

U.S. Department of Labor

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



BRB No. 23-0486 BLA

CARMEN TALERICO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JWR-WALTER ENERGY	)	
	)	
and	)	
	)	
WARRIOR MET COAL, LLC	)	DATE ISSUED: 11/22/2024
	)	
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 on Modification of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

John R. Jacobs and Paisley Newsome (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

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

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

Claimant appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Denying Benefits on Modification (2021-BLA-05336) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).<sup>1</sup> This case involves a subsequent claim filed on November 22, 2017.<sup>2</sup>

In a July 7, 2020 Decision and Order Denying Benefits, ALJ Patrick M. Rosenow found the Miner did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); *see* Director's Exhibit 62. Thus, he found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.<sup>3</sup> 30 U.S.C. §921(c)(4) (2018). Because the Miner failed to establish an essential element of entitlement, ALJ Rosenow denied benefits. Director's Exhibit 62.

Claimant timely requested modification of that denial and submitted additional evidence. Director's Exhibit 64. In her Decision and Order Denying Benefits on Modification, the subject of the current appeal, ALJ Harris (the ALJ) found the Miner had thirty years of underground coal mine employment but did not establish total disability. 20 C.F.R. §718.204(b)(2). She thus determined he failed to establish modification based on a change in conditions or mistake in a determination of fact pursuant to 20 C.F.R. §725.310 and denied benefits.

On appeal, Claimant argues the ALJ erred in finding the Miner was not totally disabled.<sup>4</sup> Neither Employer and its Carrier nor the Director, Office of Workers' Compensation Programs, have filed a response brief.

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<sup>1</sup> The Miner died on October 29, 2022. Claimant's Brief at 1 n.1. The Miner's wife, Carol Ann Kost, is pursuing his claim on his behalf. Claimant's Brief at 1 n.1; *see* Director's Exhibit 11.

<sup>2</sup> The Miner filed one prior claim on May 25, 2012. Director's Exhibit 1 at 4. The director denied that claim on December 17, 2017, because the Miner failed to establish any element of entitlement. *Id.* at 4-12. The Miner took no further action until filing the current claim. Director's Exhibit 3.

<sup>3</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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); *see* 20 C.F.R. §718.305.

<sup>4</sup> We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*,

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).

### **Modification**

The ALJ may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). In considering whether a change in conditions has been established, the ALJ is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement that defeated an award in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). With respect to mistakes of fact, an ALJ may correct any mistake "including the ultimate issue of benefits eligibility." *Youghioghney & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 954 (6th Cir. 1999); *Consol. Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-25 (4th Cir. 1993). Moreover, a party need not submit new evidence on modification because an ALJ has broad discretion "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). A miner was totally disabled if his pulmonary or respiratory impairment, standing alone, prevented 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

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6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 3; *see* Director's Exhibit 59 at 8-9.

<sup>5</sup> The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit because the Miner performed his last coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order on Modification at 5 n.4; Director's Exhibits 4, 59 at 10-11.

disability based on qualifying pulmonary function or arterial blood gas studies,<sup>6</sup> 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 Claimant failed to establish total disability by any method. 20 C.F.R. §718.204(b)(2); Decision and Order on Modification at 7-14. Claimant contends the ALJ erred in weighing the pulmonary function studies and medical opinions.<sup>7</sup> Claimant's Brief at 5-9. We agree.

### **Pulmonary Function Studies**

The ALJ considered five pulmonary function studies dated January 11, 2018, June 19, 2018, August 3, 2020, November 20, 2020, and October 6, 2021. Decision and Order on Modification at 7-10; Director's Exhibits 13 at 12; 22 at 17; Claimant's Exhibits 4, 5; Employer's Exhibit 1 at 7. All of the studies produced non-qualifying values except the most recent October 6, 2021 study, which produced qualifying values pre-bronchodilator.<sup>8</sup> Director's Exhibits 13 at 12; 22 at 17; Claimant's Exhibits 4, 5; Employer's Exhibit 1 at 7.

The ALJ found the qualifying October 6, 2021 study unreliable based on Employer's argument that it contains only one tracing of the flow-volume loop, demonstrating that only one trial was performed even though the regulatory quality standards require three trials. Decision and Order on Modification at 9; Employer's Closing Brief at 8-9. Because she found the only qualifying study is not reliable and the remaining studies are non-qualifying, the ALJ concluded that the pulmonary function study

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<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> We affirm, as unchallenged, the ALJ's findings that the arterial blood gas studies do not support total disability and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); *see Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 7 n.5, 10.

<sup>8</sup> The October 6, 2021 study did not include post-bronchodilator testing. Claimant's Exhibit 4.

evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Modification at 9.

We agree with Claimant's argument that the ALJ erred in finding the October 6, 2021 study unreliable. Claimant's Brief at 5-7. When weighing pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). In the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c); *see Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (party challenging the validity of a study has the burden to establish the results are unreliable); 20 C.F.R. Part 718, Appendix B.

The quality standards, however, do not apply to pulmonary function studies conducted as part of a miner's treatment and not in anticipation of litigation. 20 C.F.R. §§718.101, 718.103; *see J.V.S. [Stowers] v. Arch of W. Va.*, 24 BLR 1-78, 1-92 (2010) (quality standards "apply only to evidence developed in connection with a claim for benefits" and not to testing conducted as part of a miner's treatment). An ALJ must nevertheless determine if a miner's treatment record pulmonary function studies are sufficiently reliable to support a finding of total disability, despite the inapplicability of the specific quality standards. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

Here, the record reflects the Miner performed the October 6, 2021 study as part of a "routine follow-up" with Dr. Connolly "after a previous visit approximately [six] months [earlier], for an evaluation of moderate [chronic obstructive pulmonary disease] of [five] years duration." Claimant's Exhibit 7 at 16; *see* Claimant's Evidence Summary Form at 7; Claimant's Brief at 7; *see also* Claimant's Closing Brief at 11-12. Because the study was developed as part of the Miner's treatment and not in anticipation of litigation, the ALJ erred by failing to address whether it is sufficiently reliable notwithstanding whether it does not comply with certain quality standards. *Stowers*, 24 BLR at 1-92. Moreover, neither the ALJ nor Employer cited to any medical evidence to support their conclusion that the October 6, 2021 study is unreliable or does not accurately depict the Miner's condition. Decision and Order on Modification at 9; Employer's Closing Brief at 8-9; *see Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-135 (1986).

Finally, the ALJ failed to weigh the notations of technician DeAngelia Tolliver, who conducted the October 6, 2021 study and stated the Miner demonstrated good effort and understanding, and the study's results are acceptable and reproducible. Claimant's Exhibit 7 at 21-22. Thus the ALJ failed to consider all relevant evidence regarding the reliability of the October 6, 2021 study. *See* 30 U.S.C. §923(b) (fact-finder must address all relevant

evidence); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (ALJ's failure to consider all relevant evidence requires remand).

Based on the foregoing errors, we vacate the ALJ's finding that the October 6, 2021 study is unreliable and entitled to little probative weight. Decision and Order on Modification at 9. We further vacate the ALJ's determination that Claimant did not establish total disability based on the pulmonary function study evidence. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Modification at 9-10.

### **Medical Opinions**

The ALJ weighed Dr. Connolly's opinion that the Miner was totally disabled by a chronic respiratory or pulmonary impairment and the opinions of Drs. Barney, Goldstein, and Rosenberg that he was not. Decision and Order on Modification at 10-13; Director's Exhibits 13 at 7, 20, 22; Claimant's Exhibits 6, 7; Employer's Exhibits 1, 2. She determined Dr. Connolly failed to discuss the Miner's usual coal mine employment and thus did not "display a reasonably accurate understanding" of the exertional requirements of his job. Decision and Order on Modification at 13. She further indicated Dr. Connolly relied on the October 6, 2021 pulmonary function study that she found unreliable. *Id.* She thus concluded Dr. Connolly's opinion is entitled to little weight. *Id.* As Dr. Connolly was the only doctor who opined the Miner had a totally disabling respiratory or pulmonary impairment, the ALJ found the medical opinion evidence does not support a finding of total disability. *Id.*

Because the ALJ's error with respect to the October 6, 2021 pulmonary function study affected her weighing of Dr. Connolly's opinion, we must vacate her finding that the medical opinion evidence does not support a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Modification at 13.

Further, we agree with Claimant's argument<sup>9</sup> that the ALJ erred in discrediting Dr. Connolly's opinion because she found that he failed to discuss the Miner's usual coal mine employment.<sup>10</sup> Claimant's Brief at 7-8.

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<sup>9</sup> Claimant asserts the ALJ erred in discrediting Dr. Connolly's opinion because she inaccurately described the doctor's understanding of the Miner's smoking history. Claimant's Brief at 8. While the ALJ noted Dr. Connolly did not discuss the Miner's smoking history when she summarized his opinion, she did not discredit the doctor's opinion for that reason. Decision and Order on Modification at 12-13.

<sup>10</sup> The ALJ found the Miner's usual coal mine employment was working as a shift foreman, which involved "moderate exertional requirements." Decision and Order on

Contrary to the ALJ's holding, Dr. Connolly correctly recognized the Miner's usual coal mine employment involved working as a shift foreman. Claimant's Exhibits 6, 7 at 1. Dr. Connolly noted that he reviewed the transcript from Claimant's June 28, 2019 hearing before ALJ Rosenow "with specific attention to the duties and responsibilities required of [the Miner] during a normal work shift." Claimant's Exhibit 6; *see* Director's Exhibit 59 at 11-15. He opined the Miner had a totally disabling respiratory impairment that prevented him from performing his usual coal mine work as a shift foreman. Claimant's Exhibit 6. Thus substantial evidence does not support the ALJ's credibility finding and we vacate it. Decision and Order on Modification at 13.

We further vacate the ALJ's finding that Claimant failed to establish total disability based on all of the relevant evidence. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; Decision and Order on Modification at 14. Therefore, we vacate her finding that Claimant failed to invoke the Section 411(c)(4) presumption and establish modification based on a change in conditions or mistake in a determination of fact. 20 C.F.R. §§718.305, 725.310; Decision and Order on Modification at 14. Thus we vacate the denial of benefits.

### **Remand Instructions**

On remand, the ALJ must first reconsider whether the pulmonary function studies support total disability. 20 C.F.R. §718.204(b)(2)(i). In doing so, she must evaluate the reliability of the October 6, 2021 study based on her consideration of the relevant medical evidence. *Stowers*, 24 BLR at 1-92.

She should then evaluate the medical opinions and determine whether Claimant has established total disability based on this evidence. 20 C.F.R. §718.204(b)(2)(iv). She should compare the exertional requirements of the Miner's usual coal mine work with the physicians' descriptions of his pulmonary impairment and physical limitations. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). She must also address the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *U.S. Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977, 992 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

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Modification at 6. As this finding is not challenged, we affirm it. *See Skrack*, 6 BLR at 1-711.

She must adequately explain her credibility findings in accordance 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).<sup>11</sup> If Claimant establishes total disability based on the pulmonary function studies or medical opinions, in isolation, the ALJ should then weigh all of the relevant evidence together to determine whether Claimant has established total disability. See 20 C.F.R. §718.204(b)(2); *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. 20 C.F.R. §718.305. The burden would then shift to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,<sup>12</sup> or “no part of [his] 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)(i), (ii). If Claimant is unable to establish total disability, benefits are precluded. 20 C.F.R. Part 718; see *Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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<sup>11</sup> The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that 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).

<sup>12</sup> “Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes “any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b). “Clinical pneumoconiosis” consists of “those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(1).



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

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring.

I concur in the result only.

JUDITH S. BOGGS  
Administrative Appeals Judge