

U.S. Department of Labor

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



BRB No. 22-0357 BLA

DAVID C. LEARY )

Claimant-Respondent )

v. )

THE HARRISON COUNTY COAL )  
COMPANY )

and )

MURRAY ENERGY CORPORATION )  
TRUST )

Employer/Carrier- )  
Petitioners )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

Party-in-Interest )

DATE ISSUED: 7/21/2023

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Natalie A. Appetta,  
Administrative Law Judge, United States Department of Labor.

Aimee M. Stern (Dinsmore & Shohl, LLP), Wheeling, West Virginia, for  
Employer and its Carrier.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2020-BLA-05545) rendered on a subsequent claim filed on August 31, 2018,<sup>1</sup> pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901–944 (2018) (Act).

The ALJ accepted the parties' stipulation that Claimant had twenty-seven 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). Thus, the ALJ determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),<sup>2</sup> and established a change in an applicable condition of entitlement.<sup>3</sup> 20 C.F.R. §725.309(c). The ALJ further found Employer failed to rebut the presumption and awarded benefits.

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<sup>1</sup> The district director denied Claimant's two prior claims as abandoned on December 23, 2014 and June 5, 2017. Decision and Order at 2 n.4; Director's Exhibits 1, 2. A denial by reason of abandonment is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409.

<sup>2</sup> 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); 20 C.F.R. §718.305.

<sup>3</sup> When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she 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); *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 by reason of abandonment, he must submit evidence establishing at least one element of entitlement to obtain review of the merits of the current claim. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309; Director's Exhibit 2.

On appeal, Employer argues the ALJ erred in finding Claimant totally disabled and therefore also erred in finding he invoked the Section 411(c)(4) presumption.<sup>4</sup> Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a substantive response.

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.<sup>5</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 (1965).

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

To invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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 blood gas studies,<sup>6</sup> evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.<sup>7</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*

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<sup>4</sup> We affirm, as unchallenged on appeal, the ALJ's finding of twenty-seven years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4; Hearing Transcript at 18.

<sup>5</sup> 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); Hearing Transcript at 18.

<sup>6</sup> A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

<sup>7</sup> The ALJ found all of the pulmonary function and blood gas studies are non-qualifying, 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 10-11.

& *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 established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of the evidence as a whole. Decision and Order at 16-19. Employer asserts the ALJ erred in crediting Dr. Allen's opinion that Claimant is totally disabled over the contrary opinions of Drs. Abrahams and Fino. Employer's brief at 9-10. Because we do not find Employer's arguments persuasive, we affirm.

Dr. Allen performed Claimant's Department of Labor-sponsored complete pulmonary evaluation on December 14, 2018. Director's Exhibit 12. Based on the pulmonary function testing, she diagnosed a moderate obstructive impairment with some degree of reversibility. Director's Exhibit 12. Because lung volumes and diffusion capacity tests were not obtained, Dr. Allen reported she could not determine the presence of air trapping. Dr. Allen also noted Claimant's blood gas study showed an increase in his PO<sub>2</sub> with exercise from 67 to 99 mmHg and a decrease in his PCO<sub>2</sub> from 37 to 33 mmHg which indicated "recruitment of other airways." *Id.* at 5. She concluded Claimant's moderate impairment would prevent him from performing the heavy duties of his usual coal mine job as a foreman, which included shoveling, setting timbers, and roof bolting. *Id.*

Dr. Abrahams examined Claimant on September 6, 2019, and diagnosed "a 5-10 percent pulmonary impairment due to [chronic obstructive pulmonary disease]" based on a comparison of Claimant's post-bronchodilator FEV<sub>1</sub> and FVC values to the predicted values listed in the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides). Director's Exhibit 33 at 4. He observed that Claimant complained of shortness of breath for several years but never sought medical treatment for his breathing or requested a less strenuous coal mine position based on this symptom. *Id.* He also noted that Claimant's "dyspnea on exertion is out of proportion to the mild level of impairment on his pulmonary function testing[.]" but indicated coronary artery disease could possibly contribute to his dyspnea based on Claimant's chest tightness upon exertion. *Id.* at 4-5. He concluded Claimant is not totally disabled. *Id.*

Dr. Allen prepared a supplemental report on December 18, 2019, based on her review of Dr. Abrahams's medical report and testing. Director's Exhibit 35. She agreed with Dr. Abrahams that her October 31, 2018 pulmonary function study results showed mild rather than moderate obstructive lung disease *after administration of bronchodilators*. Director's Exhibits 12, 35; *see also* Director's Exhibit 33. However, she assessed Claimant's respiratory impairment based on her consideration of both the pre- and post-bronchodilator results. *Id.* Specifically, she noted Claimant's pulmonary function study

results during Dr. Abrahams's examination showed an elevated "Slow Vital Capacity compared to a FVC that is indicative of emphysema and elevated reserve volume to total lung capacity that is 130% of predicted indicating air trapping in the lungs." Director's Exhibit 35 at 1. She explained that air trapping is when air can enter the lungs but cannot be exhaled due to a collapse of the small airways or mucous accumulation, which "would prevent efficient oxygen exchange . . . ." *Id.*

Dr. Allen specifically disagreed with Dr. Abrahams's reliance on the AMA Guides to assess Claimant's respiratory disability. She cautioned that the AMA Guides are designed to estimate an individual's ability to carry out daily or minimal life activities but are "not designed to assess functional capability in a work setting." Director's Exhibit 35 at 1. She explained that "a 10-15% impairment from basic life activity may not scale linearly to the workplace which often requires more effort" and opined a functional capacity evaluation is more useful for that type of assessment. *Id.* at 1-2. Noting Claimant's job as a foreman required significant walking over uneven terrain, shoveling, setting timbers and roof bolting, which she characterized as medium to heavy manual labor, Dr. Allen opined that Claimant was functionally disabled from performing his usual coal mine work. *Id.*

Dr. Fino reviewed the medical evidence and prepared a consultative report on August 15, 2020. Employer's Exhibit 1. He diagnosed Claimant with a mild obstructive impairment that improved post-bronchodilator. *Id.* Dr. Fino opined Claimant is not totally disabled for heavy work because "his FVC and his FEV1 values are well above federal guidelines for disability" and "all of the pulmonary function studies show a normal FEV1, which is the best indicator of ability to work." *Id.* at 5. Dr. Fino also noted that Claimant's exercise blood gas study with Dr. Allen had been terminated due to fatigue, not shortness of breath, and thus concluded it was a normal study. *Id.* at 4.

In resolving the conflict in the medical opinions, the ALJ initially determined that Claimant's usual coal mine work required heavy manual labor.<sup>8</sup> Decision and Order at 4-

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<sup>8</sup> The ALJ found that Claimant last worked as an underground foreman and had to "stand 8 to 9 hours per shift, crawl 10 to 20 feet, 3-4 hour[s] per day, lift up to 80 pounds, 6 to 8 times per day and lift and carry 40 and/or 60 pounds 20 to 30 times per day." Decision and Order at 4-5 (citing Director's Exhibit 6). She also noted Claimant's testimony that "he tore down and set up on the long wall, recovery sheer and shields and everything was big, heavy and dirty and required heavy labor" and that he had to lift and carry between 60 to 120 pounds each workday. Decision and Order at 5 (citing Hearing Transcript at 15). We affirm, as unchallenged, the ALJ's finding that Claimant's usual

5. She further considered the physicians' credentials and found them equally qualified.<sup>9</sup> *Id.* at 16. Finding Dr. Allen's opinion to be the "most documented and reasoned," the ALJ concluded Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 18.

Employer contends the ALJ erred in relying on Dr. Allen's opinion because it is based on non-qualifying objective studies and she indicated Claimant only had a mild impairment in her supplement report. Employer's Brief at 9. However, total disability can be established with a reasoned medical opinion even in the absence of qualifying pulmonary function or arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests). Further, a medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer that a miner is unable to do his last coal mine job. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

Here, the ALJ permissibly found Dr. Allen's opinion reasoned and documented as she conducted a physical examination, discussed all of the objective testing in the record, took into account Claimant's symptoms, and had an accurate understanding of the exertional requirements of his usual coal mine employment. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987); Decision and Order at 17-18; Director's Exhibits 12, 35. We also see no error in the ALJ's determination that Dr. Allen sufficiently explained in her supplemental report that Claimant's impairment and air trapping shown by lung volumes would prevent him from performing the physical demands of his prior foreman position.<sup>10</sup>

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coal mine employment required heavy manual labor. *Skrack*, 6 BLR at 1-711; Decision and Order at 5.

<sup>9</sup> Drs. Abrahams and Fino are both Board-certified in internal medicine with a subspecialty in pulmonary medicine, while Dr. Allen is Board-certified in family and occupational medicine with a NIOSH spirometry certification. Decision and Order at 16. Although Employer notes that Dr. Allen is not a pulmonologist, it does not specifically challenge the ALJ's rationale for finding the physicians similarly qualified. *Skrack*, 6 BLR at 1-711; Employer's Brief at 9.

<sup>10</sup> Citing medical literature, Dr. Allen specifically noted that "[a]ir trapping causes physiologic changes that can cause increased pressure in the chest cavity from trapped air

*See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *see also Cornett*, 227 F.3d at 578; Decision and Order at 17. Consequently, we affirm the ALJ's permissible crediting of Dr. Allen's opinion in finding Claimant totally disabled.<sup>11</sup> Decision and Order at 18; Director's Exhibit 35.

Regarding Dr. Abrahams's opinion, the ALJ correctly observed that he relied entirely on the post-bronchodilator pulmonary function study results in concluding Claimant is not totally disabled and did not address the totality of the evidence Dr. Allen considered.<sup>12</sup> *See* 20 C.F.R. §718.204(b)(1)(i); 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (noting the Department of Labor's recognition that pulmonary function testing after administering bronchodilator medication does not provide an adequate assessment of a miner's disability); Decision and Order at 16-17. The ALJ also permissibly found Dr. Abrahams's opinion less persuasive because he referenced that Claimant did not request a less strenuous job while he was working, which is irrelevant to whether Claimant is currently able to perform his usual coal mine work. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 17. Thus, we affirm the ALJ's conclusion that Dr. Abrahams's opinion is "flawed" and entitled to less probative weight.<sup>13</sup> Decision and

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which can impair cardiovascular function and cause the sensation of 'smothering' even when breathing because of the overextension of the lung tissue." Director's Exhibit 35 at 2. She indicated Claimant might have increased functional capacity if he obtained treatment for his air trapping; however, "based on the information" presented to her, she concluded that Claimant is totally disabled. *Id.*

<sup>11</sup> Employer also challenges the ALJ's reliance on Dr. Allen's opinion because her blood gas testing was stopped due to Claimant's fatigue. Employer's Brief at 9. We affirm the ALJ's reliance on Dr. Allen's opinion that the non-qualifying pulmonary function study results showed an obstructive impairment that was only partially reversible and air trapping that prevented efficient oxygen exchange. Director's Exhibits 12, 35.

<sup>12</sup> Dr. Abrahams attributed Claimant's chest tightness and shortness of breath to coronary artery disease and stated, given the "significant broncho-reversibility on pulmonary function testing, [Claimant] likely would benefit from bronchodilator inhalers which would be expected to improve his breathing." Director's Exhibit 33 at 5. We affirm the ALJ's conclusion that this aspect of Dr. Abrahams's opinion is speculative. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 17.

<sup>13</sup> Additionally, although Dr. Allen cited the AMA Guides to support his opinion, the ALJ permissibly credited Dr. Allen's explanation that the AMA Guides, alone, do not provide a sufficient basis for assessing whether Claimant has the respiratory capacity to

Order at 16-17; *see U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 391 (4th Cir. 1999); *Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491 (6th Cir. 2014); Director's Exhibit 33.

Finally, we reject Employer's general contention that the ALJ erred in giving less weight to Dr. Fino's opinion. Employer's Brief at 10. The ALJ permissibly found that while Dr. Fino provided a reasoned and documented opinion, it was not as persuasive and lacked the detail of Dr. Allen's opinion. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; Decision and Order at 18; Employer's Exhibit 1.

Employer's arguments on total disability are a request to reweigh the evidence, which the Board may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As substantial evidence supports the ALJ's credibility determinations, we affirm her finding that Claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and when weighing the evidence as a whole. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); Decision and Order at 18.

Consequently, we affirm the ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b); Decision and Order at 19. We further affirm, as unchallenged, the ALJ's finding that Employer failed to rebut the presumption and therefore also affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(i), (ii); *Skrack*, 6 BLR at 1-711; Decision and Order at 24, 26.

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perform his usual coal-mine-work requirements. *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316-17 (4th Cir. 2012); Decision and Order at 18.



Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge