**U.S. Department of Labor**

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

BRB No. 24-0088 BLA

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| JERRY E. DAVIS<br><br>Claimant-Respondent<br><br>v.<br><br>APOGEE COAL COMPANY<br><br>and<br><br>ARCH RESOURCES<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: 05/28/2025<br><br>DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

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

Michael A. Pusateri (Greenberg Traurig, LLP), Washington, D.C., for Employer and its Carrier.

Ann Marie Scarpino (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: BOGGS, ROLFE, and JONES, Administrative Appeals Judges.

BOGGS and JONES, Administrative Appeals Judges:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2021-BLA-05488) rendered on a subsequent claim[1] filed on April 9, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Apogee Coal Company (Apogee) is the responsible operator and Arch Resources (Arch) is the responsible carrier. He credited Claimant with 15.55 years of coal mine employment in underground mines and surface mines in conditions substantially similar to underground mines. He found Claimant established he has a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2). Consequently, he established a change in an applicable condition of entitlement[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits.

[1] On May 3, 2017, the district director denied Claimant's prior claim, filed on August 10, 2016, because he did not establish total disability. Decision and Order at 2; Director's Exhibit 40 at 7; *see* Aug. 9, 2022 Hearing Tr. at 7-13.

[2] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless he 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 Claimant failed to establish total disability in his prior claim, he had to submit evidence establishing this element to obtain review of the merits of his current claim. *Id*.

[3] 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); *see* 20 C.F.R. §718.305.

On appeal, Employer asserts the ALJ erred in finding Arch is the liable carrier. On the merits, it argues the ALJ erred in finding Claimant established total disability and invoked the Section 411(c)(4) presumption and in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Acting Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's determination that Arch is liable for benefits. Employer filed replies to Claimant's and the Director's briefs, reiterating its contentions.[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 establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.204(b)(2), 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,[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 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

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established 15.55 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7, 10.

[5] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Apr. 4, 2022 Hearing Tr. at 9, 36.

[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).

(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 arterial blood gas study and medical opinion evidence, and in consideration of the evidence as a whole.[7] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 30-32.

**Arterial Blood Gas Studies**

The ALJ considered five blood gas studies dated June 2, 2019, June 28, 2019, January 27, 2021, July 16, 2021, and February 17, 2022. Decision and Order at 12-13, 27, 28, 30. The June 2, 2019 study produced qualifying values at rest and non-qualifying values with exercise. Director's Exhibit 20 at 26. The June 28, 2019 study produced non-qualifying values at rest. Employer's Exhibit 31 at 237. The January 27, 2021 study produced qualifying values at rest and with exercise, while the July 16, 2021 study produced qualifying values at rest. Claimant's Exhibit 15 at 12; Employer's Exhibit 2 at 3. Finally, the ALJ found the February 17, 2022 study produced qualifying results at rest. Decision and Order at 12; Claimant's Exhibit 1 at 7. The ALJ found the most recent studies are qualifying and relied on "the preponderance of qualifying test results" in concluding the blood gas study evidence weighs in favor of a finding of total disability.[8] Decision and Order at 30 n.9.

Employer argues the ALJ erred in finding the February 17, 2022 study produced qualifying values. Employer's Brief at 16. Its argument has merit. The study produced a $PCO_2$ value of 47.1, thus any $PO_2$ value equal to or less than 60 would be qualifying. Claimant's Exhibit 1 at 7. Because the $PO_2$ was 65, the study is not qualifying under 20 C.F.R. §718, Appendix C. *Id.* We therefore vacate the ALJ's finding that the February 17, 2022 study is qualifying as it is not supported by substantial evidence. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (substantial evidence is such relevant

[7] 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 30.

[8] We agree with Employer's argument that the ALJ may have applied an erroneous burden of proof to the blood gas study evidence to the extent he utilized the term "presumption." Decision and Order at 29, 32; Employer's Brief at 16. Although it appears he weighed all the evidence together without actually applying any presumption, we caution the ALJ that there is no presumption that qualifying blood gas studies establish total disability. Rather, qualifying blood gases may establish total disability at 20 C.F.R. §718.204(b)(2)(ii) absent contrary probative evidence. Decision and Order at 29, 32.

evidence as a reasonable mind might accept as adequate to support a conclusion). Consequently, we also vacate the ALJ's finding the blood gas studies support a finding of total disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 30.

Employer also asserts the ALJ erred in considering only one of the two blood gas studies dated July 16, 2021. Employer's Brief at 17. Specifically, Employer asserts the ALJ erred in only considering the qualifying blood gas study because the treatment record also contains a separate non-qualifying blood gas study, and that both the qualifying and non-qualifying studies are invalid because Claimant was being treated for cardiac issues "and[,] thus, was not in a stable medical state."[9] *Id.* at 17. On remand, the ALJ should address these arguments.[10] *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

**Medical Opinions**

The ALJ considered the medical opinions of Drs. Green, Werchowski, Habre, Rosenberg, and Zaldivar. Decision and Order at 13-26, 30-32. Drs. Green, Werchowski, and Habre opined Claimant is totally disabled. Dr. Green based his opinion on the impaired gas exchange and hypoxemia demonstrated on the January 27, 2021 blood gas study. Claimant's Exhibit 18 at 10. Dr. Habre based his opinion on the qualifying nature of the February 17, 2022 blood gas study, while Dr. Werchowski based his opinion on the qualifying June 2, 2019 resting blood gas study. Director's Exhibits 20 at 26; 23 at 1; Claimant's Exhibit 1 at 3-4. Dr. Rosenberg opined Claimant has a "respiratory issue" and a qualifying gas exchange abnormality based on his blood gas studies, and Dr. Zaldivar opined Claimant's blood gases are abnormal, but both physicians opined Claimant is not disabled from a pulmonary perspective. Employer's Exhibits 2 at 32; 3 at 3-4; 29 at 8; 30 at 6; 5 at 45-47, 56.

[9] Employer also asserts the ALJ erred in stating the July 16, 2021 study is the most recent. Employer's Brief at 17. Contrary to Employer's contention, the ALJ stated the study is "the most recent arterial blood gas study in Claimant's *treatment records*," Decision and Order at 30 n.9 (emphasis added), and that Dr. Habre conducted the most recent resting study on February 17, 2022. Decision and Order at 12, 30; *see* Claimant's Exhibit 1 at 2.

[10] Additionally, the ALJ failed to make any findings regarding the June 28, 2019 blood gas study and should do so on remand. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); Decision and Order at 28, 30; Employer's Exhibit 31 at 237.

The ALJ found the opinions of Drs. Rosenberg and Zaldivar address the cause of Claimant's disabling respiratory impairment and thus do not undermine the qualifying blood gas studies. Decision and Order at 32. He further found the opinions of Drs. Green and Habre are reasoned and documented, and thus the medical opinion evidence supports a finding of total disability. *Id.*

Employer asserts the ALJ failed to consider Dr. Werchowski's opinion. Employer's Brief at 18. We agree. While the ALJ summarized Dr. Werchowski's report, he failed to make any credibility findings and must do so on remand. *See McCune*, 6 BLR at 1-998.

Because we have vacated the ALJ's finding the February 17, 2022 blood gas study is qualifying and his overall weighing of the blood gas study evidence, we must vacate his weighing of the medical opinions.[11] Decision and Order at 30-32. Consequently, we vacate his conclusion that they support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv) and his finding the evidence overall establishes total disability. *Id.* at 32.

We therefore vacate the ALJ's findings that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c)(3), and we vacate the award of benefits. Decision and Order at 32, 42, 48. We decline to address, as premature, Employer's argument that the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption. Employer's Brief at 22-30.

**Responsible Insurance Carrier**

Employer does not challenge the ALJ's findings that Apogee is the correct responsible operator and that it was self-insured by Arch on the last day Apogee employed

[11] Employer argues the ALJ erred in weighing the opinions of Drs. Rosenberg and Zaldivar. Employer's Brief at 18-21. Drs. Rosenberg and Zaldivar opined Claimant's blood gas studies show a respiratory impairment but opined it is related to non-pulmonary issues such as obesity, obstructive sleep apnea, and a "control-of-breathing abnormality." Employer's Exhibits 2 at 32; 3 at 4; 29 at 8; 30 at 6. Contrary to Employer's argument, the ALJ rationally found their opinions "address the *cause* of Claimant's disabling respiratory or pulmonary impairment, which is not relevant at 20 C.F.R. §718.204(a), but is properly addressed at 20 C.F.R. §718.204(c) or, if [C]laimant invokes the Section 411(c)(4) presumption, on rebuttal at 20 C.F.R. §718.305(d)(1)(ii)." Decision and Order at 32; *see Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81 (10th Cir. 1989); *Johnson v. Apogee Coal Co.*, 26 BLR 1-1, 1-10-11 (2023)

Claimant; thus we affirm these findings.[12] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a). Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (Trust Fund). Employer's Brief at 30-55; Employer's Reply to Director at 2-7.

In 2005, after Claimant ceased his employment with Apogee, Arch sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot Coal Corporation (Patriot). Employer's Brief at 11-12; Director's Reply at 2; Director's Exhibit 38 at 25, 54. In 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to July 1, 1973. Director's Reply at 2; Director's Exhibit 38 at 32. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Apogee, Patriot later went bankrupt and can no longer provide for those benefits. Director's Reply at 2; Director's Exhibit 38 at 252. The ALJ found nothing, however, relieved Arch of liability for paying benefits to miners last employed by Apogee when Arch owned and provided self-insurance to that company. Decision and Order at 46; Director's Reply at 2.

Employer raises several arguments to support its contention that Arch was improperly designated the self-insured carrier in this claim and thus the Trust Fund, not Arch, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 30-55; Employer's Reply to Director at 2-7. It argues the ALJ erred in finding Arch liable for benefits because: (1) no evidence establishes Arch's self-insurance covered Apogee for this claim; (2) without proof of coverage, the DOL improperly pierced Arch's corporate veil in holding it liable; (3) the ALJ treated Arch as a

[12] Employer argues there is no insurance policy or self-insurance agreement establishing Arch's liability. Employer's Brief at 33-36; Employer's Reply to Director at 5. However, the Notice of Claim specifically identifies Arch as Apogee's insurance carrier, Director's Exhibit 26, and Employer's other arguments acknowledge that Arch was the self-insurer of Apogee at the time of Claimant's last date of employment. *See, e.g.*, Employer's Brief at 36-43.

Employer also asserts "DOL's new approach to transactions completed over a decade ago [] offends Arch's due process rights." Employer's Brief at 50. Due process requires a party be given notice and an opportunity to mount a meaningful defense. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999). Because Employer was properly notified of its designation as the potentially responsible carrier, Director's Exhibit 26, and has not identified how it was deprived of notice or an opportunity to respond, we reject its argument. *Id.*

commercial insurer under the regulations rather than a self-insurer;[13] (4) retroactive application of the policy reflected in Black Lung Benefits Act (BLBA) Bulletin No. 16-01[14] imposes new liability on self-insured mine operators that bypasses traditional rulemaking in violation of the Administrative Procedure Act (APA);[15] and (5) the sale of Apogee to Magnum released Arch from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability. *Id*.

The ALJ rejected Employer's arguments based on the Board's decision in *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-312-18. Decision and Order at 47. However, Employer contends that case is inapplicable because it submitted new evidence not considered in *Howard* that establishes BLBA Bulletin No. 16-01, and the Department's change in policy it represents, are unlawful, and that the ALJ did not adequately address this evidence. Employer's Brief at 30-33, 38-46, 52-54, *citing Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018); Employer's Reply to Director's Reply at 1. We agree that the ALJ has not specifically addressed Employer's new evidence and any effect it may have, and thus his findings do not satisfy the explanatory requirements of the APA.[16] *See*

[13] Employer also argues the BLBA imposes liability only on responsible operators and potentially liable operators and does not impose liability on insurance carriers or self-insurers, such as Arch in this case. Employer's Brief at 36-37. We reject Employer's argument. A "carrier is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 951 (4th Cir. 1990). The regulations specifically include the insurance carrier or self-insurer as a party to claims, thereby subjecting them to the same liability as responsible operators.

[14] BLBA Bulletin No. 16-01 is a memorandum the DOL issued on November 12, 2015, to "provide guidance for district office staff in adjudicating claims" affected by Patriot's bankruptcy.

[15] Employer argues the DOL's policy is a retroactive change that amounts to an unlawful taking of its property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 54-55. Contrary to Employer's argument, requiring Employer to satisfy its liability under the Act by paying benefits does not constitute an unconstitutional taking of property. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011) ("the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause").

[16] The APA provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or

*Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Employer's Exhibits 18-20. We therefore vacate the ALJ's determination that Arch is the responsible insurance carrier.

**Remand Instructions**

On remand, the ALJ must first reconsider all of the arterial blood gas studies and weigh them together to determine, with sufficient explanation, whether they support total disability. 20 C.F.R. §718.204(b)(2)(ii). He must also reweigh the medical opinions taking into consideration his findings regarding the blood gas studies and other objective evidence. *See Milburn Colliery v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998) (ALJ must consider all relevant evidence and adequately explain their rationale for crediting certain evidence); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); 20 C.F.R. §718.204(b)(2)(iv). In weighing the medical opinions, he must consider the physicians' qualifications, the explanations for their opinions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441.

If the ALJ finds Claimant established total disability based on the blood gas studies or medical opinions, he must then reweigh all the evidence as a whole and determine whether Claimant has established total disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock*, 9 BLR at 1-198. If Claimant establishes total disability, he will invoke the Section 411(c)(4) presumption and establish a change in an applicable condition of entitlement, in which case the ALJ must consider whether Employer has rebutted it.[17] 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309(c)(3). He must also reconsider the evidence regarding whether Arch is the responsible insurance carrier and explain what effect, if any, Employer's Exhibits 18-20 have on his liability determination.

If Claimant fails to establish total disability, an essential element of entitlement, the ALJ must deny benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). In rendering his findings on remand, the ALJ must explain the bases for his

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discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[17] Employer argues that if the ALJ may rely on the preamble, the Board must allow it to "conduct discovery regarding the preamble to determine [whether] it remains scientifically valid or even applicable to this case." Employer's Brief at 29-30. For the reasons set forth in *Johnson*, 26 BLR at 1-9, we reject Employer's argument.

findings in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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.

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I concur with the exception that I do not agree with Employer's argument the ALJ erred in applying an erroneous burden of proof to the blood gas study evidence. While the ALJ did reference a "presumption of total disability" it is clear he did not apply one. Decision and Order at 29, 32. Rather he correctly found, consistent with the regulations, Claimant's qualifying blood gas studies establish total disability because there is no contrary probative evidence. 20 C.F.R. §718.204(b)(2)(ii) ("In the absence of contrary probative evidence, [qualifying blood gas studies] shall establish a miner's total disability."); Decision and Order at 32.

JONATHAN ROLFE
Administrative Appeals Judge