U.S. Department of Labor

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

BRB No. 24-0141 BLA

RODERICK R. GEORGE Claimant-Petitioner v. WEST VIRGINIA ELECTRIC CORPORATION Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 03/14/2025 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits 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.

Mary Lou Smith (Howe, Anderson & Smith, P.C.), Washington, D.C., for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2023-BLA-05252) rendered on a claim filed on July 20, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 18.99 years of total coal mine employment, of which at least fifteen years were in underground coal mines or substantially similar conditions at surface coal mines. However, he found Claimant did not establish a totally disabling pulmonary or respiratory impairment and, therefore, could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. He also found Claimant did not establish pneumoconiosis, 20 C.F.R. §718.202(a)(1)-(4), and denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish total disability and thus did not invoke the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[2] 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 (1965).

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

A miner is totally disabled if he has a pulmonary or respiratory impairment that, 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,[3] evidence of

[1] Section 411(c)(4) of the Act 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) (2018).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because 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.

[3] 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.

pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[4] 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 establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

Pulmonary Function Studies

The ALJ considered three pulmonary function studies dated August 31, 1987, October 27, 2020, and May 26, 2022. Decision and Order at 20-22. He observed that a pulmonary function study constitutes evidence of total disability if it produces both a qualifying FEV_1 value and one of the following: a qualifying FVC or MVV value, or an FEV_1/FVC ratio equal to or less than fifty-five percent. *Id.* at 20-22; *see* 20 C.F.R. §718.204(b)(2)(i)(A)-(C). The qualifying values in Appendix B of 20 C.F.R. Part 718 are based on gender, height, and age.

The studies reported Claimant's height as sixty-seven inches for the August 31, 1987 study, seventy inches for the October 27, 2020 study, and sixty-nine inches for the May 26, 2022 study. Decision and Order at 21; Director's Exhibits 14, 17; Employer's Exhibit 3. Referring to the discrepancy in the measurements of Claimant's height, the ALJ asserted, with citations to two medical journal articles, that a person's height decreases with age and can vary on a daily basis by over 0.60 inches "depending on the time of day due to the effects of exertion and gravity." Decision and Order at 21 n.28. Based on this information, the ALJ determined:

> It is completely understandable, therefore, that different height measurements were recorded for the miner as they were made not only over a period of time, but at different times of day as well. In the present case, neither party has objected to any of the recorded heights contained in the

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Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[4] We affirm, as unchallenged, the ALJ's determinations that the arterial blood gas studies do not support total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii)-(iii); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22-23.

> pulmonary function test reports. Absent contrary evidence, there is no reason to doubt the accuracy of the various measurements even though they vary.

Id.

The ALJ also reported, however, that Board precedent did not permit him to use the varying recorded heights in evaluating each test, but rather "requires the [ALJ] to *sua sponte* alter the unimpeached evidence of record in this matter and not accept the measurements as observed by the medical providers." Decision and Order at 21-22 n.28 (citing *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983) ("[i]f there are substantial differences in the recorded heights among all the studies, the [ALJ] must make a factual finding to determine claimant's actual height."); *see K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008). The ALJ interpreted Board caselaw as follows:

> Evidently the Board is willing to accept precise data from physicians regarding the miner's pulmonary function and other data, but not the physician's [sic] measurement of the miner's height on a given day and time if there are "substantial differences" – a factor the Board left undefined. In compliance with the Board's requirement to "determine [the] claimant's actual height," the undersigned will adopt the shortest measurement of [Claimant] provided in the admitted pulmonary function studies. The rationale for this approach is simple; if all of the physician's [sic] measurements are presumed to be incorrect (and therefore the [ALJ] is to substitute a measurement in their place as required by the Board), averaging those incorrect measurements would simply produce – absent mere random chance – an incorrect measurement as well. By adopting the shortest measurement of many possible ones, logically the miner is *at least* as tall as the shortest, and if even the shortest is incorrectly not short enough, it would be the *closest* to the miner's real height compared to the other incorrect, taller possible choices.

Id. at 21-22 n.28 (emphasis in original).

The ALJ next determined that when Claimant's shortest height of sixty-seven inches is used, "the closest greater height to that value" in the tables at Appendix B must be applied, which is 67.3 inches. Decision and Order at 21-22 n.28. Relying on the values applicable for a miner who is 67.3 inches tall, and Claimant's age when the studies were performed (thirty-eight years old for the earliest study and over seventy-one years old for the latter two), the ALJ found that none of the pulmonary function studies produced qualifying values. *Id*. at 21-22 & 21 n.27. Consequently, he found Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*. at 22.

Claimant asserts the ALJ failed to adequately explain why he used the lowest-reported height in considering the pulmonary function study evidence. Claimant's Brief at 10-11 (unpaginated). We agree.

The ALJ made clear his disagreement with the Board's holding in *Protopappas.* Decision and Order at 21-22 n.28; *see Protopappas*, 6 BLR at 1-223. However, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, also specifically requires an ALJ to determine a miner's "correct" height to properly evaluate whether pulmonary function studies are qualifying for total disability under the regulations. *Toler v. E. Assoc. Coal Co.*, 43 F.3d 109, 114 (4th Cir. 1995); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895-96 (7th Cir. 1990). Although the ALJ has discretion to render factual findings, his determination of an actual or "correct" height must be rational and supported by substantial evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998). As explained below, we vacate the ALJ's reliance on sixty-seven inches in determining whether the pulmonary function studies are qualifying because it is based on a flawed rationale.

The ALJ first erred in failing to adequately explain how the medical literature he cited is applicable to the facts of this case. Although he observed that a person's height can vary by more than 0.60 inches daily, and that a person's height decreases with age, the evidence in this case does not conform to those observations. Decision and Order at 21 n.28. Claimant's recorded height did not steadily decline with age, as it was measured as sixty-seven inches on August 31, 1987, seventy inches on October 27, 2020, and sixty-nine inches on May 26, 2022. Director's Exhibits 14, 17; Employer's Exhibit 3. Additionally, the difference between the heights reported for Claimant was three inches, which is five times the variance of 0.60 inches referenced by the ALJ.[5]

[5] The ALJ's rationale – that "logically the miner is *at least* as tall as the shortest [recorded height], and if even the shortest is incorrectly not short enough, it would be the *closest* to the miner's real height" – also does not pass muster. Decision and Order at 21-22 n.28 (emphasis in original). While it is true that a miner who is seventy inches tall is also at least sixty-seven inches tall, it does not necessarily follow that Claimant's correct height is sixty-seven inches tall, particularly given the fact that Claimant's height was measured three times between 1987 and 2020 as sixty-seven, seventy, and sixty-nine inches. Thus, contrary to the ALJ's analysis, there is evidence in this case that sixty-seven inches is not tall enough, but there is no evidence for the proposition he advances that sixty-seven inches may be too tall.

Most critically, the ALJ's finding as it relates to Claimant's actual height is based on an incorrect interpretation of the Board's holding in *Protopappas*. Contrary to the ALJ's analysis, *Protopappas* does *not* presume that all of the physicians' measurements are incorrect. *See* Decision and Order at 21-22 n.28. Instead, it requires that "[i]f there are substantial differences in the recorded heights among all the studies, the [ALJ] must make a factual finding to determine claimant's actual height." *See Protopappas*, 6 BLR at 1-223. Thus, while the Board has upheld ALJs' decisions to calculate a miner's average height as being a reasonable method to resolve substantial differences between recorded heights, *Meade*, 24 BLR at 1-44; *Krise v. Kocher Coal Co.*, BRB No. 11-0250 BLA (Dec. 21, 2011) (unpub.), the Board has also upheld ALJs' decisions to choose one of the recorded heights as the actual height, where the ALJ provided an adequate rationale for doing so, *see Jent v. Cumberland River Coal Co.*, BRB No. 06-0814 BLA (July 31, 2007) (unpub.); *Yonce v. CSX Transportation, Inc.*, BRB No. 98-1132 BLA (May 21, 1999) (unpub.).

In the tables set forth in Appendix B of 20 C.F.R. Part 718, as the miner's height decreases, the qualifying values for the FEV_1, FVC, and MVV also decrease. Thus, pulmonary function study values that would be qualifying for total disability at a greater height may be non-qualifying at a lower height.[6] In this case, the ALJ acknowledged that the October 27, 2020 pre-bronchodilator pulmonary function study results are qualifying using the measured height of seventy inches. Decision and Order at 21 n.27. The ALJ's error thus impacted his weighing of the evidence.[7] We therefore vacate his determination that Claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[8]

[6] The effect of applying the ALJ's rationale of automatically choosing the lowest recorded height is to disadvantage claimants without a sound basis, which is counter to the remedial purpose of the Act. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019) (The Act "is remedial legislation that should be liberally construed so as to include the largest number of miners within its entitlement provisions."); *Sunnyside Coal Co. v. Dir., OWCP* [*Fossat*], 112 F.4th 902, 912 (10th Cir. 2024); *Carpenter v. GMS Mine & Repair Maint. Inc.*, 26 BLR 1-33, 38 n.5 (2023).

[7] We note, however, that the ALJ's findings with respect to the August 31, 1987 and May 26, 2022 studies would still remain non-qualifying even if Claimant's height is determined to be seventy inches. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[8] The ALJ alternatively credited the May 26, 2022 study over the October 27, 2020 study based on its recency. Decision and Order at 22 n.29. This is error, as the Board and the Fourth Circuit have held it is irrational to credit evidence solely based on recency when

Claimant's Usual Coal Mine Work and Weighing of the Medical Opinions

The ALJ relied on the *Dictionary of Occupational Titles* (DOT) to determine that Claimant's usual coal mine work as an electrician involved medium labor.[9] Decision and Order at 8 n.10, 24, 27 n.32; Hearing Transcript at 6; *see Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982) ("usual coal mine work" is "the most recent job [the miner] performed regularly and over a substantial period of time"). Next, the ALJ considered the medical opinions of Drs. Jaworski and Fino. Decision and Order at 25-28.

Dr. Jaworski performed the Department of Labor (DOL) sponsored complete pulmonary evaluation of Claimant on October 27, 2020. He identified Claimant's last coal mine employment as requiring "heavy" exertion and opined Claimant's moderate respiratory impairment could prevent him from performing "certain aspects" of the job, such as changing conduits or climbing many steps. Director's Exhibit 14 at 1, 4. Dr. Fino described Claimant's last coal mine employment as requiring "very heavy" and "heavy" exertion and stated he "agree[d] with the [DOL] evaluation performed in October of 2020 that [Claimant] does have a pulmonary disability" and "is disabled." Director's Exhibit 17 at 3, 10-11. He further explained Claimant has had a reduction in his FVC and FEV_1 values since his 1986 and 1987 pulmonary function studies and a drop in his oxygen saturation with exertion. *Id.*

The ALJ determined that because both physicians indicated Claimant could not perform heavy manual labor, their opinions overestimated the exertional requirements of Claimant's last coal mine work, which the ALJ found to require only medium exertion. Decision and Order at 27 nn.32-33. He further found Dr. Jaworski's opinion to be equivocal and not well-reasoned and Dr. Fino's opinion was conclusory and did not specifically address whether Claimant would be able to perform the duties of his last coal

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that evidence shows the miner's condition has improved. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718 (4th Cir. 1993) ("A bare appeal to 'recency' is an abdication of rational decisionmaking."); *see also Kincaid v. Island Creek Coal Co*., 26 BLR 1-43, 1-49-52 (2023); *Smith v. Kelly's Creek Res*., 26 BLR 1-15, 1-27-28 (2023).

[9] The ALJ noted that the DOT defines an electrician's job as requiring medium exertional work. The DOT defines "Medium Work" as "[e]xerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical demand requirements are in excess of those for Light Work." Decision and Order at 8 n.10 (quoting *Dictionary of Occupational Titles*, App. C (4th Ed., Rev. 1991)).

mining job. *Id.* at 26-28. Consequently, the ALJ found that Claimant failed to establish total disability at 20 C.F.R. 718.204(b)(2)(iv).

Claimant contends the ALJ erred by relying solely on his job title as an electrician to determine he performed medium exertion work and failed to consider Claimant's specific testimony and other relevant evidence indicating his work also required heavy labor. Claimant's Brief at 10 (unpaginated). We agree.

Claimant testified at the hearing that he had to carry wire, tools, water, and other items up and down steps. Hearing Transcript at 18-19. He testified that the tools weighed thirty-five to forty pounds, the oxygen bottles weighed over 100 pounds, and the "settling" weighed approximately sixty to seventy pounds. *Id*. at 19. Dr. Jaworski classified Claimant's work as heavy, noting that he changed conduits weighing 150 pounds and handled gear switches weighing eighty pounds. Director's Exhibit 14 at 1. Dr. Fino noted that Claimant described his work as "very heavy labor – 20%; heavy labor – 50%; moderate labor – 20%; and light labor – 10%." Director's Exhibit 17 at 3.

Because the ALJ did not consider all of the relevant evidence in determining the exertional requirements of Claimant's usual coal mine work, his finding that Claimant performed only medium exertion work does not comply with the Administrative Procedure Act (APA),[10] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). We therefore vacate it. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53, 255-56 (4th Cir. 2016) (ALJ must conduct an appropriate analysis of the evidence to support his conclusion and render necessary credibility findings); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (factfinder's failure to discuss relevant evidence requires remand).

As the ALJ's errors in determining the exertional requirements of Claimant's usual coal mine work affected his weighing of the medical opinions, we vacate his conclusion that the medical opinion evidence does not support a finding of total disability.[11] 20 C.F.R.

[10] The APA requires that every adjudicatory decision 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).

[11] Dr. Jaworski opined that Claimant's respiratory impairment could prevent him from performing certain aspects of his last coal mining job such as changing conduits, which weigh up to 150 pounds, or climbing large numbers of steps. The ALJ found Dr. Jaworski's opinion "does not answer the relevant inquiry as to whether the miner is able to perform his last coal mine employment or work of similar effort. If anything, the

§718.204(b)(2)(iv); Claimant's Brief at 8-9 (unpaginated). Consequently, we vacate the ALJ's findings that Claimant did not establish total disability based on the evidence as a whole or invoke the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305; Decision and Order at 28. We therefore vacate the ALJ's denial of benefits.

Remand Instructions

On remand, in weighing the pulmonary function study evidence, the ALJ must first determine Claimant's actual height and explain his determination in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. Additionally, he must resolve the conflicting evidence without regard to recency alone to determine whether Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). *See Thorn*, 3 F.3d at 718; *Kincaid*, 26 BLR at 1-49-52; *Smith*, 26 BLR at 1-27-28.

He must also determine the exertional requirements of Claimant's usual coal mine employment based on all relevant evidence and reevaluate whether the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991). In rendering his credibility findings, the ALJ must consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

If the ALJ finds total disability established based on the pulmonary function studies, the medical opinions, or both, he must weigh all the relevant evidence together to determine whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198. If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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physician's opinion is equivocal or vague, finding only that the miner is disabled from certain aspects of his last mining job." Decision and Order at 26. Contrary to the ALJ's statements, Dr. Jaworski's opinion that Claimant is unable to perform certain aspects of his job, if credible, supports a finding that Claimant is totally disabled from performing his usual coal mine work. *See Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991) (in evaluating the exertional requirements of a miner's usual coal mine employment, an ALJ must determine the exertional requirements of the most difficult job the miner performed); *Shortridge*, 4 BLR at 1-539.

However, if Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption and the ALJ must determine whether Employer has rebutted it.[12] 20 C.F.R. §718.305(d)(1). In rendering his findings and credibility determinations on remand, the ALJ must explain his decision in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[12] Because the burden of proof may change on remand, we decline to address, as premature, the ALJ's finding that Claimant failed to establish pneumoconiosis. Decision and Order at 18.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits and remand the case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge