



BRB No. 25-0003 BLA

ALBERT L. WISE )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 CONSOL MINING COMPANY, LLC )  
 )  
 and )  
 )  
 CONSOL ENERGY INCORPORATED, c/o )  
 SMART CASUALTY CLAIMS )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest )

**NOT-PUBLISHED**

DATE ISSUED: 06/11/2025

DECISION and ORDER

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

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Deanna Lyn Istik (Sinatra & Istik Law Office, PLLC), Cranberry Township, Pennsylvania, for Claimant.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE 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-05940) rendered on a claim filed May 19, 2022, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with twenty-one years of underground coal mine employment and found he established 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,<sup>1</sup> 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established a totally disabling respiratory or pulmonary impairment and thereby invoked the Section 411(c)(4) presumption. It further argues he erred in finding it did not rebut the presumption.<sup>2</sup> Claimant responds in support of the award of benefits. The Acting Director, Office of Workers' Compensation Programs, has not filed 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 accordance with applicable law.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

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<sup>1</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground or substantially similar surface coal mine employment. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305.

<sup>2</sup> We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-one years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 6.

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as 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 3; Hearing Transcript at 24.

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A miner may establish total disability based on pulmonary function studies, 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 opinion evidence, and evidence as a whole.<sup>4</sup> 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 16-24. Employer challenges these findings. Employer's Brief at 5-7.

The ALJ considered the results of three resting blood gas studies. Dr. Celko's June 6, 2022 study and Dr. Kilkenny's November 15, 2022 study produced non-qualifying values, while Dr. Basheda's March 4, 2024 study produced qualifying values.<sup>5</sup> Director's Exhibits 13, 23; Employer's Exhibit 5. Finding the most recent study of record most probative of Claimant's current condition, the ALJ found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 20.

The ALJ next considered the medical opinions of Drs. Celko, Hua, and Kreft diagnosing Claimant with a totally disabling pulmonary impairment<sup>6</sup> and the opinions of

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<sup>4</sup> The ALJ found the pulmonary function studies do not establish total disability and there is 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 18-20.

<sup>5</sup> A "qualifying" blood gas study yields values that are equal to or less than the applicable table values listed in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(ii).

<sup>6</sup> Drs. Celko, Hua, and Kreft diagnosed a moderate obstruction and moderate diffusion impairment based on Claimant's pulmonary function studies with reduced Diffusing Capacity of the Lung for Carbon Dioxide (DLCO) values; they opined the sum of these impairments preclude the heavy exertion required of his last coal mine job as a roof bolter. Director's Exhibits 13 at 1, 20 at 1; Claimant's Exhibits 1 at 5, 3 at 4. Dr. Hua additionally interpreted the desaturation with exercise that Claimant demonstrated on Dr.

Drs. Kilkenny and Basheda that Claimant retains the pulmonary capacity to perform his last coal mine work as a roof bolter.<sup>7</sup> Director's Exhibits 20, 23; Claimant's Exhibits 1, 1a, 3, 3a; Employer's Exhibits 2, 3, 5-7. The ALJ found the opinions of Drs. Krefft, Kilkenny, and Basheda are not well reasoned because the physicians failed to address the qualifying values of Claimant's most-recent blood gas study, "classifying all of Claimant's diagnostic testing as 'non-qualifying.'" Decision and Order at 23. He additionally found Dr. Kilkenny failed to consider the exertional requirements of Claimant's usual coal mine employment. *Id.* By contrast, the ALJ found Drs. Celko and Hua credibly explained Claimant's moderate obstructive impairment and moderate diffusion impairment preclude him from performing his usual coal mine work. *Id.* at 24. He therefore found the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 24.

We agree with Employer's arguments that the ALJ both mischaracterized the opinions of Drs. Kilkenny and Basheda and erred in failing to resolve the scientific conflict in the evidence. Employer's Brief at 5, 9. As Employer asserts, Drs. Kilkenny and Basheda did address the qualifying values of Claimant's March 4, 2024 resting blood gas study, explaining that the values are normal for Claimant's advanced age and do not reflect an impairment. Employer's Exhibits 5 at 6; 6 at 16-17, 21; 17 at 18-19. As a qualifying test

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Kilkenny's exercise pulse oximetry test as "consistent with significant diffusion impairment." Claimant's Exhibit 3a at 3.

<sup>7</sup> Relying on the objective studies that she conducted, Dr. Kilkenny explained the bases of her opinion: Claimant does not have any obstructive impairment; his DLCO, resting blood gas study, and resting pulse oximetry are normal for his advanced age; and the desaturation with exercise demonstrated on his walk-oximetry test does not reflect a "severe problem" as it did not qualify Claimant for oxygen therapy. Director's Exhibit 23 at 8; Employer's Exhibit 6 at 14-22.

Dr. Basheda diagnosed Claimant with a non-disabling, moderate obstructive impairment. Employer's Exhibits 5 at 19-21, 7 at 16. Although Dr. Basheda conceded Claimant's DLCO value was "abnormal," he opined it did not reflect additional impairment because the DLCO obtained on his pulmonary function study reflects a diffusion "measurement" whereas blood gas and pulse oximetry studies assess diffusion "impairments." Employer's Exhibit 5 at 20. Further explaining Claimant's resting blood gas and pulse oximetry tests were normal for his age and that the desaturation he demonstrated on Dr. Kilkenny's exercise pulse oximetry would not qualify him for oxygen therapy, Dr. Basheda concluded Claimant's moderate obstructive impairment alone would not preclude him from performing his roof bolting work. Employer's Exhibits 5 at 20-21; 7 at 17-19, 22-23.

is sufficient to establish a totally disabling blood gas impairment only in the absence of contrary probative evidence, the ALJ erred in failing to consider this aspect of Drs. Kilkenny's and Basheda's opinions at 20 C.F.R. §718.204(b)(2)(ii).<sup>8</sup> *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137, 1-141 (1986);<sup>9</sup> see *K.J.M. [Meade] v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008) (party opposing entitlement may offer medical evidence to prove qualifying pulmonary function study values are actually normal and do not represent a totally disabling pulmonary impairment for a miner who is over the age of seventy-one). We therefore vacate the ALJ's finding that the blood gas studies establish total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 20.

Moreover, as the ALJ's evaluation of the blood gas study evidence affected his weighing of the medical opinions on total disability, we also vacate his finding at 20 C.F.R. §718.204(b)(2)(iv).<sup>10</sup> In doing so, we note, as Employer asserts, that the ALJ did not resolve the conflict underlying the physicians' disability opinions as he did not provide a valid reason for discrediting the opinions of Drs. Basheda and Kilkenny regarding the absence of an obstructive-diffusion impairment that precludes the exertional demands of Claimant's last coal mine work. 20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 9-10.

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<sup>8</sup> The ALJ's decision makes no reference to Drs. Kilkenny's and Basheda's interpretations of Claimant's March 4, 2024 blood gas studies as not reflecting impairment for his age.

<sup>9</sup> In *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986), the Board held that an ALJ may not reject medical opinions solely because the physicians state a miner's blood gas studies are normal for his age. The Board noted that the comments to Appendix C of 20 C.F.R. Part 718 "specifically recognized the validity of the assertion that blood gas tensions vary with age" but noted "age was not used in formulating the table[s]" of qualifying values, because the Department of Labor concluded that adjusting the tables for age would have made them "increasingly complicated." *Hucker*, 9 BLR at 1-141 (citation omitted).

<sup>10</sup> In addition to discounting Drs. Kilkenny and Basheda for failing to address Claimant's qualifying blood gas study, the ALJ additionally found Dr. Basheda failed to recognize that the results of a blood gas study may be both qualifying under Appendix C and not qualifying for oxygen therapy under insurance-company thresholds. Decision and Order at 23-24. Although the ALJ also discounted Dr. Kilkenny for failing to consider the exertional requirements of Claimant's usual work, Employer correctly asserts Dr. Kilkenny actually did consider Claimant's usual work as including very heavy exertion. Employer's Brief at 6; Director's Exhibit 23 at 3; Employer's Exhibit 6 at 26.

Because we have vacated the ALJ's finding of total disability, we also vacate his finding that Claimant invoked the Section 411(c)(4) presumption.<sup>11</sup> 30 U.S.C. §921(c)(4).

### **Remand Instructions**

On remand, the ALJ must reconsider whether the blood gas study evidence supports the establishment of total disability, taking into account all relevant evidence, including the opinions of Drs. Basheda and Kilkenny that Claimant's qualifying blood gas study reflects normal gas exchange for his age. 20 C.F.R. §718.204(b)(2)(ii). The ALJ must then reconsider the medical opinion evidence to determine whether that evidence supports finding total disability. 20 C.F.R. §718.204(b)(2)(iv). When weighing the medical opinions, the ALJ must address the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 310 (4th Cir. 2012); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993). If the blood gas study or medical opinion evidence supports finding total disability, the ALJ should then weigh all the relevant evidence together to determine whether Claimant has established total disability. *See* 20 C.F.R. §718.204(b)(2); *see also 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 must set forth his findings in detail as the Administrative Procedure Act<sup>12</sup> requires. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If Claimant is unable to establish total disability, benefits are precluded. However, if he establishes total disability, he will have invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1); *Shedlock*, 9 BLR at 1-198. If Claimant invokes the Section 411(c)(4) presumption, the ALJ must then consider whether Employer rebutted it. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(d)(1)(i), (ii). If Employer fails to rebut the presumption, Claimant is entitled to benefits, and the ALJ may reinstate the award of benefits.

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<sup>11</sup> We decline to address, at this time, Employer's challenge to the ALJ's determination that it failed to rebut the presumption.

<sup>12</sup> 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 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