



BRB No. 25-0191 BLA

PRESTON D. HESS

Claimant-Respondent

v.

ISLAND CREEK COAL COMPANY

Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 08/27/2026

DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Modification of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

Before: ROLFE, Acting Chief Administrative Appeals Judge, JONES and ULMER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Modification (2016-BLA-05404) of Administrative Law Judge Francine L. Applewhite, rendered on a subsequent claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). This case involves Claimant's second request for modification of a

subsequent claim filed on April 10, 2008, and is before the Benefits Review Board for a third time.

In her initial March 11, 2020 Decision and Order Granting Second Request for Modification (First Decision and Order), the ALJ credited Claimant with thirty years of underground coal mine employment based on the parties' stipulation. First Decision and Order at 3. She also found Claimant established a totally disabling respiratory or pulmonary impairment based on the arterial blood gas studies and medical opinions. *Id.* at 17-18; 20 C.F.R. §718.204(b)(2)(ii), (iv). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. First Decision and Order at 18; 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305. She further found Employer did not rebut the presumption and awarded benefits. First Decision and Order at 18-20.

In consideration of Employer's appeal, the Board affirmed the ALJ's findings that Claimant had thirty years of underground coal mine employment and that the arterial blood gas studies support total disability. *Hess v. Island Creek Coal Co.*, BRB No. 20-0238 BLA, slip op. at 2 n.4, 6 (Aug. 11, 2021) (unpub.). However, the Board held she erred in weighing the medical opinion evidence on the issue of total disability. *Id.* at 6-9. The Board also concluded the ALJ erred in weighing the evidence on rebuttal of the Section 411(c)(4) presumption. *Id.* at 10-14. Thus, the Board vacated her conclusion Claimant established total disability and invoked the presumption and the award of benefits. *Id.* at 9-10. The Board remanded the case with instructions for the ALJ to reconsider whether Claimant established a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2). *Id.* at 14-15. Specifically, the Board instructed the ALJ to identify the exertional requirements of Claimant's usual coal mine employment, reconsider the medical opinions, determine whether the opinions of Drs. Jonkers, Basheda, and Castle are well-reasoned and documented, and weigh all the relevant evidence together to determine whether Claimant is totally disabled and has invoked the Section 411(c)(4) presumption. *Id.* The Board further ordered that, in doing so, she must resolve the conflict in the opinions of Drs. Basheda and Forehand as to the reliability of a pulse oximetry test relative to that of a blood gas study and address Dr. Basheda's statements that the variability in Claimant's blood gas studies may reflect a variable, rather than fixed, impairment. *Id.*

Upon remand, in her September 13, 2022 Decision and Order Denying Second Request for Modification (Second Decision and Order), the ALJ found Claimant failed to establish total disability by any method. Second Decision and Order at 5-10. With respect to the medical opinions, the ALJ summarized Dr. Forehand's opinion that Claimant is totally disabled and the contrary opinions of Drs. Castle and Basheda that he is not totally disabled. *Id.* at 8-10. She found all three opinions reasoned and documented, afforded some weight to all the opinions, and found the overall medical opinion evidence does not

support a finding total disability. *Id.* at 10. She therefore found Claimant could not invoke the Section 411(c)(4) presumption. *Id.* Because Claimant failed to establish total disability, an essential element of entitlement, she denied benefits. *Id.*

In consideration of Claimant's pro se appeal and Employer's cross-appeal, the Board noted the ALJ erred in reconsidering the arterial blood gas study evidence, and it reinstated its affirmance of her original determination that the arterial blood gas study evidence supports a finding of total disability. *Hess v. Island Creek Coal Co.*, BRB Nos. 22-0523 BLA & 22-0523 BLA-A, slip op. at 4-5 (Dec. 18, 2023) (unpub.). The Board held the ALJ's error with respect to reconsidering the arterial blood gas testing may have affected her weighing of the medical opinions on the issue of total disability. *Id.* at 2-3. The Board further held the ALJ failed to follow its remand instructions to resolve the conflict in the opinions of Drs. Basheda and Forehand as to the reliability of a pulse oximetry test relative to that of a blood gas study and to address Dr. Basheda's statements that the variability in Claimant's blood gas studies may reflect a variable, rather than fixed, impairment. *Id.* at 5-6; *Hess*, BRB No. 20-0238 BLA, slip op. at 14-15.

Thus, the Board vacated the ALJ's conclusion that Claimant failed to establish total disability and the denial of benefits. *Hess*, BRB Nos. 22-0523 BLA & 22-0523 BLA-A, slip op. at 6-7. The Board again remanded the case to the ALJ with instructions to reconsider whether the medical opinion evidence supports a finding of total disability taking into consideration that the arterial blood gas studies support total disability. *Id.* at 7. The Board again specifically directed the ALJ to resolve the conflict in the opinions of Drs. Basheda and Forehand as to the reliability of a pulse oximetry test relative to that of a blood gas study and to address Dr. Basheda's statements that the variability in Claimant's blood gas studies may reflect a variable, rather than fixed, impairment. *Id.*

In her January 29, 2025 Decision and Order on Remand Granting Modification (Third Decision and Order), the ALJ concluded Claimant established a totally disabling respiratory or pulmonary impairment based on the arterial blood gas studies and medical opinions. Third Decision and Order at 7, 9; 20 C.F.R. §718.204(b)(2)(ii), (iv). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis¹ at Section 411(c)(4) of the Act.² Third Decision and Order at 10; 30

¹ She thus found Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §§725.309, 725.310.

² 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); 20 C.F.R. §718.305. The Board previously

U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305. She further found Employer did not rebut the presumption and awarded benefits. Third Decision and Order at 10-12.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and that it failed to rebut the presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs, filed a response.

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

The ALJ may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). In considering whether a change in conditions has been established, the ALJ must perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence establishes at least one element of entitlement that defeated an award in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). An ALJ may correct any mistake of fact, "including the ultimate issue of benefits eligibility." *Jessee v. Director, OWCP*, 5 F.3d 723, 724-26 (4th Cir. 1993).

Invocation of the Section 411(c)(4) Presumption – 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.⁴ *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on

affirmed the ALJ's finding of thirty years of underground coal mine employment based on the parties' stipulation. *Hess v. Island Creek Coal Co.*, BRB No. 20-0238 BLA, slip op. at 2 n.4, 6 (Aug. 11, 2021) (unpub.).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 7.

⁴ The Board previously affirmed the ALJ's finding that Claimant's usual coal mine employment as a shuttle car operator "required him to engage in a heavy level of exertion."

qualifying pulmonary function studies or arterial blood gas studies,⁵ evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See 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 total disability based on the arterial blood gas study evidence, the medical opinion evidence, and the evidence as a whole.⁶ Decision and Order at 6-9.

Medical Opinion Evidence

The ALJ summarized Dr. Forehand's opinion that Claimant is totally disabled and the contrary opinions of Drs. Castle and Basheda.⁷ Third Decision and Order at 7-9; *see* Director's Exhibits 41, 65, 70, 91, 99; Employer's Exhibits 11, 12. The ALJ afforded Dr. Forehand's opinion "some weight," finding it well-reasoned and well-documented as supported by the arterial blood gas study results, review of the data and medical evidence

Hess v. Island Creek Coal Co., BRB Nos. 22-0523 BLA & 22-0523 BLA-A, slip op. at 4 n.7 (Dec. 18, 2023) (unpub.).

⁵ A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields results that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

⁶ The Board previously affirmed the ALJ's findings that the pulmonary function study evidence did not support a finding of total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. *Hess*, BRB Nos. 22-0523 BLA & 22-0523 BLA-A, slip op. at 4 n.9; 20 C.F.R. §718.204(b)(2)(i), (iii).

⁷ The record also includes a report and a supplemental report from Dr. Jonkers, who indicated she has treated Claimant for chronic obstructive pulmonary disease and coal workers' pneumoconiosis since 2011. Claimant's Exhibits 5, 12. She stated Claimant "has severe bronchitis which has severely limited his life" and he "is now dyspneic with talking." Claimant's Exhibit 12. She noted Claimant's FEV1 is "less than 70% of predicted despite treatment with inhaled medications" and thus Claimant is "impaired to the point where he could not work in the mines or any other job." *Id.* The Board previously held the ALJ permissibly discredited Dr. Jonkers's opinion because she found it does "not include clinical findings, except for the results of one undated [pulmonary function study], and contains only limited and general observations of [] Claimant." *Hess*, BRB Nos. 22-0523 BLA & 22-0523 BLA-A, slip op. at 5 n.10.

in the record, and Claimant's history of treatment. Third Decision and Order at 9. She gave Dr. Basheda's opinion reduced weight as she found it partially based on an incorrect statement that Claimant's arterial blood gas studies did not demonstrate any significant impairment prior to the March 2017 study. *Id.* The ALJ did not discuss Dr. Basheda's reliance on an ambulatory pulse oximetry test or the conflict between Drs. Basheda and Forehand as to its reliability relative to an arterial blood gas study. *See id.* Nor did the ALJ discuss Dr. Basheda's statements that the variability in Claimant's blood gas studies may reflect a variable, rather than fixed, impairment and how that variability might affect his conclusion Claimant is not totally disabled. *See id.*

The ALJ also afforded reduced weight to Dr. Castle's opinion, finding he conflated the issues of total disability and disability causation based on his statement that while Claimant had the capacity to return to his last coal mine employment, he might be disabled due to a bronchial condition. Third Decision and Order at 9. Having accorded Dr. Forehand's opinion some weight, but reduced weight to the contrary opinions of Drs. Castle and Basheda, the ALJ found the overall medical opinion evidence supports a finding of total disability. *Id.*

Employer argues the ALJ erred in failing to comply with the Board's prior remand instructions by not resolving the conflict in the opinions of Drs. Basheda and Forehand as to the reliability of a pulse oximetry test relative to that of a blood gas study. Employer's Brief at 6; *Hess*, BRB Nos. 22-0523 BLA & 22-0523 BLA-A, slip op. at 7. Employer further argues the ALJ failed to comply with the Board's prior instructions to address Dr. Basheda's statements that the variability in Claimant's blood gas studies may reflect a variable, rather than fixed, impairment. Employer's Brief at 9; *Hess*, BRB Nos. 22-0523 BLA & 22-0523 BLA-A, slip op. at 7. We agree.

When the Board remands a case, the ALJ must comply with its instructions and "implement both the letter and spirit of the . . . mandate," absent appropriate legal basis for not applying the mandate rule.⁸ *See Edd Potter Coal Co. v. Dir., OWCP [Salmons]*, 39 F.4th 202, 209-10 (4th Cir. 2022) (quoting *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993)); *see also Scott v. Mason Coal Co.*, 298 F.3d 263, 267 (4th Cir. 2007). In our last remand, we again instructed the ALJ to "resolve the conflict in the opinions of Drs.

⁸ *See, e.g., Invention Submission Corp. v. Dudas*, 413 F.3d 411, 415 (4th Cir. 2005) ("Deviation from the mandate rule is permitted only in a few exceptional circumstances, which include (1) when 'controlling legal authority has changed dramatically'; (2) when 'significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light'; and (3) when 'a blatant error in the prior decision will, if uncorrected, result in a serious injustice.'") (citations omitted).

Basheda and Forehand as to the reliability of a pulse oximetry test relative to that of a blood gas study[,]” and to “address Dr. Basheda’s statements that the variability in Claimant’s blood gas studies may reflect a variable, rather than fixed, impairment.” *Hess*, BRB Nos. 22-0523 BLA & 22-0523 BLA-A, slip op. at 6; *Hess*, BRB No. 20-0238 BLA, slip op. at 14-15. The ALJ did not resolve the conflict nor address Dr. Basheda’s statements regarding the variability of the blood gas studies.

Based on the foregoing, we vacate the ALJ’s finding that the medical opinion evidence supports finding total disability and that the evidence as a whole establishes total disability. 20 C.F.R. §718.204(b)(2). We further vacate her findings that Claimant established a basis for modification, 20 C.F.R. §725.310(a), and invoked the Section 411(c)(4) presumption and that Employer failed to rebut the presumption. We therefore vacate the award of benefits and remand the case for further consideration.

Remand Instructions

On remand, the ALJ must reconsider whether the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv). The ALJ must explain the weight afforded the medical opinions of Drs. Forehand, Basheda, and Castle based on the physicians’ comparative credentials, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Milburn Colliery v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). The ALJ must then weigh all relevant evidence together to determine whether Claimant is totally disabled and has invoked the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §§718.204(b)(2), 718.305. In doing so, the ALJ must comply with the Board’s earlier remand instructions to resolve the conflict in the opinions of Drs. Basheda and Forehand as to the reliability of a pulse oximetry test relative to that of a blood gas study and address Dr. Basheda’s statements that the variability in Claimant’s blood gas studies may reflect a variable, rather than fixed, impairment.⁹ Director’s Exhibit 99 at 33; Claimant’s Exhibit 13 at 4; Employer’s Exhibit 11 at 19, 24-25.

If the ALJ finds Claimant has invoked the Section 411(c)(4) presumption, she must determine whether Employer rebutted the presumption by establishing Claimant does not have clinical or legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). If Employer fails to establish Claimant has neither form of pneumoconiosis, the ALJ must then determine whether Employer has established “no part of [Claimant’s] total disability was caused by

⁹ The Board’s identification of these errors in her analysis of the medical opinions constitutes the law of the case.

pneumoconiosis as defined in [20 C.F.R.] §718.201.” 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015). If Claimant fails to establish total disability, an essential element of entitlement, the ALJ must deny benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). The ALJ must explain the bases for her findings in accordance with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, we vacate the ALJ’s Decision and Order on Remand Granting Modification and remand this case for further consideration in accordance with this opinion.

SO ORDERED.

JONATHAN ROLFE, Acting Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge