**U.S. Department of Labor**

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

BRB No. 23-0449 BLA

| | | |
|---|---|---|
| JOHN P. IVORY | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| TANOMA MINING COMPANY, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| AMERICAN MINING INSURANCE COMPANY, k/n/a BERKLEY CASUALTY COMPANY | ) | DATE ISSUED: 08/12/2024 |
| | ) | |
| 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.

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, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits (2022-BLA-05376) rendered on a claim filed on June 10, 2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 18.86 years of underground or substantially similar surface coal mine employment. Although the ALJ found Claimant established the existence of legal pneumoconiosis, he found Claimant did not establish the existence of clinical pneumoconiosis or a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). Thus, he found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4) (2018), or establish entitlement under 20 C.F.R. Part 718. He therefore denied benefits.

On appeal, Claimant argues the ALJ erred in finding he did not establish a totally disabling respiratory or pulmonary impairment.[2] Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[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 (1965).

[1] 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established 18.86 years of underground or substantially similar surface coal mine employment and the existence of legal pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6, 17-18.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in

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

To invoke the Section 411(c)(4) presumption, 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. *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 the pulmonary function studies, arterial blood gas studies, and medical opinions do not support a finding of total disability, and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iv); Decision and Order at 22-23, 27. He therefore found the evidence as a whole does not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); Decision and Order at 27.

Claimant contends the ALJ erred in weighing the medical opinion evidence.[4] Claimant's Brief at 5-8. The ALJ considered the medical opinions of Drs. Go, Zlupko, and Fino. Decision and Order at 23-27. Dr. Go opined Claimant is totally disabled, while Drs. Zlupko and Fino opined he is not. Director's Exhibit 12; Claimant's Exhibit 2; Employer's Exhibits 2, 3. The ALJ found the opinions of Drs. Go, Zlupko, and Fino well-reasoned and entitled to great weight. Decision and Order at 26-27. Because two of the three physicians opined Claimant is not totally disabled, the ALJ concluded the medical opinion evidence does not support a finding of total disability. *Id*. at 27.

Claimant argues the ALJ erred in failing to critically analyze the medical opinions by "assigning great weight to all doctors without specifically discussing and making

---

Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] We affirm, as unchallenged, the ALJ's findings that the pulmonary function and arterial blood gas studies do not establish total disability, and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Skrack*, 6 BLR at 1-711; Decision and Order at 22-23.

findings as to the adequacy of each doctor's explanation." Claimant's Brief at 5-8. We agree.

Dr. Zlupko opined Claimant has a non-disabling mild restrictive ventilatory defect based on his non-qualifying pulmonary function and arterial blood gas studies. Director's Exhibit 12 at 4-5. Similarly, Dr. Fino opined Claimant has a non-disabling mild respiratory impairment based on his non-qualifying pulmonary function and arterial blood gas studies. Employer's Exhibits 2 at 11; 3. In contrast, Dr. Go opined Claimant has a Class 3 pulmonary impairment under the American Medical Association criteria based on his most recent pulmonary function study, and that such an impairment is "incompatible with any coal mine employment." Claimant's Exhibit 2 at 6. He thus concluded Claimant is totally disabled "for any coal mine employment." *Id*.

Considering the opinions of Drs. Zlupko and Fino, the ALJ found their conclusions were based on objective medical data and summarily concluded that they are well-reasoned and "entitled to great weight." Decision and Order at 26. The ALJ also found Dr. Go's opinion supports an inference that Claimant is unable to perform his usual coal mine work and is well-reasoned and entitled to great weight. *Id*. at 26-27. However, the ALJ did not consider the physicians' underlying rationales or otherwise attempt to resolve their conflicting total disability opinions. Instead, he relied on the numerical superiority of the opinions weighing against total disability to find Claimant is not disabled.

Because the ALJ erred in failing to critically analyze the medical opinions, resolve the conflict in their opinions, or explain his conclusions as the Administrative Procedure Act (APA) requires,[5] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), we vacate his finding that Claimant failed to establish a totally disabling respiratory or pulmonary impairment. *See Balsavage v. Director*, OWCP, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); 20 C.F.R. §718.204(b); *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016) (ALJ may not base a determination on the numerical superiority of the same items of evidence, and must articulate specific reasons and provide support for favoring one medical opinion over another). We therefore vacate his finding that Claimant did not invoke the Section

[5] The Administrative Procedure Act provides 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).

411(c)(4) presumption and remand the case for further consideration of the evidence consistent with this opinion.

**Remand Instructions**

On remand, the ALJ must consider whether Claimant has established total disability based on the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv). When weighing the medical opinions, the ALJ must address the comparative credentials of the physicians,[6] the explanations for their medical findings, the documentation underlying their judgments, and the sophistication of and bases for their conclusions. *See Balsavage*, 295 F.3d at 396-97; *Kertesz*, 788 F.2d at 163. In reaching his credibility determinations, the ALJ must set forth in detail how conflicts in the evidence are resolved, as the APA requires. *Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes total disability based on the medical opinion evidence, the ALJ must then weigh all of the relevant evidence together to determine whether Claimant has established total disability. 20 C.F.R. §718.204(b)(2); *see Defore*, 12 BLR at 1-28-29; *Shedlock*, 9 BLR at 1-198. If Claimant establishes total disability, and thereby invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer has rebutted the presumption.[7] *See* 20 C.F.R. §718.305(d); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015).

If Claimant fails to establish total disability, an essential element of entitlement, the ALJ may reinstate the denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[6] As Claimant argues, the ALJ failed to consider the physicians' qualifications when weighing their opinions. Claimant's Brief at 7-8. Dr. Zlupko is Board-certified in internal medicine. Director's Exhibit 13. Drs. Go and Fino are Board-certified in pulmonary disease and internal medicine. Claimant's Exhibit 3; Employer's Exhibit 3.

[7] As we have affirmed the ALJ's unchallenged finding that Claimant established legal pneumoconiosis, Employer is foreclosed from rebutting the presumption by establishing Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). The ALJ must nevertheless address whether Employer rebutted clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B). He must also address whether Employer established "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge