

U.S. Department of Labor

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



BRB No. 22-0039 BLA

MARK ANTHONY HOWARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROCKSPRING DEVELOPMENT,	)	
INCORPORATED	)	
	)	DATE ISSUED: 04/07/2023
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III,  
Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for Claimant.

T. Jonathan Cook (Cipriani & Werner, PC), Charleston, West Virginia, for  
Employer.

Before: BUZZARD, ROLFE, JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) John P. Sellers, III's Decision  
and Order Awarding Benefits (2020-BLA-05867) rendered on a claim filed pursuant to the  
Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case  
involves a miner's claim filed on July 2, 2018.

The ALJ found Claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).<sup>1</sup> The ALJ further found Employer did not rebut the presumption and, therefore, awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and thereby invoked the Section 411(c)(4) presumption.<sup>2</sup> Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

### **Section 411(c)(4) Invocation – Total Disability**

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.<sup>4</sup> 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on

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<sup>1</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b).

<sup>2</sup> We affirm, as unchallenged, the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

<sup>3</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Hearing Transcript at 12, 23.

<sup>4</sup> We affirm, as unchallenged, the ALJ's finding that Claimant's usual coal mine work as a general laborer required heavy to very heavy manual labor because he was required to lift and pull at least 100 pounds every day. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5.

qualifying<sup>5</sup> pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The ALJ found Claimant established total disability based on Dr. Shah's medical opinion and in consideration of the evidence as a whole.<sup>6</sup> Decision and Order at 7-14. Employer argues the ALJ erred in finding Dr. Shah's opinion adequately reasoned since it is based on non-qualifying pulmonary function and blood gas studies, while Dr. Rosenberg's contrary opinion is more consistent with the objective testing. Employer contends Dr. Rosenberg's opinion is also adequately reasoned and thus the ALJ should have at least found the opinions of Drs. Shah and Rosenberg in equipoise and that Claimant did not satisfy his burden of proof. Employer's Brief at 10-13 (unpaginated). We disagree.

Contrary to Employer's contention, the regulations specifically provide that despite non-qualifying pulmonary function studies or blood gas studies, total disability may be established if a physician, exercising reasoned medical judgment based on medically acceptable diagnostic techniques, concludes the miner's respiratory or pulmonary condition prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). Thus, a physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties").

Dr. Shah performed the Department of Labor's complete pulmonary evaluation of Claimant on August 14, 2018. Director's Exhibit 19. She described Claimant's last coal mine job as requiring "heavy and very heavy manual labor." *Id.* at 6. Although Dr. Shah acknowledged Claimant's pulmonary function studies and blood gas studies were non-

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<sup>5</sup> A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

<sup>6</sup> The ALJ found the opinions of Drs. Sikder and Lafferty that Claimant is totally disabled not well-reasoned. Decision and Order at 10-11.

qualifying, she indicated they showed a restrictive impairment with decreases in Claimant's total lung and diffusing capacities and abnormal gas exchange during exercise. *Id.* at 5-6. Further noting Claimant's reduced peak oxygen consumption demonstrated on the incremental exercise blood gas test she conducted, Dr. Shah opined Claimant does "not retain the pulmonary capacity to perform sustained activity for [a] prolong[ed] period of time to meet [the] physical demand[s] of his last coal mine job."<sup>7</sup> *Id.* at 6.

In a supplemental report dated March 26, 2020, Dr. Shah reviewed the results of Dr. Rosenberg's examination, objective testing, and narrative report. Director's Exhibit 40. She noted Claimant became lightheaded and felt faint after two minutes of exercise during Dr. Rosenberg's pulse oximetry test and had shortness of breath on exertion while walking up a hill or climbing steps. *Id.* at 12, 14. She also noted Dr. Rosenberg's examination corroborated Claimant's self-reported symptoms of shortness of breath while walking, and she reiterated her opinion that he is totally disabled for the same reasons she provided in her initial report. *Id.* at 14-15.

We see no error in the ALJ's permissible conclusion that Dr. Shah's opinion is reasoned and documented because she examined Claimant, understood the exertional requirements of his usual coal mine work, considered additional medical evidence beyond her own examination, and explained why Claimant's symptoms and objective test results preclude him from performing heavy manual labor required in his usual coal mine job. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439 (4th Cir. 1997); Decision and Order at 9-10; Director's Exhibits 19, 40.

We also affirm the ALJ's rejection of Dr. Rosenberg's opinion that Claimant is not totally disabled. Dr. Rosenberg evaluated Claimant on May 22, 2019. Director's Exhibit 36. He opined the pulmonary function studies showed no obstructive or restrictive impairment. *Id.* at 5-6. He conducted a resting blood gas study and pulse oximetry exercise

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<sup>7</sup> Dr. Shah described Claimant's usual work in underground coal mine employment as primarily operating a continuous miner, but noted he also performed several other duties such as building cribs, laying tracks, building brattices, cleaning the mine tails, laying water lines (which required pulling and dragging), drilling and shooting, building a metal overcast to prevent rock from falling, cutting the belt line, and setting belt heads. Director's Exhibit 19 at 4. Additionally, he lifted bags of rock dust weighing fifty pounds each, lifted curtains weighing seventy-five pounds each, and carried miner cables weighing fifty to seventy-five pounds. *Id.* at 4. She also noted he did "repetitive lifting all day long," ranging from 10 pounds to 110 pounds. *Id.*

test, but noted Claimant stopped exercising after two minutes because he became dizzy and feared he would “pass out.” *Id.* at 6. He reported Claimant’s resting PO2 value was normal and he did not desaturate with exercise. *Id.*

In his June 28, 2019 report, Dr. Rosenberg reviewed Dr. Shah’s medical testing but concluded that Claimant has no respiratory or pulmonary impairment based on the results of his own examination.<sup>8</sup> Director’s Exhibit 36. He did not explain why he disagreed with Dr. Shah’s assessment. *Id.*

The ALJ permissibly found Dr. Rosenberg’s opinion unpersuasive because he reviewed but did not address Dr. Shah’s exercise testing, which Dr. Shah described as showing Claimant has insufficient oxygen consumption to perform heavy manual labor. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 12. The ALJ further noted that while Dr. Rosenberg indicated Claimant did not desaturate with exercise during his own testing, he did not adequately explain how Claimant could perform heavy manual labor when he could not exercise for more than a few minutes during Dr. Rosenberg’s examination. Decision and Order at 12. Because the ALJ acted within his discretion in finding Dr. Rosenberg’s opinion unpersuasive, we affirm his decision to give it “little probative weight.” *Id.*; *see Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 439.

We thus reject Employer’s contention that the ALJ should have found the medical opinions in equipoise as to whether Claimant is totally disabled. The ALJ had discretion to evaluate the conflicting evidence, draw appropriate inferences, and assess probative value, which he did here. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 439. Employer’s arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the ALJ’s finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. Decision and Order at 12-14.

Consequently, we affirm the ALJ’s finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. As Employer does not challenge the ALJ’s findings that it did not rebut the presumption, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), we affirm the award of benefits.

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<sup>8</sup> Dr. Rosenberg also prepared a May 4, 2021 supplemental report, but it does not further discuss Dr. Shah’s opinion or testing. Employer’s Exhibit 3.

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

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge