**U.S. Department of Labor**

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

BRB No. 23-0307 BLA

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| JAMES A. BREWSTER JR. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| BROOKS RUN COAL COMPANY, LLC | ) | |
| | ) | **NOT-PUBLISHED** |
| and | ) | |
| | ) | |
| CHARTIS CASUALTY COMPANY | ) | |
| | ) | DATE ISSUED: 09/30/2024 |
| Employer/Carrier-Petitioners | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

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

Samuel B. Petsonk (Petsonk PLLC), Oak Hill, West Virginia, for Claimant.

Kendra Prince (Penn, Stuart, & Eskridge), Abingdon, Virginia, for Employer and its Carrier.

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

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

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2019-BLA-05000) rendered on a subsequent claim[1] filed on April 20, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901–944 (2018) (Act). This case is before the Benefits Review Board for the second time.

In its prior decision, the Board affirmed as unchallenged the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment. *Brewster v. Brooks Run Coal Co.*, BRB No. 20-0332 BLA, slip op. at 3 n.4 (Aug. 31, 2021) (unpub.). However, the Board vacated his determination that Claimant established total disability based on the medical opinion evidence because he did not adequately explain his findings.[2] *Id.* at 5. Thus, the Board vacated the ALJ's conclusion that 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).[3] *Id.* at 6. On remand, the Board instructed the ALJ to reconsider

[1] Claimant filed two prior claims. Decision and Order at 2; Director's Exhibits 1, 2. His most recent prior claim was denied by reason of abandonment. Director's Exhibit 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. §725.309(c).

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 he 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 Claimant's most recent prior claim was abandoned, he had to submit new evidence establishing at least one element of entitlement to obtain review of the merits of his current claim. *White*, 23 BLR at 1-3; Director's Exhibit 2.

[2] Administrative Appeals Judge Buzzard would have affirmed the ALJ's finding that Drs. Werntz's and Go's opinions are well-reasoned and documented as supported by substantial evidence and would have affirmed the award of benefits. *Brewster v. Brooks Run Coal Co.*, BRB No. 20-0332 BLA, slip op. at 6-8 (Aug. 31, 2021) (unpub.) (Buzzard, J., dissenting).

[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

whether the medical opinion evidence is sufficient to establish total disability by a preponderance of the evidence.[4] *Id.* at 5.

On remand, the ALJ again found Claimant established a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore invoked the Section 411(c)(4) presumption. He further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer challenges the ALJ's finding that Claimant is totally disabled and thus invoked the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

The 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.[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).

**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.[6] 20

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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.

[4] The Board held the ALJ correctly found neither the pulmonary function nor the arterial blood gas study evidence support a finding of total disability and there is no evidence of cor pulmonale with right-sided heart failure. *Brewster*, BRB No. 20-0332 BLA, slip op. at 3 n.6; 20 C.F.R. §718.204(b)(2)(i)-(iii).

[5] 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); Director's Exhibit 6.

[6] All the experts understood Claimant's usual coal mine employment was as a roof bolter, consistent with the ALJ's finding that roof bolting was Claimant's last coal mining job. Director's Exhibits 13, 17; Claimant's Exhibit 2; Decision and Order at 21. Dr. Werntz indicated this work required moderate exertion while Dr. Go opined it required heavy labor. Director's Exhibit 13; Claimant's Exhibit 2. Dr. Zaldivar did not specifically

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 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 established total disability based on the medical opinion evidence and the evidence as a whole. Decision and Order at 17-24.

The ALJ considered the medical opinions of Drs. Werntz[7] and Go that Claimant is totally disabled.[8] Decision and Order at 21-24; Director's Exhibits 13, 21; Claimant's Exhibit 2. He found their opinions to be well-documented and reasoned because both physicians based their conclusions on objective medical data. Decision and Order at 23-24. Consequently, the ALJ found the medical opinion evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer argues the ALJ failed to adequately explain how he found Drs. Werntz's and Go's opinions are well-reasoned and documented when, it asserts, their opinions are based "only on work history, subjective complaints, and variable diagnostic evidence." Employer's Brief at 6-10 (unpaginated). Employer's arguments are unpersuasive.

A physician may offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying.[9] *Cornett v. Benham Coal, Inc.*, 227 F.3d

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opine as to the exertional requirements of Claimant's usual coal mine work. Director's Exhibit 17; Employer's Exhibits 1, 2.

[7] While the ALJ refers to the Department of Labor-examining physician as Dr. Wentz, his name is Dr. Werntz. Director's Exhibits 13, 21.

[8] The ALJ also considered Dr. Zaldivar's opinion that Claimant is not totally disabled. Decision and Order at 24; Director's Exhibit 17; Employer's Exhibit 1. Employer contends the ALJ erred in discrediting his opinion. Employer's Brief at 6, 8 (unpaginated). However, the Board previously affirmed the ALJ's finding that Dr. Zaldivar's opinion was worthy of less weight because it was conditionally based on whether Claimant was optimally treated. *Brewster*, BRB No. 20-0332 BLA, slip op. at 4. We note Dr. Zaldivar found mild restriction of the FVC on pulmonary function testing and moderate airway obstruction prior to administration of bronchodilators, as well as a mild diffusion abnormality. Director's Exhibit 17 at 4-5.

[9] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R.

569, 577 (6th Cir. 2000) (even a non-qualifying pulmonary function study reflecting a mild impairment may be totally disabling); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); 20 C.F.R §718.204(b)(2)(iv). As the ALJ found, Drs. Werntz and Go explained why they believe Claimant's respiratory or pulmonary impairment prevents him from performing his usual coal mine work even though his pulmonary function and blood gas studies are non-qualifying. Director's Exhibits 13, 21; Claimant's Exhibit 2; Decision and Order at 21-24.

Dr. Werntz opined Claimant would be unable to perform his last coal mining job as a roof bolter based on his abnormal pulmonary function with restriction, impaired resting arterial blood gas study, and low diffusion capacity. Director's Exhibits 13, 21; Decision and Order at 21-22. He also indicated Claimant's blood gas study was moderately abnormal at rest and, while his blood gases improved with exercise, Claimant's exercise study demonstrated an inadequate workload of 3.2 METS, which is "well below" what would be required to perform his usual coal mine employment as a roof bolter. Director's Exhibit 13 at 4; Decision and Order at 22.

Similarly, Dr. Go opined Claimant would be unable to perform his last coal mine employment based on his pulmonary function, arterial blood gas testing, and low diffusion capacity. Claimant's Exhibit 2. He explained that Claimant's pulmonary function testing is consistent with a moderate impairment and diffusion capacity abnormality, which both meet the criteria for a Class 2 pulmonary impairment as defined by the American Medical Association; thus, Claimant would be unable to perform his usual coal mine employment as a roof bolter.[10] Claimant's Exhibit 2 at 10; Decision and Order at 23.

Thus, contrary to Employer's arguments, the ALJ adequately explained his findings, pointing to the medical evidence relied upon by the physicians, who appropriately

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Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] Employer also contends that Dr. Go relies on the diffusion capacity "without adequate explanation" and does not address "the fact that the diffusion values later normalized." Employer's Brief at 8-9 (unpaginated). Initially, it is unclear at what point Employer contends the diffusion capacity normalized, as it does not cite to the record and Dr. Zaldivar, in the most recent testing, acknowledged a mild diffusion impairment. Director's Exhibit 17 at 4. Further, contrary to Employer's contention that Dr. Go did not explain his reliance on the diffusion capacity, Dr. Go explained that both the American Medical Association and American Thoracic Society use this testing to evaluate impairment. Director's Exhibit 13, 21; Claimant's Exhibit 2 at 16.

considered the objective testing, Claimant's work history, symptoms, and physical limitations. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000) (it is the province of the ALJ to evaluate the physicians' opinions).

Substantial evidence supports the ALJ's conclusion that Drs. Werntz's and Go's opinions are well-reasoned and documented as they sufficiently explained why they found Claimant to be totally disabled considering the evidence of record. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). We therefore affirm the ALJ's finding that the medical opinion evidence establishes total disability. 20 C.F.R §718.204(b)(2)(iv). As Employer has raised no further arguments regarding the ALJ's weighing of the evidence together, we also affirm his finding that Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 10, 16.

Therefore, we affirm the ALJ's determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Finally, as Employer does not challenge the ALJ's finding that it failed to rebut the Section 411(c)(4) presumption, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-16.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits on Remand.

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