U.S. Department of Labor

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

BRB No. 25-0008 BLA

SARAH KUNSELMAN (o/b/o DONALD M. KUNSELMAN Claimant-Petitioner v. ROSEBUD MINING COMPANY and ROCKWOOD CASUALTY INSURANCE COMPANY 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 Remand 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.

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

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:[1]

Claimant[2] appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits on Remand (2019-BLA-06290) 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 November 5, 2018, and is before the Benefits Review Board for a third time.[3]

Pursuant to Claimant's first appeal of the ALJ's denial of benefits, the Board affirmed his finding Claimant established the Miner had at least fifteen years of underground coal mine employment and the existence of both clinical and legal pneumoconiosis arising out of coal mine employment. *Kunselman v. Rosebud Mining Co.*, BRB No. 21-0221 BLA, slip op. at 2 nn.2 & 3 (Feb. 16, 2022) (unpub.). With respect to the issue of total disability, the Board affirmed his finding the pulmonary function and arterial blood gas studies do not support this element and there is no evidence of cor pulmonale with right-sided congestive heart failure. *Id.* at 3 n.5. However, the Board vacated the ALJ's finding the medical opinion evidence does not support a finding of total disability because he failed to render a finding regarding the exertional requirements of the Miner's usual coal mine employment. *Id.* at 5-6. Thus, the Board vacated the denial of benefits and remanded the case to the ALJ for further consideration. *Id*.

On remand, the ALJ determined the Miner's usual coal mine employment as a purchasing agent required light labor. He again found the medical opinion evidence does not support a finding of total disability. Consequently, he found Claimant could not invoke the Section 411(c)(4) presumption or establish entitlement to benefits under 20 C.F.R. Part 718. Thus, he denied benefits.

In consideration of Claimant's second appeal, the Board's three-member panel affirmed the ALJ's finding the exertional requirements of the Miner's usual coal mine employment required light labor. *Kunselman v. Rosebud Mining Co.*, BRB No. 23-0257

[1] Administrative Appeals Judge Jonathan Rolfe is substituted on the panel for Administrative Appeals Judge Greg J. Buzzard, who is no longer with the Board. 20 C.F.R. §802.407(a).

[2] Claimant is the widow of the Miner, who died on September 3, 2022. ALJ's Exhibit 1 at 204-05. She is pursuing the miner's claim on behalf of the Miner's estate. *Id.*

[3] We incorporate by reference the procedural history of this case as set forth in *Kunselman v. Rosebud Mining Co.*, BRB No. 23-0257 BLA (June 28, 2024) (unpub.).

BLA, slip op. at 6 (June 28, 2024) (unpub.). However, a majority of the Board's three-member panel again vacated the ALJ's finding the medical opinion evidence does not support total disability because he failed to compare those exertional requirements with the physicians' opinions identifying the Miner's physical limitations.[4] *Id.* at 6-8.

In his Decision and Order Denying Benefits on Remand, the subject of the current appeal, the ALJ again found the medical opinion evidence does not support total disability. Consequently, he denied benefits.

On appeal, Claimant argues the ALJ erred in weighing the medical opinions on total disability. Neither Employer nor the Acting Director, Office of Workers' Compensation Programs, have 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.[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, 361-62 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

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 is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents 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 pulmonary function studies or 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). Qualifying evidence in any of the four categories

[4] Administrative Appeals Judge Buzzard would have affirmed the ALJ's finding Dr. Zlupko's opinion on total disability inadequately explained and the denial of benefits. *Kunselman*, BRB No. 23-0257 BLA, slip op. at 10-12 (Buzzard, J., dissenting).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The ALJ considered the opinions of Drs. Zlupko, Basheda, and Fino. Decision and Order at 8-11. Dr. Zlupko opined the Miner was totally disabled from a respiratory or pulmonary impairment, while Drs. Basheda and Fino opined he was not totally disabled. Director's Exhibit 12; Employer's Exhibits 1-4. The ALJ found the opinions of Drs. Zlupko and Fino reasoned and documented and Dr. Basheda's opinion not credible. Decision and Order at 10-11. Having found the opinions of Dr. Zlupko and Dr. Fino each reasoned and documented, the ALJ determined "the evidence stands in equipoise." *Id.* at 11. He then stated Claimant has not proved "total disability by a preponderance of the evidence." *Id.*

As Claimant argues, the ALJ erred by failing to resolve the conflict in the medical opinion evidence and explain his findings as the Administrative Procedure Act (APA)[6] requires. Claimant's Brief at 5-6. While we see no error in the ALJ's discrediting of Dr. Basheda's opinion,[7] the ALJ did not adequately explain his findings with respect to the opinions of Drs. Zlupko and Fino.

Dr. Zlupko examined the Miner, reviewed a copy of the Miner's Employment History, and noted the Miner's symptoms of daily dry cough, dyspnea, orthopnea, and shortness of breath on exertion. Director's Exhibit 12 at 1-2; *see* Director's Exhibit 3. He also observed the Miner could not walk very far before becoming winded. Director's Exhibit 12 at 3. In addition, he opined the Miner's arterial blood gas testing evidenced a totally disabling respiratory impairment based on "a substantial drop in the PO2 with

[6] The APA provides that 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).

[7] Dr. Basheda opined the Miner was not totally disabled because the pulmonary function study he administered did not show any obstructive impairment, and the blood gas study he administered was "normal." Employer's Exhibits 1 at 7-9, 3 at 15-17. The ALJ permissibly found Dr. Basheda's opinion entitled to little weight because he "fail[ed] to address the totality of the evidence," including the blood gas study Dr. Zlupko administered as part of the Department of Labor-sponsored complete pulmonary evaluation of the Miner. *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); *see also Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); Decision and Order at 11.

exertion." *Id.* at 4, 7. He concluded the Miner would be unable to perform his usual coal mine employment. *Id.* at 4. The ALJ found Dr. Zlupko's opinion reasoned and documented because he adequately explained how the Miner's drop in PO2 based on blood gas testing rendered him totally disabled. Decision and Order at 10.

Dr. Fino noted the Miner's usual coal mine employment required him to perform "heavy labor for a considerable amount of the day." Employer's Exhibit 2 at 8. He noted the Miner experienced symptoms of shortness of breath and dyspnea when walking on level ground, ascending one flight of steps, lifting and carrying, and performing manual labor. *Id.* at 2. Further, he opined the Miner's pulmonary function study showed mild reductions in the FEV1 and FVC values and diffusing capacity, but concluded the Miner was not totally disabled and retained the necessary pulmonary capacity to perform his usual coal mine job. *Id.* at 8. During his deposition, Dr. Fino acknowledged the Miner's blood gas study showed a drop in PO2 with exertion, but opined it was not disabling because the study was non-qualifying. Employer's Exhibit 4 at 14-17. He opined the blood gas study did not show "clinical hypoxemia" that would prevent him from performing his usual coal mine employment. *Id.* at 16-17. The ALJ found Dr. Fino's opinion reasoned and documented because he adequately explained why the Miner's severely reduced PO2 value on the non-qualifying blood gas study would not prevent him from performing his usual coal mine employment. Decision and Order at 9-11.

The ALJ's finding that Drs. Zlupko's and Fino's discordant opinions are both entitled to "probative weight" and his apparent reliance on a head count of opinions are an insufficient basis to find Claimant failed to meet her burden to establish total disability. Decision and Order at 11. We note the ALJ failed to properly resolve the conflict in the medical opinions or adequately explain why he found the opinions in equipoise. Decision and Order at 11; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). While a claimant fails to meet his burden of proof when the evidence is equally balanced, *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 279-81 (1994), the ALJ must nevertheless explain his rationale for reaching that conclusion. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). The mere fact that the relevant evidence may be conflicting does not authorize the ALJ to declare Claimant failed to establish total disability. *See generally Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010) ("[ALJ] has a duty to explain, on scientific grounds, why a conclusion cannot be reached"). It is the ALJ's duty to evaluate conflicting evidence, draw appropriate inferences, and assess probative value. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because the ALJ did not properly resolve the conflict in the medical opinions or adequately explain his findings, we must vacate his determination that the medical opinion evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11.

We thus vacate the ALJ's finding the evidence as a whole does not establish total disability and that Claimant did not invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.204(b)(2). Consequently, we vacate the ALJ's denial of benefits and remand the case for further consideration.

Reassignment

In light of the Board's previous remands of this case, and the ALJ's failure to follow the Board's instructions and repetition of numerous errors, we conclude that "review of this claim requires a fresh look at the evidence." *Hicks*, 138 F.3d at 537 (instructing that review of the claim required a fresh look at the evidence, unprejudiced by the various outcomes of the ALJ, where he made several errors of law including failing to consider all of the relevant evidence and to adequately explain his rationale for crediting certain 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). Thus, we direct the case be reassigned to a different ALJ on remand.[8]

[8] Citing out-of-circuit cases that, unlike *Hicks*, do not arise under the Black Lung Benefits Act (Act), our dissenting colleague opposes reassignment in this case, arguing that sending this back to the same ALJ for a fourth bite at the apple better serves efficiency and the appearance of impartiality than simply turning the page. We disagree. In *Hicks*, the Fourth Circuit declined to send a case back to the same ALJ a third time, reasoning that repeated errors and a failure to consider all relevant evidence demanded a "fresh look" under the Act -- given the years the case had been pending with little progress. Indeed, courts have long lamented the protracted delays in processing cases that plague this subsistence-level benefits program. *See, e.g., Amax Coal Co. v. Franklin*, 957 F.2d 355, 356 (7th Cir. 1992) ("As so often in black lung cases, the processing of the claim has been protracted scandalously . . . delay in processing these claims is especially regrettable" because most black lung claimants "are middle-aged or elderly and in poor health, and therefore quite likely to die before receiving benefits if their cases are spun out for years."); *Lango v. Director, OWCP*, 104 F.3d 573, 575-76 (3d Cir. 1997) ("many cases languish while waiting for an ALJ or the [Board] to hear them" such that "the magnitude of the delays is also likely to affect the legal representation available to claimants") (citation omitted). Like *Hicks*, this case similarly has been pending for years, and like *Hicks*, the parties nevertheless have yet to pass first base in the administrative litigation. We thus conclude a similar fresh look is necessary under the Act.

Remand Instructions

On remand, the new ALJ must consider whether the medical opinion evidence supports finding total disability and render findings pursuant to 20 C.F.R. §718.204(b)(2)(iv). The ALJ must resolve the conflict in the medical opinion evidence by addressing the physicians' comparative credentials, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 163. In making their determinations, the ALJ must set forth their findings in detail and explain their rationale in accordance with the APA's requirements. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

If the Claimant establishes total disability based on the medical opinion evidence, the ALJ must weigh the evidence as a whole to determine whether she established the Miner had 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, she 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 by establishing either that the Miner did not have both clinical and legal pneumoconiosis, or that "no part of [the Miner's] 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); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015). If Claimant fails to establish total disability, an essential element of entitlement, the new ALJ may reinstate the denial of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987).

Accordingly, the ALJ's Decision and Order Denying Benefits on Remand is affirmed in part and vacated in part, and the case is remanded to the Office of

Administrative Law Judges for reassignment to a different ALJ for further consideration in accordance with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

JONES, Administrative Appeals Judge, dissenting and concurring:

I respectfully dissent from the majority's decision to order reassignment of this case to a different ALJ on remand. The majority relies on the Fourth Circuit's holding in *Hicks* to conclude that "review of this claim requires a fresh look at the evidence." *Hicks*, 138 F.3d at 537; *supra* p. 6. While remand of this case is required, it does not require such a "fresh look" and reassignment to another ALJ is not necessary.

This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit which has not formulated a specific test for when reassignment is warranted. Other Circuit Courts use a three-part test to determine whether judicial reassignment on remand is appropriate absent proof of bias: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty disregarding previously expressed views or findings the appellate court determined were erroneous; (2) whether reassignment is advisable to preserve appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving appearance of fairness. *Maldonado Santiago v. Velazquez Garcia*, 821 F.2d 822, 832 (1st Cir. 1987); *U.S. v. Robin,* 553 F.2d 8, 10 (2d Cir.1977); *U.S. ex rel. Williams v. Renal Care Grp., Inc.,* 696 F.3d 518, 532-33 (6th Cir.2012); *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1041 (9th Cir. 2008); *Mitchell v. Maynard*, 80 F.3d 1433, 1448 (10th Cir. 1996); *U.S. v. White*, 846 F.2d 678, 696 (11th Cir. 1988). In this case, all three factors weigh against reassignment. First, there is no indication that the ALJ would have difficulty disregarding his previous findings as he only needs to resolve a conflict between two contrary medical opinions. Second, because this panel no longer includes our former colleague who dissented from

our prior remand and would have affirmed the denial of benefits, reassignment compromises the appearance of justice and could inadvertently appear to signal the Board favors a particular outcome. Lastly, reassignment would be wasteful and duplicative as I do not believe it would result in preserving even the appearance of fairness.

For these reasons, I would not reassign this case to another ALJ. *See* 20 C.F.R. §725.352; *Cochran v. Consolidation Coal Co*., 16 BLR 1-101, 1-107-08 (1992); *Zamora v. C.F. & I. Steel Corp*., 7 BLR 1-568, 1-572 (1984). I otherwise concur with the majority.

MELISSA LIN JONES
Administrative Appeals Judge