that "the effects of altitude in human physiology contradict[t] using 3,000 feet of difference in altitude as being equivalent"; he stated that his report took "into consideration the physiological findings by citing actual medical literature to reach accurate and valid conclusions." (EX 2 at 5).

Dr. Zaldivar in this supplemental report also cited to medical literature to explain his diagnosis of bronchiolitis, which he stated was a "disease of smokers that can cause pulmonary fibrosis." (EX 2 at 6). He stated that:

> Regarding my having ignored Mr. Kourianos's work history of 26 years when explaining the drop in the blood gases, it is very important to remember that coal miners are human beings subject to all diseases and conditions of human beings and are affected by habits such as smoking just as the population at large is affected by it.

(EX 2 at 5).

Dr. Zaldivar prepared a second supplemental report dated February 26, 2014, based on his review of

Claimant's treatment records. (EX 2 at 1-3). Dr. Zaldivar stated that the records made "evident that [Claimant] has never complained of any lung problems, at least to his physician," and that "no mention has been made of any pulmonary problems." (EX 2 at 3). Based on these records, "I question the accuracy of the result of the blood gases." (EX 2 at 3).

Dr. Zaldivar was deposed on April 21, 2014. (EX 4). He testified that he would consider thirty-three to thirty-nine years of coal mine employment significant because the likelihood of developing pneumoconiosis increased with exposure to coal dust. (EX 4 at 8-9). He testified that barometric pressure was "very, very important" for arterial blood gas studies, and that a test taken at higher elevations can be expected to yield lower PO_2 values. (EX 4 at 13-15). He testified that the results of Claimant's arterial blood gas study tests were "normal." (EX 4 at 16). Dr. Zaldivar stated that this was the case, despite Department of Labor regulations that found the results of Claimant's arterial blood gas testing to show that he was disabled, because the regulation did not accurately reflect the drop in PO_2 values that occurs at higher altitudes. (EX 4 at 17). He testified that the values obtained after exercise would have been in the normal range if the tests had been taken at a lower altitude. (EX 4 at 18-19). Dr. Zaldivar testified that the drop in PO_2 levels was not "normal" but was "acceptable"; however, he stated that the drop was due to Claimant suffering from bronchiolitis caused by smoking. (EX 4 at 19-20). He also testified that if Claimant suffered from chronic bronchitis, that that was caused by his smoking. (EX 4 at 22-23).

Dr. Zaldivar concluded at his deposition that Claimant was not disabled, based on his arterial blood gas studies, because the drop in levels was due to the altitude at which the tests were performed; he stated that Claimant could work as a fire boss (although Dr. Zaldivar was not presented with and did not discuss the specific duties required by that position). (EX 4 at 24-25). He concluded that Claimant did not suffer from clinical pneumoconiosis, based on the x-ray readings. (EX 4 at 23-24). He concluded that Claimant did not suffer from legal pneumoconiosis, because although the drop in PO_2 levels was attributed to the altitude of the testing, that any "abnormality" was caused by Claimant's smoking. (EX 4 at 24).

Dr. Selby

Dr. Jeff Selby prepared a medical record review dated June 25, 2013, for which he reviewed Dr. Gagon's August 23, 2013 report. (EX 3 at 29-36). Dr. Selby did not note Claimant's employment history, other than to stated that he "worked for West Ridge as a fire boss and safety manager from 7/05 to 6/10." (EX 3 at 29). He stated that Claimant currently smoked a half-pack of cigarettes daily and began smoking in 1970. (EX 3 at 30).

Dr. Selby concluded that Claimant does not have simple or complicated coal worker's pneumoconiosis, as there was no x-ray evidence of clinical pneumoconiosis. (EX 3 at 31). Dr. Selby concluded that Claimant "does not have any permanent impairment of a respiratory nature," but that "[i]f he is ever found to have respiratory impairment it will be the effects of asthma more likely than not." (EX 3 at 31).

Dr. Selby stated that Claimant's symptoms, including wheezing, productive cough, and decreased PO_2, indicated "a very strong presentation for the diagnosis of asthma," and that Claimant's lack of wheezing during his physical exam "in no way dismisses the diagnosis of asthma." (EX 3 at 32). Dr. Selby stated that Claimant's asthma was exacerbated by his cigarette smoking, and stated that coal mine dust exposure did not contribute to his asthma: "In fact, working in coal mines prohibits the inhalation of cigarette smoking, thus actually protecting the lungs." (EX 3 at 32).

Dr. Selby stated that although Claimant's arterial blood gas study yielded a qualifying value, that the "blood gas analyzers are only accurate to a value of + or – 3 mm Hg." (EX 3 at 33). He also noted that Price, Utah, is more than 5,000 feet above sea level, and "[s]ince there is a known linear drop in PO_2 with increasing altitude," that the range of disability "would be more accurately defined toward the PO_2 of 57 value." (EX 3 at 33).

Dr. Selby prepared a supplemental record review after reviewing extensive treatment notes from 1990 to 2013. (EX 3 at 1-28). Based on his review of these records, he maintained his opinion that Claimant does not suffer from clinical or legal pneumoconiosis. (EX 3 at 27). He stated that Claimant was "strongly addicted to narcotics for years," that "[n]arcotics blunt sigh and cough reflexes that can lead to hypoxia through microatelectasis and other means," and that "[t]his in association with active smoking could easily explain

the low PO_2 he experienced during exercise testing." (EX 3 at 27).

Dr. Selby was deposed on June 17, 2014. (EX 5). Dr. Selby acknowledged that twenty-six years of coal mining employment was sufficient time for a miner to develop coal workers' pneumoconiosis. (EX 5 at 7). He stated that the only "significant" issue that arose from Dr. Gagon's examination was Claimant's PO_2 level, which Dr. Selby stated was "a bit low at first glance at rest, and then the PO_2 decreased with exercise." (EX 5 at 6). Dr. Selby stated that Claimant's PO_2 values both at rest and with exercise were "normal." (EX 5 at 10). He stated that Claimant's PO_2 value might have decreased because of technical problems with testing, or because Claimant suffered from "some form of disease." (EX 5 at 10-11). But because both resting and exercise values were within "within normal, it's not really a significant disease." (EX 5 at 11). Dr. Selby stated that Claimant's PO_2 values could likely be "undiagnosed asthma," "chronic bronchitis from smoking," or "congestive heart failure." (EX 5 at 12).

Dr. Selby concluded at the deposition that Claimant did not suffer from clinical or legal pneumoconiosis. (EX 5 at 13-14). He stated that based on the pulmonary function testing and arterial blood gas studies, that Claimant was "[n]ot even close" to being disabled due to a pulmonary condition. (EX 5 at 14). He testified that that Claimant had the capacity to work as a fire boss (although Dr. Selby was not presented with and did not discuss the specific duties required by that position). (EX 5 at 14-15).

6. Treatment Records

Extensive treatment records from 1990 to 2014 have been admitted to the record. (EX 6-EX 9). Few of these records, however, pertain to Claimant's respiratory or pulmonary condition. I note that Claimant was found to have "no history of pulmonary disorder or asthma" on March 7, 1990. (EX 6 at 205-08). Claimant's lungs were clear on April 8, 1993. (EX 6 at 197). He had "difficulty breathing" and his lungs "showed some decreased breath sounds" on June 11, 1996; he was diagnosed with bronchitis and dyspnea. (EX 6 at 195). His lungs were clear on June 21, 2005. (EX 6 at 137). On February 15, 2008, he arrived at a hospital emergency room with flu-like symptoms, and had trouble breathing, but a chest x-ray was read as normal. (EX 6 at 110). On March 6, 2008, his lungs were again clear; and on October 29, 2009, although he complained of a cough, his lungs were again clear without rhonchi or wheeze. (EX 6 at 131, 125). On January 15, 2010, his lungs showed "bilateral air exchange with no wheezing or crackles." (EX 7 at 28-34).

On March 17, 2010, Claimant complained that he got out of breath, and that he could not work because shortness of breath; he was diagnosed with "lung hypoxia with exertion." (EX 6 at 36-37). Pulmonary function tests (EX 8 at 70) and arterial blood gas studies (EX 8 at 72) were taken.

On August 23, 2010, Claimant's lungs were clear without rhonchi or wheeze. (EX 6 at 33-34). On February 14, 2011, his respiratory function was normal with no distress. (EX 7 at 8-12). On July 18, 2011, his

lungs were clear without rhonchi or wheeze. (EX 6 at 26).

On August 23, 2012, Claimant underwent the DOL-sponsored examination by Dr. Gagon (*see* DX 16; EX 8 at 45-48).

On February 9, 2013, his lungs showed "equal breath sounds bilaterally" and were "clear to auscultation and percussion." (Ex 8 at 31, 36-39). His respiratory function was positive for cough on February 12, 2013. (EX 8 at 19, 24-29). His lungs were clear on March 18, May 8, May 28, June 19, July 8, and December 16, 2013. (EX 6 at 12-18).

During a physical on June 3, 2013, Claimant reported smoking a half-pack of cigarettes a day, and had no asthma or COPD. (EX 8 at 9). On January 16, 2014, Claimant complained of shortness of breath with some exertion and "some black lung." (EX 9 at 5). He was recorded as having a 21 pack-year smoking history. (EX 9 at 5).

DISCUSSION

1. The Fifteen Year Presumption Applies to Mr. Kourianos's Claim

In claims filed after January 1, 2005, if the miner was employed for fifteen or more years underground and has a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption that he is totally disabled due to pneumoconiosis. 20 C.F.R. § 718.305. In order to invoke the presumption, the Claimant must establish that he suffers from a totally

disabling respiratory or pulmonary impairment. 20 C.F.R. §§ 718.204 and 718.305(b).

2. The Medical Opinion Evidence Establishes that Mr. Kourianos Suffers from a Totally Disabling Respiratory or Pulmonary Impairment

A miner will be considered "totally disabled" if:

> the miner has a pulmonary or respiratory impairment which, standing along, prevents . . . the miner:
>
> (i) From performing his or her usual coal mine work; and
>
> (ii) From engaging in gainful employment in the immediate area of his or residence requiring the skills or abilities comparable to those of any employment in a mine or mines . . . .

20 C.F.R. § 718.204(b)(1). Total disability may be established by, among other means, pulmonary function tests or arterial blood gas studies. 20 C.F.R. § 718.204(b)(2)(i)-(ii). If the pulmonary function tests and/or blood gas studies do not yield qualifying values, or are medically contraindicated, total disability may be nevertheless found if a physician, exercising reasoned medical judgment and based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented him from performing his usual coal mine work or comparable and gainful work. 20 C.F.R. § 718.204(b)(2)(iv).

I am to weigh all evidence relevant to total disability at this stage. *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1479 (10th Cir. 1989). I find that Claimant has established by a preponderance of the evidence that he is totally disabled. First, I find that the pulmonary function tests and the arterial blood gas studies yield equivocal results. Claimant underwent both pulmonary function and arterial blood gas testing in May 2010 and August 2012, and I give greater weight to the more recent testing. Neither pulmonary function yielded a value indicating total disability. The arterial blood gas study taken in May 2010 also did not yield a qualifying value. Finally, the arterial blood gas studies taken in August 2012 did not yield a qualifying value while Claimant was resting, but did yield a qualifying value after exercise. I recognize that pulmonary function tests and arterial blood gas studies measure different types of pulmonary impairment, and further recognize that coal workers' pneumoconiosis may manifest itself in different ways. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones and Laughlin Steel Corp.*, 6 B.L.R. 1-797, 1798 (1984); *Gurule v. Director, OWCP*, 2 B.L.R. 1-772, 1-777 (1979). But after carefully considering the evidence, and having given greater weight to the more recent testing, I find that Claimant has not carried his burden via this medical evidence because the evidence is equivocal.

But I find that the medical opinion evidence does establish that Claimant is totally disabled from working as a fire boss. I give great weight to Dr. Gagon's opinion, because he is the only physician who discussed (in his deposition) the specific duties

Claimant performed as a fire boss. His opinion regarding disability is well-documented and well-reasoned, and he was in a better position to determine whether Claimant could exert the physical effort required to perform a fire boss's duties than the other physicians. *See Killman v. Director, OWCP*, 415 F.3d 716, 722 (7th Cir. 2005).

I give little weight to Dr. Zaldivar's and Dr. Selby's findings that Mr. Kourianos is not disabled. Neither doctor's finding was informed by details of Claimant's usual coal mine employment. Furthermore, Dr. Zaldivar and Dr. Selby both stated in their reports and testified at their depositions that the arterial blood gas studies did not properly account for Price, Utah's altitude: because the test was conducted at a relatively high altitude, they stated, and because PO_2 values could be expected to drop linearly as altitude increased, the low PO_2 value should not be considered to show disability. Appendix C to 20 C.F.R. Part 718, however, requires that administrative law judges analyze arterial blood gas studies according to three ranges of altitude: from sea level to 2,999 above sea level; from 3,000 to 5,999 above sea level; and over 6,000 feet above sea level. The testing was performed in the second range, from 3,000 to 5,999 feet above sea level. The regulations do not contemplate further dividing testing results into narrower ranges, nor am I permitted to do so. Because Dr. Zaldivar's and Dr. Selby's statements are inconsistent with the regulations, I give their opinions regarding Claimant's disability little weight.

3. Employer Has Not Rebutted the Presumption that Mr. Kourianos Suffers from Pneumoconiosis

Because Mr. Kourianos has established that he was totally disabled, he has triggered the presumption that his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. Thus the burden shifts to the Respondent to demonstrate that Mr. Kourianos did not have legal or clinical pneumoconiosis (discussed in this section), or that Mr. Kourianos's totally disabling respiratory or pulmonary impairment is wholly unrelated to pneumoconiosis (discussed in Section 4 *infra*). 20 C.F.R. § 718.305.

The regulations define pneumoconiosis to include not only "clinical" but also "legal" pneumoconiosis:

> (a) For the purpose of the Act, "pneumoconiosis" means 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.
>
> > (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition

> includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, 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.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201.

There is no evidence that Claimant suffers from clinical pneumoconiosis, and Employer has rebutted the presumption that he does so suffer.

Dr. Gagon diagnosed chronic bronchitis caused in part by exposure to coal dust (as well as cigarette smoke)—*i.e.*, legal pneumoconiosis. Dr. Zaldivar diagnosed symptoms of bronchitis, but stated that if Claimant did suffer from bronchitis, that it was caused by smoking. Dr. Selby stated that Claimant's symptoms showed a "very strong presentation for the diagnosis of asthma" unrelated to coal mining, and stated "working in coal mines prohibits the inhalation of cigarette smoking, thus actually protecting the lungs."

I give little weight to Dr. Gagon's conclusion that coal dust exposure and cigarette smoke equally contributed to his respiratory condition, because his diagnosis is conclusory and not well-documented.

I also give little weight to Dr. Zaldivar's conclusion that Claimant's respiratory condition was caused solely by smoking, for several reasons. First, Dr. Zaldivar dismissed the notion that Claimant's exposure to coal dust might have led to his arterial blood gas study results because "[c]onsidering that the chest x-ray is normal and that the ventilatory study is normal, the only abnormality that could explain this drop in the PO_2 would be a low diffusion capacity of a pulmonary fibrosis or a bronchiolitis of a smoker." Dr. Zaldivar's opinion implies that arterial blood gas studies alone could not indicate the presence of coal workers' pneumoconiosis, but that pneumoconiosis *must* be seen via pulmonary function testing or x-rays—a position inconsistent with the regulations. Second, Dr. Zaldivar's assertion that Claimant's breathing problems were caused by smoking and not by exposure

to coal dust were based on an analysis of the general population, and not on an analysis specific to the miner: in finding that smoking and not coal dust exposure caused the symptoms of bronchitis he diagnosed, Dr. Zaldivar stated that "it is very important to remember that coal miners are human beings subject to all diseases and conditions of human beings and are affected by habits such as smoking just as the population at large is affected by it." Because his diagnosis is not specifically tied to Mr. Kourianos, I give it little weight. *See Consolidation Coal v. Director, OWCP [Beeler]*, 521 F.3d 723 (7th Cir. 2008) (affirming administrative law judge who discredited a doctor because the doctor "did not rely on information particular to [the miner] to conclude that smoking was the only cause of his obstruction").

I also give little weight to Dr. Selby's finding that Mr. Kourianos suffered from asthma, and that his asthma was unrelated to his coal mining and exacerbated by his smoking. First, Dr. Selby is the only physician to have diagnosed asthma, and he provides little basis for this differential diagnosis; his diagnosis of asthma is not well-documented and is inconsistent with the other medical evidence. Second, Dr. Selby's statement that "working in coal mines prohibits the inhalation of cigarette smoking, thus actually protecting the lungs" is contrary to the central purpose and function of the Act. *See* 30 U.S.C. § 901(a); *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992, 999 (7th Cir. 2005) (affirming administrative law judge's discrediting of a doctor who stated that coal mining had a "positive effect on [a miner's] health"

because it limited his smoking). For these reasons, I give Dr. Selby's opinion little weight.

The fifteen-year presumption shifts the burden to Employer to rebut the presumption that Claimant suffers from pneumoconiosis. I give little weight to any of the medical opinions regarding the existence of pneumoconiosis. Accordingly, I find that Employer has failed to rebut the presumption that Mr. Kourianos suffers from legal pneumoconiosis.

4. Employer Has Not Rebutted the Presumption that Mr. Kourianos's Disabling Respiratory or Pulmonary Impairment Was Caused by Pneumoconiosis

Employer may also rebut the presumption by establishing that pneumoconiosis did not contribute to Mr. Kourianos's pulmonary disability. Here, however, neither Dr. Zaldivar nor Dr. Selby diagnosed pneumoconiosis, and Employer has pointed to no other evidence to rebut the presumption that Mr. Kourianos's pneumoconiosis caused his total disability. Accordingly, Employer has not rebutted the presumption that Mr. Kourianos's disabling respiratory or pulmonary impairment was caused by pneumoconiosis.

5. Employer Has Not Rebutted the Presumption that Mr. Kourianos's Coal Mine Employment Caused His Pneumoconiosis

The Act and the regulations provide for a rebuttable presumption that pneumoconiosis arose out of coal mine employment if a miner with pneumoconiosis was employed in the mines for ten or more years. 30 U.S.C. § 921(c)(1); 20 C.F.R. § 718.203(b). Mr. Kourianos was

employed as a miner for more than twenty-seven years, and therefore is entitled to the presumption. Employer has not offered evidence sufficient to rebut the presumption. Indeed, Employer argues that Mr. Kourianos did not suffer from pneumoconiosis at all, and makes no argument in the alternative that the disease has been caused by another source. Employer has therefore failed to rebut the presumption that Mr. Kourianos's pneumoconiosis was caused by his coal mine employment.

FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO BENEFITS

1. Mr. Kourianos Is Entitled to Benefits Commencing in June 2012

In the case of a miner who is totally disabled due to pneumoconiosis, benefits commence with the month of onset of total disability due to pneumoconiosis. Medical evidence of total disability does not establish the date of entitlement; rather, it shows that a claimant became disabled at some earlier date. *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). Where the evidence does not establish the month of onset, benefits begin with the month that the claim was filed (unless the evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time). 20 C.F.R. Part 725.503(b); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006).

Because the evidence does not establish the month of onset, I find that Mr. Kourianos is entitled to benefits commencing with the month in which he filed his claim: June 2012.

2. Mr. Kourianos Has One Dependent for Purposes of Augmentation

Per the parties' stipulation, I find that for purposes of augmentation Mr. Kourianos has one dependent, his wife.

ORDER

Mr. Kourianos's claim for benefits under the Act is hereby **GRANTED**. Employer shall pay all benefits to which Mr. Kourianos is entitled commencing in June 2012.

SO ORDERED.

[SEAL]

Digitally signed by PAUL R. ALMANZA
DN; CN=PAUL R. ALMANZA,
OU=ADMINISTRATIVE LAW JUDGE,
O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

PAUL R. ALMANZA
Associate Chief Administrative Law Judge

Washington, D.C.

* * *

[*Notice of Appeal Rights and Service Sheet Omitted in the Printing of this Appendix*]

APPENDIX E

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington. DC 20001-8002
(202) 693-7300
(202) 693-7365 (FAX)

Case No. 2014-BLA-05171

[Filed April 12, 2016]

In the Matter of:	)
	)
TONY N. KOURIANOS,	)
Claimant,	)
	)
v.	)
	)
HIDDEN SPLENDOR RESOURCES, INC.,	)
Employer,	)
	)
and	)
	)
ROCKWOOD CASUALTY INSURANCE CO.,	)
Carrier,	)
	)
and	)
	)
DIRECTOR, OFFICE OF WORKERS'	)

COMPENSATION PROGRAMS,)
Party in Interest.)
)

ORDER DENYING EMPLOYER'S MOTION TO WITHDRAW STIPULATION AS RESPONSIBLE OPERATOR AND TO DISMISS HIDDEN SPLENDOR AS THE RESPONSIBLE OPERATOR AND SUPPLEMENTAL EVIDENTIARY ORDER AND BRIEFING SCHEDULE

PROCEDURAL HISTORY

Claimant filed this claim for benefits in June 2012. (DX 2). Hidden Splendor ("Employer") filed an Operator Response on November 1, 2012, contesting whether Claimant was exposed to coal dust while employed by Employer, and contesting whether Claimant was employed by Employer as a coal miner for at least one year. (DX 26). But on Nov. 30, 2012, Employer filed an Amended Operator Response accepting Responsible Operator ("R/O") status. (DX 27). Additionally, Employer sent to the District Director a fax titled "Hire Dates for Tony Kourianos" on February 6, 2013, which stated that from November 2010 to October 2011, Claimant worked both "in the mine" and "outside at the Loadout." (DX 11). Employer again accepted R/O status on May 20, 2013, in its response to Director's Schedule for the Submission of Additional Evidence ("SSAE"), (DX 29). The District Director issued a Proposed Decision and Order on August 22, 2013, in which Employer was named the R/O.

I held a formal hearing in this matter in Price, Utah, on August l2, 2014. In light of Claimant's testimony at the hearing regarding the job duties he performed for Employer, I permitted the parties to brief the issue of whether Employer should be allowed to withdraw its R/O stipulation. (Tr. at 71-72). On October 15, 2014, I received Employer's Brief in Support of Its Motion to Withdraw Stipulation as Responsible Operator and Motion to Dismiss Hidden Splendor as the Responsible Operator ("Employer's Br."). On October 29, 2014, I received the Office of Workers' Compensation Programs Director's Response to Employer's Combined Post-Hearing Brief ("Director's Resp.").

SECTION 725.463(11) BARS CONSIDERATION OF THE R/O ISSUE

Employer argues that I should consider whether Employer is the R/O in spite of its stipulation because its R/O status became "became a 'new issue' following [Claimant's] testimony," and as a new issue, it can be considered by an ALJ pursuant to 20 C.F.R. § 725.463(b). (Employer's Br. at 10).

Section 725.463(b) states, in part: "[a]n administrative law judge may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director," Employer argues that although it stipulated to its R/O status, that:

> [t]he R/O issue was not disputed at the District Director level because the documentary evidence submitted before Director supported a finding

> that Hidden Splendor was the correctly named R/O for this claim. The written documentation gave no indication that Mr. Kourianos was anything but a coal miner during his tenure at Hidden Splendor . . . . The Responsible Operator designation became a "new issue" following Mr. Kourianos's testimony that his last stint at Hidden Splendor was not as a miner, but as a security guard on a closed mine and therefore, § 725.463(b) should be applied.

(Employer's Br. at 10),

I find that the nature of Claimant's employment with Employer was "reasonably ascertainable" at the time the claim was before the district director, and that § 725.463(b) therefore prohibits my consideration of the R/O issue. The Benefits Review Board in *Clevinger v. Harman Mining Corp.,* No, 88-2575, slip op. at 3 (BRB Aug. 18, 1992), held that an ALJ failed to follow § 725.463(b) when the ALJ dismissed the R/O based on testimony at the hearing that claimant was not employed as a miner after December 31, 1969, when that issue was not controverted by the parties, and when the nature of claimant's employment was "easily ascertainable" by the parties at the district director level. In *Pack v. Mingo Coal and Coke Co.,* No. 06-0562, slip op. at 3-5 (BRB Apr. 26, 2007), the Board held that an ALJ erred in considering as a "new issue" whether a designated R/O was near financial insolvency based on the R/O president's hearing testimony when the R/O's insolvency was "readily apparent" from evidence in the record, including admitted statements that the R/O "owes more than [it] could possibly pay."

Here, Employer states that the "documentary evidence" and "written documentation" before the district director did not indicate that Claimant performed work other coal mining when employed by Hidden Splendor, and that his job duties only came to light after his testimony hearing. While I appreciate that Claimant's testimony at the hearing concerning his job duties for Employer came as a surprise, I note that one significant piece of written documentation related to the R/O issue, the "Hire Dates for Tony Kourianos" fax (DX 11), was submitted by Employer. Furthermore, this piece of evidence, which Employer states in its brief was prepared by Employer's "staff accountant" (*see* Employer's Br. at 4), distinguished between the periods when Claimant worked "in the mine" and "at the Loadout." Thus, Employer might have ascertained what job duties Claimant performed, and thereby determined whether Hidden Splendor should have been named the R/O, by interviewing its own agent regarding the evidence it submitted. Because Claimant's employment history was reasonably ascertainable based on evidence admitted into the record by Employer at the time that this claim was before the district director, I am prohibited by 20 C.F.R. § 725.463(b) from considering as a "new issue" whether Employer should not be designated the R/O. The Board has made it quite clear in *Clevinger* and *Pack* that I would err if I were to find otherwise.

Accordingly, I will not consider the portion of Employer's brief arguing that it is not the R/O. For the same reason—because it not relevant to any contested issue, and is in fact an issue that I am prohibited by 20 C.F.R. § 725.463 from considering—I give no weight to

Claimant's testimony regarding his job duties insofar as that testimony relates to Claimant's R/O status.

SUPPLEMENTAL EVIDENTIARY ORDER AND BRIEFING SCHEDULE

At the hearing I permitted the Director to submit Dr. Gagon' s supplemental report post-hearing, and provided the Employer the opportunity to submit rebuttal evidence or to depose Dr. Gagon. (Tr. at 30). I note the parties' cross-motions regarding admittance of Dr. Gagon's supplemental medical report, DX 39; however, this issue appears to have been resolved by Employer's deposition of Dr. Gagon.

I further note Employer's December 28, 2015 motion to depose Dr. Gagon and to submit his deposition testimony. On April 11, 2016, I received Employer's submission of Dr. Gagon's deposition. I hereby admit Dr. Gagon's deposition as Employer's Exhibit 12.

Accordingly, the record consists of the following and is now closed:

- ALJ Exhibits 1-4;[1]
- Director's Exhibits 1-39; and
- Employer's Exhibits 1-12.

Finally, I note that the parties have yet to submit post-hearing briefs on the merits of this claim. I ask that the parties submit post-hearing briefs postmarked no later than **Friday, May 13, 2016.** I anticipate

[1] I designate the November 20, 2015 Evidentiary Order ALJ Exhibit 3, and this Order ALJ Exhibit 4.

issuing a Decision and Order in this matter within thirty days after receiving the parties' briefs.

SO ORDERED.

[SEAL]

Digitally signed by PAUL R. ALMANZA
DN; CN=PAUL R. ALMANZA,
OU=ADMINISTRATIVE LAW JUDGE,
O=US DOL Office of Administrative Law
Judges, L=Washington, S=DC, C=US
Location: Washington DC

PAUL R. ALMANZA
Associate Chief Administrative Law Judge

Washington, D.C.

* * *

[*Service Sheet Omitted in the Printing of this Appendix*]

APPENDIX F

20 C.F.R. § 725.101 Definition and use of terms.

(a) Definitions. For purposes of this subchapter, except where the content clearly indicates otherwise, the following definitions apply:

* * *

(32) Year means a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days." A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

(i) If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. If a miner worked fewer than 125 working days in a year, he or she has worked a fractional year based on the ratio of the actual number of days worked to 125. Proof that

the miner worked more than 125 working days in a calendar year or partial periods totaling a year, does not establish more than one year.

(ii) To the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment must be ascertained. The dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it must be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment.

(iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table must be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

(iv) Periods of coal mine employment occurring outside the United States must not be considered in computing the miner's work history.

* * *

20 C.F.R. § 725.408 Operator's response to notification.

(a)(1) An operator which receives notification under §725.407 shall, within 30 days of receipt, file a response indicating its intent to accept or contest its identification as a potentially liable operator. The operator's response shall also be sent to the claimant by regular mail.

(2) If the operator contests its identification, it shall, on a form supplied by the district director, state the precise nature of its disagreement by admitting or denying each of the following assertions. In answering these assertions, the term "operator" shall include any operator for which the identified operator may be considered a successor operator pursuant to §725.492.

(i) That the named operator was an operator for any period after June 30, 1973;

(ii) That the operator employed the miner as a miner for a cumulative period of not less than one year;

(iii) That the miner was exposed to coal mine dust while working for the operator;

(iv) That the miner's employment with the operator included at least one working day after December 31, 1969; and

(v) That the operator is capable of assuming liability for the payment of benefits.

(3) An operator which receives notification under §725.407, and which fails to file a response within the time limit provided by this section, shall not be allowed

to contest its liability for the payment of benefits on any of the grounds set forth in paragraph (a)(2).

(b)(1) Within 90 days of the date on which it receives notification under § 725.407, an operator may submit documentary evidence in support of its position.

(2) No documentary evidence relevant to the grounds set forth in paragraph (a)(2) may be admitted in any further proceedings unless it is submitted within the time limits set forth in this section.

20 C.F.R. § 725.410 Submission of additional evidence.

* * *

(b) The schedule shall allow all parties not less than 60 days within which to submit additional evidence, including evidence relevant to the claimant's eligibility for benefits and evidence relevant to the liability of the designated responsible operator, and shall provide not less than an additional 30 days within which the parties may respond to evidence submitted by other parties. Any such evidence must meet the requirements set forth in § 725.414 in order to be admitted into the record.

* * *

20 C.F.R. § 725.412 Operator's response.

(a)(1) Within 30 days after the district director issues a schedule pursuant to §725.410 of this part containing a designation of the responsible operator liable for the

payment of benefits, that operator shall file a response with regard to its liability. The response shall specifically indicate whether the operator agrees or disagrees with the district director's designation.

(2) If the responsible operator designated by the district director does not file a timely response, it shall be deemed to have accepted the district director's designation with respect to its liability, and to have waived its right to contest its liability in any further proceeding conducted with respect to the claim.

(b) The responsible operator designated by the district director may also file a statement accepting claimant's entitlement to benefits. If that operator fails to file a timely response to the district director's designation, the district director shall, upon receipt of such a statement, issue a proposed decision and order in accordance with §725.418 of this part. If the operator fails to file a statement accepting the claimant's entitlement to benefits within 30 days after the district director issues a schedule pursuant to § 725.410 of this part, the operator shall be deemed to have contested the claimant's entitlement.

20 C.F.R. § 725.414 Development of evidence.

(b) Evidence pertaining to liability. (1) Except as provided by §725.408(b)(2), the designated responsible operator may submit evidence to demonstrate that it is not the potentially liable operator that most recently employed the claimant.

(2) Any other party may submit evidence regarding the liability of the designated responsible operator or any other operator.

(3) A copy of any documentary evidence submitted under this paragraph must be mailed to all other parties to the claim. Following the submission of affirmative evidence, the parties may submit rebuttal evidence in accordance with the schedule issued by the district director.

20 C.F.R. § 725.463 Issues to be resolved at hearing; new issues.

(a) Except as otherwise provided in this section, the hearing shall be confined to those contested issues which have been identified by the district director (see §725.421) or any other issue raised in writing before the district director.

(b) An administrative law judge may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director. Such new issue may be raised upon application of any party, or upon an administrative law judge's own motion, with notice to all parties, at any time after a claim has been transmitted by the district director to the Office of Administrative Law Judges and prior to decision by an administrative law judge. If a new issue is raised, the administrative law judge may, in his or her discretion, either remand the case to the district director with instructions for further proceedings, hear and resolve the new issue, or refuse to consider such new issue.

(c) If a new issue is to be considered by the administrative law judge, a party may, upon request, be granted an appropriate continuance.

20 C.F.R. § 725.495 Criteria for determining a responsible operator.

(a)(1) The operator responsible for the payment of benefits in a claim adjudicated under this part (the "responsible operator") shall be the potentially liable operator, as determined in accordance with §725.494, that most recently employed the miner.

(2) If more than one potentially liable operator may be deemed to have employed the miner most recently, then the liability for any benefits payable as a result of such employment shall be assigned as follows:

(i) First, to the potentially liable operator that directed, controlled, or supervised the miner;

(ii) Second, to any potentially liable operator that may be considered a successor operator with respect to miners employed by the operator identified in paragraph (a)(2)(i) of this section; and

(iii) Third, to any other potentially liable operator which may be deemed to have been the miner's most recent employer pursuant to §725.493.

(3) If the operator that most recently employed the miner may not be considered a potentially liable operator, as determined in accordance with §725.494, the responsible operator shall be the potentially liable operator that next most recently employed the miner. Any potentially liable operator that employed the

miner for at least one day after December 31, 1969 may be deemed the responsible operator if no more recent employer may be considered a potentially liable operator.

(4) If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title, and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph (a)(3) shall be inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of §725.494, the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

(b) Except as provided in this section and §725.408(a)(3), with respect to the adjudication of the identity of a responsible operator, the Director shall bear the burden of proving that the responsible operator initially found liable for the payment of benefits pursuant to § 725.410 (the "designated responsible operator") is a potentially liable operator. It shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with §725.494(e).

(c) The designated responsible operator shall bear the burden of proving either:

(1) That it does not possess sufficient assets to secure the payment of benefits in accordance with §725.606; or

(2) That it is not the potentially liable operator that most recently employed the miner. Such proof must include evidence that the miner was employed as a miner after he or she stopped working for the designated responsible operator and that the person by whom he or she was employed is a potentially liable operator within the meaning of §725.494. In order to establish that a more recent employer is a potentially liable operator, the designated responsible operator must demonstrate that the more recent employer possesses sufficient assets to secure the payment of benefits in accordance with §725.606. The designated responsible operator may satisfy its burden by presenting evidence that the owner, if the more recent employer is a sole proprietorship; the partners, if the more recent employer is a partnership; or the president, secretary, and treasurer, if the more recent employer is a corporation that failed to secure the payment of benefits pursuant to part 726 of this subchapter, possess assets sufficient to secure the payment of benefits, provided such assets may be reached in a proceeding brought under subpart I of this part.

(d) In any case referred to the Office of Administrative Law Judges pursuant to §725.421 in which the operator finally designated as responsible pursuant to § 725.418(d) is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the

reasons for such designation. If the reasons include the most recent employer's failure to meet the conditions of §725.494(e), the record shall also contain a statement that the Office has searched the files it maintains pursuant to part 726, and that the Office has no record of insurance coverage for that employer, or of authorization to self-insure, that meets the conditions of §725.494(e)(1) or (e)(2). Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim. In the absence of such a statement, it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim.

APPENDIX G

3266 South 125 West
Price, UT 84501-4462
Phone: 435-636-0520
Fax: 435-636-0817

Hidden Splendor Resources, Inc.

Fax

To:	Department of Labor Federal Black Lung Program Attention: Theresa Hobbs	**From:**	George L. Kontgas Senior Staff Accountant
Fax:	720-264-3110	**Pages:**	1 Including Cover
Phone:		**Date:**	February 6, 2013
Re:	Hire Dates for Tony Kourianos	**cc:**	

☐ Urgent ☐ For Review ☐ Please Comment
☐ Please Reply ☐ Please Recycle

- **Comments:**

December 26, 2006 to April 11, 2007 – In the Mine

November 16, 2010 to January 21, 2011 – In the Mine

April 5, 2011 to October 14, 2011 – Outside at the Loadout

DIRECTOR'S EXB. NO. 11
CONSISTING OF 2 PAGES

APPENDIX H

Pulmonary Function Study Testing Results
(May 6, 2010)

[*Fold-Out Exhibit, see next page*]

MR# 008024

Castleview Hospital
300 N. Hospital Dr.
Price, Utah 84501
435-637-4800

Name:	KOURIANOS, TONY M	ID:	DOB 08-15-50	BSA:	1.93	Date:	5/6/10
Doctor:	SHANE GAGON	Height:	70.0 in	Age:	59	Room:	OP
Tech:	JENNIFER CROUSE	Weight:	166.0 lbs	Sex:	Male	Race:	Caucasian

Pre-test comments:
COPD
Dyspnea: After any exertion
Cough: Productive Wheeze: Rare
Yrs Quit: 0 Pk Yrs: 5 Pks/Day: 0.25 Yrs Smk: 20 Tbco Prod: Cigarette
Post-Test Comments:
PFT WITHOUT BRONCHODILATOR
PATIENT EFFORT GOOD
NO BRONCHODILATOR USED FOR THIS TEST

	PRE-BRONCH			POST-BRONCH		
	Actual	**Pred.**	**%Pred.**	**Actual**	**%Pred**	**%Chng**
SPIROMETRY						
FVC (L)	4.39	4.47	98			
FEV0.5 (L)	2.80	3.00	93			
FEV1 (L)	3.43	3.59	96			
FEV3 (L)	3.97	4.40	90			
FEV0.5/FVC (%)	64	67				
FEV1/FVC (%)	78	78				
FEV3/FVC (%)	90	92				
FEF Max (L/sec)	9.21	7.69	120			
FEF 25-75% (L/sec)	3.08	3.64	85			
Expiratory Time (sec)	6.61					
FIVC (L)	3.64					
FIF 25-75% (L/sec)	3.80					
FEF50%/FIF50% (%)	0.81	0.9-1.0				
MVV (L/min)	136	142	96			
RR (br/min)	56.39					
TV (L/breath)	2.41					
LUNG VOLUMES						
SVC (L)	4.13	4.77	87			
IC (L)	2.98	3.73	80			
ERV (L)	1.16	1.41	82			

Spirometry Normal
Lung volumes IC + ERV mildly reduced

5/6/10

APPENDIX I

Arterial Blood Gas Testing Results
(August 23, 2012)

[*Fold-Out Exhibit, see next page*]

Report of Arterial Blood Gas Study

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs
Division of Coal Mine Workers' Compensation

OMB No. 1240-0023
Expires 10/31/2014

This report is authorized by law (30 USC 901 et. seq.) and required to obtain a benefit. The results of this interpretation will aid in determining the miner's eligibility for black lung benefits. Disclosure of a Social Security number is voluntary. The failure to disclose such number will not result in the denial of any right, benefit, or privilege to which the claimant may be entitled. This method of collecting information complies with the Freedom of Information Act, the Privacy Act of 1974, and OMB Circular No. 108.

Instructions: Summarized below are the procedures to be followed in administering this test. The arterial blood gas study shall initially be administered at rest and in a sitting position. If the results of the test at rest are not within the values indicated on the applicable table shown on the reverse side of this form, an exercise blood-gas study shall be offered to the miner unless medically contraindicated. *If an exercise blood gas test is administered, blood shall be drawn during exercise. Complete instructions for administration of this test and table of values may be found in 20 CFR Part 718, Subpart B, 718.105, and appendix C.

1. Name of Miner (First, middle, last)	2. SSN or DOL Claim No.	3. Date of Test (mm/dd/yyyy)
Tony N Kourianos	XXX-XX-7452	8/7/12

4. Miner's: 62 Age; 72 Height; ____ Weight

5. Altitude: (Check one)
- ☐ 0 to 2999 feet above sea level
- ☒ 3000 to 5999 feet above sea level
- ☐ 6000 feet or more above sea level

6. Barometric Pressure: 24.7
Equipment Temperature: 21 C°

7. Site of Puncture: Right Radial x2 Indwelling line: ____ Single stick: Rest + Exercise

8a.

	Time Sample Drawn	Iced Yes	Iced No	Time Sample Analyzed
Rest:	0909	____	X	0910
Exercise:*	0933	____	X	1935

b. Pulse rate at time sample drawn: Rest: 70 Exercise: 98

c. Was equipment calibrated before and after each test? ☒ Yes ☐ No

d. Type of exercise and duration: * Treadmill x 14:05 SpO2 91% HR 128 10% Grade 1.7 mph

9. Test Results	Predicted Normal Range	Observed Values — Resting	Observed Values — Exercise if Administered*
pCO_2 (mmHg)	28-41	39	33
pO_2 (mmHg)	57-68	68	59
pH	7.35-7.45	7.41	7.45

RECEIVED
US DEPT OF LABOR
OCT 15 2012
BLACK LUNG PROGRAM
DENVER CO

RECEIVED
US DEPT OF LABOR
OCT 25 2012
BLACK LUNG PROGRAM
DENVER CO

* Is the exercise portion of this study medically contraindicated? ☐ Yes ☒ No
If YES, for what reason?

10. Additional Comments: ABG Correlated with Pulse Oximetry

11a. Facility where test performed: Cashelmere Hospital

11b. Provider Number:

12. Print or type name of technician performing the study: Heather Crouse RRT

13. Print or type the name of the physician:

14. Physician's Signature: I certify that the information furnished is correct and am aware that my signature attests to the accuracy of the results reported. I am also aware that any person who willfully makes any false or misleading statement or representation in support of an application for benefits shall be guilty under Title 30 USC 941 of a misdemeanor and subject to a fine of up to $1000, or imprisonment for up to one year, or both.

Signature: [signature] **Date:** 10/9/12

CM-1159 (Rev.05-11)

APPENDIX J

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation
Division of Coal Mine Workers' Compensation
PO Box 25603
Denver, CO 80225-0603
Phone: 1-800-366-4612
FAX: (720) 264-3110

NOTICE OF CLAIM

Date Issued: October 23, 2012

Miner's Name: Tony N Kourianos	
Claimant's Name/Address Tony N Kourianos 974 N Smith Dr Price, UT 84501-1854	Claim Number XXX-XX-7452 LM C
Potentially Liable Operator/Address Hidden Splendor Resources Inc 3266 South 125 West Price, UT 84501	Insurance Carrier/Address Rockwood Casualty Insurance Co 654 Main St Rockwood, PA 15557 Policy Number: WC455592

The claimant named above has filed a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 et seq. We are currently developing the claim to determine the claimant's eligibility. Enclosed is a copy of the claimant's application and any evidence OWCP has obtained to date relating to the miner's employment.

This Notice of Claim is issued pursuant to 20 C.F.R. 725.407. We have identified you as a 'potentially liable operator' in this claim. A "potentially liable operator" is an employer of the miner (or a successor of an employer pursuant to 20 C.F.R. 725.492) who may be held liable for the payment of benefits should the claimant be found entitled to them. Designation as a potentially liable operator does not constitute a determination that you are in fact liable. Where OWCP's records indicate you obtained a policy of insurance, and the claim falls within such policy, we are sending a copy of this notice to your insurer. You and your insurer shall be considered parties to the claim unless an adjudication officer dismisses you and you are not thereafter notified again of your potential liability.

Within 30 days of receipt of this Notice of Claim, you (or your insurer) must file a response pursuant to 20 C.F.R. 725.408 indicating your intent to accept or contest your identification as a potentially liable operator. This time period may be extended for good cause shown if you file an extension request with the District Director prior to expiration of the 30 days. We have enclosed a form entitled 'Operator Response to Notice of Claim' for your use. Please send your response and any other

correspondence to the Office of Workers' Compensation Programs, Division of Coal Mine Workers' Compensation, at the address shown above.

If you accept liability for the payment of benefits should the claimant obtain an award (*i.e.* you accept that you are the 'responsible operator'), please mark the box in Section A (entitled 'Acceptance of Liability') on the Operator Response to Notice of Claim. **Accepting liability means only that you are the operator liable for the payment of any benefits due; it does not constitute a stipulation or admission that the claimant is entitled to benefits.**

If you wish to contest your status as a potentially liable operator, you must state the precise nature of your disagreement by accepting or denying each of the five assertions listed in Section B (entitled 'Contest of Potential Liability – Operator Assertions) on the Operator Response to Notice of Claim. The assertions are limited to information about your employment of the miner and your status as an operator. If you deny any of the five operator assertions, you have 90 days from your receipt of this notice to submit documentary evidence in support of your response. This time period may be extended for good cause shown if you file an extension request with the District Director prior to expiration of the 90 days. **Absent extraordinary circumstances, no documentary evidence relevant to the assertions set forth in 20 C.F.R. 725.408(a)(2) (reiterated in Section B of the Operator Response to Notice of Claim) may be admitted in any further proceedings unless it is**

submitted within 90 days of your receipt of this notice or an extended period authorized by the District Director.

If you do not respond within 30 days of your receipt of this Notice of Claim, you will not be allowed to contest your liability for payment of benefits on any of the grounds set forth in 20 C.F.R. 725.408(a)(2) (reiterated in Section B of the Operator Response to Notice of Claim).

Please note that your response need not include evidence about any other potentially liable operator and its employment of the miner. At the conclusion of the initial evidence-gathering period, the District Director will issue a Schedule for the Submission of Additional Evidence pursuant to 20 C.F.R. 725.410. In that schedule, the District Director will select and designate one "responsible operator" from the potentially liable operators notified. All parties will then be given an opportunity to present evidence regarding the liability of the designated responsible operator or any other operator.

NOTE: THE 'OPERATOR RESPONSE TO NOTICE OF CLAIM' MUST INCLUDE THE ORIGINAL SIGNATURE OF AN AUTHORIZED OFFICIAL FOR THE POTENTIALLY LIABLE RESPONSIBLE OPERATOR OR ITS INSURANCE CARRIER. WE CANNOT ACCEPT A COPY OF THE RESPONSE SENT BY FAX IN LIEU OF THE ORIGINAL DOCUMENT.

We are available to assist you with this process. I may be contacted at the address and telephone number shown above.

Sincerely,

/s/Mark C Helfrich
Mark C Helfrich
Claims Examiner

Enclosures: Copy of claim and evidence relating to miner's employment history Operator Response to Notice of Claim form (Form No. CM-2970a)

[*Proof of Service Omitted in the Printing of this Appendix*]

APPENDIX K

Pulmonary Function Study Testing Results
(August 23, 2012)

[*Fold-Out Exhibit, see next page*]

MH 00824

Castleview Hospital

300 N. Hospital Dr.
Price, Utah 84501
435-637-4800

Name:	KOURIANOS, TONY M	ID:	DOB 08-15-50	BSA:	1.89	Date:	8/23/12
Doctor:	SHANE GAGON	Height:	72.0 in	Age:	62	Room:	OP
Tech:	JENNIFER CROUSE	Weight:	150.0 lbs	Sex:	Male	Race:	Caucasian

Pre-test comments:
BLACK LUNG DETERMINATION
Dyspnea: After severe exertion
Cough: Productive Wheeze: Frequent
Yrs Quit: 0 Pk Yrs: 20 Pks/Day: 0.5 Yrs Smk: 40 Tbco Prod: Cigarette
Post-Test Comments:
PFT
PATIENT EFFORT GOOD
NO BRONCHODILATOR INDICATED FOR THIS TEST

	PRE-BRONCH			POST-BRONCH		
	Actual	Pred.	%Pred.	Actual	%Pred	%Chng
SPIROMETRY						
FVC (L)	5.33	4.81	111			
FEV0.5 (L)	3.03	3.12	97			
FEV1 (L)	3.80	3.84	99			
FEV3 (L)	4.73	4.59	103			
FEV0.5/FVC (%)	57	65				
FEV1/FVC (%)	71	77				
FEV3/FVC (%)	89	92				
FEF Max (L/sec)	9.67	7.50	129			
FEF 25-75% (L/sec)	2.50	3.82	66			
Expiratory Time (sec)	6.84					
FIVC (L)	4.64					
FIF 25-75% (L/sec)	4.43					
FEF50%/FIF50% (%)	0.82	0.9-1.0				
MVV (L/min)	123	145	85			
RR (br/min)	55.25					
TV (L/breath)	2.23					
LUNG VOLUMES						
SVC (L)	5.00	5.01	100			
IC (L)	2.79	3.67	76			
ERV (L)	2.21	1.51	147			

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