U.S. Department of Labor

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

BRB No. 23-0331 BLA

ROBERT E. LEE Claimant-Petitioner v. AMERICAN ENERGY, LLC and ROCKWOOD CASUALTY INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/30/2024 DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Robert E. Lee, St. Paul, Virginia.

Jason A. Mullins (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

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

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

Claimant, without representation,[1] appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order on Remand Denying Benefits (2015-BLA-05663) rendered on a claim filed on November 15, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Board for a third time.[2]

On Claimant's first appeal, the Board held ALJ Alan L. Bergstrom failed to determine whether Claimant's twenty-nine years of coal mine employment qualified to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] *Lee v. American Energy, LLC*, BRB No. 18-0087 BLA, slip op. at 10-11 n.13 (Nov. 16, 2018) (unpub.). In addition, the Board agreed with the Director, Office of Workers' Compensation Programs (the Director), that ALJ Bergstrom erred in weighing the pulmonary function study and medical opinion evidence and therefore vacated his finding that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iv). *Id.* at 5-9. Thus, the Board vacated the denial of benefits and remanded the case for further consideration. *Id.* at 9-11.

On remand, the case was reassigned to ALJ Johnson (the ALJ) upon ALJ Bergstrom's retirement. The ALJ found Claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2)(iv). He thus found Claimant invoked the Section 411(c)(4) presumption. Further, he found Employer did not rebut the presumption and therefore awarded benefits.

[1] On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested that 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] We incorporate the procedural history of this case as set forth in *Lee v. American Energy, LLC*, BRB No. 18-0087 BLA (Nov. 16, 2018) (unpub.).

[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); *see* 20 C.F.R. §718.305.

Employer filed a Motion for Reconsideration asserting the ALJ erred in finding total disability established based on the medical opinion evidence. It did not, however, request the ALJ to reconsider his findings that Claimant worked for at least fifteen years in qualifying coal mine employment or that it failed to rebut the Section 411(c)(4) presumption. In his Order Granting Motion for Reconsideration and Denying Benefits, the ALJ agreed with Employer that the medical opinion evidence does not support a finding of total disability. He therefore found Claimant did not invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718. Thus, the ALJ denied benefits.

On Claimant's second appeal, the Board vacated the ALJ's finding that Claimant failed to establish a totally disabling respiratory or pulmonary impairment. *Lee v. American Energy, LLC*, BRB No. 21-0104 BLA, slip op. at 7-9 (June 22, 2022) (unpub.). Specifically, it vacated his determination that the medical opinion evidence does not support a finding of total disability because he did not properly address the exertional requirements of Claimant's usual coal mine employment.[4] *Id.* Thus, the Board also vacated his finding that Claimant did not invoke the Section 411(c)(4) presumption and the denial of benefits. *Id.* at 9-10.

The Board remanded the case to the ALJ with instructions to determine the exertional requirements of Claimant's usual coal mine work and then consider them in conjunction with Drs. Ajjarapu's and Sargent's medical opinions[5] assessing total disability.

[4] The Board previously affirmed the ALJ's findings that Claimant did not establish total disability through arterial blood gas studies or with evidence of cor pulmonale with right-sided congestive heart failure. *Lee*, BRB No. 18-0087 BLA, slip op. at 6 n.5; *see* 20 C.F.R. §718.204(b)(2)(ii)-(iii). In its most recent decision, the Board affirmed the ALJ's finding the pulmonary function study evidence does not establish total disability. *Lee v. American Energy, LLC*, BRB No. 21-0104 BLA, slip op. at 3-5 (June 22, 2022) (unpub.); *see* 20 C.F.R. §718.204(b)(2)(i).

[5] Although the Board's previous Decision and Order analyzes the ALJ's error with respect to Dr. Sargent, due to a scrivener's error the remand instructions mistakenly reference Dr. Dahhan, who did not offer an opinion in this case. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see Lee*, BRB No. 21-0104, slip op. at 7-8. Thus, the Board's remand instruction was intended to apply to the opinions of Drs. Ajjarapu and Sargent. To avoid potential confusion from the remand instruction's misidentification of Dr. Dahhan, the ALJ rationally reconsidered all of the medical opinions from Drs. Ajjarapu, Sargent, and McSharry. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C.

Lee, BRB No. 21-0104, slip op. at 8. Noting that Employer did not ask the ALJ to reconsider his findings that Claimant worked for at least fifteen years in qualifying coal mine employment and that it failed to rebut the Section 411(c)(4) presumption, the Board affirmed those findings as unchallenged and instructed the ALJ that he could reinstate the award of benefits should he find Claimant established total disability and, thus, invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Lee*, BRB No. 21-0104 BLA, slip op. at 8. The Board further instructed the ALJ that should he find Claimant failed to establish total disability on remand, an essential element of entitlement, he may reinstate the denial of benefits. *Lee*, BRB No. 21-0104 BLA, slip op. at 8.

On second remand to the ALJ, Employer filed a Motion to Reopen the Record to admit additional evidence labeled Employer's Exhibits 6, 7, and 8, consisting of a September 29, 2021 pulmonary function study and supplemental reports from Drs. Sargent and McSharry. As Claimant did not respond to Employer's motion, the ALJ found it was unopposed, granted it, and admitted Employer's Exhibits 6, 7, and 8. ALJ's November 22, 2022 Order on Remand. The ALJ allowed Claimant thirty days to submit additional evidence. *Id.* Claimant did not submit any. After considering Employer's newly submitted evidence, the ALJ found Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2) and denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer responds in support of the denial. The Director has not filed a response brief.

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation

---

§932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965); Decision and Order at 3 n.1, 6-8.

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

(pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award 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 (1986) (en banc).

Procedural/Evidentiary Issue

Because an ALJ exercises broad discretion in resolving procedural and evidentiary matters, *see Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc), the Board reviews such determinations under an abuse of discretion standard. *See V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). For the following reasons, we hold the ALJ abused his discretion in reopening the record.

As previously discussed, this claim has already been the subject of two decisions and two remands by the Board. The Board first determined that ALJ Bergstrom erred in weighing the pulmonary function studies and medical opinion evidence on total disability. This evidence consisted of five pulmonary function studies[7] dated October 30, 2013, March 26, 2014, August 1, 2014, August 15, 2014, and July 2, 2015, and medical opinions from Drs. Ajjarapu, Sargent, and McSharry.[8] It thus instructed him to reweigh that evidence on remand to determine whether Claimant is totally disabled. Upon reassignment of the case to ALJ Johnson on remand, ALJ Johnson complied with the Board's remand instructions to *reconsider* this evidence; however, on Claimant's appeal of that decision, the Board held

[7] The Board also noted that the ALJ failed to consider a May 26, 2014 pulmonary function study he erroneously believed was not in the record.

[8] Dr. Ajjarapu examined Claimant on behalf of the Department of Labor (DOL) on December 18, 2013, and submitted an initial report based on that examination. Director's Exhibit 10. Because the pulmonary function study obtained during the initial examination was invalid, Claimant performed another study on March 26, 2014. *Id.* After reviewing this study, Dr. Ajjarapu restated her opinion from her initial report. After reviewing additional medical evidence, Dr. Ajjarapu submitted supplemental reports dated January 21, 2015, and March 24, 2015. Director's Exhibit 15. Dr. Sargent examined Claimant and reviewed a portion of Claimant's medical records and submitted a report dated September 2, 2014. Employer's Exhibit 2. Dr. McSharry examined Claimant, reviewed a portion of his medical records, and submitted an initial report dated August 1, 2015. Employer's Exhibit 2. After reviewing additional medical evidence, Dr. McSharry submitted a supplemental report dated October 5, 2016. Employer's Exhibit 3.

he erred in *weighing* the medical opinion evidence, while affirming his weighing of the pulmonary function studies. It thus remanded the case for a second time, instructing him to reconsider the medical opinions on the issue of total disability.

When the Board remands a case, the ALJ must comply with its instructions and "implement both the letter and spirit of the . . . mandate," absent appropriate legal basis for not applying the mandate rule. *See Edd Potter Coal Co. v. Dir., OWCP* [*Salmons*], 39 F.4th 202, 209-10 (4th Cir. 2022), *quoting United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993); *see also Scott v. Mason Coal Co*., 298 F.3d 263, 267 (4th Cir. 2007). "Deviation from the mandate rule is permitted only in a few exceptional circumstances, which include (1) when 'controlling legal authority has changed dramatically'; (2) when 'significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light'; and (3) when 'a blatant error in the prior decision will, if uncorrected, result in a serious injustice." *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 415 (4th Cir. 2005), *citing United States v. Aramony*, 166 F.3d 655, 662 (4th Cir.1999) (quoting *Bell*, 5 F.3d at 67) (internal quotation marks omitted).

Rather than following the Board's remand instructions to reconsider the medical opinions in light of the errors the Board identified, the ALJ reopened the record for the submission of additional evidence, including a pulmonary function study dated September 29, 2021, from Claimant's treatment records and supplemental reports from Drs. Sargent and McSharry. He then rendered new findings in which he credited the newly-submitted evidence and relied on it to discredit the opinion of Dr. Ajjarapu, who performed Claimant's Department of Labor (DOL)-sponsored pulmonary evaluation and opined he is totally disabled. The ALJ's sole basis for doing so was that Employer's motion was not opposed by Claimant, thus ignoring the Board's mandate and setting forth no basis, let alone an exceptional one, for such deviation. Nor is any basis apparent from the record.[9]

[9] Our dissenting colleague asserts that by addressing the ALJ's evidentiary determination we, in essence, are raising an objection on Claimant's behalf to Employer's Motion to Reopen the Record. To the contrary, Claimant appeals the ALJ's denial of benefits. In cases such as this, where Claimant appears before the Board pro se, the Board's standard of review dictates that we review the ALJ's findings that are adverse to Claimant. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994) (in an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). In this case, the ALJ's decision to reopen the record years into the litigation and then rely on that new evidence to discredit the opinion of the physician who performed Claimant's DOL-sponsored complete pulmonary evaluation is, indisputably, adverse to

First, there has been no change in any "controlling legal authority." *Dudas*, 413 F.3d at 415; *see Robinson v. Pickands Mather & Co*., 914 F.2d 1144 (4th Cir. 1990). Second, Employer's evidence does not constitute "significant new evidence, not earlier obtainable in the exercise of due diligence, [that] has come to light." *Dudas*, 413 F.3d at 415. The newly submitted pulmonary function study evidence consists of one study from Claimant's medical treatment records that produced non-qualifying values[10] comparable to the non-qualifying pulmonary function studies already in the record. *Compare* Claimant's Exhibits 4, 5; Employer's Exhibits 1, 4; Director's Exhibits 3 at 327, 32 at 21; *and* Employer's Exhibit 6. Likewise, the newly submitted medical opinion evidence reiterates

---

Claimant and outside the scope of the evidence and issues that were the subject of the Board's remand orders.

Our colleague does not offer any reason for the Board to ignore the ALJ's deviation from our prior instructions, nor does she provide any explanation for why the ALJ acted within his discretion given the limited exceptional circumstances that might warrant such deviation from the letter and spirit of the Board's remand instructions. Nothing in the Board's mandate for the ALJ to reconsider all of the relevant evidence in the record – which had already been considered by two ALJs and twice by the Board – necessitated a reopening of the record to allow Employer to submit new evidence. As the Fourth Circuit has explained:

> By its operation, the mandate rule serves the "key interests" of "hierarchy and finality." *Doe* [*v. Chao*], 511 F.3d [461, 465 (4th Cir. 2007)]. It protects "the very value and essential nature of an appeal" while preventing "[r]epetitive hearings" that "waste judicial resources." *Id.* (quoting *United States v. O'Dell*, 320 F.3d 674, 679 (6th Cir. 2003)). At bottom, it is an outgrowth of common sense, and it ensures the orderly resolution of disputes rather than allowing litigation to proceed in dribbles.

See Edd Potter Coal Co. v. Dir., OWCP [*Salmons*], 39 F.4th 202, 210 (4th Cir. 2022); *see also U.S. v. Amedeo*, 487 F.3d 823, 829–30 (11th Cir. 2007) (The mandate rule is "simply an application of the law of the case doctrine" which, in turn, is "self-imposed by the courts . . . to create efficiency, finality, and obedience within the judicial system" so that "an appellate decision binds all subsequent proceedings in the same case.") (citations omitted).

[10] A "qualifying" pulmonary function study or arterial blood gas study yields results equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

opinions from two of the same physicians whose opinions are already in the record. *See* Employer's Exhibits 7, 8. Neither the ALJ nor Employer identifies any basis to conclude this evidence warrants reopening the record and deviating from the Board's prior mandate.[11] *Dudas*, 413 F.3d at 415.

Finally, there was no "blatant error" that necessitated the admission of new evidence to correct "a serious injustice" or prevent a "manifest injustice." *See Dudas*, 413 F.3d at 415; *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-104 (1992). Despite identifying no blatant error, Employer argues that admitting the new evidence is necessary to prevent a manifest injustice against Employer because the new evidence is relevant to total disability. Given that mere relevance is not enough to establish "good cause" for admitting evidence that does not comply with the Act's evidentiary rules,[12] we reject Employer's argument that mere relevance can establish "a serious injustice" or "manifest injustice" warranting its admission post-remand. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297 n.18 (4th Cir. 2007) (if relevancy were enough to meet the good cause standard for exceeding black lung evidentiary limitations at 20 C.F.R. §725.414, it would render those limitations "meaningless").

[11] Moreover, the Board remanded the case for the ALJ to determine the credibility of the medical opinions assessing whether Claimant's pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *Lee*, BRB No. 21-0104 BLA, slip op. at 8. As noted above, the Board previously affirmed the ALJ's findings that the pulmonary function study evidence does not establish total disability. *Id.* at 3-5. Thus, Employer does not explain why its additional non-qualifying pulmonary function study, with results similar to those that the physicians already reviewed, constitutes significant new evidence that would change the clinical picture upon which their opinions are based.

[12] We note, for example, that evidence not exchanged at least twenty days prior to the hearing may not be admitted absent the "consent" of the parties or a showing of "good cause" as to why it was not timely exchanged. 20 C.F.R. §725.456(b)(3). In the present claim, Employer's effort to submit its additional evidence came well after the November 8, 2016 hearing. In fact, the request came five years and eleven months later, and only after two ALJs and the Board, twice, had considered the claim. By that time, the "record of the hearing," on which the ALJ and Board must (and did) base their decisions, 20 C.F.R. §725.454, had long since closed. 20 C.F.R. §725.475 (hearing "terminates" when "all the evidence has been received, witnesses heard, pleadings and briefs submitted to the administrative law judge, and the transcript of the proceedings has been printed and delivered to the administrative law judge").

Because none of the limited exceptional circumstances exist in this case to deviate from the Board's remand instructions to reconsider the evidence already in the record, we reverse the ALJ's decision granting Employer's Motion to Reopen the Record. Thus, we do not address the ALJ's findings with respect to the newly-submitted medical opinions and must remand the claim a third time for the ALJ to reweigh the evidence based on the record as it existed when the Board issued its first and second decisions remanding the case. However, in the interest of judicial economy, we will address his findings and determinations with respect to that record, as they may affect his reconsideration of such evidence on remand.

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

To invoke the Section 411(c)(4) presumption or establish entitlement under 20 C.F.R. Part 718, Claimant must establish he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §§718.204(b)(2), 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 and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function studies or 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 failed to establish total disability by any method. 20 C.F.R. §718.204(b)(2); Decision and Order at 7-11.

Medical Opinions

Before weighing the medical opinions, the ALJ determined the exertional requirements of Claimant's usual coal mine employment. Decision and Order at 7. A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period, *Shortridge v. Beatrice Pocahontas Coal Co*., 4 BLR 1-534, 1-539 (1982), unless he changed jobs because of a respiratory inability to do his usual coal mine work. *Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co*., 7 BLR 1-124, 1-127 (1984).

The ALJ correctly noted Claimant testified he performed "a lot of heavy lifting and maintenance on equipment," lifting and carrying up to fifty pounds ten to fifteen times per day as a repairman. Decision and Order at 7; Hearing Transcript at 13. As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant's usual coal mine work

as a repairman required heavy labor. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 7.

The ALJ then considered the medical opinions of Drs. Ajjarapu, Sargent, and McSharry. Decision and Order at 6-9. Dr. Ajjarapu opined Claimant is totally disabled due to the moderate pulmonary impairment seen on his March 26, 2014 pulmonary function study. Director's Exhibit 38. Drs. Sargent and McSharry opined Claimant is not totally disabled because the newly admitted pulmonary function study, conducted on September 29, 2021, does not meet DOL standards for disability. Employer's Exhibits 7, 8.

The ALJ discredited Dr. Ajjarapu's opinion because she did not consider the newly admitted pulmonary function study. Decision and Order at 8. In addition, he found her opinion inconsistent with his determination that the pulmonary function study evidence does not establish total disability. *Id.* at 8-9. He found the opinions of Drs. Sargent and McSharry well-reasoned and documented and afforded them "significant weight." *Id.* at 8. Weighing the evidence together, the ALJ found the medical opinions do not support a finding of total disability. *Id.* at 9.

Because we hold the ALJ erred in admitting the September 29, 2021 pulmonary function study, the ALJ erred in rejecting Dr. Ajjarapu's opinion on the basis that she did not review it. The ALJ also erred in discrediting Dr. Ajjarapu's opinion for being inconsistent with his finding that the pulmonary function study evidence is non-qualifying for total disability. Decision and Order at 8-9. A physician may conclude a miner is totally disabled even if the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Hicks*, 138 F.3d at 533; *Cornett*, 227 F.3d at 578. We therefore vacate the ALJ's rationales for discrediting Dr. Ajjarapu's opinion. Decision and Order at 8-9.

Similarly, because we hold the ALJ erred in admitting the September 29, 2021 pulmonary function study, the ALJ erred in considering Drs. Sargent's and McSharry's supplemental reports and crediting them because they considered the newly submitted pulmonary function study. Decision and Order at 8. Nor did the ALJ otherwise explain why he considered their opinions reasoned and documented with respect to whether Claimant's obstructive impairment prevents him from performing his usual coal mine work, independent of whether the pulmonary function studies yielded qualifying values. Decision and Order at 8; *see* 20 C.F.R. §718.204(b)(2)(iv); *see also Addison*, 831 F.3d at 252-53; *Hicks*, 138 F.3d at 533; *Cornett*, 227 F.3d at 578. Finally, the ALJ did not reconcile his finding that Dr. McSharry failed to directly address whether Claimant could perform his usual coal mine employment with his determination that Dr. McSharry provided a reasoned and documented opinion that the mild impairment he identified is not disabling.

See Crisp, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 8 n.5.

Thus we vacate the ALJ's finding the opinions of Drs. Sargent and McSharry are reasoned and documented. Decision and Order at 8.

We therefore vacate the ALJ's finding the medical opinion evidence does not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 8. Further, we vacate his finding the evidence overall does not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 9. Thus, we vacate his finding that Claimant did not invoke the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and the denial of benefits. Consequently, we remand the case for further consideration.

Remand Instructions

On remand, the ALJ must reconsider the medical opinions of Drs. Ajjarapu, McSharry, and Sargent based upon the evidence already in the record as of the Board's most recent remand. The ALJ should consider that the regulations permit a physician to offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. 20 C.F.R. §718.204(b)(2)(iv); *see Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett*, 227 F.3d at 587 ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties").

The ALJ must also compare the exertional requirements of Claimant's usual coal mine employment to the physicians' descriptions of his pulmonary impairment and physical limitations. *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); 20 C.F.R. §718.204(b)(2)(iv). In rendering his credibility findings, he must consider the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

In reaching his credibility determinations, the ALJ must set forth his findings in detail and explain his rationale in accordance with the Administrative Procedure Act.[13] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If the ALJ

[13] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material

determines total disability is demonstrated by the medical opinions, he must weigh all the relevant evidence together to determine whether Claimant is totally disabled. 20 C.F.R. §718.204(b)(2); *Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *see Shedlock*, 9 BLR at 1-198.

As noted above, because we have affirmed the ALJ's findings that Claimant worked for at least fifteen years in qualifying coal mine employment and Employer failed to rebut the Section 411(c)(4) presumption, if the ALJ finds Claimant establishes total disability on remand, thus invoking the Section 411(c)(4) presumption, he must award benefits. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305; *Skrack*, 6 BLR at 1-711. If the ALJ finds Claimant fails to establish total disability on remand, an essential element of entitlement, the ALJ must reinstate the denial of benefits. *See Trent*, 11 BLR at 27; *Perry*, 9 BLR at 1-1.

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, the ALJ's Decision and Order on Remand Denying Benefits is affirmed in part and reversed 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

JONES, Administrative Appeals Judge, dissenting:

I dissent from the majority's holding that the ALJ erred in granting Employer's Motion to Reopen the record and from the majority's application of the consequences that follow from that holding.

In its June 22, 2022 decision, the Board vacated the ALJ's conclusions that the medical opinion evidence did not support total disability, that Claimant did not establish total disability, and that Claimant did not invoke the Section 411(c)(4) presumption. On remand, the Board instructed the ALJ to render findings regarding the exertional requirements of Claimant's usual coal mine job, reconsider the medical evidence based on his finding regarding those exertional requirements, and weigh the evidence as a whole regarding total disability. While the case was pending before the ALJ on remand, Employer filed a Motion to Reopen the Record to admit additional evidence labeled Employer's Exhibits 6, 7, and 8. The ALJ granted Employer's motion and considered Exhibits 6, 7, and 8 when reaching his conclusions.

The majority cannot dispute that it is within the ALJ's discretion to reopen the record on remand. *Troup v. Reading Anthracite Coal Co*., 21 BLR 1-11, 1-21 (1999); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-5 n.3 (1989); *Lynn v. Island Creek Coal Co*., 12 BLR 1-

146, 1-148 (1988), *aff'd on recon*., 13 BLR 1-57 (1989) (en banc). Yet it denies the ALJ the ability to do so.

First, the majority relies on Claimant's status as a self-represented litigant in this appeal to scrutinize the ALJ's ruling; however, when this case was before the ALJ, Claimant was represented by a lay representative, and that representative failed to respond to Employer's motion.[14] The Board does not have the authority to raise that objection on Claimant's behalf now even if he is self-represented on appeal.

As for the mandate rule, the Board instructed:

> On remand, the ALJ must first consider all relevant evidence to determine the exertional requirements of Claimant's usual coal mine work and then consider them in conjunction with Drs. Ajjarapu's and Dahhan's medical opinions assessing total disability. *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); *Cornett*, 227 F.3d at 578. In evaluating the medical opinions, the ALJ should address the comparative credentials of the physicians, the explanations for their conclusions, 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, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). The ALJ must set forth his findings on remand in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.
>
> The ALJ must then weigh the categories of evidence together to determine if Claimant has established total disability by a preponderance of the evidence. *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. If the ALJ finds total disability established, he may reinstate his prior finding that Claimant invoked the Section 411(c)(4) presumption. Decision and Order on Remand at 7; 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.
>
> Moreover, because Employer did not ask the ALJ to reconsider his findings that Claimant worked for at least fifteen years in qualifying coal mine employment and Employer failed to rebut the Section 411(c)(4) presumption, the ALJ must reinstate the award if he finds Claimant established total disability. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983);

[14] Even when in response to the newly admitted evidence the ALJ gave Claimant 30 days to submit any new additional medical evidence relevant to total disability, Claimant's representative did nothing.

> Decision and Order on Remand at 14-15. But if the ALJ finds Claimant cannot establish total disability, he must deny benefits, as Claimant will have failed to establish an essential element of entitlement. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Lee v. American Energy, LLC, BRB No. 21-0104, slip op. at 8 (June 22, 2022) (unpub.).

This language is standard remand instruction from the Board, and without specification that the ALJ was restricted to the record as it existed at the time of the previous remand, I cannot agree that the ALJ's ruling is arbitrary and capricious or a violation of the mandate rule.

Consequently, I would affirm the ALJ's ruling on the Motion and accept the consequences that flow from that ruling.

MELISSA LIN JONES
Administrative Appeals Judge