

U.S. Department of Labor

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



BRB No. 25-0089 BLA

PAMELA MENEAR)
(o/b/o JAMES E. MENEAR, JR., deceased))

Claimant-Petitioner)

v.)

CONSOL MINING COMPANY, LLC, c/o)
CONSOL ENERGY INCORPORATED)

and)

CONSOL ENERGY INCORPORATED, c/o)
SMART CASUALTY CLAIMS)

Employer/Carrier-)
Respondents)

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

Party-in-Interest)

NOT-PUBLISHED

DATE ISSUED: 01/29/2026

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Deanna Lyn Istik (Sinatra & Istik Law Office, PLLC), Cranberry Township, Pennsylvania, for Claimant.

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

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

PER CURIAM:

Claimant¹ appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits on Remand (2022-BLA-05769) rendered on a claim² filed on October 28, 2019, 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 his initial Decision and Order Denying Benefits, the ALJ credited the Miner with twenty-three years of qualifying coal mine employment but found Claimant did not establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Thus, he found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,³ 30 U.S.C. §921(c)(4) (2018), or establish a necessary element of entitlement under 20 C.F.R. Part 718. Consequently, the ALJ denied benefits.

In consideration of Claimant's appeal, the Board affirmed the ALJ's finding that Claimant established the Miner had twenty-three years of underground or substantially similar surface coal mine employment. *Menear v. Consol Mining Co.*, BRB No. 23-0440 BLA, slip op. at 2 (Sep. 30, 2024) (unpub.). But the Board vacated the ALJ's finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 6. Thus, the Board vacated the denial of benefits and remanded the case for further consideration. *Id.* at 6-7.

Considering whether Claimant invoked the Section 411(c)(4) presumption on remand, the ALJ found Claimant did not establish a totally disabling pulmonary or

¹ Claimant is the widow of the Miner, who died on January 5, 2021, while his claim was pending before the district director. Director's Exhibits 47, 48. She is pursuing the miner's claim on behalf of her husband's estate. Director's Exhibit 49.

² The Miner filed two prior claims but withdrew them. Director's Exhibit 86. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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); *see* 20 C.F.R. §718.305(b).

respiratory impairment and again denied benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.204(b)(2).

On appeal, Claimant argues the ALJ erred in finding she did not establish the Miner was totally disabled. Employer urges the Board to affirm the ALJ's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.⁴ 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, 361-62 (1965).

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function and 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 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 Board previously affirmed the ALJ's determination that the pulmonary function studies and arterial blood gas studies do not establish total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure. *Menear*, BRB No. 23-0440 BLA, slip op. at 3.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because the Miner performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 33.

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

Before weighing the medical opinions, the ALJ addressed the exertional requirements of the Miner's usual coal mine employment.⁶ Decision and Order on Remand at 4-6. A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *Pifer v. Florence Mining Co.*, 7 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

On remand, the ALJ considered the Miner's CM-911a Employment History form, on which the Miner listed his work for Employer from January 1978 to January 1998 as "laborer, miner operator, shuttle car operator, roof bolter." Decision and Order on Remand at 5; Director's Exhibit 33. The ALJ also considered Claimant's testimony that the Miner worked "as a roof bolter, a miner operator helper, and then for several years, his last job was the miner operator." Decision and Order on Remand at 5; Hearing Transcript at 12. In addition, the ALJ considered Employer's employment verification letter dated September 30, 2010, indicating that the Miner worked as a miner bolter operator from 1975 to 1981, as a miner operator helper from 1981 to 1982, and as a miner operator from 1982 to 1997. Decision and Order on Remand at 5; Director's Exhibit 35. Finally, the ALJ considered a statement describing the Miner's employment history that was included in Dr. Celko's Department of Labor-sponsored complete pulmonary evaluation report and listed the Miner's last coal mining job as a roof bolter.⁷ Decision and Order on Remand at 5; Director's Exhibit 53 at 2.

The ALJ found that Claimant's sworn testimony is "unequivocal" and the employment verification letter is closest in temporal proximity to the Miner's coal mine employment, predating the litigation in this claim. Decision and Order on Remand at 5. Considering the reliability of those two corroborative sources, the ALJ found "there is no reason to doubt [the] validity, accuracy, or truthfulness [of either]." *Id.* Turning to the work history statement, the ALJ noted that it is unsigned, so while it is presumed that the Miner provided the information contained within it, the ALJ found "there is no proof of that." *Id.* Thus, the ALJ accorded less weight to the work history statement "as it is based

⁶ The Board previously held that the ALJ's summary determination that the Miner's usual coal mine employment was that of a "miner operator" requiring medium labor was not adequately explained. *Menear v. Consol Mining Co.*, BRB No. 23-0440 BLA, slip op. at 4 (Sep. 30, 2024) (unpub.).

⁷ The ALJ noted that Drs. Spagnolo, Rosenberg, Sood, and Go also found in their reports that the Miner last worked in coal mine employment as a roof bolter. Decision and Order at 5-6. Specifically, the ALJ found that their understanding of the Miner's last coal mine job was based on Dr. Celko's report. *Id.*

on a presumption” and found that Claimant’s sworn testimony and the pre-litigation employment verification letter demonstrate that the Miner last worked as a miner operator. *Id.*

Claimant contends the ALJ erred in finding that the evidence establishes the Miner’s usual coal mine employment was working as a machine operator requiring medium exertion and not that of a roof bolter requiring heavy exertion. Claimant’s Brief at 3-5. We disagree.

First, we reject Claimant’s argument that the ALJ should have credited the employment history recorded in Dr. Celko’s report. Claimant’s Brief at 4. The ALJ is granted broad discretion in evaluating the credibility of the evidence. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). The Board will not disturb an ALJ’s credibility findings unless they are inherently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). There is nothing in the record to show who recorded or transcribed the information in Dr. Celko’s examination report, when it was recorded, if the Miner specifically provided the information or if it was obtained thirdhand, or if Dr. Celko reviewed the information. Decision and Order on Remand at 5; Director’s Exhibit 53 at 2. Consequently, the ALJ reasonably found it was unreliable. *Tackett*, 12 BLR at 1-14.

We further reject Claimant’s argument that the Miner’s CM-911a Employment History Form “clearly indicated that his last position with [Employer] was that of a roof bolter.” Claimant’s Brief at 4. On the Form, the Miner listed his work as being a “laborer, miner operator, shuttle car operator, roof bolter” under the column titled “Occupation,” with the instructions to “[s]pecify type of work; if mining, specify underground or strip mining.” Director’s Exhibit 33. As the Employment History Form does not ask the Miner to list the occupations in chronological order and there is no indication he did so, the ALJ reasonably did not find the Miner last worked as a roof bolter simply because “roof bolter” is listed last on the Form. *See Mancina v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997); Decision and Order on Remand at 5-6.

Consequently, we affirm the ALJ’s finding that Claimant’s unequivocal testimony⁸ establishes that the Miner’s last coal mine employment for a period of several years was

⁸ Because Claimant does not challenge the reliability of her testimony and we have rejected her challenges to the ALJ’s weighing of the employment history from Dr. Celko’s examination report and the Miner’s employment history form, we need not address her

working as a miner operator and therefore affirm his finding that this constituted the Miner's usual coal mine employment. Decision and Order on Remand at 5. As Claimant does not challenge the finding that this work required medium exertion, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 6.

The ALJ next considered the medical opinions of Drs. Celko, Spagnolo, Rosenberg, Sood, and Go. Decision and Order on Remand at 14-18. Drs. Sood and Go opined the Miner was totally disabled from a pulmonary or respiratory impairment.⁹ Director's Exhibit 57; Claimant's Exhibits 1, 1a, 5. Drs. Celko, Spagnolo, and Rosenberg opined he was not totally disabled. Director's Exhibit 53; Employer's Exhibits 7-10. The ALJ found Drs. Sood's and Go's opinions unreasoned because they are based on an inaccurate understanding of the Miner's usual coal mine work and they did not give sufficient details of the Miner's impairment for the ALJ to infer that he was totally disabled from performing his work as a machine operator. Decision and Order on Remand at 17. In contrast, he found Drs. Celko's, Spagnolo's, and Rosenberg's opinions well-reasoned and documented because they are supported by the Miner's objective medical testing results. *Id.* at 18. The ALJ thus concluded the medical opinion evidence does not support a finding of total disability. *Id.*

Claimant argues that the ALJ erred in discrediting Drs. Sood's and Go's opinions, asserting "the ALJ is the one with the incorrect work history" and that their opinions credibly establish the Miner was totally disabled from performing heavy manual labor as a roof bolter. Claimant's Brief at 6-7. As we have already affirmed the ALJ's finding that the Miner's most recent coal mine job as a miner operator required lifting thirty to fifty pounds, we reject Claimant's argument. As Claimant raises no other challenges to the

challenges to the ALJ's crediting of Employer's employment verification letter. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

⁹ Dr. Sood opined the Miner had a totally disabling chronic obstructive pulmonary disease based on his pulmonary function study results. Director's Exhibit 57 at 6-7; Claimant's Exhibit 5 at 8. He concluded the Miner was unable to perform his last coal mining job because he could not perform "heavy labor, including lifting [fifty to seventy-five] pounds of weight." Director's Exhibit 57 at 7; Claimant's Exhibit 5 at 8. Dr. Go opined the Miner had a Class III pulmonary impairment under American Medical Association criteria and was totally disabled "for any coal mine employment, including his last coal mine employment as a roof bolter, in which he carried loads weighing up to [seventy-five] pounds." Claimant's Exhibits 1 at 5; 1a at 7.

ALJ's findings that the opinions of Drs. Sood and Go do not establish that the Miner was totally disabled from performing medium exertion as a machine operator, they are affirmed. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §802.211(b); Decision and Order on Remand at 18. Since Drs. Sood's and Go's opinions are the only opinions supportive of Claimant's burden of proof, we affirm the ALJ's finding that the medical opinion evidence does not establish total disability.¹⁰ 20 C.F.R. §718.204(b)(2)(iv)

Thus, we affirm the ALJ's finding that Claimant did not establish total disability based on the evidence as a whole, 20 C.F.R. §718.204(b)(2), and therefore did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305(b). As Claimant did not establish total disability, an essential element of entitlement, she cannot establish entitlement under 20 C.F.R. Part 718. We therefore affirm the denial of benefits.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits on Remand.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge

¹⁰ We need not address Claimant's arguments that the ALJ erred in crediting Employer's experts as their opinions do not support Claimant's burden. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).