



BRB No. 19-0216 BLA

JACK W. STEELE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ADDINGTON, INCORPORATED)	DATE ISSUED: 02/19/2020
)	
Employer-Respondent)	
)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan, P.S.C.), South Williamson, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (2014-BLA-05940) of Administrative Law Judge Drew A. Swank rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on November 29, 2013, and is before the Board for the second time.¹

In a Decision and Order Awarding Benefits dated July 27, 2016, Administrative Law Judge Richard A. Morgan credited claimant with 29.67 years of underground coal mine employment or employment in conditions substantially similar to those in an underground mine. He further found claimant established total disability by medical opinion evidence. 20 C.F.R. §718.204(b)(2). Judge Morgan therefore determined claimant established a change in the applicable condition of entitlement at 20 C.F.R. §725.309² and 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) (2012).³ He further found employer did not rebut the presumption and awarded benefits.

Upon review of employer's appeal, the Board held Judge Morgan erred in finding the opinions of Drs. Forehand and Rosenberg sufficient to establish total disability. Consequently, the Board vacated Judge Morgan's determination that claimant established

¹ We incorporate the procedural history of the case as set forth in *Steele v. Addington, Inc.*, BRB No. 16-0636 BLA, slip op. at 1 n.1 (Sept. 21, 2017) (unpub.).

² When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds "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); *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 prior claim was denied for failure to establish total disability, claimant is required to establish this element in order for the subsequent claim to be considered on the merits.

³ Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

total disability and a change in the applicable condition of entitlement, and his finding that claimant invoked the Section 411(c)(4) presumption. The Board also remanded the case for the development of evidence necessary to provide claimant with a complete pulmonary evaluation in accordance with Section 413(b) of the Act, 30 U.S.C. §923(b).⁴ 20 C.F.R. §718.101(a). *Steele v. Addington, Inc.*, BRB No. 16-0636 BLA (Sept. 21, 2017) (unpub.).

On remand, following additional proceedings before Judge Morgan and the district director,⁵ the case was transferred without objection to Administrative Law Judge Drew A. Swank (the administrative law judge) due to Judge Morgan's retirement. Order dated August 16, 2018. In a Decision and Order on Remand Denying Benefits dated December 31, 2018, the administrative law judge found that Dr. Forehand's opinion sufficiently addressed the elements of entitlement necessary to permit the resolution of the claim. He further found the new evidence did not establish total disability and, therefore, did not establish a change in the applicable condition of entitlement. 20 C.F.R. §§725.309(c), 718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues the administrative law judge erred in finding he did not establish total disability and contends he was not provided a complete pulmonary evaluation as required under the Act. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting she satisfied her obligation to provide claimant with a complete pulmonary evaluation.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order on Remand Denying Benefits if it is

⁴ Pursuant to Section 413(b) of the Black Lung Benefits Act, "[e]ach miner who files a claim for benefits . . . 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).

⁵ On remand, the case was returned to Administrative Law Judge Richard A. Morgan. By Order dated March 1, 2018, he directed the district director to obtain a supplemental report from Dr. Forehand containing his opinion on the issue of claimant's total disability. By letter dated May 30, 2018, the district director submitted Dr. Forehand's supplemental report dated May 25, 2018. By Oder dated August 16, 2018, Judge Morgan approved claimant's schedule to depose Dr. Forehand and ordered the case reassigned to Administrative Law Judge Drew A. Swank (the administrative law judge).

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 Associates, Inc.*, 380 U.S. 359 (1965).

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). At this juncture, claimant may establish total disability based on medical opinions.⁷ 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge 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). On remand, the administrative law judge determined the medical opinions and the evidence as a whole did not establish total disability. Decision and Order on Remand at 6-7.

Claimant argues the administrative law judge did not consider “the totality of the evidence” in finding he failed to establish total disability at 20 C.F.R. §718.204(b)(2). Claimant’s Brief at 4. We reject this contention. The administrative law judge considered Dr. Forehand’s new supplemental medical opinion and deposition testimony⁸ and accurately found he did not diagnose claimant with a totally disabling

⁶ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 3.

⁷ The administrative law judge considered and adopted Judge Morgan’s finding that the evidence was insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order on Remand at 5, *citing* 2016 Decision and Order at 34-35 and *Steele*, BRB No. 16-0636 BLA, slip op. at 3, 6. We affirm this finding as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁸ Dr. Forehand conducted the Department of Labor-sponsored pulmonary evaluation on January 9, 2014. Director’s Exhibit 17. He diagnosed an obstructive impairment based on the pulmonary function study he administered and opined that claimant had insufficient residual ventilatory capacity to perform his usual coal mine job. *Id.* After Dr. Ranavaya invalidated the pulmonary function study, which was non-qualifying under the table values in Appendix B to Part 718, Dr. Forehand administered a second study on February 28, 2014, which also produced non-qualifying values. *Id.* He did not, however, provide any further disability assessment. On remand, Dr. Forehand submitted a supplemental opinion and amended his original diagnosis of a totally disabling

respiratory impairment.⁹ 20 C.F.R. §718.204(b)(2)(iv); see *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (en banc); Decision and Order on Remand at 6.

Finally, the administrative law judge found the new evidence, considered as a whole, does not establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order on Remand at 6. We affirm this finding as supported by substantial evidence. See *Martin*, 400 F.3d at 305; *Shedlock*, 9 BLR at 1-198. Consequently, we affirm the administrative law judge's determination that claimant failed to establish a change in the applicable condition of entitlement. Decision and Order on Remand at 6-7. We therefore further affirm his finding that claimant's subsequent claim must be denied. 20 C.F.R. §725.309(c); see *White*, 23 BLR at 1-3; Decision and Order on Remand at 7.

Complete Pulmonary Evaluation

We also reject claimant's assertion he is entitled to a new complete pulmonary evaluation because the February 2014 pulmonary function study was "never sent for a validating opinion by the [Department of Labor (DOL)]." Claimant's Brief at 5. As the Director correctly noted, there is no requirement that DOL-sponsored pulmonary function studies be validated, nor has claimant pointed to any such authority. Director's Brief at 3, citing 20 C.F.R. §725.406(c).¹⁰ The United States Court of Appeals for the Sixth Circuit, in whose jurisdiction this case arises, has held:

respiratory or pulmonary impairment to state claimant has a respiratory impairment but "retains the ventilatory capacity to return to his last coal mining job." Unmarked Exhibit on Remand (May 25, 2018 supplemental opinion). He further indicated, "I no longer find [claimant] totally disabled." *Id.* In a subsequent deposition, Dr. Forehand affirmed his opinion that claimant is not totally disabled from a respiratory or pulmonary standpoint. Unmarked Exhibit on Remand (September 4, 2018 deposition of Dr. Forehand at 16).

⁹ The administrative law judge correctly noted Drs. Rosenberg and Castle did not diagnose a disabling respiratory impairment. Decision and Order on Remand at 5; Employer's Exhibits 1, 5, 6, 7.

¹⁰ The regulation at 20 C.F.R. §725.406(c) provides:

In order to determine whether any medical examination or test was administered and reported in substantial compliance with the provisions of

The DOL meets its statutory obligation to provide a “complete pulmonary evaluation” under 30 U.S.C. §923(b) when it pays for an examining physician who (1) performs all of the medical tests required by 20 C.F.R. §§ 718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion under 20 C.F.R. § 718.202(a)(4) that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 642 (6th Cir. 2009). In this case, claimant was provided two pulmonary function studies in accordance with 20 C.F.R. §725.406(c).¹¹ Moreover, Dr. Forehand conducted all medical tests as the regulations at 20 C.F.R. §§718.101(a) and 725.406(a) require and specifically linked his conclusions to those tests. Therefore, the Director met her statutory obligation to provide claimant with a complete pulmonary evaluation under 30 U.S.C. §923(b). *Greene*, 575 F.3d at 641-42.

part 718 of this subchapter, the district director *may* have any component of such examination or test reviewed by a physician selected by the district director.

20 C.F.R. §725.406(c) (emphasis added).

¹¹ Due to the invalidation of his first pulmonary function study based on lack of effort, claimant was entitled to one additional opportunity to produce satisfactory results in accordance with 20 C.F.R. §725.406(c).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge