



BRB No. 25-0211 BLA

ALLEN G. HILBERT

Claimant-Respondent

v.

DOMINION COAL CORPORATION, c/o
HEALTHSMART CASUALTY CLAIMS

Employer-Petitioner

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

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 07/09/2026

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits Following Remand by the Benefits Review Board of William P. Farley, Administrative Law Judge, United States Department of Labor.

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

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) William P. Farley's Decision and Order Awarding Benefits Following Remand by the Benefits Review Board (2021-

BLA-05718) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Act). This case involves a miner's subsequent claim¹ filed on October 21, 2019, and is before the Benefits Review Board a second time.²

In his first decision, the ALJ found Claimant did not establish complicated pneumoconiosis and thus could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. He found Claimant established 32.5 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he 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),³ and established a change in an applicable condition of entitlement.⁴ 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption and awarded benefits.

Pursuant to Employer's appeal, the Board affirmed, as unchallenged, the ALJ's finding that Claimant established 32.5 years of qualifying coal mine employment. *See Hilbert v. Dominion Coal Corp.*, BRB No. 24-0018 BLA, slip op. at 3 n.5 (Dec. 3, 2024) (unpub.). The Board vacated, however, the ALJ's finding that Claimant established total

¹ Claimant filed a prior claim, which the district director denied on January 27, 2016, because the evidence did not establish the existence of a totally disabling pulmonary or respiratory impairment. Director's Exhibit 1.

² Administrative Appeals Judge Jonathan Rolfe is substituted on the panel for Administrative Appeals Judge Judith S. Boggs, who is no longer a member of the Board.

³ Section 411(c)(4) 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(b).

⁴ 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 he finds "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); *see 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 the district director denied the prior claim for failure to establish total disability, Claimant was required to submit new evidence establishing that element to obtain a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

disability based on the medical opinion evidence. The Board noted the ALJ credited Dr. Nader's opinion, which relied in part on a qualifying, resting arterial blood gas study, over Dr. Fino's contrary opinion, which relied on a non-qualifying, resting study and that substituted a pulse oximetry test for the exercise study the regulations require in the absence of medical contraindications after a non-qualifying resting study.⁵

The Board held the ALJ did not adequately explain his finding that Dr. Nader's opinion is well-reasoned for relying on a qualifying blood gas test and Claimant's symptoms because the ALJ did "not reconcile this finding with his determination that the arterial blood gas study evidence as a whole was in equipoise." *Id.* at 5.

Further, the Board held the ALJ erred in discrediting Dr. Fino's opinion in finding that he failed to consider Claimant's qualifying, resting arterial blood gas study results and relied solely on the pulse oximetry results, whereas Dr. Fino expressly reviewed Dr. Nader's conflicting resting blood gas evidence and explained that he relied on the pulse oximetry results to find Claimant did not exhibit oxygen desaturation with exertion. Thus, the Board vacated the ALJ's findings that Claimant established total disability based on the medical opinion evidence and the record as a whole. 20 C.F.R. §718.204(b)(2)(iv); *see Hilbert*, BRB No. 24-0018 BLA, slip op. at 6. The Board therefore also vacated the ALJ's findings that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309(c); *see Hilbert*, BRB No. 24-0018 BLA, slip op. at 6. The Board, however, affirmed as unchallenged the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. *See Hilbert*, BRB No. 24-0018 BLA, slip op. at 6 n.11.

On remand, the ALJ reconsidered the arterial blood gas and medical opinion evidence. Decision and Order on Remand at 8-11. The ALJ credited Dr. Nader's February 13, 2020 qualifying resting arterial blood gas study over Dr. Fino's July 29, 2020 non-qualifying resting study and further found Dr. Nader's opinion more reasoned and persuasive than Dr. Fino's contrary opinion because Dr. Nader followed the process the regulations establish for administering the arterial blood gas studies that served as the basis for both medical opinions -- while Dr. Fino did not follow the framework and provided no reason for his failure to do so. 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order on Remand at 8-11. In light of these findings, the ALJ determined Claimant established total disability based on the arterial blood gas studies, medical opinion evidence, and record as

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

a whole. *Id.* at 11. He therefore reinstated his finding Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309(c). Given the Board's previous affirmance of the ALJ's determination that Employer did not rebut the presumption, the ALJ awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption. Claimant responds in support of the award 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.⁶ 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, a claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). 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 qualifying 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 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 Claimant established total disability based on the blood gas studies, medical opinions, and evidence as a whole.⁷ 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order on Remand at 8-11.

⁶ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 15, 22-23.

⁷ In his initial decision, the ALJ found the two pulmonary function studies are non-qualifying and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 27-28.

Blood Gas Studies

Employer first argues the ALJ erred in finding the arterial blood gas studies establish total disability. Employer's Brief at 5-8. We disagree. Dr. Fino's unexplained failure to follow the unambiguous regulatory framework governing arterial blood gas studies provided a reasonable basis for the ALJ to credit Dr. Nader's qualifying study over Dr. Fino's non-qualifying study. 20 C.F.R. §718.105(b); *Lane v. Union Carbide, Corp.*, 105 F.3d 166, 173 (4th Cir. 1997) (where a resting blood gas study is non-qualifying, the applicable regulations at 20 C.F.R. §718.105(b) "provide that physicians must administer an exercise study unless such a study is medically contraindicated"); see *Ridner v. LeMarco, Inc.*, BRB No. 01-0582 BLA, slip op. at 6 (unpaginated), 2002 WL 34707308, at *3 (Mar. 27, 2002) (unpub.) (where resting blood gas study was non-qualifying "and the record contained no evidence that an exercise study was medically contraindicated," "an exercise blood gas study was properly administered and the [ALJ] misapplied Section 718.105(b) when he suggested that the exercise study should not have occurred").

The regulation at 20 C.F.R. §718.105(b) mandates that "[a] blood gas study shall initially be administered at rest and in a sitting position" and "[i]f the results of the blood-gas test at rest do not satisfy the requirements of Appendix C to this part, an exercise blood-gas test shall be offered to the miner unless medically contraindicated." 20 C.F.R. §718.105(b). This requirement reflects the medical understanding that blood gas studies "are performed to detect an impairment in the process of alveolar gas exchange" and that "[t]his defect will manifest itself as a fall in arterial oxygen tension either at rest or during exercise." 20 C.F.R. §718.105(a). Thus, both resting and exercise blood gas tests provide independent bases to establish disability. *Id.* As it is within the ALJ's discretion to find a particular blood gas study more probative than another, see *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984), an ALJ may give greater weight to exercise study results because exercise testing is more probative of a miner's respiratory or pulmonary capacity to perform his usual coal mine work.

The ALJ considered two resting blood gas studies.⁸ Dr. Nader's February 13, 2020 resting study produced qualifying values, and no exercise study was conducted. Dr. Fino's July 29, 2020 resting study produced non-qualifying values, yet Dr. Fino conducted a pulse oximetry test instead of an exercise blood gas test without explaining why. 20 C.F.R. §718.204(b)(2)(ii); Director's Exhibits 22, 39.⁹

⁸ The record contains no exercise blood gas studies.

⁹ Notably, Dr. Nader's qualifying at-rest study eliminated any need for him to conduct an exercise study. 20 C.F.R. §718.105(b). Dr. Fino's refusal to offer an exercise

The ALJ noted the applicable quality standard at 20 C.F.R. §718.105(b), which provides in pertinent part that if a miner's resting blood gas study yields non-qualifying results, "an exercise blood-gas test shall be offered to the miner unless medically contraindicated." Decision and Order on Remand at 9. Finding "the record does not contain any evidence of medical contraindication," and that Dr. Fino conducted an exercise pulse oximetry rather than exercise blood gas test without "provid[ing] any medical reason for foregoing an exercise arterial blood gas study," the ALJ found Dr. Fino's resting study merits less weight and the preponderance of blood gas studies establishes total disability at 20 C.F.R. §718.204(b)(2)(ii).¹⁰ *Id.*

Counter to Employer's argument, the ALJ properly determined that Dr. Fino's blood gas study did not comply with Section 718.105(b), and he appropriately used his discretion to discredit the study on that basis. 20 C.F.R. §718.105(b). As Dr. Fino's resting blood gas study result was non-qualifying and the record contained no medical opinion that an exercise study was medically contraindicated for Claimant, an exercise blood gas study should have occurred. *See* 20 C.F.R. §718.105(b); *Lane*, 105 F.3d at 173; *Ridner*, BRB No. 01-0582 BLA, slip op. at 6 (unpaginated), 2002 WL 34707308, at *3.

Moreover, the ALJ determined, within his discretion, that Dr. Fino did not explain why he chose not to administer an exercise blood gas study to Claimant in accordance with Section 718.105(b) but rather administered a pulse oximetry test. Indeed, Dr. Fino did not even attempt to explain why an exercise blood gas study was contraindicated in Claimant's specific case, and just generally stated that pulse oximetry is "without complications (such as arterial damage that may occur with a blood gas)[.]" Director's Exhibit 39 at 8. While that may be true, it is not, as the ALJ recognized, the process the regulations contemplate, and allowing such a general justification would permit a physician to substitute pulse oximetry tests for exercise blood gas tests at their discretion, nullifying the regulation's

test after conducting an initial non-qualifying resting test, however, was particularly puzzling given his recognition that Claimant's last coal mine employment involved "very heavy labor" and that Claimant suffered dyspnea "performing manual labor[.]" Director's Exhibit 39 at 3; *see* 20 C.F.R. §718.105(b); *Coen v. Director, OWCP*, 7 BLR at 1-30, 1-31-32 (1984).

¹⁰ While the ALJ found the blood gas study evidence in equipoise in his initial Decision and Order, Decision and Order at 28, he followed the Board's remand instructions to reconcile that determination with his finding regarding the medical opinion evidence and permissibly found on remand that Dr. Fino's unexplained failure to follow the regulations undermined both his medical opinion and the blood gas studies that served as the foundation for that opinion. Decision and Order on Remand at 9-11.

unambiguous mandate that an exercise test be administered. The ALJ therefore acted in his discretion in crediting Dr. Nader's blood gas testing over Dr. Fino's. *See, e.g., Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16, 1-22 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). And because the ALJ provided a rational basis for crediting Dr. Nader's qualifying study over Dr. Fino's non-qualifying study, we affirm his finding that the blood gas evidence supports total disability at 20 C.F.R. §718.204(b)(2)(ii). *Coen*, 7 BLR at 1-31-32.

Medical Opinions

The same result controls the medical opinion evidence because both doctors used the same studies almost exclusively as the foundation for their disability opinions. Dr. Nader conducted the Department of Labor's complete pulmonary evaluation of Claimant on February 13, 2020, and obtained "normal" pulmonary function test results and qualifying resting blood gas study results. Dr. Nader noted that Claimant, working as a section boss, "operated scoop and roof bolt machine," "hung curtains," and lifted "50-100 pounds at any given time during work day" in conditions "42 inches to 5 feet high," which he classified as a "heavy" level of exertion. Director's Exhibit 22 at 1. He further noted Claimant has a history of chronic cough, wheezing, and shortness of breath, and stated these symptoms also "contribute[] to [Claimant's] pulmonary disability." *Id.* at 4. Ultimately, he concluded Claimant is "totally disabled from a pulmonary capacity standpoint and could not perform" the heavy exertional requirement of "[his] last coal mine job" based on his "ABG at rest[.]" which "meets the standard for total pulmonary disability[.]" *Id.*

Dr. Fino examined Claimant on July 29, 2020, and reviewed Dr. Nader's report and objective testing results. Director's Exhibit 39. Dr. Fino noted that Claimant's breathing problem "has been present for the last 20 years and is getting worse," and that he becomes "dyspneic when walking at his own pace on the level ground or ascending one flight of steps." *Id.* at 2. He further noted the same shortness of breath occurs "when walking up hills or grades, lifting and carrying," or "performing manual labor." *Id.* Dr. Fino obtained "normal" pulmonary function test results and a non-qualifying resting blood gas study result, which he also characterized as "normal." *Id.* at 6.

But despite recognizing that Claimant performed "heavy labor," Director's Exhibit 39 at 3, Dr. Fino did not perform an exercise blood test, did not explain why one was medically contraindicated, and completely limited his disability discussion to what he considered to be the benefits of a pulse oximetry test in general. Dr. Fino noted, among other things: pulse oximetry testing "is the preferred method of determining whether or not a patient requires home oxygen under Medicare guidelines;" it "can provide the same

information as an arterial blood gas [sic];” and it “has numerous uses and is well known to be an accurate method of assessing oxygenation in exercise laboratories and other areas of the hospital where oxygenation needs to be monitored.” *Id.* at 8. But Dr. Fino provided nothing further in discussing whether Claimant was disabled and did nothing to address why a pulse oximetry test was preferable in Claimant’s case. *Id.*

As the ALJ thus correctly found, “Dr. Fino’s pulse oximetry evidence is his sole reasoning against total disability” and he “failed to acknowledge Claimant’s symptoms” given the heavy exertional requirements of his job. Decision and Order on Remand at 11. The ALJ then permissibly concluded, “I find Dr. Fino’s sole reliance on pulse oximetry, and lack of a statement or explanation regarding medical contraindication for an exercise ABG following a non-qualifying resting ABG, evidence that his total disability conclusion portion of his opinion is not as well-documented nor as well-reasoned as Dr. Nadar’s [sic] opinion.” *Id.* The ALJ’s inescapable implication that an exercise arterial blood gas test was the best measure of disability given Claimant’s last job and uncontested symptoms was well within his discretion, *Lane*, 105 F.3d at 173, as was his conclusion to give Dr. Fino’s opinion less weight because he did not adequately explain why he did not perform an exercise study as the regulation requires nor did he otherwise explain how Claimant could perform his job. 20 C.F.R. §718.105(b); *Ridner*, BRB No. 01-0582 BLA, slip op. at 6 (unpaginated), 2002 WL 34707308, at *3.

Simply put, the ALJ permissibly determined the arterial blood gas studies in this case established disability, and as those studies served as the primary basis for the medical opinions, he likewise acted in his discretion in finding they too support disability. *Underwood*, 105 F.3d at 949; *Carson*, 19 BLR at 1-22; *Clark*, 12 BLR at 1-155; *Coen*, 7 BLR at 1-31-32.

We therefore affirm the ALJ’s finding that the medical opinion evidence supports a finding of total disability and Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Remand at 11. Consequently, we affirm the ALJ’s finding that Claimant invoked the Section 411(c)(4) presumption and therefore the award of benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309(c); Decision and Order on Remand at 2, 12.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits Following Remand by the Benefits Review Board.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge