



BRB No. 21-0610 BLA

AARON GAMBILL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOL, INCORPORATED)	
)	
and)	DATE ISSUED: 5/10/2023
)	
CONSOL ENERGY, INCORPORATED)	
)	
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 on Remand Denying Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Aaron Gambill, Hazard, Kentucky.

Joseph D. Halbert and Jarrod R. Portwood (Shelton, Branham, & Halbert PLLC), Lexington, Kentucky, for Employer.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without representation,¹ Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order on Remand Denying Benefits (2015-BLA-05352) rendered on a miner's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on March 18, 2013, and is before the Benefits Review Board for the second time.²

In a Decision and Order Denying Benefits dated February 22, 2017, the ALJ accepted the parties' stipulation that Claimant had sixteen years of underground coal mine employment. But he found Claimant failed to establish that he has a totally disabling pulmonary or respiratory impairment and therefore could not 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 He also found Claimant did not establish the existence of pneumoconiosis and denied benefits.

¹ 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 on Claimant's behalf, but Ms. Napier is not representing Claimant on appeal. See *Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

² Claimant has filed four previous claims for benefits. Director's Exhibits 1-4. On January 19, 2012, the district director finally denied his March 9, 2011 claim for failure to establish any element of entitlement. Director's Exhibit 4 at 33. Where a miner files a claim for benefits more than one year after the denial of a previous claim, 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)(1); *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 did not establish any element of entitlement, he had to submit evidence establishing at least one of those elements to obtain review of the merits of his current claim. *Id.*

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or

Pursuant to Claimant's appeal, the Board issued an Order vacating the denial of benefits. *Gambill v. Consol, Inc.*, BRB No. 17-0320 BLA (July 20, 2018) (unpub. order). Pursuant to the request of the Director, Office of Workers' Compensation Programs (the Director), the Board found the Department of Labor (DOL) failed to provide Claimant with a complete pulmonary evaluation that included a valid pulmonary function study. *Id.* at 2. Accordingly, the Board vacated the ALJ's Decision and Order Denying Benefits and remanded the case to the district director to provide Claimant with one additional opportunity to produce a valid pulmonary function study, and to have Dr. Habre, or another physician if he was unavailable, reconsider whether Claimant is totally disabled based on that study. *Id.* at 3. On remand, the DOL had Claimant perform an additional pulmonary function study and had Dr. Habre provide a supplemental medical opinion addressing the study.

In a Decision and Order on Remand issued on August 23, 2021, which is the subject of this appeal, the ALJ again credited Claimant with sixteen years of underground coal mine employment. However, he again found Claimant failed to establish total disability and therefore could not invoke the Section 411(c)(4) presumption. He further found Claimant did not establish pneumoconiosis and denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. The Director has filed a motion in which he concedes the DOL again failed to provide Claimant with a complete pulmonary evaluation and requests remand to the district director for Dr. Habre to clarify his opinion on the issue of total disability. Employer responds in support of the denial of benefits and argues that the DOL did provide Claimant with a complete pulmonary evaluation.

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.⁴ 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).

substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

⁴ 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 Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1 at 76.

The Act requires that “[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.” 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a) (“[e]ach miner who files a claim for benefits under the Act must be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation”), and 725.406; *see Hodges*, 18 BLR at 1-93. To fulfill its obligations under the Act, the DOL must “provid[e] ‘a medical opinion that addresses all of the essential elements of entitlement.’” *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 640 (6th Cir. 2009), *quoting Smith v. Martin Cnty. Coal Corp.*, 233 F. App’x 507, 512 (6th Cir. 2007).

Dr. Habre conducted the DOL-sponsored evaluation of Claimant on June 12, 2013, in which he opined Claimant was totally disabled based on the qualifying⁵ pulmonary function study associated with the examination. Director’s Exhibit 14. The ALJ determined the pulmonary function study was invalid due to inadequate effort, and therefore discredited Dr. Habre’s opinion as it relied upon an invalid test. Decision and Order at 13. On appeal the Director conceded that Claimant was not provided with a complete pulmonary evaluation as the June 12, 2013 pulmonary function study was invalid due to inadequate effort and Claimant was not afforded a second opportunity to produce a satisfactory result.⁶ *Gambill*, BRB No. 17-0320 BLA, slip op. at 2. The Board therefore remanded the case to the district director for Claimant to have a second pulmonary function study administered and for a supplemental opinion as to whether Claimant is totally disabled based on that study. *Id.*

On remand, Claimant underwent a second pulmonary function study with Dr. Alam on February 12, 2019, and the district director obtained a supplemental report from Dr. Habre based on his review of the study. Director’s Exhibit 44; Administrative Law Judge Exhibit 105. Dr. Habre opined that, based on the “February 12, 2019 [pulmonary function

⁵ A “qualifying” pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A “non-qualifying” study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

⁶ If a test is deficient for lack of effort on the part of the miner, then “the miner will be afforded one additional opportunity to produce a satisfactory result.” 20 C.F.R. §725.406(c); *see Johnson v. Director, OWCP*, 890 F.2d 416 (Table), 1989 WL 144348 (6th Cir. Nov. 30, 1989) (unpub.) (remand is “necessary” where a claimant gave “suboptimal” effort on a DOL-sponsored pulmonary function study because the district director “must allow the claimant the opportunity to undergo further testing” when testing is not in compliance with the quality standards).

study] showing ventilatory measurements exceeding the disabling threshold set by the Department of Labor, he did not have a complete pulmonary impairment.” *Id.*

On appeal, the Director again concedes that the DOL failed to satisfy its obligation to provide Claimant with a complete pulmonary evaluation because Dr. Habre did not address whether Claimant nevertheless can or cannot perform his usual coal mine work.⁷ Director’s Response Brief at 2-3. The Director states that Dr. Habre’s opinion relies solely on the non-qualifying pulmonary function testing without considering any other factors or the exertional requirements of Claimant’s usual coal mine work, and it is unclear whether he knew or understood that a miner may be disabled even in the absence of qualifying tests. *Id.*; see *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) (“even a ‘mild’ respiratory impairment may preclude the performance of the miner’s usual duties”). Thus, the Director argues Dr. Habre’s report does not contain sufficient information to determine if Claimant is totally disabled and therefore requests that the case be remanded for Dr. Habre to provide a supplemental report addressing the issue. Director’s Response Brief at 2-3.

Based on the facts of this case, we grant the Director’s request to remand this case given the Director’s concession that the DOL failed to provide Claimant with a complete pulmonary evaluation as the Act requires. 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *Greene*, 575 F.3d at 641-42; *R.G.B. [Blackburn] v. S. Ohio Coal Co.*, 24 BLR 1-129, 1-137-40 (2009) (en banc). Consequently, we vacate the ALJ’s denial of benefits.

⁷ The ALJ determined Claimant’s usual coal mine work required heavy manual labor. Decision and Order at 4.

Accordingly, the ALJ's Decision and Order on Remand Denying Benefits is vacated, and the case is remanded to the district director for further development of the evidence.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge