U.S. Department of Labor

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

BRB No. 22-0443 BLA

DONNIE DEEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG TRACK COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 01/31/2024
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 on Remand Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

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

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

JONES, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order on Remand Granting Benefits (2018-BLA-06147) rendered on a subsequent claim filed on September 15, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Benefits Review Board for the second time.

In her April 24, 2020 Decision and Order Granting Benefits, the ALJ found Big Track Coal Co., Inc. (Big Track), is the properly designated responsible operator. She credited Claimant with at least fifteen years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, she 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),[2] and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).[3] She further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant filed a prior claim for benefits on August 10, 2009. Director's Exhibit 1. The Benefits Review Board affirmed ALJ Richard T. Stansell-Gamm's denial of it on June 21, 2013, because Claimant failed to establish pneumoconiosis. *Deel v. Big Track Coal Co.*, BRB No. 12-0529 BLA (June 21, 2013) (unpub.).

[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) (2018); 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1);

Employer appealed, and the Board rejected Employer's challenges to the constitutionality of the ALJ's appointment,[4] to her findings that Big Track is the responsible operator, and that Claimant established a totally disabling respiratory or pulmonary impairment. *Deel v. Big Track Coal Co.*, BRB No. 20-0301 BLA, slip op. at 3 n.4, 3-7 (Sept. 24, 2021) (unpub.). The Board further held, however, that the ALJ erred in finding Claimant established at least fifteen years of underground coal mine employment and thus vacated her findings that Claimant invoked the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and established a change in an applicable condition of entitlement. *Deel*, BRB No. 20-0301 BLA, slip op. at 9; *see* 20 C.F.R. §725.309(c). Accordingly, the Board remanded the case for reconsideration of the length of Claimant's underground coal mine employment for purposes of invoking the Section 411(c)(4) presumption. *Deel*, BRB No. 20-0301 BLA, slip op. at 14.

In the interest of judicial efficiency, the Board also addressed Employer's additional arguments regarding rebuttal of the Section 411(c)(4) presumption. Because the ALJ failed to accurately characterize the x-ray evidence and did not adequately explain her findings, the Board vacated her determination that Employer did not disprove clinical pneumoconiosis. *Deel*, BRB No. 20-0301 BLA, slip op. at 11. The Board further held the ALJ erred in evaluating the credibility of the medical opinion evidence and thus vacated her determinations that Employer failed to disprove legal pneumoconiosis and disability causation. *Id.* at 12-14; *see* 20 C.F.R. §§718.202, 718.305. Thus, if the ALJ found Claimant invoked the Section 411(c)(4) presumption on remand, the Board instructed the ALJ to reweigh the x-ray and medical opinion evidence to determine whether Employer rebutted the presumption. *Deel*, BRB No. 20-0301 BLA, slip op. at 14-15. The Board further instructed the ALJ to address and rule on Employer's objection to the admission of Dr. Raj's supplemental report, obtained as part of a Department of Labor (DOL) "pilot program," as well as to reevaluate the amount and length of Claimant's smoking history. *Id*. at 11 n.17, 12 n.18.

White v. New White Coal Co., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish the existence of pneumoconiosis in his prior claim, he had to submit new evidence establishing this element of entitlement to obtain review of the merits of his current claim. *Id.*

[4] The Board rejected as unpersuasive Employer's argument concerning the removal protections afforded ALJs. *Deel v. Big Track Coal Co.*, BRB No. 20-0301 BLA, slip op. at 4-5 (Sept. 24, 2021) (unpub.).

On remand, the ALJ credited Claimant with at least fifteen years of qualifying coal mine employment and found he invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), and therefore established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in admitting Dr. Raj's supplemental opinions under the DOL pilot program. On the merits, Employer contends the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption and in finding Employer did 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 rejection of Employer's arguments concerning the length of Claimant's coal mine employment and the admission of Dr. Raj's supplemental report. Employer replied to Claimant's and the Director's briefs, reiterating its arguments.

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Evidentiary Issue

Employer contends the ALJ erred by failing to address its objection to admitting and considering the supplemental opinions of Dr. Raj obtained as part of a DOL pilot program. Employer's Brief at 19-21; Employer's Reply Brief to the Director at 1-2. Employer asserts the DOL has no legal authority to request supplemental opinions under the pilot program, that the pilot program deprives it of due process, that the issuance of the pilot program, without notice and comment, violates the Administrative Procedure Act (APA), and that the pilot program transforms the DOL into an advocate for claimants. Employer's Brief at 19-21. For the reasons set forth in *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 7-12 (June 27, 2023), we reject Employer's arguments.[6]

[5] 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); Director's Exhibits 1, 6.

[6] We thus decline to address Employer's contention that the ALJ failed to comply with the Board's instructions to consider and address Employer's objection to the

Invocation of the Section 411(c)(4) Presumption: Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i).

Length of Coal Mine Employment

We initially reject Employer's argument that the ALJ was bound by ALJ Stansell-Gamm's finding of less than fifteen years of coal mine employment in Claimant's prior claim.[7] Employer's Brief at 21-22. The regulation at 20 C.F.R. §725.309(c)(5) states that if Claimant "demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see [20 C.F.R.] §725.463), will be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(c)(5).

We next address Employer's alternate argument that the ALJ erred in finding the evidence establishes at least fifteen years of coal mine employment. Employer's Brief at 23. We find no error based on the arguments it raises.

Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination on the length of coal mine employment based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

To credit a miner with a year of coal mine employment, the ALJ must first determine whether that miner was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). If the threshold one-year period is met, the ALJ must then determine whether the miner worked for at least 125 working days within that one-year

admission of Dr. Raj's supplemental report. *Deel*, BRB No. 20-0301 BLA, slip op. at 11 n.17, 12 n.18; Employer's Brief at 19.

[7] In Employer's prior appeal, although it asserted the ALJ did not acknowledge ALJ Stansell-Gamm's prior length of coal mine employment determination and explain why it was not controlling, the Board noted Employer did not adequately brief its argument and thus declined to address it. *Deel*, BRB No. 20-0301 BLA, slip op. at 9 n.13.

period. 20 C.F.R. §725.101(a)(32). Where a miner establishes he was engaged in coal mine employment for a period of one calendar year or partial periods totaling one year, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

In calculating the length of Claimant's coal mine employment, the ALJ considered his hearing testimony, Social Security Administration (SSA) earnings records, employment history forms, and employment verification letters. Decision and Order on Remand at 2-3; Hearing Transcript at 11-20; Director's Exhibits 3, 6-11. For the years prior to 1978, the ALJ credited Claimant with a quarter-year of employment for each quarter in which he earned at least $50.00 from coal mine operators. Decision and Order on Remand at 3; *see Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984). Using this method, the ALJ credited Claimant with thirteen quarters (3.25 years) of coal mine employment from 1971 through 1977. Decision and Order on Remand at 3.

Still relying on Claimant's SSA earnings records, for the years beginning with 1978, the ALJ applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[8] to determine Claimant's number of workdays in each calendar year. Decision and Order on Remand at 2-3. She divided Claimant's yearly earnings as reported in his SSA earnings records by the coal mine industry's average daily earnings, as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*. *Id.* If Claimant's earnings reflected 125 or more workdays in a given year, the ALJ credited him with one year of coal mine employment. *Id.* If Claimant had less than 125 workdays, the ALJ credited him with a fractional year based on the ratio of the actual number of days worked to 125. *Id.* Based on this method, she found Claimant had 11.37 years of coal mine employment from 1978 to 1989. *Id.*; Director's Exhibits 7-11.

Finally, although noting it is not reflected in Claimant's SSA earnings records, the ALJ credited employment verification letters from Shelton Trucking and Cumberland Trucking to determine Claimant had an additional 1.75 years of coal mine employment

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

from July 5, 1996, to February 7, 1998. Decision and Order on Remand at 3; Director's Exhibit 6. The ALJ thus found Claimant established at least fifteen years of coal mine employment. Decision and Order on Remand at 3.

Employer contends that, for the years beginning in 1978, the ALJ erred by applying a divisor of 125 days, asserting the ALJ should have applied a divisor of 251 days. Employer's Brief at 23-30. We disagree.

To credit a miner with a year of coal mine employment in the Fourth Circuit, the Board has long interpreted Fourth Circuit case law as supporting the position that the threshold question is whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Mitchell*, 479 F.3d at 334-35 (a one-year employment relationship must be established, during which the miner had 125 working days); *Martin*, 277 F.3d at 474-75 (recognizing the 2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark*, 22 BLR at 1-280.

Because Employer does not contend Claimant did not work an entire calendar year during any year of his coal mine employment from 1978 through 1988 or that he did not work for at least 125 working days during those years, we affirm the ALJ's finding that Claimant established eleven years of coal mine employment for that time period. 20 C.F.R. §725.101(a)(32)(ii), (iii); *see Muncy*, 25 BLR at 1-27; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993). We thus further affirm the ALJ's finding that Claimant established a total of at least fifteen years of coal mine employment.[9]

Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must also establish he worked at least fifteen years in "underground coal mines" or in surface mines in conditions "substantially similar to conditions in an underground mine." 20 C.F.R. §718.305(b)(1)(i).

[9] Adding the eleven years of coal mine employment from 1978 to 1988 to the 3.25 years prior to 1978 and the 1.75 years from July 5, 1996, to November 30, 1997, Claimant has established 16 years of coal mine employment. To the extent the ALJ may have erred by applying a one-year divisor to 1989, as Claimant temporarily left coal mining in that year and it thus appears unlikely that he worked the entire calendar year, any error is harmless as Claimant established fifteen years of coal mine employment even without considering his employment during 1989. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order on Remand at 3.

The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if [Claimant] demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479 (7th Cir. 2001).

The ALJ determined all of Claimant's coal mine employment before 1996 was underground. Decision and Order on Remand at 4. She also credited Claimant's testimony that he was exposed to coal mine dust "on a daily basis" at Shelton Trucking and Cumberland Trucking. *Id.* (citing Hearing Transcript at 16). Claimant further testified that, at Shelton Trucking, he worked "[u]nder the belt lines" and in dumping the coal chute, which was "very dusty," and that he worked the entire day on the mine site. *Id.* (citing Hearing Transcript at 23, 25). In addition, he testified that, at both jobs, there was "dust on every level," and the level of dust exposure was "the same" as his other underground coal mining jobs. *Id.* (citing Hearing Transcript at 16). The ALJ therefore found the conditions of Claimant's work with Shelton Trucking and Cumberland Trucking were substantially similar to those in an underground mine. *Id.* at 5.

Employer contends the ALJ erred in failing to assess whether the conditions of Claimant's surface coal mine employment were substantially similar to those in an underground mine. Employer's Brief on Remand at 30-35. Employer's argument is unpersuasive.

An ALJ is not required to analyze the conditions of an underground mine in comparison to a miner's working conditions in surface mining. *See* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013) (it is unnecessary for a claimant to prove anything about dust conditions existing at an underground mine; a claimant need only develop evidence addressing the dust conditions at the non-underground mine). Here, the ALJ rationally found Claimant's uncontradicted testimony that he was exposed to coal mine dust on a daily basis sufficient to show that he was regularly exposed to coal mine dust. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 487, 490 (6th Cir. 2014) (claimant's testimony that the conditions throughout his surface coal employment were "very dusty" met his burden to establish he was regularly exposed to coal mine dust); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984) (ALJ may rely on a miner's testimony, especially if the testimony is not contradicted by any documentation of record); Decision and Order on Remand at 4-5.

Because the ALJ acted within her discretion, we affirm her crediting of Claimant's uncontradicted testimony. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th

Cir. 1997); Decision and Order on Remand at 5. As it is supported by substantial evidence, we further affirm her conclusion that Claimant established he worked in conditions substantially similar to those in an underground mine. *See* 20 C.F.R. §718.305(b)(2); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (duty of explanation under the APA is satisfied if the reviewing court can discern what the ALJ did and why she did it). We thus further affirm her finding that Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 20 C.F.R. §921(c)(4) (2018); Decision and Order on Remand at 5.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[10] or that "no part of [his] 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)(i), (ii). The ALJ found Employer did not establish rebuttal by either method.[11] Decision and Order on Remand at 10-12.

The ALJ considered the medical opinions of Drs. Raj, Green, Fino, and Rosenberg. Decision and Order on Remand at 9-10. Drs. Raj and Green opined Claimant has legal pneumoconiosis in the form of chronic obstructive pulmonary disease for which his coal mine dust exposure was a significant contributing factor, whereas Drs. Fino and Rosenberg diagnosed emphysema caused by cigarette smoke exposure and unrelated to coal mine dust exposure. Director's Exhibits 15 at 3, 17 at 9-16; 19 at 1-2; Claimant's Exhibits 1 at 3-4; 2 at 4; 5; Employer's Exhibits 7 at 6-13; 9 at 1-2. The ALJ gave greater weight to Dr. Raj's opinion because he was Claimant's treating physician who frequently treated Claimant and because his findings were confirmed on reexamination a year later. Decision and Order on Remand at 10. In contrast, she gave the opinions of Drs. Green, Fino, and Rosenberg only "some weight." *Id.* Thus, she found the medical opinion evidence establishes legal

[10] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the condition 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). Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[11] The ALJ found that Employer rebutted clinical pneumoconiosis. Decision and Order on Remand at 7.

pneumoconiosis and that Claimant established a change in an applicable condition of entitlement. *Id.*; 20 C.F.R. §§718.202(a)(2), 725.309(c).

Employer contends the ALJ erred in evaluating the opinion evidence because she failed to comply with the Board's remand instructions directing her to evaluate Claimant's smoking history, resolve the discrepancies in the record regarding his smoking history, and specifically "determine the amount and length of Claimant's smoking" history. *Deel*, BRB No. 20-0301 BLA, slip op. at 12 n.18; Employer's Brief at 15-16. It further contends her failure to evaluate Claimant's smoking history undermines her credibility determinations with regard to the medical opinion evidence. Employer's Brief at 16-19. We agree.

The Board instructed the ALJ to resolve the conflict in the record between the amount and length of smoking history Claimant reported to Drs. Raj and Green, during his hearing testimony and in his initial claim. *Deel*, BRB No. 20-0301 BLA, slip op. at 12 n.18. Drs. Raj and Green reported smoking histories of one-half pack per day for six to seven years or eight years, respectively. Director's Exhibit 15 at 2; Claimant's Exhibit 1 at 2. At the hearing, Claimant testified to smoking cigarettes on and off between 1970 and 2010, quitting only to chew tobacco. Hearing Transcript at 31, 33. In the initial claim, ALJ Stansell-Gamm found Claimant smoked between 1973 and April 2010 at the rate of one-quarter to one pack per day, resuming in January 2011. 2012 Decision and Order at 3. In evaluating the evidence on remand, however, the ALJ failed to resolve the conflict in the reported accounts of the extent and duration of Claimant's smoking history, and further failed to consider and address whether Drs. Raj or Green may have relied on an inaccurate smoking history. *See* 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985) (ALJ is responsible for making a factual determination as to the length and extent of a miner's smoking history and the effect of an inaccurate smoking history on the credibility of a medical opinion); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (failure to discuss relevant evidence requires remand).

In light of the ALJ's errors, we must vacate the ALJ's weighing of the medical opinion evidence and remand this case to the ALJ for a reweighing of this evidence.[12] We

[12] We also note that, contrary to the ALJ's analysis and findings on the existence of legal pneumoconiosis, because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to disprove the existence of pneumoconiosis; Claimant is not required to establish the existence of pneumoconiosis. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015); Decision and Order at 9-10.

further vacate the ALJ's finding that Employer has not established rebuttal of the Section 411(c)(4) presumption by disproving legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Remand Instructions

The ALJ must reconsider whether Employer has rebutted the Section 411(c)(4) presumption. First, the ALJ must consider all relevant evidence related to Claimant's smoking history, resolve the conflicts in the evidence, and render specific findings as to the length and intensity of his smoking. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 (4th Cir. 1999) ("[T]he 'substantial evidence' standard is tolerant of a wide range of findings on a given record."); *Maypray*, 7 BLR at 1-686; *see also Bobick*, 13 BLR at 1-54 (ALJ has discretion in determining the effect of an inaccurate smoking history on the credibility of a medical opinion).

In evaluating the medical opinions on remand, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Specifically, she should address whether each physician overestimated or underestimated Claimant's cigarette smoking and coal mine dust exposure histories when weighing their opinions on the issue of legal pneumoconiosis. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick*, 13 BLR at 1-54. She must then address whether Employer has disproved legal pneumoconiosis. 20 C.F.R. §718.201(b).

If the ALJ determines Employer has disproven legal pneumoconiosis, Employer will have rebutted the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis and the ALJ need not reach the issue of disability causation. If the ALJ finds Employer has not disproven legal pneumoconiosis, she must reconsider whether Employer has established that no part of Claimant's total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

In reaching her conclusions on remand, the ALJ must explain the bases for her credibility determinations, findings of fact, and conclusions of law as the APA requires.[13]

[13] The APA provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

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, the ALJ's Decision and Order on Remand Granting Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

MELISSA LIN JONES
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS
Administrative Appeals Judge

GRESH, Chief Administrative Appeals Judge, concurring:

I concur with affirming the ALJ's finding that Claimant established fifteen years of qualifying coal mine employment and thereby invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b). Further, I concur with vacating the ALJ's finding that Employer did not rebut the presumption, 20 C.F.R. §718.305(d), and therefore concur with again remanding the case for reconsideration of that issue.

However, I write separately to express my view that, in this case arising within the jurisdiction of the Fourth Circuit, due to the Board's previous remand of this case and the ALJ's failure to follow the Board's instructions and repetition of errors, "review of this claim requires a fresh look at the evidence . . . ." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537 (4th Cir. 1998) ("Finding the ALJ made several errors of law including failing to consider all of the relevant evidence and to adequately explain his rationale for crediting certain evidence, we conclude that review of this claim requires a fresh look at the evidence."); *see* 20 C.F.R. §§802.404(a), 802.405(a); *see also Cochran v. Consolidation*

Coal Co., 16 BLR 1-101, 1-107 (1992). While the ALJ's integrity or impartiality is not in question, such circumstances in cases arising within the Fourth Circuit's jurisdiction require a "fresh look" at the evidence in view of the Board's previous remand instructions and the ALJ's failure to follow them as directed when weighing the medical opinion evidence on remand.

Thus, I would direct the case be reassigned to a different ALJ on remand. I otherwise concur in the majority opinion in all other respects.

DANIEL T. GRESH, Chief
Administrative Appeals Judge