

U.S. Department of Labor

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



BRB No. 25-0154 BLA

WILLIAM D. KUTSEY, JR. )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 RONALD BUSH COAL COMPANY c/o )  
 RONALD BUSH )  
 )  
 and )  
 )  
 STATE WORKERS INSURANCE FUND )  
 (PA) )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest )

**NOT-PUBLISHED**

DATE ISSUED: 05/06/2026

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for Claimant.

Sean B. Epstein (Thomas, Thomas & Hafer, LLP), Pittsburgh, Pennsylvania, for Employer.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Denying Benefits on Remand (2020-BLA-05945) rendered on a claim filed on February 26, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Act). This claim is before the Benefits Review Board for a second time.<sup>1</sup>

In her initial Decision and Order Denying Benefits, the ALJ found Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Thus, she found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,<sup>2</sup> 30 U.S.C. §921(c)(4), or establish entitlement pursuant to 20 C.F.R. Part 718. 20 C.F.R. §§718.204(b)(2), 718.305. She therefore denied benefits.

In consideration of Claimant's first appeal, the Board affirmed as unchallenged the ALJ's finding that Claimant's usual coal mine employment required "heavy labor." *Kutsey v. Ronald Bush Coal Co.*, BRB No. 22-0508 BLA, slip op. at 3 n.5 (June 27, 2023) (unpub.). A majority of the Board's three-member panel vacated the ALJ's finding that Claimant failed to establish total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), however, because she did not adequately consider Dr. Corwin's opinion. *Id.* at 6. Thus, the majority vacated the ALJ's finding that Claimant failed to establish total disability and the denial of benefits. *Id.*

On remand, the ALJ again found Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Consequently, she found Claimant failed to establish total disability based on the evidence as a whole and again denied benefits.

In the present appeal, Claimant contends the ALJ did not follow the Board's previous remand instructions to consider the credibility of Dr. Corwin's opinion, which

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<sup>1</sup> Administrative Appeals Judges Jonathan Rolfe and Glenn E. Ulmer are substituted on the panel for Administrative Appeals Judges Greg J. Buzzard and Judith S. Boggs, who are no longer members of the Board.

<sup>2</sup> 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); *see* 20 C.F.R. §718.305.

Claimant asserts establishes total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a substantive response.

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.<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).

### **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. 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,<sup>4</sup> evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.<sup>5</sup> 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).

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant 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; Hearing Transcript at 15.

<sup>4</sup> A "qualifying" pulmonary function study or arterial 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).

<sup>5</sup> The ALJ reiterated her findings from her August 10, 2022 decision that the two pulmonary function studies are non-qualifying, the two blood gas studies are non-qualifying, and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order on Remand at 3. As Claimant has not challenged these findings, we affirm the ALJ's determination that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

## Medical Opinion Evidence

The ALJ considered the medical opinions of Drs. Corwin and Krukltitis. Decision and Order on Remand at 4-7. Dr. Corwin diagnosed Claimant with a moderate impairment and determined he would not be able to do his usual coal mine work. Director's Exhibits 21 at 6-7; 27 at 1. Dr. Krukltitis diagnosed Claimant with obstructive lung disease but opined he is not totally disabled based on Claimant's reported symptoms and limitations.<sup>6</sup> Employer's Exhibit 1 at 1-2 (unpaginated).

In her initial decision and order, the ALJ found Dr. Corwin failed to explain how Claimant's impairment would prevent him from performing his usual coal mine employment because the "only basis" he provided for his opinion was Claimant's non-qualifying pulmonary function study and "unnamed" clinical limitations. Decision and Order at 8. Thus, she determined his opinion is conclusory and insufficiently documented or reasoned to support a finding of total disability. *Id.*

The majority vacated the ALJ's weighing of the medical opinions because she failed to fully consider Dr. Corwin's opinion as he relied on more than Claimant's non-qualifying pulmonary function study and "unnamed" "clinical limitations" to find Claimant totally disabled. *Kutsey*, BRB No. 22-0508 BLA, slip op. at 5. Specifically, the majority instructed the ALJ to consider the entirety of Dr. Corwin's opinion and analyze whether he credibly diagnosed total disability based on Claimant's moderate impairment in conjunction with his respiratory limitations due to shortness of breath "which do not require [a] similar degree of exertion[.]" *Id.* at 6 n.7; *see* Director's Exhibits 21 at 7; 27 at 1. The Board also noted that, "as Claimant alleges, [Dr. Corwin] 'phrased [his opinion] in terms of total disability' and 'provide[d] a medical assessment of physical abilities' and exertional limitations that, if credited, is sufficient to support a finding that Claimant cannot perform the heavy manual labor required of his previous coal mine work." *Kutsey*, BRB No. 22-0508 BLA, slip op. at 5 (quoting Claimant's Prior Brief before the Board at 11-12).

On remand, the ALJ recognized a "'moderate' restrictive impairment *could* preclude the performance of heavy coal mine work," but again discredited Dr. Corwin's opinion for not explaining how the moderate impairment and clinical limitations he identified would preclude Claimant from performing his usual coal mine employment, especially given his non-qualifying pulmonary function study values. Decision and Order on Remand at 6-7. The ALJ determined Dr. Corwin did not demonstrate any awareness of the exertional

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<sup>6</sup> The ALJ found that "regardless of what level of probative value it merits," Dr. Krukltitis's opinion does not support a finding of total disability and therefore cannot aid Claimant in meeting his burden. Decision and Order on Remand at 7 n.10.

requirements of Claimant's usual coal mine work or link any clinical testing or clinical limitation to his total disability determination. *Id.*

Claimant argues the ALJ again erred in weighing Dr. Corwin's opinion and failed to follow the Board's remand instructions -- which are the law of the case -- when evaluating the sufficiency of Dr. Corwin's opinion to support a finding of total disability. Claimant's Brief at 10-15. We agree.

A medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer a miner is unable to do his usual coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in doctor's report sufficient to establish total disability); *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).

Dr. Corwin conducted the Department of Labor (DOL)-sponsored complete pulmonary evaluation of Claimant and indicated he reviewed Claimant's employment history form (CM-911a), which states he worked as an inside miner. Director's Exhibits 3 at 1, 21 at 4. In addition, Dr. Corwin noted Claimant's history of "attacks of wheezing," "dramatic worsening" of shortness of breath beginning "after several years" of working with a drill, and complaints of increasing difficulty with activity, including: shortness of breath walking up steps; an inability to "fully walk up hill for many years" due to dyspnea; and an inability to hunt or fish "because of his dyspnea." Director's Exhibits 21 at 5-7; 27 at 1. He also noted Claimant has chest pain "on slight exertion" and "activity is becoming more difficult such as running his tractor." Director's Exhibit 21 at 6. Although the pulmonary function and blood gas studies he conducted did not have qualifying values, he diagnosed Claimant with a moderate restrictive impairment with significant bronchodilator reversibility and resting and exertional hypoxemia. *Id.* at 6-7; *see* Director's Exhibit 27 at 1-2. Ultimately, Dr. Corwin opined Claimant "would not be able to participate in his previous line of work given . . . [the] significant exertion required." Director's Exhibits 21 at 7, 27 at 1.

The ALJ found that while Dr. Corwin cited to "clinical limitations" when concluding Claimant is totally disabled, he did not specifically identify the limitations he relied on aside from Claimant's inability to hunt or fish. Decision and Order on Remand at 5. She explained that since the record does not explain how much exertion these hobbies require, she declined to infer Claimant could not perform his usual coal mine work on this basis. *Id.* at 5-6. The ALJ also declined to infer that Claimant's shortness of breath on exertion supports a finding of total disability because the record is "entirely unclear" on whether or when his shortness of breath became severe enough to be totally disabling. *Id.*

at 6. She also again discredited Dr. Corwin’s opinion because he “did not demonstrate any awareness of the exertional requirements of Claimant’s usual coal mine work,[] or explain why the severity of Claimant’s restrictive impairment . . . would prevent him from performing those requirements.” *Id.* Further, she determined that Dr. Corwin’s opinion is insufficient to support a finding of total disability because it is “the *only* piece of evidence that suggests Claimant suffers from a totally disabling respiratory impairment” and fails to link any objective testing or specific clinical limitations to his total disability conclusion. *Id.* at 7 (emphasis in original). Thus, the ALJ discredited Dr. Corwin’s opinion for “not provid[ing] enough information on which to base a finding of total pulmonary or respiratory disability.” Decision and Order on Remand at 7 n.8.

But as Claimant asserts, the majority previously held that, contrary to the ALJ’s finding on remand, “[r]egardless of whether Dr. Corwin specifically identified the exertional requirements of Claimant’s usual coal mine work, *he provided sufficient information that, if credited, could support a finding that Claimant is totally disabled.*” *Kutsey*, BRB No. 22-0508 BLA, slip op. at 6 (emphasis added); *see* Claimant’s Brief at 14-15. Thus, the ALJ’s discrediting of Dr. Corwin’s opinion for not providing enough information is contrary to the Board’s remand instructions and the mandate rule.<sup>7</sup> *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”); *Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988) (“a lower forum must not deviate from the orders of a superior forum, regardless of the lower forum’s view of the instructions given it”); *see also*

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<sup>7</sup> The mandate rule is a specific application of the “law of the case” doctrine requiring a lower tribunal to act in strict compliance with remand instructions from a higher tribunal without altering, amending, or examining them. *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014); *see Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014). Thus, when the Board remands a case, the ALJ must comply with its instructions and “‘implement both the letter and spirit’ of the mandate,” absent appropriate legal basis for not applying the mandate rule. *Edd Potter Coal Co. v. Dir., OWCP [Salmons]*, 39 F.4th 202, 209-10 (4th Cir. 2022) (quoting *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993)); *see also Scott v. Mason Coal Co.*, 298 F.3d 263, 267 (4th Cir. 2007). “Deviation from the mandate rule is permitted only in a few exceptional circumstances, which include (1) when ‘controlling legal authority has changed dramatically’; (2) when ‘significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light’; and (3) when ‘a blatant error in the prior decision will, if uncorrected, result in a serious injustice.’” *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 415 (4th Cir. 2005) (citations omitted).

*Edd Potter Coal Co. v. Dir., OWCP [Salmons]*, 39 F.4th 202, 209-10 (4th Cir. 2022); *Scott*, 298 F.3d at 267.

In addition, contrary to the ALJ's finding that Dr. Corwin had no awareness of Claimant's exertional requirements, Dr. Corwin reviewed Claimant's CM-911a employment history form, which states he worked as an inside miner,<sup>8</sup> and the majority previously noted that Dr. Corwin specifically indicated Claimant operated a drill. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713 (6th Cir. 2002) (if a physician lists a miner's job title, ALJ may rationally conclude physician understands the exertional requirements of common mining jobs, even absent explicitly identifying them); *Kutsey*, BRB No. 22-0508 BLA, slip op. at 5 n.6; Decision and Order on Remand at 6; Director's Exhibits 3; 21 at 4.

Also, as the majority previously indicated, a medical opinion can still support a finding of total disability even if specific exertional requirements are not listed "if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his usual coal mine employment." *Kutsey*, BRB No. 22-0508 BLA, slip op. at 4-5; *see Scott*, 60 F.3d at 1141 (physical limitations described in a doctor's report are sufficient to establish total disability and may not be rejected "as being nothing more than mere notations of the patient's descriptions unless there is specific evidence for doing so in the report"); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability *or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion.*") (emphasis added); *Budash*, 9 BLR at 1-51-52 (description of physical limitations in performing routine tasks may be sufficient to allow the ALJ to infer total disability); *see also Gonzales v. Director, OWCP*, 869 F.2d 776, 779-80 (3d Cir. 1989) (physician's opinion that a miner's impairment is *not totally disabling* lacks probative value if the physician does not know the miner's job requirements).

Further, the ALJ incorrectly implied that because Dr. Corwin did not specifically delineate the clinical limitations he relied on in a specific section of the DOL Medical History and Examination for Coal Miner Workers' Pneumoconiosis (CM-988) form, she is unable to consider the entirety of his opinion on the issue. *See* Decision and Order on Remand at 5-6. However, as indicated *supra* and as highlighted by the majority in the prior

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<sup>8</sup> The ALJ noted Dr. Corwin reviewed Claimant's CM-911a form, but she found it only includes Claimant's employers and does not contain information concerning the exertional requirements of his usual coal mine work. Decision and Order on Remand at 6 n.6.

decision, Dr. Corwin considered a variety of respiratory limitations due to shortness of breath in his report even if not specifically mentioned “in the section of the CM-988 where he was asked to explain how he arrived at his disability assessment.” Decision and Order on Remand at 5; *see Kutsey*, BRB No. 22-0508 BLA, slip op. at 5. Thus, as Claimant contends, the ALJ erred in failing to follow the Board’s instructions to compare the exertional requirements of Claimant’s coal mine work with Dr. Corwin’s impairment rating and identification of physical limitations to determine whether his opinion supports a finding of total disability. *See Sullivan*, 490 U.S. at 886; *Hall*, 12 BLR at 1-82; *Budash*, 9 BLR at 1-51-52; Decision and Order on Remand at 4-7; Director’s Exhibits 21 at 5-6; 27 at 1.

Because the ALJ largely repeated the same credibility findings she made in her original decision and failed to adequately weigh all of the physical limitations identified by Dr. Corwin against the heavy exertional requirements of Claimant’s coal mine work, we vacate her determinations that the medical opinion evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv) and that the preponderance of the evidence as a whole<sup>9</sup> does not establish Claimant is totally disabled by a pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2).<sup>10</sup> Decision and Order on Remand at

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<sup>9</sup> Claimant asserts the ALJ again erred in discrediting Dr. Corwin for relying on non-qualifying objective testing. Claimant’s Brief at 13. While it is unclear whether the ALJ discredited Dr. Corwin on this basis or simply was acknowledging that the testing is non-qualifying, a physician can offer a reasoned medical opinion diagnosing total disability even when the objective testing is non-qualifying. *Kutsey*, BRB No. 22-0508 BLA, slip op. at 6 n.8; *see Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild impairment may be totally disabling depending on the exertional requirements of a miner’s usual coal mine employment).

<sup>10</sup> The ALJ relied on the dissent in the Board’s prior decision to support her findings that she is not qualified to make a medical determination and that the record in this case contains insufficient evidence for her to make a legal decision that Claimant is totally disabled. Decision and Order on Remand at 7; *see Kutsey*, BRB No. 22-0508 BLA, slip op. at 9. However, as the majority previously explained:

[W]e do not remand the claim for the ALJ to render her own medical opinion as a layperson on whether a diagnosis of a moderate impairment, by itself, is disabling. We remand the claim for the ALJ to consider the entirety of Dr. Corwin’s opinion, including his conclusion that Claimant’s respiratory limitations “which do not require [a] similar degree of exertion,” would

7-8; *see Sullivan*, 490 U.S. at 886; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

### **Reassignment**

Finally, in light of the Board's previous remand of this case and the ALJ's failure to follow the Board's instructions and repetition of numerous errors, we conclude that "review of this claim requires a fresh look at the evidence . . ." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537 (4th Cir. 1998) (instructing that review of the claim required a fresh look at the evidence, unprejudiced by the various outcomes of the ALJ, where he made several errors of law including failing to consider all of the relevant evidence and to adequately explain his rationale for crediting certain evidence); *see* 20 C.F.R. §§802.404(a), 802.405(a); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992); *Lango v. Director, OWCP*, 104 F.3d 573, 575-76 (3d Cir. 1997) ("many cases languish while waiting for an ALJ or the [Board] to hear them" such that "the magnitude of the delays is also likely to affect the legal representation available to claimants") (citation omitted). Thus, we direct the case be reassigned to a different ALJ on remand.

### **Remand Instructions**

On remand, the new ALJ must reconsider the entirety of Dr. Corwin's medical opinion diagnosing a disabling pulmonary impairment in conjunction with the finding, which we previously affirmed, that Claimant's usual coal mine employment required heavy manual labor. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Budash*, 9 BLR at 1-51-52. The ALJ must compare the heavy exertional requirements of Claimant's usual coal mine work with Dr. Corwin's descriptions of his moderate restrictive impairment and respiratory limitations. *See Kertesz*, 788 F.2d at 163; *see also Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894; *Budash*, 9 BLR at 1-51-52. Moreover, the ALJ must set forth in detail how conflicts in the evidence are resolved, as the Administrative Procedure Act (APA) requires.<sup>11</sup> 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.

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prevent him from his previous coal mine work (which the ALJ found required heavy manual labor).

*Kutsey*, BRB No. 22-0508 BLA, slip op. at 6 n.7 (quoting Director's Exhibit 21 at 7).

<sup>11</sup> The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material

The ALJ then must reweigh the medical opinions and the evidence as a whole to determine whether Claimant is totally disabled. *See Gonzales*, 869 F.2d at 779-80. If the ALJ finds Claimant is not totally disabled, they may reinstate the denial of benefits. *See 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).

If Claimant establishes total disability, the ALJ must also determine the length of his coal mine employment and whether it was performed in underground mines or in substantially similar conditions at surface mines. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i). If Claimant establishes both fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, he will invoke the Section 411(c)(4) presumption, in which case the ALJ would have to consider whether Employer rebutted it. 20 C.F.R. §718.305(d)(1). If Claimant establishes total disability, but not fifteen years of qualifying employment, the ALJ must address Claimant's entitlement pursuant to 20 C.F.R. Part 718. *See* 20 C.F.R. §718.305.

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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, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits on Remand and remand the case to the Office of Administrative Law Judges for reassignment to a different ALJ for further consideration in accordance with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

GLENN E. ULMER  
Administrative Appeals Judge