U.S. Department of Labor

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

BRB No. 24-0429 BLA

DANIEL J. LEWIS Claimant-Respondent v. MEPCO, LIMITED LIABILITY COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/17/2025 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand 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.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC) Morgantown, West Virginia, for Employer and its Carrier.

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

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2018-BLA-05865) rendered on a subsequent claim filed on May 20, 2016.[1] This case is before the Benefits Review Board for the third time.[2]

In his initial Decision and Order Awarding Benefits, the ALJ credited Claimant with sixteen years of underground coal mine employment and found he has a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), and established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). The ALJ further found Employer failed to rebut the presumption and awarded benefits.

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[1] Claimant filed two prior claims for benefits. Director's Exhibits 1-3. The district director denied his most recent prior claim, filed on December 18, 2013, because Claimant failed to establish total disability. Director's Exhibits 1, 3.

[2] We incorporate the procedural history and the Board's prior holdings as set forth in the Board's prior decisions in this case. *Lewis v. MEPCO, LLC*, BRB Nos. 21-0227 BLA (June 22, 2022) (unpub.); 23-0244 BLA (Feb. 7, 2024) (unpub.).

[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. §92l(c)(4) (2018); 20 C.F.R. §718.305(b).

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, an ALJ must also deny the subsequent claim unless he or she finds "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(d); *see 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 the district director denied Claimant's prior claim for failure to establish total disability, Claimant needed to submit new evidence establishing total disability to obtain a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Director's Exhibits 1-3.

In consideration of Employer's first appeal, the Board affirmed the ALJ's finding that Claimant established a totally disabling pulmonary or respiratory impairment.[5] *Lewis v. MEPCO, LLC*, BRB No. 21-0227 BLA, slip op. at 7 (June 22, 2022) (unpub.). However, the Board held the ALJ erred in summarily finding Claimant established sixteen years of underground coal mine employment based upon "a totality of the evidence" without adequately explaining the basis for his finding. *Id.* at 8. Thus, the Board vacated the ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption and the award of benefits and remanded the case for further consideration.[6] *Id.* at 8-9.

On remand, the ALJ found Claimant established nineteen years of coal mine employment and thus invoked the Section 411(c)(4) presumption. He further found Employer did not rebut the presumption and thus again awarded benefits.

Considering Employer's second appeal, the Board held the ALJ failed to adequately explain his calculation of the length of Claimant's coal mine employment. *Lewis v. MEPCO, LLC*, BRB No. 23-0244 BLA, slip op. at 5 (Feb. 7, 2024) (unpub.). The Board also held the ALJ once again erred in considering Dr. Hornby's medical opinion and thus directed the ALJ to not consider Dr. Hornsby's medical opinion on remand. *Id.* at 6. Thus, the Board vacated the ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption and the award of benefits and remanded the case for further consideration.

On second remand, the ALJ found Claimant established 15.496 years of coal mine employment.[7] 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 and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). The ALJ further found Employer did not rebut the presumption and awarded benefits.

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[5] Because Claimant established total disability, the element of entitlement denied in his prior claim, he established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

[6] The Board also held the ALJ erred in considering Dr. Hornsby's medical opinion and instructed the ALJ to not consider Dr. Hornsby's opinion on remand. *Lewis*, BRB No. 21-0227 BLA, slip op. at 4 n.6, 9 n.14.

[7] In addition, despite the Board having previously affirmed his finding that Claimant established total disability and holding that finding constituted the law of the case, the ALJ once again found Claimant established a totally disabling respiratory or pulmonary impairment. *Lewis*, BRB Nos. 21-0227 BLA, slip op. at 7; 23-0244 BLA slip op. at 3 n.7; Decision and Order on Remand at 25.

In the present appeal, Employer argues that the ALJ erred in crediting Claimant with 15.496 years of coal mine employment and therefore erred in finding he invoked the Section 411(c)(4) presumption. Claimant responds in support of the award. The Acting Director, Office of Workers' Compensation Programs, declined to file a response brief. Employer replied to Claimant's response brief, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand if it is rational, supported by substantial evidence, and in accordance with applicable law.[8] 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: Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Hunt*, 7 BLR at 1-710-11.

The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark*, 22 BLR at 1-280. If the miner's employment "lasted for a calendar year or partial periods totaling a 365-day period amounting to one year," the regulations presume, in the absence of contrary evidence, "that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii). The regulations further provide that an ALJ may rely on a comparison of the miner's wages to the average daily earnings in the coal mining industry "[i]f the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year . . . ." 20 C.F.R. §725.101(a)(32)(iii).

[8] 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 7.

The ALJ considered Claimant's CM-911 Claim for Benefits form, his CM-911a Employment History form, his hearing testimony, and his Social Security Administration (SSA) earnings records.[9] Decision and Order on Remand at 5-7 (Aug. 2, 2024) (Decision and Order on Remand); Hearing Transcript at 11; Director's Exhibits 5, 7, 10. The ALJ credited Claimant with a full year of coal mine employment if his SSA earnings records showed "substantial earnings" and, "for purposes of this decision," defined a year of "substantial earnings" as any year in which Claimant's earnings exceeded $10,000.00. Decision and Order on Remand at 6. Thus, as Claimant's SSA earnings records show more than $10,000 of earnings for the years 1980 through 1987, 1990, 1992, 1997 through 1999, 2001, and 2002, the ALJ credited Claimant with a full year of employment for each of those years for a total of fifteen years. *Id.*; Director's Exhibit 10 at 8-11. For the years 1991, 1993, and 1998,[10] the ALJ divided Claimant's earnings as reported on his SSA earnings records by the average daily earnings listed in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual* and then divided the resulting number by 250 to arrive at a fractional portion of a year of coal mine employment. Decision and Order on Remand at 6-7. The ALJ thus found an additional 0.496 years for a total of 15.496 years of coal mine employment. *Id.* at 7.

Employer argues the ALJ erred by finding earnings of $10,000 in a calendar year constitutes a full year of coal mine employment, asserting this determination is inconsistent with the law and does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[11] Employer's Brief at 8-9. Employer's arguments have merit.

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[9] In his previous Decision and Order Awarding Benefits on Remand, the ALJ noted that the dates provided on Claimant's CM-911a form were "not specific, as Claimant merely provided the start and end years rather than specific dates for his employment." Decision and Order Awarding Benefits on Remand (Mar. 21, 2023) at 5.

[10] Claimant's SSA earnings records document earnings in 1989 of $6,945.41 from Preston Energy, Inc., and $5,092.00 from J A L Coal Company, Inc. Director's Exhibit 10 at 9. The ALJ did not explain whether or how this employment figured into his calculations. *See* Decision and Order on Remand at 6-7.

[11] The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "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).

As Employer contends, the ALJ did not adequately explain his calculation of the length of Claimant's coal mine employment. Employer's Brief at 11. The ALJ found Claimant established a year of employment in any year in which he had "substantial earnings" and further defined "substantial earnings" as constituting $10,000 in one year. Decision and Order on Remand at 6. He did not, however, explain the basis for his conclusion that $10,000 of earnings in one year constitutes a year of coal mine employment. Thus, as we are unable to discern the reasoning behind the ALJ's length of coal mine employment calculation, his finding does not comply with the Board's remand instructions or the requirements of the APA. 5 U.S.C. §557(c)(3)(A); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *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); *Lewis*, BRB No. 23-0244 BLA, slip op. at 5-6.

We therefore vacate the ALJ's finding that Claimant established 15.496 years of coal mine employment. Decision and Order on Remand at 7. Consequently, we must vacate his finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits. 30 U.S.C. §921(c)(4).

Remand Instructions

Initially, we direct that this case be reassigned to a different ALJ on remand. In this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, due to the Board's previous remands of this case and the ALJ's repeated failure to follow the Board's instructions and repetition of 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) ("Finding the ALJ made several errors of law including failing to consider all of the relevant evidence and to adequately explain his rationale for crediting certain evidence, we conclude that review of this claim requires a fresh look at the evidence."); *see* 20 C.F.R. §§802.404(a), 802.405(a); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). While the ALJ's integrity or impartiality is not in question, such circumstances in cases arising within the Fourth Circuit's jurisdiction require a "fresh look" at the evidence in view of the Board's previous remand instructions and the ALJ's failure to follow them as directed when weighing the evidence on remand. *See Hicks*, 138 F.3d 537. Thus, we direct the case be reassigned to a different ALJ on remand.[12]

[12] Citing out-of-circuit cases that, unlike *Hicks*, do not arise under the Black Lung Benefits Act (Act), our dissenting colleague opposes reassignment in this case, arguing that sending this back to the same ALJ for a *fourth* bite at the apple better serves efficiency and the appearance of impartiality than simply turning the page. We disagree. In *Hicks*, the Fourth Circuit declined to send a case back to the same ALJ a third time, reasoning that

On remand, the ALJ must determine the length of Claimant's coal mine employment taking into consideration the relevant evidence and using any reasonable method of computation. *See Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186. The ALJ must determine whether the evidence shows Claimant worked a full calendar year or partial periods totaling a calendar year before applying the formula at 20 C.F.R. §725.101(a)(32)(iii), and must explain those findings as the APA requires. *Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes fifteen or more years of qualifying coal mine employment on remand, he will have invoked the Section 411(c)(4) presumption, and the ALJ may reinstate the award of benefits.[13] If Claimant does not invoke the presumption on remand, the ALJ must consider whether Claimant can establish entitlement under 20 C.F.R. Part 718 by establishing the existence of pneumoconiosis, pneumoconiosis causation, and disability causation.[14] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

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repeated errors and a failure to consider all relevant evidence demanded a "fresh look" under the Act -- given the years the case had been pending with little progress. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537 (4th Cir. 1998). Indeed, courts have long lamented the protracted delays in processing cases that plague this subsistence-level benefits program. *See, e.g., Amax Coal Co. v. Franklin*, 957 F.2d 355, 356 (7th Cir. 1992) ("As so often in black lung cases, the processing of the claim has been protracted scandalously . . . delay in processing these claims is especially regrettable" because most black lung claimants "are middle-aged or elderly and in poor health, and therefore quite likely to die before receiving benefits if their cases are spun out for years."); *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). Like *Hicks*, this case similarly has been pending for years, and like *Hicks*, the parties nevertheless have yet to pass first base in the administrative litigation. We thus conclude a similar fresh look is necessary under the Act.

[13] We affirm, as unchallenged on appeal, the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 18, 28. Thus, if Claimant invokes the Section 411(c)(4) presumption, he will have established entitlement to benefits. *See* 20 C.F.R. §718.305.

[14] As the finding that Claimant established total disability constitutes the law of the case, he does not have to establish total disability again on remand. *See Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 209-10 (4th Cir. 2022); *Brinkley v.*

Accordingly, we vacate the ALJ's Decision and Order Awarding 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

JONES, Administrative Appeals Judge, dissenting and concurring:

I respectfully dissent from the majority's decision to order reassignment of this case to a different ALJ on remand. The majority relies on the Fourth Circuit's holding in *Hicks* to 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); *supra* p. 6. While remand of this case is required, it does not require such a "fresh look" and reassignment to another ALJ is not necessary, especially sua sponte.

Other Circuit Courts use a three-part test to determine whether judicial reassignment on remand is appropriate absent proof of bias, and it is reasonable to consider those factors here: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty disregarding previously expressed views or findings the appellate court determined were erroneous; (2) whether reassignment is advisable to preserve appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving appearance of fairness. *Maldonado Santiago v.*

Peabody Coal Co., 14 BLR 1-147, 1-151 (1990); *Lewis*, BRB No. 23-0244 BLA, slip op. at 3 n.7. In addition, as the Board previously instructed, the ALJ may not consider Dr. Hornsby's medical opinion in determining whether Claimant can establish entitlement under 20 C.F.R. Part 718. *See Lewis*, BRB No. 23-0244 BLA, slip op. at 3 n.6.

Velazquez Garcia, 821 F.2d 822, 832 (1st Cir. 1987); *U.S. v. Robin*, 553 F.2d 8, 10 (2d Cir.1977); *U.S. ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518, 532-33 (6th Cir.2012); *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1041 (9th Cir. 2008); *Mitchell v. Maynard*, 80 F.3d 1433, 1448 (10th Cir. 1996); *U.S. v. White*, 846 F.2d 678, 696 (11th Cir. 1988). In this case, all three factors weigh against reassignment. First, there is no indication that the ALJ would have difficulty disregarding his previous findings as he only needs to explain his years of coal mine employment calculation. Second, the ALJ has reached a similar result each time, namely at least fifteen years in underground or "substantially similar" surface coal mine employment; therefore, because this panel no longer includes our former colleague who did not join the previous concurring opinion on this issue, reassignment compromises the appearance of justice and could inadvertently appear to signal the Board favors a particular outcome. Lastly, reassignment would be wasteful and duplicative as I do not believe it would result in preserving even the appearance of fairness.

For these reasons, I would not reassign this case to another ALJ. *See* 20 C.F.R. §725.352; *Cochran v. Consolidation Coal Co*., 16 BLR 1-101, 1-107-08 (1992); *Zamora v. C.F. & I. Steel Corp*., 7 BLR 1-568, 1-572 (1984). I otherwise concur with the majority.

MELISSA LIN JONES
Administrative Appeals Judge