**U.S. Department of Labor**

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

BRB Nos. 23-0402 BLA
and 23-0402 BLA-A

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| DARRELL L. JOHNSON | ) | |
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| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| KOKOSING CONSTRUCTION COMPANY, INCORPORATED | ) | DATE ISSUED: 06/11/2024 |
| | ) | |
| Employer-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Darrell L. Johnson, London, Kentucky.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

PER CURIAM:

Claimant appeals, without representation,[1] and Employer cross-appeals, Administrative Law Judge (ALJ) Steven D. Bell's Decision and Order Denying Benefits (2020-BLA-05843), rendered on a miner's claim filed on January 18, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant failed to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2).[2] Therefore, he concluded Claimant could not invoke 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),[3] or establish entitlement to benefits at 20 C.F.R. Part 718. Accordingly, the ALJ denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds in support of the denial. On cross-appeal, Employer asserts the ALJ erred in failing to address its argument that it is not the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response to Claimant's appeal or Employer's cross-appeal but commented on the responsible

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

[2] The ALJ correctly found, and we therefore affirm, that Claimant did not establish complicated pneumoconiosis as none of the x-rays, computed tomography (CT) scans, biopsies, or medical opinions documented evidence of large opacities consistent with complicated pneumoconiosis. Decision and Order at 4; *see* Director's Exhibits 12, 15, 22-25, 28; Claimant's Exhibits 1, 3-8; Employer's Exhibits 1-14. Thus, Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[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. §921(c)(4) (2018); 20 C.F.R. §718.305.

operator issue.[4] Employer responds to the Director's comments, reiterating its contentions on cross-appeal.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

**Total Disability**

To invoke the Section 411(c)(4) presumption or establish entitlement to benefits under 20 C.F.R. Part 718, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(i). A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). 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 consider all relevant evidence and weigh the evidence supporting total disability against all 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). The ALJ found that Claimant failed to establish total disability by any method.[6] 20 C.F.R. §718.204(b)(2); Decision and Order at 12-15.

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[4] While the Director did not substantively respond to Employer's cross-appeal, he commented on Employer's contention that the ALJ erred in failing to consider its responsible operator defense. Director's Letter Response to Employer's Cross-Appeal at 1 n.1 (unpaginated). He urged the Board to "affirm the ALJ's act of judicial economy" in declining to address the responsible operator issue since the ALJ found Claimant was not entitled to benefits, but he stated the Board should direct the ALJ to consider this issue if the case is remanded to the ALJ and he determines Claimant is entitled to benefits. *Id.*

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 10; Director's Exhibit 3.

[6] The ALJ accurately found that the pulmonary function studies do not establish total disability as they are all non-qualifying, and there is no evidence of cor pulmonale

**Arterial Blood Gas Studies**

The ALJ considered the results of three arterial blood gas studies. Decision and Order at 6. The April 29, 2019 study produced non-qualifying values at rest, but qualifying values with exercise.[7] Director's Exhibit 12 at 15-18. The August 20, 2019 and January 11, 2021 studies produced non-qualifying results at rest and with exercise. Director's Exhibit 28 at 14-18; Employer's Exhibit 1 at 13-15. The ALJ found Claimant failed to establish total disability based on the blood gas studies because a preponderance of the studies were non-qualifying. Decision and Order at 13. Because the ALJ rationally found the single qualifying exercise study outweighed by two non-qualifying exercise studies and three non-qualifying resting studies, we affirm his finding as supported by substantial evidence. 20 C.F.R. §718.204(b)(2)(ii); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 13.

**Medical Opinions**

The ALJ considered the medical opinions of Drs. Forehand, Dahhan, and Broudy. Decision and Order at 7-14. Dr. Forehand conducted the Department of Labor (DOL)-sponsored complete pulmonary examination of Claimant on April 29, 2019. Director's Exhibit 12. Initially, he determined Claimant's work as a heavy equipment operator required a heavy level of exertion. *Id*. at 1. He then opined Claimant has a "significant, work-limiting respiratory impairment" and is totally and permanently disabled. *Id.* at 4. Dr. Forehand based his opinion on Claimant's $FEV_1$ on pulmonary function testing and pO2 values on blood gas testing, which he found leave Claimant "with insufficient 'wind' (the ability to increase ventilation in response to an increase in physical activity) and oxygen" to allow him to perform the exertional requirements of his previous coal mine employment. *Id*.

Dr. Dahhan examined Claimant on August 20, 2019, and noted all of Claimant's coal mine employment occurred at strip mines "cleaning up, using a grader, sweeper, end loader, cleaning coal and loading coal." Director's Exhibit 28 at 1. He observed that all

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with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 4-5; Director's Exhibits 12 at 6, 28 at 6; Employer's Exhibit 1 at 8. A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] A "qualifying" blood gas study yields values that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

of the pulmonary function study values are above disability standards and the blood gas values from his examination of Claimant are "normal." *Id*. at 2-3. While acknowledging that the blood gas values from Dr. Forehand's examination "showed exercise induced hypoxemia," Dr. Dahhan found that result was not duplicated on the testing he administered. *Id*. He found no evidence of a "functional pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by inhalation of coal dust[.]" *Id*. at 3.

At his deposition, Dr. Dahhan indicated he reviewed additional records[8] and stated that Claimant's coal mine work required him "to get in and out of the equipment that usually ha[s] six steps, occasionally had to do lifting." Employer's Exhibit 3 at 6-7. He opined that the difference in results between his and Dr. Forehand's blood gas study is due to the lower starting pO2 from Dr. Forehand's resting blood gas values, which "could be due to some superimposed condition at the time[,]" such as Claimant's sleep apnea or "some other respiratory illness" he may have had. Employer's Exhibit 3 at 10-11.

In a supplemental opinion, Dr. Forehand responded to the DOL claims examiner's request to reconsider his findings based on Dr. Dahhan's report. Dr. Forehand asserted that Dr. Dahhan's blood gas study is less reliable because Claimant only "exercised to a peak of [twelve] watts of work," which "is not a significant level of physical activity" and therefore "was not sufficient to demonstrate [Claimant's] exercise-induced arterial hypoxemia." Director's Exhibit 22 at 2-3. Thus, Dr. Forehand reiterated his opinion that Claimant has a totally disabling respiratory impairment. *Id*. at 3.

Dr. Broudy examined Claimant on January 11, 2021, and opined he could perform his last job of operating heavy machinery from a respiratory standpoint, basing his opinion on Claimant's non-qualifying pulmonary function and blood gas studies conducted during that examination. Employer's Exhibit 1 at 4. Dr. Broudy commented that the blood gas study values he obtained "are considerably better" than Dr. Forehand's November 13, 2018 study and "about the same" as the results from Dr. Dahhan's August 20, 2019 study. *Id*. at 3. In his deposition, based on a review of additional records,[9] Dr. Broudy noted that

[8] Dr. Dahhan stated he reviewed blood gas studies dated November 13, 2018, April 29, 2019, August 20, 2019, and January 11, 2021. Employer's Exhibit 3 at 9. He also indicated he reviewed Drs. Forehand's and Broudy's reports. *Id*.

[9] Attached to Dr. Broudy's deposition is a list of all of the records he reviewed, including Dr. Forehand's examination report and objective testing, Dr. Dahhan's report and objective testing, CT scans, x-rays, and treatment records. Employer's Exhibit 4 at 24-26.

while Claimant's spirometry showed a mild to moderate restrictive defect, the results were above the federal criteria for disability. Employer's Exhibit 4 at 14. He also reiterated his contention that, based on a review of the objective testing, Claimant retains the capacity to perform his last mining job as a heavy equipment operator, which required moderate exertion. *Id.* at 8, 15.

The ALJ discredited Dr. Forehand's opinion solely on the basis that he did not review the most recent non-qualifying objective tests Dr. Broudy performed. Decision and Order at 13-14. The ALJ stated that even if he credited Dr. Forehand's opinion that Claimant was not adequately exercised during Dr. Dahhan's blood gas study, Dr. Dahhan's opinion was also supported by the more recent, non-qualifying testing that he reviewed. *Id.* at 14. Therefore, the ALJ gave greater weight to the opinions of Drs. Dahhan and Broudy because they relied on the most recent objective testing. *Id.* at 14. The ALJ thus concluded that the medical opinions do not support a finding of total disability. *Id.*

In weighing the medical opinions, the ALJ failed to adequately resolve the conflict in the evidence. *See* Decision and Order at 13-15.

First, the Board and the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, have held it is irrational to credit evidence solely on the basis of recency when it shows the miner's condition has improved.[10] *See Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993) (given the progressive nature of pneumoconiosis, a fact-finder must evaluate evidence without reference to its chronological order when the evidence shows a miner's condition has improved) (citing *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) (when the evidence shows improvement in condition, as opposed to deterioration, "[e]ither the earlier or the later result *must* be wrong, and it is just as likely that the later evidence is faulty as the earlier")); *Kincaid v. Island Creek Coal Co.*, BLR , BRB Nos. 22-0024 BLA and 22-0024 BLA-A, slip op. at 7-11 (Nov. 17, 2023); *Smith v. Kelly's Creek Res.*, BLR , BRB No. 21-0329 BLA, slip op. at 10 (June 27, 2023). As the only reason the ALJ provided for discrediting Dr. Forehand's opinion was that he did not review the most recent non-qualifying objective tests, we vacate his finding that Dr. Forehand's medical opinion is entitled to less probative weight. *See Woodward*, 991 F.2d at 319-20; *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996) (medical opinion may be credited and

[10] We note that any error in the ALJ's reference to the non-qualifying blood gas studies being "more recent" is harmless because he nonetheless permissibly found the preponderance of the blood gas studies were non-qualifying as a whole. Decision and Order at 12-13; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

sufficient to establish Claimant's burden if it is based on the doctor's own examination of the miner and objective test results); Decision and Order at 13-14.

Second, the ALJ acknowledged Dr. Forehand's opinion that Dr. Dahhan's "exercise protocol" when administering a blood gas study was inadequate for purposes of assessing Claimant's hypoxemia, yet the ALJ appears to have discredited Dr. Forehand's opinion because he did not also review Dr. Broudy's more recent blood gas exercise testing. Decision and Order at 14. To the extent this could be construed as a finding that Dr. Broudy's blood gas study results are entitled to the greatest weight for reasons other than their recency, the ALJ's decision is not adequately explained in light of the conflicting medical opinions. *See* 30 U.S.C. §923(b) (requiring consideration of all relevant evidence); *see also Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002).

Although Dr. Forehand reviewed only Dr. Dahhan's blood gas testing, Dr. Broudy acknowledged that the results of the testing he conducted were "about the same" as Dr. Dahhan's; the results revealed a decrease in pO2 after "only [two] minutes of walking;" and, like Dr. Dahhan's testing, exercise was stopped after two minutes because of Claimant's "shortness of breath." Employer's Exhibit 1 at 3, 13-15; Director's Exhibit 28 at 11-17. Dr. Broudy did not offer an opinion on the adequacy of Dr. Forehand's exercise protocol when administering a blood gas study or otherwise question Dr. Forehand's testing but, rather, limited the basis of his diagnosis to the non-qualifying values on his own testing and described his review of the other physicians' records as "neither helpful [nor] unhelpful." Employer's Exhibit 4 at 13, 17; *see also* Employer's Exhibit 1. Dr. Dahhan likewise described his testing results as similar to Dr. Broudy's, but attributed the lower pO2 values Dr. Forehand observed after a longer duration of exercise (three minutes rather than two) to Claimant "start[ing] with lower values," which Dr. Dahhan "presume[d] . . . could be due to some superimposed condition at the time" such as sleep apnea or "possibly some other respiratory illness." Employer's Exhibit 3 at 10-11.

Based on the foregoing errors, we vacate the ALJ's finding that the medical opinions do not establish total disability as it is inconsistent with law and does not account for all of the relevant evidence. *See* 20 C.F.R. §718.204(b)(2)(iv); *see also Martin*, 400 F.3d at 305 (substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion).

**Remand Instructions**

On remand, the ALJ must initially determine the exertional requirements of Claimant's usual coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (even a mild respiratory impairment may preclude the performance of the miner's usual duties; ALJ must compare the miner's assessed limitations with the

exertional requirements of his usual coal mine work); *see also Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). He must then reweigh the medical opinions, resolve any conflict regarding the degree of Claimant's respiratory impairment, and determine whether the physicians have identified an impairment or physical limitations that would preclude Claimant from performing his usual coal mine work and thereby establish that Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett*, 227 F.3d at 578.

In weighing the medical opinions, the ALJ must consider the qualifications of the respective physicians, the explanations for their opinions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). If Claimant establishes total disability based on the medical opinion evidence, the ALJ must weigh the evidence as a whole to determine whether Claimant is totally disabled by a respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2); *see also Shedlock*, 9 BLR at 1-198.

Because we are remanding this case on the merits, we need not address Employer's arguments on cross-appeal.[11] *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 5-6. If Claimant establishes total disability, the ALJ will need to address the additional elements of entitlement pursuant to 20 C.F.R. Part 718 and, if

[11] Employer contends, in its initial brief and brief on cross-appeal, that the ALJ erred in not considering its challenge to its designation as the responsible operator. Employer's Brief at 5-6; Employer's Brief on Cross-Appeal at 5-6. Based on the facts of this case, Employer asserts that the Director would be barred from contesting entitlement to benefits on the merits and, therefore, if the ALJ found Employer is not the properly named responsible operator, liability would transfer to the Black Lung Disability Trust Fund. *Id.* It further states this error is not harmless as "[d]enying the claim on total disability grounds would place both Claimant and Employer in jeopardy by requiring them to re-litigate the relevant issues in future proceedings." *Id.* Contrary to Employer's contentions, because the ALJ denied benefits, his decision to not address the responsible operator issue does not constitute an "adverse finding[] of fact or conclusion[] of law." 20 C.F.R. §802.201(a)(2). The designation of the responsible operator is not necessary to the denial of benefits; thus, collateral estoppel does not bar its re-litigation in the event benefits are denied and a subsequent claim is filed. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 320-21 (6th Cir. 2014). Moreover, Employer did not cite any authority to support its assertions or adequately explain its arguments given the regulations and case law. Thus, its argument is inadequately briefed. *See* 20 C.F.R. §802.211(b); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986).

necessary, determine whether Employer is the responsible operator. However, if the ALJ finds the evidence insufficient to establish total disability, he may reinstate the denial of benefits. *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). In rendering his findings on remand, the ALJ must comply with the Administrative Procedure Act.[12] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[12] 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).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits, and we remand the case to the ALJ for further consideration consistent with this decision.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge