

U.S. Department of Labor

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



BRB Nos. 19-0250 BLA  
and 19-0250 BLA-A  
Case No. 2017-BLA-05804

ESTILE B. GREGORY (deceased)	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
EASTOVER MINING COMPANY	)	
	)	DATE ISSUED: 08/12/2020
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	ORDER on MOTION
Party-in-Interest	)	for RECONSIDERATION

ROLFE, Administrative Appeals Judge:

Employer has filed a timely Motion for Reconsideration of the Benefits Review Board's Decision and Order in *Gregory v. Eastover Mining Co.*, BRB Nos. 19-0250 BLA, 19-0250 BLA-A (Mar. 11, 2020) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. In light of Claimant's death on February 28, 2019, Employer challenges the Board's decision to remand the case to the district director for additional pulmonary function testing and requests the Board modify its decision to affirm the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds, agreeing

the Board should vacate that portion of its order and affirm the denial of benefits as a result.<sup>1</sup>

In its decision, the Board affirmed the administrative law judge's finding that the opinion of Dr. Ajarapu, the sole physician to diagnose a totally disabling pulmonary impairment, was entitled to little weight as it was based on an invalid pulmonary function study. *Gregory*, slip op. at 6. Because no other opinions support Claimant's burden, the Board affirmed the administrative law judge's finding the medical opinion evidence and evidence as a whole do not establish disability.<sup>2</sup> *Id.* Nevertheless, because the administrative law judge found Dr. Ajarapu had administered an invalid pulmonary function test as part of the Department of Labor-sponsored pulmonary evaluation and based her opinion on it, the Board held Dr. Ajarapu's report was incomplete. *Id.*; *see also* Decision and Order at 10-11; Director's Exhibit 17. Consequently, and because the Board was not advised of the Claimant's death, it remanded the case to the district director to schedule "further examination and testing."<sup>3</sup> *Gregory*, slip op. at 7.

As further testing is no longer possible, we vacate that portion of the Board's decision. Moreover, because we have affirmed the administrative law judge's finding that Claimant did not establish total disability, we modify our order and affirm the administrative law judge's decision denying benefits.<sup>4</sup> The directive to reconsider the length of Claimant's coal mine employment is now moot. *See* n.3, *supra*.

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<sup>1</sup> Employer also asserts the Board erred in instructing the administrative law judge to reconsider the length of Claimant's coal mine employment if he established total disability and in holding Employer was not denied due process due to the destruction of the record in Claimant's claim that was denied in 1993. Employer also avers the Section 411(c)(4), 30 U.S.C. §921(c)(4), presumption is unconstitutional.

<sup>2</sup> The Board also affirmed the administrative law judge's findings that Claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), and that the record contains no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304.

<sup>3</sup> In light of statements made by Claimant regarding possible additional coal mine employment, the Board instructed the administrative law judge on remand to consider whether the miner was entitled to credit for additional coal mine employment if she found the evidence established total disability. *Gregory*, slip op. at 7-8.

<sup>4</sup> In light of our disposition, we need not consider Employer's remaining contentions. *See* n.1, *supra*.

Accordingly, we grant employer's Motion for Reconsideration. 20 C.F.R. §§802.301(c), 802.409. We vacate, in part, the Board's Decision and Order of March 11, 2020, and modify the decision to reflect affirmance of the administrative law judge's Decision and Order Denying Benefits.<sup>5</sup>

SO ORDERED.

JONATHAN ROLFE  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to reinstate the denial of benefits. In its initial decision, the Board vacated the denial of benefits with instructions for the district director to "schedule claimant for further examination and testing" as part of his Department of Labor (DOL)-sponsored pulmonary evaluation. *Gregory v. Eastover Mining Co.*, BRB Nos. 19-0250 BLA, 19-0250 BLA-A (Mar. 11, 2020) (unpub.), slip op. at 7. In its motion for reconsideration, Employer advises the Board that Claimant is deceased and therefore cannot undergo additional testing. Even so, his widow is not without a remedy if she pursues this claim on behalf of his estate, as the regulations specifically permit the development of additional evidence to account for the defect in his DOL-sponsored examination. Denying benefits based on Claimant's death is therefore improper.

The Black Lung Benefits Act requires the DOL to provide miners with a "complete pulmonary evaluation." 30 U.S.C. §923(b); *see* 20 C.F.R. §§718.101(a), 725.406. The purpose is to "develop the medical evidence necessary to determine each claimant's entitlement to benefits." 20 C.F.R. §718.101(a). Thus, a complete pulmonary evaluation must include "a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R.

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<sup>5</sup> Notably, if additional medical records relating to respiratory disability are available, Claimant's widow may seek modification of the denial of Claimant's claim by filing a motion with the district director. 33 U.S.C. §922.

§725.406(a). Importantly, if an administrative law judge determines that any part of the complete pulmonary evaluation “fails to comply with the applicable quality standards,” she must either “remand the claim to the district director with instructions to develop only such additional evidence as is required” to remedy the defect or “allow the parties a reasonable time to obtain and submit such evidence[.]”<sup>6</sup> 20 C.F.R. §725.456(e).

In its initial decision, the Board affirmed the administrative law judge’s finding that the qualifying pulmonary function study conducted by Dr. Ajarapu as part of the DOL-sponsored pulmonary evaluation, and validated by Dr. Gaziano at DOL’s request, did not meet the relevant quality standards and therefore was invalid. *Gregory*, slip op. at 4-5. Because the administrative law judge failed to provide Claimant an opportunity to undergo additional testing as required by Section 725.456(e), however, the Board vacated the denial of benefits and remanded the claim to the district director for “further examination and testing.”<sup>7</sup> *Gregory*, slip op. at 7; see *Johnson v. Director, OWCP*, 1989 WL 144348, No. 89-3211 (6th Cir. Nov. 30, 1989) (“If the [complete pulmonary evaluation] tests are not performed in compliance with [the quality standards at] Part 718, the Director *must* allow the claimant the opportunity to undergo further testing.”).

In its motion for reconsideration, Employer asserts the claim must be denied because Claimant is now deceased and therefore cannot undergo additional testing. Emp. Brief in Support of Motion for Recon.at 4. The Director agrees, alleging there is no “discernable method by which the supposed flaw [in the DOL pulmonary evaluation] could be corrected

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<sup>6</sup> A similar requirement applies to the district director:

If any medical examination or test conducted [as part of the miner’s complete pulmonary evaluation] is not administered or reported in substantial compliance with the [quality standards] . . . the district director must schedule the miner for further examination and testing. Where the deficiencies in the report are the result of a lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result.

20 C.F.R §725.406(c).

<sup>7</sup> This would have necessitated that Dr. Ajarapu review the results of such testing and evaluate whether they render the miner totally disabled. See *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 642 (6th Cir. 2009) (DOL examiner must “perform[] all of the medical tests required by 20 C.F.R. §§ 718.101(a) and 725.406(a)” and “specifically link[] each conclusion in his or her medical opinion to those medical tests”).

under these circumstances.”<sup>8</sup> Dir. Brief at 2. Both assume, incorrectly, that no remedy is available.

If, as here, an administrative law judge finds that the pulmonary function study from the DOL-sponsored examination fails to meet the quality standards, the solution is not strictly limited to allowing the claimant to undergo another study. Rather, Section 725.456(e) contemplates the development of “such additional evidence as is required” to remedy the defect. 20 C.F.R. §725.456(e). The administrative law judge “shall” afford Claimant this remedy, but the specific confines of that evidentiary development – including necessary instructions to the district director on what “is required” – are committed to “her discretion.” *Id.* While allowing a claimant to perform another pulmonary function study may be the most direct solution, it is not the only one – especially when the claimant’s death makes additional examination and testing impossible.

In stating the obvious – a deceased miner cannot perform a pulmonary function study – neither Employer nor the Director addresses the requirements of Section 725.456(e) or explains why the administrative law judge lacks authority to determine what evidentiary development is required to account for the fact that Claimant’s DOL-sponsored pulmonary function study was deemed invalid. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc) (administrative law judge exercises broad discretion in resolving evidentiary matters); *Consolidation Coal v. Dir. OWCP*, 413 F. App’x 552, 556–57 (3d Cir. 2011) (confirming administrative law judge’s broad authority to remand for a second complete pulmonary evaluation under 20 C.F.R. §725.456(e)).

The administrative law judge found Dr. Ajjarapu’s opinion equivocal on the validity of the test, and Dr. Gaziano’s validation unexplained. Decision and Order at 10-11. To remedy this defect, she could remand the claim to the district director to have one or both of the physicians explain their opinions and respond to the criticisms from Drs. Vuskovich and Rosenberg who found the studies invalid. She also could remand the claim with instructions for Dr. Ajjarapu to address the validity of two additional qualifying pulmonary function studies in the record, both of which were deemed invalid due, in part, to Dr. Ajjarapu’s lack of explanation regarding their validity. *Id.* Separately, she could allow Claimant’s estate the opportunity to submit more recent medical records, if any exist,

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<sup>8</sup> The Director also “believes” Claimant was not deprived of a complete pulmonary evaluation because Drs. Ajjarapu and Gaziano “found the pulmonary function test to be acceptable.” Dir. Brief at 2 n.1. This belief, however, does not address the fact that the administrative law judge found the test invalid based on the opinions of Drs. Vuskovich and Rosenberg or her failure to apply the remedy at Section 725.456(e) in light of that finding.

documenting his respiratory condition in closer proximity to his death, and obtain a new medical opinion to account for the fact that Dr. Ajjarapu's DOL examination was based on an invalid pulmonary function study.

The point of these examples is not to dictate the remedy the administrative law judge should order. As noted, that decision is committed to her discretion. 20 C.F.R. §725.456(e). Rather, the point is to demonstrate that there are, in fact, remedies available beyond having Claimant undergo additional testing.

In light of its holding that Claimant was denied a remedy under Section 725.456(e), the Board cannot reinstate the denial of benefits simply because he is deceased. Now that it is apparent remand for additional testing is an impossibility, the proper course, required by the controlling regulation, is to remand the claim for the administrative law judge to determine what "additional evidence is required" to remedy the defect and the manner best suited for Claimant's estate to obtain that evidence.<sup>9</sup>

I, therefore, dissent.

GREG J. BUZZARD  
Administrative Appeals Judge

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<sup>9</sup> Employer's additional arguments that Claimant forfeited his right to challenge the completeness of his DOL-sponsored pulmonary evaluation, and the Board exceeded its review authority by raising the issue *sua sponte*, are without merit. First, Claimant appeared without the assistance of counsel and therefore was not required to identify any issues to be considered by the Board. See 20 C.F.R. §§802.211(e), 802.220 (Board may waive formal compliance with procedural rules including identification of issues to be appealed). Instead, as is required, the Board reviewed the decision below to ensure that it was supported by substantial evidence and consistent with law. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). Second, the administrative law judge specifically rendered a finding on the validity of the DOL-sponsored pulmonary function study, making review of that finding well within the Board's authority. 20 C.F.R. §802.301(a) ("The Board is authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based."). Finally, the Board did not raise the completeness of the DOL examination *sua sponte*. Consistent with its review authority, it held the administrative law judge's decision did not comport with the law in

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that she found the DOL-sponsored pulmonary function study invalid but failed to apply the remedy at 20 C.F.R. §725.456(e).