U.S. Department of Labor

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

BRB No. 24-0425 BLA

DAVID A. EAVENSON Claimant-Petitioner v. ERP FEDERAL MINING COMPLEX , LLC and BRICKSTREET MUTUAL INSURANCE COMPANY, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 07/18/2025 DECISION and ORDER

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

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits on Modification (2023-BLA-05946) rendered on a claim filed on February 2, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification of a subsequent claim.[1]

In a January 19, 2021 Decision and Order Denying Benefits, the ALJ accepted the parties' stipulation that Claimant has thirty-one years of underground coal mine employment, but found Claimant did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the ALJ found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018) or establish entitlement to benefits under 20 C.F.R. Part 718. Consequently, he denied benefits.

Claimant timely requested modification. Director's Exhibit 66. In his July 31, 2024 Decision and Order Denying Benefits on Modification, the subject of the current appeal, the ALJ again found Claimant did not establish total disability.[3] 20 C.F.R. §718.204(b)(2). He thus denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability. Employer responds in support of the denial of benefits. The Acting Director, Office of Workers' Compensation Programs, declined to file a response.

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

[1] This is Claimant's second claim for benefits. The district director denied Claimant's prior claim on September 26, 2007, because he failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until filing his current claim. *Id*.

[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] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-one years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 5.

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 (1965).

An 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). When a request for modification is filed, "any mistake may be corrected [by the ALJ], including the ultimate issue of benefits eligibility." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

To invoke the Section 411(c)(4) presumption, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on 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 the pulmonary function studies, arterial blood gas studies, and medical opinions do not support a finding of total disability.[6] 20 C.F.R. §718.204(b)(2); Decision and Order on Modification at 9-16.

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[5] A "qualifying" pulmonary function study or 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, respectively. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The ALJ found there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order on Modification at 13.

Claimant argues the ALJ erred in determining the exertional requirements of his usual coal mine employment, asserting it affects the credibility of the medical opinion evidence. Claimant's Brief at 7-9 (unpaginated). We agree.

Before weighing the medical opinions, the ALJ addressed the exertional requirements of Claimant's usual coal mine work[7] as a mobile equipment operator. Decision and Order on Modification at 6. He found this job required medium exertional labor. *Id*. Next, the ALJ considered the medical opinions of Drs. Jaworski, Lenkey, Posin, Fino, and Basheda. *Id*. at 14-16. He found Drs. Jaworski, Lenkey, and Posin opined Claimant is totally disabled, and Drs. Fino and Basheda opined Claimant is not. *Id*. After weighing the medical opinions, he discredited Dr. Jaworski's opinion because he found the doctor was equivocal and did not have access to more recent objective testing. *Id*. He discredited Dr. Lenkey's opinion because the doctor did not set forth the exertional requirements of Claimant's usual coal mine employment. *Id*. In addition, he assigned diminished weight to Dr. Posin's opinion because the doctor based his opinion on non-qualifying objective testing. *Id*. Finally, he found the opinions of Drs. Fino and Basheda reasoned and documented, and they outweigh those of Drs. Jaworski, Lenkey, and Posin. *Id*.

Claimant testified his most recent coal mine employment was working as a heavy equipment operator. Hearing Transcript at 27. In addition to operating the heavy equipment, he had to shovel mud off equipment tracks. *Id*. He spent half of his job operating the equipment and the other half helping mechanics. *Id*. at 28. His job required him to help put parts on the dozers and rock trucks, as well as help to pull dozers and rock trucks out of ditches if they got stuck. *Id*. In addition, his job required climbing a "very steep" ladder to enter the cab of his truck. Director's Exhibit 65 at 76-77. He spent approximately half an hour at the end of each shift shoveling slate weighing between ten and twenty-five pounds into an end-loader bucket. Hearing Transcript at 33-34. The job required him to lift parts weighing more than fifty pounds[8] by himself and objects exceeding one hundred pounds with assistance. *Id*. at 35. The heaviest part of his job was replacing pump motors. *Id*. at 34. On Claimant's Form CM-913 Description of Coal Mine Work and Other Employment, Claimant stated he lifted fifty pounds eight to nine times per

[7] 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.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

[8] Claimant replaced equipment rollers that weighed in excess of fifty pounds. Hearing Transcript at 30-31, 35.

day and carried twenty-five pounds five to ten feet three times per day. Director's Exhibit 6.

The ALJ found, based on Claimant's testimony, that his job was working as a mobile equipment operator and that it is the equivalent of working as a loading machine operator. Decision and Order on Modification at 6-7, *citing* Director's Exhibit 65; Hearing Transcript at 6. He took official notice of the *Dictionary of Occupational Titles* (DOT), which defines the job of loading machine operator as requiring medium labor, consisting of "[e]xerting [twenty] to [fifty] pounds of force occasionally, and/or [ten] to [twenty-five] pounds of force frequently, and/or greater than negligible up to [ten] pounds of force constantly to move objects." Decision and Order on Modification at 6 n.6, *citing DOT* Appendix C (4th Ed., Rev. 1991). Thus, he concluded Claimant's usual coal mine employment required medium exertional labor. *Id*. at 6.

We agree with Claimant's argument that the ALJ erred in evaluating the exertional requirements of his usual coal mine employment. Claimant's Brief at 9 (unpaginated). The ALJ summarily found Claimant's job is the equivalent of a loading machine operator without addressing aspects of his testimony inconsistent with the work of a loading machine operator and of a medium level of labor. As discussed above, Claimant testified that his work required him to lift in excess of fifty pounds by himself and one hundred pounds with assistance. Hearing Transcript at 35. He had to lift fifty pounds eight to nine times per day. Director's Exhibit 6. Those aspects of his work could be consistent with heavy labor under the DOT.

The DOT defines heavy labor as exerting fifty to one hundred pounds of force "occasionally," and/or exerting twenty-five to fifty pounds of force "frequently." *DOT*, Appendix C. Aspects of Claimant's work could establish that his usual coal mine employment required heavy labor because a miner cannot perform his usual coal mine work if he cannot perform the heaviest or hardest parts of that work. *See Eagle v. Armco Inc.*, 943 F.2d 409, 512-13 (4th Cir. 1991); 20 C.F.R. §718.204(b)(1). As the ALJ failed to discuss evidence that could establish that Claimant's employment required heavy labor as opposed to medium labor, we vacate his finding that Claimant's usual coal mine employment required medium labor. 30 U.S.C. §923(b) (ALJ must address all relevant evidence); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *McCune v. Cent. Appalachian Coal Co*., 6 BLR 1-996, 1-998 (1984) (failure to discuss relevant evidence requires remand); Decision and Order on Modification at 6.

Because the ALJ's exertional requirement finding affected the weight he assigned the medical opinions, we also vacate his credibility findings with respect to Drs. Jaworski, Lenkey, Posin, Fino, and Basheda. Decision and Order on Modification at 6.

Further, the ALJ also erred in discrediting Dr. Posin's opinion independent of his exertional requirement finding. Dr. Posin opined Claimant has worsening shortness of breath that limits what he can do daily because he gets short of breath with exertion. Director's Exhibit 61 at 2. He noted Claimant "can walk approximately [fifty feet] on a flat surface before stopping to catch his breath" and "cannot complete a flight of stairs without stopping to catch his breath." *Id*. He also noted Claimant "worked above ground at the [preparation] plant operating heavy equipment" and "had to do heavy lifting during that time as well as walk[] several miles a day." *Id*. at 3. He diagnosed a moderately severe restrictive lung disease based on pulmonary function testing. *Id*. at 3-4. Based on the foregoing, he opined Claimant is totally disabled from his usual coal mine employment as a result of the permanent pulmonary impairment he diagnosed. *Id*.

The ALJ erred by discrediting Dr. Posin's opinion because the pulmonary function testing he relied on is non-qualifying. Decision and Order on Modification at 16. The regulations 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 prevented 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. 20 C.F.R. §718.204(b)(2)(iv); *see Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties").

Thus, we vacate the ALJ's finding that Claimant failed to establish total disability through the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). We further vacate the ALJ's finding that Claimant failed to establish total disability based on all the relevant evidence. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232. Consequently, we also vacate his finding that Claimant failed to invoke the Section 411(c)(4) presumption and establish an essential element of entitlement. Decision and Order on Modification at 14. Thus we vacate the denial of benefits.

On remand, the ALJ must first consider all relevant evidence to determine the exertional requirements of Claimant's usual coal mine employment and then must consider the medical opinions given those requirements. 20 C.F.R. §718.204(b)(1)(i), (b)(2)(iv); *see Eagle*, 943 F.2d at 512-13; *Black Diamond Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985). As Claimant correctly argues, if the ALJ finds Claimant's usual coal mine employment required heavy labor, he must then consider Dr. Fino's opinion as one supportive of total disability. Claimant's Brief at 9 (unpaginated). While Dr. Fino initially opined Claimant is not totally disabled, in his most

recent report he reviewed additional testing and opined Claimant would be totally disabled from a job involving fifty percent heavy labor. Director's Exhibit 64; Employer's Exhibits 1, 3, 7 at 13-14; *see Eagle*, 943 F.2d at 512-13. As noted above, a miner cannot perform his usual coal mine work if he cannot perform the heaviest or hardest parts of that work. *See Eagle*, 943 F.2d at 512-13.

In weighing the medical opinions, the ALJ must consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, the sophistication of and bases for their diagnoses, and any conflicts presented. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). He must compare the exertional requirements of Claimant's usual coal mine employment to the physicians' descriptions of his pulmonary impairment and physical limitations. *Eagle*, 943 F.2d at 512 n.4; 20 C.F.R. §718.204(b)(2)(iv). In reaching his determinations, the ALJ must set forth his findings in order to satisfy the explanatory requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[9]

If Claimant establishes total disability based on the medical opinion evidence, the ALJ must weigh the evidence as a whole to determine whether he has established he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); *Defore*, 12 BLR at 1-28-29; *see Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, he will have invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305. The ALJ must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305(d); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). In that event, the ALJ must reconsider the evidence with the burden shifting to Employer to affirmatively establish Claimant has neither legal nor clinical pneumoconiosis 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); *see Minich*, 25 BLR at 1-155.

If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[9] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefore, 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).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge