

U.S. Department of Labor

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



BRB No. 25-0147 BLA

DAVID E. NEWCOMB)
)
 Claimant-Petitioner)
)
 v.)
)
 REDHAWK MINING, LLC)
)
 and)
)
 KENTUCKY EMPLOYERS' MUTUAL)
 INSURANCE)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

NOT-PUBLISHED

DATE ISSUED: 05/21/2026

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Denying Benefits on Remand (2020-BLA-05265) rendered on a claim filed on April 2, 2019,¹ pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Act). This case is before the Benefits Review Board for the second time.

In his initial Decision and Order Denying Benefits, the ALJ found the record does not contain any evidence of complicated pneumoconiosis, and thus Claimant could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. He found Claimant established thirty-five years of coal mine employment, based on the parties' stipulation, but did not establish a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b).² Thus, he found Claimant could not establish entitlement under 20 C.F.R. Part 718 and denied benefits.

In response to Claimant's appeal, the Board affirmed the ALJ's findings that the pulmonary function and arterial blood gas studies do not support a finding of total disability as unchallenged on appeal and that there is no evidence of cor pulmonale with right-sided congestive heart failure. *Newcomb v. Redhawk Mining, LLC*, BRB No. 23-0308 BLA, slip op. at 4 n.5 (May 28, 2024) (unpub.). However, the Board vacated the ALJ's finding that the medical opinion evidence does not support a finding of total disability and remanded the case for further consideration. *Id.* at 6-7.

On remand, the ALJ again found Claimant did not establish total disability and denied benefits. 20 C.F.R. §718.204(b)(2).

On appeal, Claimant argues the ALJ erred in finding he is not totally disabled. Neither Employer and its Carrier (Employer) nor the Director, Office of Workers' Compensation Programs, filed substantive response briefs.

¹ Claimant filed two prior claims but withdrew them. Director's Exhibits 1, 2. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b).

² Section 411(c)(4) 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); 20 C.F.R. §718.305. Although Claimant established at least fifteen years of coal mine employment, the ALJ did not determine whether the employment was underground or performed in substantially similar conditions, as he found Claimant did not establish total disability. Decision and Order Denying Benefits at 3, 7.

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.³ 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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing the elements of entitlement if certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Total Disability

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 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 *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). The ALJ found Claimant did not establish total disability based on any category of evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order on Remand at 4-5.

Claimant challenges the ALJ's determination that the medical opinion evidence does not support a finding of total disability. Claimant's Brief at 7-14.

Before weighing the medical opinions, the ALJ addressed the exertional requirements of Claimant's usual coal mine employment as a chief maintenance and

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 13; Director's Exhibits 7-9.

electrical foreman.⁴ Decision and Order on Remand at 3-4. He summarized Claimant’s hearing testimony, stating Claimant testified he: repaired and replaced equipment parts; lifted a tool belt that weighed twenty to thirty-five pounds “multiple times a day;” used tools and assistance from other repairmen to lift motors and other equipment; crawled and moved positions “multiple times a day;” walked three miles per day on average; and “worked [twelve] to [fifteen] times a day.”⁵ Decision and Order on Remand at 3 (citing Hearing Transcript at 13-17). Based on Claimant’s testimony, the ALJ found Claimant’s usual coal mine work as a chief maintenance and electrical foreman required “moderate manual labor.” Decision and Order on Remand at 4.

Claimant argues the ALJ erred in assessing the exertional requirements of his usual coal mine work because the ALJ failed to consider all of the relevant evidence. Claimant’s Brief at 7-11. We agree.

In addition to Claimant’s testimony that the ALJ summarized, Claimant further testified about the duties required by his usual coal mine work. Specifically, he testified that aspects of his work were “very, very strenuous,” required crawling under equipment to dig out mud and debris, and required that he spend so much time bent over that it would trigger shortness of breath, aches, and pains. Hearing Transcript at 15-18. He further testified he lifted his twenty-to-thirty-five-pound tool bag approximately fifty times per day and might carry it as much as three miles at a time.⁶ *Id.* at 14, 17. Claimant also indicated on his Form CM-913, Description of Coal Mine Work, that he lifted 150 pounds three to four times per day and carried forty pounds over a distance of 1,500 feet six times per day. Director’s Exhibit 6 at 2. Similarly, Claimant reported to Dr. Green that his work required lifting fifty to one hundred pounds “at any given time” and that the level of exertion was “heavy.” Director’s Exhibit 15 at 1. Likewise, Dr. Fino noted Claimant

⁴ The Board previously held the ALJ erred by failing to address the exertional requirements of Claimant’s usual coal mine employment for comparison with the medical opinions assessing his capability to perform that work. *Newcomb v. Redhawk Mining, LLC*, BRB No. 23-0308 BLA, slip op. at 5 (May 28, 2024) (unpub.).

⁵ We presume the ALJ’s reference to Claimant working “[twelve] to [fifteen] times a day” was a scrivener’s error and that he intended to refer to a frequency of performing an action such as lifting and carrying objects. Decision and Order on Remand at 3.

⁶ The ALJ acknowledged Claimant lifted a twenty to thirty-five-pound tool bag “multiple times a day” but did not address the remainder of Claimant’s testimony concerning how often he lifted the tool bag or the distance he walked with it. Decision and Order on Remand at 3; Hearing Transcript at 14, 17.

reported carrying his tool belt for up to two miles and that he indicated he performed fifty percent of his work at the very heavy exertional level, thirty percent at the heavy exertional level, ten percent at the moderate exertional level, and ten percent at the light exertional level. Employer's Exhibit 5 at 3.

Because the ALJ did not consider all the relevant evidence, we vacate his finding that Claimant's usual coal mine work required moderate manual labor. *See* 30 U.S.C. §923(b) (factfinder must address all relevant evidence); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *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) (failure to discuss relevant evidence requires remand); *see also Eagle v. Armco Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (a miner cannot perform his usual coal mine work if he cannot perform the heaviest or hardest parts of that work).

The ALJ next considered the medical opinion of Dr. Green that Claimant is totally disabled and the opinions of Drs. Fino and Dahhan that he is not.⁷ Decision and Order on Remand at 4-5; Director's Exhibit 15 at 3-4; Employer's Exhibits 6 at 4; 7 at 4; 8 at 4; 9 at 3. Dr. Green opined that Claimant's May 3, 2019 pulmonary function study revealed a "moderate to severe degree of lung restriction" that leaves Claimant unable to "perform the duties of his previous coal mine employment with heavy exertion given the fact that he has ventilatory compromise." Director's Exhibit 15 at 4. Noting Dr. Green did not review Dr. Dahhan's later, nonqualifying pulmonary function testing, which the ALJ found did not support a finding of total disability, the ALJ gave Dr. Green's opinion "less weight" because it "is unclear how Dr. Green would have opined" had he reviewed this testing. Decision and Order on Remand at 5. He did not indicate what weight he gave Drs. Fino's and Dahhan's opinions, indicating only that Claimant had not met his burden to establish total disability. *Id.*

Claimant argues the ALJ erred in discrediting Dr. Green's opinion for the reason given. Claimant's Brief at 11-14. We agree.

Total disability can be established with a reasoned medical opinion even "[w]here total disability cannot be shown" by qualifying objective testing, as a non-qualifying impairment may still render a miner incapable of performing his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir.

⁷ Dr. Fino initially opined Claimant is totally disabled. Employer's Exhibit 5 at 9. But after reviewing the pulmonary function testing conducted during Dr. Dahhan's examination, Dr. Fino revised his opinion and concluded Claimant is not totally disabled. Employer's Exhibits 7 at 4; 8 at 4.

2000). In determining whether a miner is totally disabled, the ALJ must compare the exertional requirements of a miner's usual coal mine work with the physician's description of the miner's pulmonary impairment and physical limitations. *See Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19 (6th Cir. 1996); *Eagle*, 943 F.2d at 512 n.4.

The ALJ asserted he "must" give less weight to Dr. Green's opinion because the physician had not reviewed the most recent nonqualifying pulmonary function study and it was thus not based on a complete picture of Claimant's condition. Decision and Order on Remand at 5. However, total disability may be established with a reasoned medical opinion notwithstanding nonqualifying objective testing, and even a mild pulmonary impairment may be totally disabling, depending on the exertional requirements of a miner's usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett*, 227 F.3d at 578. The ALJ failed to adequately explain why Dr. Green's opinion was undermined by subsequent nonqualifying pulmonary function studies beyond the fact that the more recent studies are nonqualifying and thus failed to satisfy the explanatory requirements of the Administrative Procedure Act.⁸ 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

Further, contrary to the Board's remand instructions, *Newcomb*, BRB No. 23-0308 BLA, slip op. at 5, the ALJ again failed to compare the restrictions imposed by Claimant's pulmonary or respiratory impairment to the exertional requirements of his usual coal mine work to determine whether he retains the ability to perform that work. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989) ("Deviation from the court's remand order in the subsequent administrative proceedings is itself legal error"); *Cornett*, 227 F.3d at 578; *Eagle*, 943 F.2d at 512 n.4; *see also McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988) (ALJ must identify the miner's usual coal mine work and then compare evidence of the exertional requirements of the miner's usual coal mine employment with the medical opinions as to the miner's work capabilities). Because the ALJ failed to conduct the proper analysis at 20 C.F.R. §718.204(b)(2)(iv) and explain his findings as the APA requires, we vacate his determination that the medical opinion evidence does not support a finding of total disability. *See Wojtowicz*, 12 BLR at 1-165; Decision and Order on Remand at 5. Thus, we vacate the ALJ's findings that Claimant did not establish a totally disabling respiratory or pulmonary impairment.

⁸ The APA 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).

Remand Instructions

On remand, the ALJ must again reconsider the exertional requirements of Claimant's usual coal mine employment and must consider all of the relevant evidence in doing so. *See Cornett*, 227 F.3d at 578; *Wojtowicz*, 12 BLR at 1-165. He must then reevaluate whether the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv) by comparing the findings regarding the exertional requirements of Claimant's usual coal mine work with the physicians' descriptions of his pulmonary impairment and physical limitations. *See Cornett*, 227 F.3d at 578; *Ward*, 93 F.3d at 218-19; *McMath*, 12 BLR at 1-9; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (description of physical limitations in performing routine tasks may be sufficient to allow the ALJ to infer total disability). 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 Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). Moreover, the ALJ must set forth in detail how he resolves conflicts in the evidence, as the APA requires. *Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the ALJ must further determine whether Claimant is totally disabled upon consideration of the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Shedlock*, 9 BLR at 1-198. If Claimant fails to establish total disability, the ALJ may reinstate the denial of benefits. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

However, if Claimant establishes total disability, the ALJ must determine whether he has at least fifteen years of underground or substantially similar coal mine employment to invoke the Section 411(c)(4) presumption. If Claimant invokes the presumption, the ALJ must determine whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1). If Claimant establishes total disability but does not have fifteen years of qualifying coal mine employment, the ALJ must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GLENN E. ULMER
Administrative Appeals Judge