**U.S. Department of Labor**

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

BRB Nos. 24-0113 BLA
and 24-0114 BLA

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| MAXINE TRIGG<br>(o/b/o and Widow of LEON TRIGG)<br><br>Claimant-Respondent<br><br>v.<br><br>SLAB FORK COAL COMPANY<br><br>and<br><br>WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | **NOT-PUBLISHED**<br><br>DATE ISSUED: 06/16/2025<br><br>DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

Chris M. Green and Wes A. Shumway (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits (2021-BLA-05661 and 2021-BLA-05675) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on February 25, 2019,[1] and a survivor's claim filed on January 13, 2021.[2]

The ALJ found Claimant established the Miner had thirty-seven years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she determined 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),[3] and established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). She further found Employer did not rebut the

[1] This is the Miner's fifteenth claim for benefits; as he withdrew his tenth, thirteenth, and fourteenth claims, they are considered not to have been filed. *See* 20 C.F.R. §725.306(b); Miner's Claim (MC) Director's Exhibits 1-10, 12; ALJ Exhibits 1, 2 (Exhibit 9); Hearing Transcript at 13-14. On July 5, 2016, the district director denied the Miner's most recent prior claim -- his twelfth, filed on December 3, 2015 -- because he failed to establish any element of entitlement. ALJ Exhibit 2 (Exhibit 28).

[2] Claimant is the widow of the Miner, who died on October 20, 2020, while his claim was pending before the district director. Survivor's Claim (SC) Director's Exhibits 2, 4, 5. She is pursuing the miner's claim on his behalf and her own survivor's claim.

[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).

[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 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); *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 Miner failed to establish any element of entitlement in his prior claim, Claimant had to submit new evidence establishing at least one element of

presumption and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, the ALJ determined Claimant is automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[5]

On appeal, Employer asserts the ALJ erred in finding the Miner had a totally disabling respiratory or pulmonary impairment.[6] Claimant responds in support of the award. Employer replies, addressing Claimant's assertions and reiterating its arguments on appeal. The Acting Director, Office of Workers' Compensation Programs, did not file a substantive 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 accordance with applicable law.[7] 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).

**Miner's Claim**

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

To invoke the Section 411(c)(4) presumption, a 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 or comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total

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entitlement to obtain review of the merits of the Miner's current claim. *Id.*; *see White*, 23 BLR at 1-3.

[5] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 37 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5 n.4; MC Director's Exhibit 13.

disability based on qualifying pulmonary function studies or arterial blood gas studies,[8] 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2). Employer contends the ALJ erred in finding Claimant established total disability based on the pulmonary function studies and the evidence as a whole.[9] Decision and Order at 9-11, 18; *see* 20 C.F.R. §718.204(b)(2)(i).

The ALJ considered three pulmonary function studies dated June 26, 2018, March 15, 2019, and October 16, 2019. Decision and Order at 10. Before determining whether the studies were qualifying for total disability, the ALJ noted a discrepancy in the measurements of the Miner's height, with two physicians listing the Miner's height at 67 inches and one listing it as 66.5 inches. *Id.* at 9; *see* MC Director's Exhibit 23 at 14-23; MC Employer's Exhibits 1 at 8-13, 2 at 12-14. She also considered recorded heights in the Miner's treatment records: 71 inches (three times), 70 inches (one time), 69 inches (four times), and 68 inches (one time). Decision and Order at 9 (citing *Duty v. Cow Creek Coal Co.*, BRB No. 21-0213 BLA (Jan. 31, 2022) (unpub.)), MC Employer's Exhibits 3-5, 12. Averaging the recorded heights from the designated pulmonary function studies and the treatment records, the ALJ found the Miner was 68.96 inches tall. Decision and Order at 9. Applying the greater closest table-value height of 69.3 inches, the ALJ determined the June 26, 2018 study produced non-qualifying values both before and after the administration of a bronchodilator, the March 15, 2019 study produced qualifying values before and after the administration of a bronchodilator, and the October 16, 2019[10] study

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

[9] The ALJ found Claimant did not establish total disability based on the arterial blood gas studies or medical opinions and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii)-(iv); Decision and Order at 9 n.6, 11-18.

[10] The ALJ stated Dr. Zaldivar, who conducted the October 16, 2019 study, did not identify any validity issues with the study in his initial report but later concluded this study "is really not very good" and "the effort was not maximal." Decision and Order at 10-11 (quoting MC Employer's Exhibits 1, 10 at 25). In a supplemental report, Dr. Zaldivar also

produced qualifying values before the administration of a bronchodilator and post-bronchodilator values were not obtained. *Id.* at 10-11.

Employer asserts the ALJ erred in basing the pulmonary function study results on an incorrect height for the Miner, which skewed the applicable disability values when evaluating the studies. Employer's Brief at 11-18. Employer maintains that the ALJ offered insufficient rationale for considering height measurements from medical records she deemed too old to be probative of the Miner's respiratory or pulmonary condition.[11] *Id.* 12-14, 18-21; Employer's Reply Brief at 3-5. We disagree.

Both the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, and the Board have held that where there are substantial differences[12] in the recorded heights among the pulmonary function studies of record, an ALJ must make a factual finding to determine a miner's "correct" height. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 114, 19 BLR 2-70, 2-80-81 (4th Cir. 1995);

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stated this study "was of poor quality overall." MC Employer's Exhibit 15. The ALJ found Dr. Zaldivar's statements insufficient to invalidate the October 16, 2019 study. Decision and Order at 11. As Employer does not challenge this finding, we affirm it. *See Skrack*, 6 BLR at 1-711.

[11] Specifically, Employer asserts the ALJ should not have averaged in the height of 70 inches noted in the Miner's May 7, 2013 treatment notes, while simultaneously finding the non-qualifying spirometry in those notes to be too old to be indicative of the Miner's condition at the time of his death. Employer's Brief 6-7, 20-21.

[12] Employer argues that there was not a "substantial difference" in the recorded heights on the affirmative pulmonary function studies and therefore the ALJ should have averaged only those three heights or used the tallest of the three heights. Employer's Brief at 12-13. However, it is the duty of the ALJ to make findings of fact and resolve conflicts in the evidence; therefore, we defer to her determination as to whether there was a substantial difference in the recorded heights and how to resolve the issue. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999). Employer also generally asserts the ALJ failed to incorporate the Miner's 67-inch recorded heights from prior 2013 and 2016 Department of Labor-sponsored examinations of the Miner without citing to these documents or explaining how the ALJ's consideration of those height values would have changed the ALJ's calculation concerning the Miner's "correct" height. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 12-13.

*Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). In compliance with these holdings, the ALJ explained that she averaged the recorded heights in the designated pulmonary function studies and in the Miner's treatment records to find that the Miner's height was 68.96 inches. Decision and Order at 9.

Contrary to Employer's contention, the ALJ's determination that the May 7, 2013 treatment record pulmonary function study values were "not probative of the Miner's pulmonary condition at the time of his death (or even at the times of the more recent pulmonary function tests of record) because it was more than ten-years-old does not preclude her reliance on that study's recorded height when calculating the Miner's average height, as these two uses are not similar. Decision and Order at 26; *see* Employer's Brief at 21-22; Employer's Reply Brief at 7. Because of the latent and progressive nature of pneumoconiosis, an ALJ may credit newer studies over older studies when, like in the current case, the more recent tests show a deterioration consistent with that progression.[13] *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Kincaid v. Island Creek Coal Co*., 26 BLR 1-43, 1-50-52 (2023). However, the same rationale does not apply to a recorded height absent a sufficient rationale for why it is an outlier or should not be considered. In addition, the ALJ specifically considered Dr. Zaldivar's testimony questioning more recent recorded heights of 71 inches and found that while his "skepticism is not unwarranted," she determined "no reason or indication that any of the height recordings are inaccurate per se" but rather found they were variable due to the Miner's inability to stand up straight.[14] Decision and Order at 14 n.12 (citing MC Employer's Exhibit 10 at 33). Because it is supported by substantial evidence, we affirm the ALJ's finding that the Miner's "correct" height was 68.96 inches. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 9; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756 (4th Cir. 1999) (The Board must uphold decisions that rest within the realm of rationality; a reviewing court has no license to "set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis.").

[13] To the extent Employer is arguing the ALJ relied solely on a recency analysis to find the pulmonary function study evidence supports a finding of total disability, we reject it. *See* Employer's Brief at 21-22; Employer's Reply Brief at 7. The ALJ permissibly performed a quantitative and qualitative analysis, indicating she gave probative weight to each of the three studies but found the two more recent, qualifying studies entitled to more weight than the older, non-qualifying study. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-54 (4th Cir. 2016); Decision and order at 10-11.

[14] Thus, we reject Employer's general assertion that "[j]ust like pulmonary function decreases with age, so too does an individual's height." Employer's Reply Brief at 7.

Consequently, we affirm the ALJ's determination that the pulmonary function studies support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 11.

Employer further contends the ALJ erred in failing to consider the Miner's May 7, 2013 treatment record pulmonary function study in evaluating total disability. Employer's Brief at 18-22; Employer's Reply Brief at 5-7. We reject Employer's assertion that remand is required because the ALJ did not consider the May 7, 2013 pulmonary function study when weighing the evidence as a whole concerning total disability.[15] Employer's Brief at 18-20; Employer's Reply Brief at 5-7. The ALJ indicated she declined to weigh the May 7, 2013 pulmonary function study contained in the Miner's treatment notes with the affirmatively designated studies "because . . . it would run afoul of the evidentiary limitations." 20 C.F.R. §725.414(a)(2)(i)." Decision and Order at 11 n.9. She also failed to weigh the study when considering the evidence as a whole at 20 C.F.R. §718.204(b)(2). But as Employer contends, there are no evidentiary limitations for records of treatment for a respiratory or pulmonary or related disease, and therefore the ALJ should have considered this treatment study when evaluating whether the Miner was totally disabled. *See* 20 C.F.R. §725.414(a)(4); Employer's Brief at 20. However, given the ALJ's determination, discussed *supra*, that the May 7, 2013 pulmonary function study was not probative of the Miner's condition at either the time of his death or when the more recent studies were conducted, Employer has not explained how the ALJ's total disability determination would have been altered even if she had considered this study. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *see also Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 26; Employer's Brief at 18-20; Employer's Reply Brief at 5-7.

Consequently, we affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole[16] and therefore established a change in an applicable

[15] We affirm, as unchallenged, the ALJ's finding that the Miner's usual coal mine work required "heavy manual labor." *See Skrack*, 6 BLR at 1-711; Decision and Order at 6.

[16] The ALJ indicated that Claimant's testimony supports that the Miner had breathing problems and would not be able to perform his usual coal mine work requiring heavy exertion. Decision and Order at 18 n.13. The ALJ quoted Claimant's statements that the Miner "couldn't breathe too good" when they got married approximately twenty-five years ago, "couldn't walk too far" without becoming short of breath, and "stopped driving because his breathing was so bad" two years before he died. *Id.* (quoting Hearing

condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309(c); *see Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 18-19. Thus, we affirm her finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305. As Employer raises no arguments concerning rebuttal, we also affirm the ALJ's finding that it did not rebut the presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.305(d)(1); Decision and Order at 23-27. We therefore affirm the award of benefits in the miner's claim.

**Survivor's Claim**

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack*, 6 BLR at 1-711; Decision and Order at 28.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

Transcript at 25-27). As Employer has not challenged the ALJ's finding that Claimant's testimony supports a finding of total disability, we affirm it. *See Skrack*, 6 BLR at 1-711.