**U.S. Department of Labor**

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

BRB No. 17-0333 BLA

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| ROBERT H. FANNON | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| POWELL MOUNTAIN COAL COMPANY, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | DATE ISSUED: 03/19/2018 |
| PROGRESS FUELS CORPORATION | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Robert H. Fannon, Dryden, Virginia.[1]

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but she is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2015-BLA-5364) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on February 7, 2015, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation of 39.93 years of coal mine employment, and found that claimant worked at least fifteen years in underground mines. Finding the evidence insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment, the administrative law judge concluded that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Further, the administrative law judge found that because claimant failed to establish total disability, a requisite element of entitlement, benefits were precluded under 20 C.F.R. Part 718. Accordingly, he denied benefits.

Claimant generally appeals the administrative law judge's Decision and Order. Employer responds, urging affirmance of the administrative law judge's finding that claimant is not totally disabled and the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they are 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 Associates, Inc.*, 380 U.S. 359 (1965).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United

In the absence of contrary probative evidence, a miner's total disability is established by qualifying pulmonary function or arterial blood-gas studies, evidence that the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or reasoned medical opinions.[4] 20 C.F.R. §718.204(b)(2)(i)-(iv).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered five pulmonary function studies dated February 11, 2013, March 20, 2013, December 18, 2013, July 17, 2016, and July 25, 2016. Decision and Order at 9. The administrative law judge observed that total disability may be established based on pulmonary function studies showing an FEV1 value that is equal to or less than those listed in Table B1 (Males), Appendix B to 20 C.F.R. Part 718, for claimant's age and height, if the studies also show either: an FVC or MVV value that is equal to or less than those listed in the table "for an individual of the miner's age, sex, and height"; or an FEV1/FVC ratio equal to or less than 55 percent. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 8-9.

Claimant's height was recorded as 66 inches for the February 11, 2013 study, but 69 inches for the other four studies.[5] Director's Exhibits 9, 31; Claimant's Exhibits 5, 6; Employer's Exhibit 2. Referring to the discrepancy in the measurements of claimant's height, the administrative law judge asserted, with citations to two medical journal articles, that a person's height decreases with age and can vary on a daily basis by over .60 inches "depending on the time of day due to effects of exertion and gravity." Decision and Order at 10 n.12. Based on this information, the administrative law judge determined:

> It is completely understandable, therefore, that different height measurements were recorded for the miner as they were made not only over a period of time, but at different times of day as well. In the present case, neither party has objected to any of the recorded heights contained in the

States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] The administrative law judge correctly found that claimant is not eligible for the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 because there is no evidence in the record indicating that he suffers from complicated pneumoconiosis. Decision and Order at 7.

[5] Claimant was 66 years of age when the February 11, 2013 study was conducted, 67 years of age for the March 20, 2013 and December 18, 2013 studies, and 70 years of age for the July 19, 2016 and July 25, 2016 studies. Director's Exhibits 9, 31; Claimant's Exhibits 5, 6; Employer's Exhibit 2.

> pulmonary function [study] reports. Absent contrary evidence, there is no reason to doubt the accuracy of the various measurements even though they vary.

*Id*.

The administrative law judge also reported, however, that Board precedent did not permit him to use the varying recorded heights in evaluating each test, but rather "requires the administrative law judge to sua sponte alter the unimpeached evidence of record in this matter and not accept the measurements as observed by the medical providers." Decision and Order at 10 n.12, *citing Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983) ("[i]f there are substantial differences in the recorded heights among all the studies, the administrative law judge must make a factual finding to determine claimant's actual height.").[6] The administrative law judge interpreted the Board case law as follows:

> Evidently the Board is willing to accept precise data from physicians regarding the miner's pulmonary function and other data, but not the physician's measurement of the miner's height on a given day and time if there are "substantial differences" – a factor the Board left undefined. In compliance with the Board's requirement to "determine [the] claimant's actual height," the undersigned will adopt the shortest measurement of [claimant] provided in the admitted pulmonary function studies. The rationale for this approach is simple; if all of the physician's (sic) measurements are presumed to be incorrect (and therefore the administrative law judge is to substitute a measurement in their place as required by the Board), averaging those incorrect measurements would simply produce – absent mere random chance – an incorrect measurement as well. By adopting the shortest measurement of many possible ones, logically the miner is at least as tall as the shortest, and if even the shortest is incorrectly not short enough, it would be the closest to the miner's real height compared to the other incorrect, taller possible choices.

[6] The administrative law judge failed to recognize that the variation in the reported measurements is so great that, applying the research results he cited, they cannot all be correct. It is in such instances, i.e., where the differences are so great that the measurements cannot all be accurate, that the administrative law judge is called upon to rationally establish a "correct" height measurement.

Decision and Order at 10 n.12 (emphasis added).

The administrative law judge next determined that when the miner's shortest height of 66 inches is used, "the closest greater height to that value" in the tables at Appendix B must be applied, which is 66.1 inches. Decision and Order at 10. Relying on the values applicable for a miner who is 66.1 inches tall and is either 66, 67 or 70 years of age, the administrative law judge found that "only the oldest pulmonary function study of record performed on February 11, 2013 produced 'qualifying' values'" for total disability.[7] *Id*. Giving greater weight to the more recent pulmonary function studies, the administrative law judge found that claimant failed to establish total disability at 20 C.F.R. 718.204(b)(2)(i). *Id*. at 10-11.

The administrative law judge made clear his disagreement with the Board's holding in *Protopappas.* *See Protopappas*, 6 BLR at 1-223. However, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, also specifically requires an administrative law judge to determine a miner's "correct height" in order to properly evaluate whether pulmonary function studies are qualifying for total disability under the regulations. *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 114, 19 BLR 2-70, 2-81 (4th Cir. 1995); *see also Poole v. Freeman United Coal Min'g Co.*, 897 F.3d 888 (7th Cir. 1990). Although the administrative law judge has discretion to render factual findings, his determination of an actual or "correct height" must be rational and supported by substantial evidence. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). We vacate the administrative law judge's finding that the miner's actual height was 66 inches because it is based on a rationale that is flawed.

The administrative law judge first erred in failing to adequately explain how the medical literature he cited is applicable to the facts of this case. Although he observed that a person's height can vary by over .60 inches daily, and that a person's height decreases with age, the evidence in this case does not conform to that observation. Claimant's recorded height did not decline with age, as it was measured as 66 inches in February 11, 2013 and recorded as 69 inches for the March 20, 2013, December 18, 2013, July 17, 2016, and July 25, 2016 studies. Director's Exhibits 9, 31; Claimant's Exhibits 5, 6; Employer's

[7] The administrative law judge noted, however, that "[c]laimant's pre-bronchodilator spirometry from the March 20, 2013 pulmonary function study *would* have qualified based on his *measured* height [of 69 inches]. However, the results are non-qualifying based upon the undersigned's finding regarding [c]laimant's 'actual' height [of 66 inches]." Decision and Order at 9 n.11, *citing Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983) (emphasis in original).

Exhibit 2. The difference between the heights reported for claimant was 3 inches, which is five times the variance of .60 inches referenced by the administrative law judge.[8] *Id*.

Most critically, the administrative law judge's finding as it relates to claimant's actual height is based on an incorrect interpretation of this Board's holding in *Protopappas*. The administrative law judge explained his rationale as follows: "if all of the physician's measurements are presumed to be incorrect (and therefore the administrative law judge is to substitute a measurement in their place as required by the Board), averaging those incorrect measurements would simply produce – absent mere random chance – an incorrect measurement as well." Decision and Order at 10 n.12. Contrary to the administrative law judge's analysis, the Board's holding in *Protopappas* does *not* presume that all of the physicians' measurements are incorrect. Instead, it requires that "[i]f there are substantial differences in the recorded heights among all the studies, the administrative law judge must make a factual finding to determine claimant's actual height." *See Protopappas*, 6 BLR at 1-223. Thus, while the Board has upheld administrative law judges' decisions to calculate a miner's average height as a reasonable method to resolve substantial differences between recorded heights, *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008); *Krise v. Kocher Coal Co.*, BRB No. 11-0250 BLA (Dec. 21, 2011) (unpub.), the Board has also upheld administrative law judges' decisions to choose one of the recorded heights as the actual height, where the administrative law judge provided an adequate rationale for doing so, *see Jent v. Cumberland River Coal Co.*, BRB No. 06-0814 BLA (July 31, 2007) (unpub.); *Yonce v. CSX Transportation*, BRB No. 98-1132 BLA (Nov. 17, 2004) (unpub.).

The effect of applying the administrative law judge's logically unsound rule is to disadvantage the miner. In the tables set forth in Appendix B to Part 718, as the miner's height decreases, the qualifying values for the FEV1, FVC and MVV also decrease. Thus, pulmonary function study values that would be qualifying for total disability at a greater height would be non-qualifying at a lower height. In this case, the administrative law judge

[8] The administrative law judge's rationale that "logically the miner is *at least* as tall as the shortest [recorded height], and if even the shortest is incorrectly not short enough, it would be the *closest* to the miner's real height . . . ." also does not pass muster. Decision and Order at 10 n.12 (emphasis in original). While it is true that a miner who is 69 inches tall is also at least 66 inches tall, it does not necessarily follow that the miner's correct height is 66 inches tall, particularly given the evidence in this case that the miner was measured four separate times between 2013 and 2016 as being 69 inches tall. Thus, contrary to the administrative judge's analysis, there is evidence in this case that 66 inches is not tall enough, but there is no evidence for the proposition he advances that 66 inches may be too tall.

acknowledged that the March 20, 2013 pulmonary function study has a qualifying pre-bronchodilator FEV1 value using the measured height of 69 inches. Decision and Order at 9, n. 11. Because that study also has an FEV1/FVC value of less than 55 percent, and thus would be qualifying at a height of 69 inches, the administrative law judge's error impacted his weighing of the evidence at 20 C.F.R. §718.204(b)(2)(i).[9]

In the absence of a valid rationale for finding that claimant's actual height is 66 inches, we vacate the administrative law judge's determination that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Furthermore, because the administrative law judge's finding with regard to the pulmonary function studies influenced his weighing of the medical opinion evidence,[10] we must also vacate his finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[11] We therefore vacate the administrative law judge's denial of benefits and remand this case for further consideration.

[9] We note, however, that the administrative law judge's findings with respect to the February 11, 2013, December 18, 2013, July 19, 2016, and July 25, 2016 studies would not change, as their values would remain qualifying, non-qualifying, non-qualifying, and non-qualifying, respectively, even if the miner's height is determined to be 69 inches. *See Larioni v. Director, OWCP*, 6 BLR 1-1276,1-1278 (1984).

[10] The record includes three medical opinions. Dr. Alam opined that claimant is totally disabled, while Drs. Fino and McSharry opined that he is not. Director's Exhibits 9, 31; Employer's Exhibit 2. The administrative law judge rejected Dr. Alam's opinion because the physician relied on the qualifying FEV1 pre-bronchodilator value on the March 20, 2013 pulmonary function study, which the administrative law judge determined "is, in fact 'non-qualifying' based on [c]laimant's 'actual' height." Decision and Order at 15. The administrative law judge credited Dr. Fino's explanation that claimant is not totally disabled to the extent the FEV1 values are normal. *Id*. The administrative law judge credited Dr. McSharry's opinion that claimant is not totally disabled because "the pulmonary function [studies] are well outside disability standards as determined by the Department of Labor." *Id*., *quoting* Employer's Exhibit 4.

[11] We affirm the administrative law judge's finding that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), as none of the arterial blood gas studies is qualifying for total disability. Decision and Order at 11. We further affirm his finding that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), because there is no evidence that claimant has cor pulmonale with right-sided congestive heart failure. *Id*.

On remand, the administrative law judge must determine claimant's actual height and reconsider whether claimant is totally disabled based on the pulmonary function studies pursuant to 20 C.F.R. §718.204(b)(2)(i). In determining claimant's actual height, the administrative law judge must set forth a rationale that conforms to the facts of this case, and explain his findings of fact and conclusions of law in accordance with the Administrative Procedure Act (APA).[12] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). He must also reconsider whether the medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), taking into consideration the credibility of the physicians' explanations, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). If the administrative law judge finds total disability established based on the pulmonary function studies at 20 C.F.R. §718.204(b)(2)(i) or the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), or under both subsections, he must further determine, based on his consideration of all the evidence, whether claimant satisfied his burden to establish a totally disabling respiratory or pulmonary impairment. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

If claimant fails to establish total disability, an essential element of entitlement, benefits are precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). However, if the administrative law judge finds that claimant has a totally disabling respiratory or pulmonary impairment, claimant is entitled to invocation of the Section 411(c)(4) presumption, and the administrative law judge must determine whether employer has established rebuttal of that presumption. 20 C.F.R. §718.305(d)(1)(i), (ii).

[12] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge