**U.S. Department of Labor**

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

BRB No. 24-0146 BLA

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| ABRAM S. FRANKS (Deceased)<br><br>Claimant-Respondent<br><br>v.<br><br>CONSOL PENNSYLVANIA COAL COMPANY, LLC<br><br>and<br><br>CONSOL ENERGY, INCORPORATED, c/o SEDGWICK CMS<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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Christopher L. Wildfire (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Amanda Torres (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2023-BLA-05512) rendered on a subsequent claim filed on August 30, 2021,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ accepted the parties' stipulation of twenty-eight years of coal mine employment and found that at least fifteen of those years were qualifying. He further found the Miner[2] had a totally disabling respiratory or pulmonary impairment and therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] The ALJ also found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer challenges the ALJ's finding that the Miner had a totally disabling impairment and therefore invoked the Section 411(c)(4) presumption. It further argues the ALJ erred in finding it failed to rebut the presumption. Claimant has not filed a response. The Acting Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Benefits Review Board to affirm the ALJ's finding that

[1] The Miner indicated on his application for benefits that he filed a prior claim for federal black lung benefits, which was denied. Director's Exhibit 2. The records associated with that claim have been destroyed. Director's Exhibit 39.

[2] Claimant is the widow of the Miner, who died on April 3, 2022. Employer's Exhibit 11. She is pursuing the Miner's claim on his behalf. Director's Exhibit 13.

[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); 20 C.F.R. §718.305.

the Miner's usual coal mine employment required medium exertion. Employer has filed a reply to the Director's brief, reiterating its arguments.[4]

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 also 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 qualifying pulmonary function studies or arterial blood gas studies,[6] 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 pulmonary function study evidence, the medical opinion evidence, and the evidence when weighed together as a whole.[7]

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[4] We affirm, as unchallenged on appeal, the ALJ's finding that at least fifteen years of the Miner's coal mine employment was qualifying. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5; Employer's Brief at 1.

[5] 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 3.

[6] 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).

[7] The ALJ found the arterial blood gas study evidence failed to support the establishment of total disability and there was no evidence of cor pulmonale with right-

**Pulmonary Function Studies**

The ALJ considered two pulmonary function studies dated April 26, 2021, and October 25, 2021. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 21-24; Director's Exhibit 16; Claimant's Exhibit 3. The April 26, 2021 pulmonary function study, taken as part of Claimant's medical treatment, was qualifying for total disability. Claimant's Exhibit 3. The October 25, 2021 pulmonary function study, taken as part of the Department of Labor sponsored complete pulmonary evaluation of the Miner, was qualifying, but the physician who conducted the test stated it was invalid due to inadequate effort.[8] Director's Exhibit 16. Because the April 26, 2021 pulmonary function study was qualifying, the ALJ found the pulmonary function study evidence establishes total disability. Decision and Order 24; 20 C.F.R. §718.204(b)(2)(i).

Employer argues the ALJ erred in failing to consider the opinions of Drs. Basheda (Employer's Exhibit 3, 3a) and Go (Claimant's Exhibit 1) that the April 26, 2021 pulmonary function study was invalid. Employer's Brief at 15-18. We agree.

The Miner underwent a pulmonary function study at Centerville Clinic on April 26, 2021, which noted that the Miner "cooperated well with good comprehension," but it was not reviewed by a physician. Claimant's Exhibit 3 at 4 and 7. Dr. Go reviewed the study and stated the test was "uninterpretable" and the trials were "technically suboptimal." Claimant's Exhibit 1 at 3. Dr. Basheda also reviewed the study and stated "the forced expiratory time/volume-time curve was less than 6 seconds" and there was "suboptimal effort with invalid spirometry." Employer's Exhibit 3 at 6. The ALJ erred in not considering this evidence. *See* 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order at 24.

However, we note that a pulmonary function study not administered to support a claim for benefits is not subject to the specific quality standards set forth in Appendix B of 20 C.F.R. Part 718. *See* 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2008) (quality standards are not applicable to hospitalization and treatment

sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 24-25.

[8] The Miner passed away before he could be offered a repeat examination as required by 20 C.F.R. §725.406(c). Director's Exhibit 29.

records). Nonetheless, an ALJ must determine if the results are reliable.[9] *Stowers*, 24 BLR at 1-92; 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). Thus, while the ALJ did not err in failing to consider whether the study was in substantial compliance with the specific requirements of the quality standards, he erred in failing to consider whether it is reliable. *Id*.

Consequently, we vacate the ALJ's determination that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 24.

**Medical Opinion Evidence**

Notwithstanding whether the objective testing is qualifying, total disability may be established by a reasoned medical opinion that the miner is unable to perform his usual coal mining work. 20 C.F.R. §718.204(b)(2)(iv); *see Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988). A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co*., 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Coal Co.*, 4 BLR 1-535, 1-538-39 (1982). Even a mild impairment may be totally disabling depending on the exertional requirements of the miner's usual coal mine employment. *Cornett*, 227 F.3d at 578. The determination will vary on a case-by-case basis, depending upon the individual's employment history. *Brown v. Cedar Coal Co.*, 8 BLR 1-86, 1-87 (1985); *Shortridge*, 4 BLR at 1-539.

The Miner worked in coal mine employment from February 1971 to August 2002, last working for Enlow Fork Mining from October 1990 to August 2022. Director's Exhibit 3. At Enlow, the Miner worked as a loader operator from February 18, 1991, to

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[9] The Department of Labor explained in the comments to the 2001 revised regulations that evidence that is not subject to the quality standards must still be assessed for reliability by the fact finder:

> The Department note[s] that [20 C.F.R.] §718.101 limits the applicability of the quality standards to evidence "developed . . . in connection with a claim for benefits" governed by 20 C.F.R. [P]arts 718, 725, or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

March 15, 2002, and as a mine examiner from March 15, 2002, to August 2, 2002. Director's Exhibits 5, 7. Based on the Dictionary of Occupational Titles, the ALJ found the Miner's work as a loader operator required medium exertion while his work as a mine inspector required light exertion. Decision and Order at 6 n.8. Because the Miner worked at both positions for his last employer, the ALJ stated he would consider the Miner's last coal mine employment to have required medium exertion. *Id*.

Employer contends that the Miner's last job was working solely as a mine inspector and therefore the ALJ erred in finding his last coal mine employment required medium exertion. Employer's Brief at 18-19. The Director responds that the ALJ rationally found that the Miner's work as a loader operator for more than ten years was his usual coal mine employment, i.e., the most recent job he performed regularly and over a substantial period of time, and not the final five months of his job as a mine inspector for the company. Director's Response at 2-3. We agree with Employer's argument to the extent that the ALJ failed to make a specific finding as to Claimant's usual coal mine employment and explain his reasoning.

Contrary to the Director's argument, the ALJ did not specifically determine that Miner's loader operator position "more fully reflected the Miner's usual coal mine work." Director's Brief at 3. Rather, the ALJ found the Miner performed both jobs and, without further explanation, summarily stated he would consider the Miner's last coal mine employment to have required medium exertion to evaluate whether the Miner was totally disabled. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 6 n.8. We therefore vacate the ALJ's determination that the Miner's usual coal mine work required moderate exertion. *Id.* As this finding, and his determination that the pulmonary function study evidence establishes total disability, may have affected his weighing of the medical opinions, we vacate his finding that the medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(iv).

Consequently, we also vacate the ALJ's finding that the evidence as a whole establishes total disability, that Claimant invoked the Section 411(c)(4) presumption, and the award of benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 25-31, 35-36.

**Remand Instructions**

On remand, the ALJ must reconsider whether Claimant has established total disability and invoked the Section 411(c)(4) presumption. He must first address whether a preponderance of the pulmonary function study evidence supports finding total disability. 20 C.F.R. §718.204(b)(2)(i). In doing so, he should first determine whether the

April 26, 2021 pulmonary function study is reliable for establishing total disability. *See Stowers*, 24 BLR at 1-92.

Next, the ALJ must determine whether the Miner's work as a loader operator or coal mine inspector was his usual coal mine employment, i.e., the most recent job he performed regularly and over a substantial period of time. *See Pifer*, 8 BLR at 1-155; *Shortridge*, 4 BLR at 1-539. The ALJ must then reconsider the medical opinions given his findings regarding the pulmonary function study evidence, the exertional requirements of Claimant's usual coal mine work, and all other relevant evidence. 20 C.F.R. §718.204(b)(2)(iv). The ALJ must resolve the conflicts in the evidence by addressing the physicians' explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986).

If the ALJ finds the pulmonary function studies, the medical opinion evidence or both support finding total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), he must weigh all the relevant evidence together, like and unlike, to determine whether Claimant has established the existence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

If the ALJ finds the evidence establishes total disability, Claimant will have invoked the Section 411(c)(4) presumption that the Miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). If so, the ALJ must then determine if Employer rebutted the presumption.[10] 20 C.F.R. §718.305(d). However, if Claimant does not establish total disability, the ALJ must deny benefits as Claimant will have failed to establish an essential element of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). In making his findings on remand, the ALJ must explain the bases for his credibility determinations, findings of fact, and conclusions of law as the Administrative Procedure Act requires.[11] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR 1-162, 1-165 (1989).

[10] We decline to address, as premature, the ALJ's findings that Employer did not rebut the presumption.

[11] The Administrative Procedure Act 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).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge