



BRB No. 15-0519 BLA

JOHN R. DAUGHERTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RIVER BASIN COAL COMPANY	)	
	)	DATE ISSUED: 07/28/2016
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 of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

John R. Daugherty, Jacksboro, Tennessee, *pro se*.

Matthew Moynihan (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,<sup>1</sup> the Decision and Order (12-

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<sup>1</sup> Judy Hamblin, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Hamblin is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

BLA-5697) of Administrative Law Judge Larry A. Temin denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on March 14, 2011.<sup>2</sup>

The administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b) and, therefore, failed to establish that the applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with applicable law.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 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);

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<sup>2</sup> Claimant filed previous claims in 2007 and 2009. Because claimant withdrew his 2007 claim, it is considered not to have been filed. *See* 20 C.F.R. §725.306(b); Decision and Order at 3; Director's Exhibit 1. The district director denied claimant's 2009 claim on November 30, 2009, because claimant failed to establish that he suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 2.

<sup>3</sup> The record reflects that claimant's coal mine employment was in Tennessee. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

*Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

### **Change in an Applicable Condition of Entitlement**

Where a claimant 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 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); *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). Claimant’s prior claim was denied because he did not establish that he suffered from a totally disabling respiratory or pulmonary impairment. Director’s Exhibit 2. Consequently, to obtain review on the merits of his current claim, claimant had to submit new evidence establishing that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). 20 C.F.R. §725.309(c)(3); see *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 758-59, 25 BLR 2-221, 2-227-28 (6th Cir. 2013).

### **Total Disability**

#### **Section 718.204(b)(2)(i)**

In considering whether the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge initially considered the results of five new pulmonary function studies conducted on April 5, 2011, July 6, 2011, October 14, 2011, January 27, 2012, and August 22, 2012. The administrative law judge found that all of these pulmonary function studies were invalid. Decision and Order at 19-22. Therefore, the administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

In considering the April 5, 2011 pulmonary function study, the administrative law judge noted that the technician who administered the study indicated that claimant’s effort, while good, was variable. Decision and Order at 10; Director’s Exhibit 14. The technician also indicated that claimant did not comprehend the directions in performing the test. *Id.* The administrative law judge further noted that Drs. Michos, Rosenberg, and Long opined that the study was invalid,<sup>4</sup> and that no physician opined that the study was

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<sup>4</sup> Dr. Michos, who is Board-certified in Internal Medicine and Pulmonary Disease, invalidated the results of the April 5, 2011 pulmonary function study due to less than optimal effort, cooperation, and comprehension. Director’s Exhibit 14. Dr. Rosenberg, an equally qualified physician, invalidated the study due to “incomplete and erratic” effort. Employer’s Exhibit 7 at 9-11. Dr. Long invalidated the study because the flow

valid. Decision and Order at 20. Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the April 5, 2011 pulmonary function study is invalid.

In considering the July 6, 2011 pulmonary function study, the administrative law judge noted that Drs. Castle<sup>5</sup> and Rosenberg concluded that the test was invalid, explaining that the study failed to satisfy criteria established by the regulations.<sup>6</sup> Decision and Order at 21; Director's Exhibit 14; 20 C.F.R. Part 718, App. B. The administrative law judge considered the report of Dr. Michos indicating that the July 6, 2011 pulmonary function study was valid, but permissibly accorded it less weight because the doctor failed to provide an explanation for his opinion. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-323, 2-330 (4th Cir. 1998) (holding that a physician who checked a box indicating that an arterial blood gas study was valid "lent little additional persuasive authority" to the study); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997) (noting lack of detail in validation of a qualifying blood gas study and affirming administrative law judge's conclusion that arterial blood gas studies did not establish total disability); see also *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Lucostic v. U. S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 21. Consequently, the administrative law judge permissibly found that the July 6, 2011 pulmonary function study is invalid.

Dr. Dahhan administered the October 14, 2011 pulmonary function study, but invalidated its results due to claimant's poor cooperation. Director's Exhibit 17. The administrative law judge noted that Dr. Rosenberg also invalidated the study due to incomplete effort. Decision and Order at 21; Employer's Exhibits 1 at 2, 7 at 9-11. The

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volume loops demonstrated inconsistent effort, and because the two highest FEV1 values showed a greater than 5% variation. Director's Exhibit 19.

<sup>5</sup> The administrative law judge noted that Dr. Castle, like Drs. Michos and Rosenberg, is Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order at 21.

<sup>6</sup> Dr. Castle invalidated the results of the July 6, 2011 pulmonary function study because (1) the flow volume loops demonstrated significant variability in effort; (2) there was some hesitation at the onset of exhalation; (3) there was inadequate exhalation time demonstrated by the volume time curves; and (4) the report indicated that American Thoracic Society reproducibility criteria were not met. Employer's Exhibit 4 at 1. Dr. Rosenberg opined that claimant's effort was incomplete, noting that his "maximum exhalation was only for five or six seconds." Employer's Exhibit 1 at 2.

administrative law judge also noted that there are no medical opinions indicating that the study is valid. Decision and Order at 21. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the October 14, 2011 study is invalid.

In considering the January 27, 2012 pulmonary function study, the administrative law judge found that Drs. Castle and Rosenberg provided reasoned explanations for their invalidation of the study.<sup>7</sup> Decision and Order at 21; Claimant's Exhibit 3. The administrative law judge also noted that there is no evidence indicating that the study is valid, or calling into question the invalidations of Drs. Castle and Rosenberg. *Id.* Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the January 27, 2012 pulmonary function study is invalid.

Dr. Rosenberg attempted to have claimant perform a pulmonary function study on March 22, 2012, but reported that claimant's "inspiratory efforts were not sufficient to generate any recordable values." Employer's Exhibit 2. Dr. Rosenberg, therefore, conducted a "repeat study" on August 22, 2012. *Id.* However, based "on the shape of the flow-volume and volume-time loops," Dr. Rosenberg opined that claimant's efforts on the study were incomplete. *Id.* Dr. Rosenberg, therefore, opined that the study was invalid. *Id.* Based upon Dr. Rosenberg's invalidation of the August 22, 2012 pulmonary function study, and the absence of a medical opinion indicating that the study is valid or rebutting Dr. Rosenberg's rationale, the administrative law judge permissibly found that the study is invalid. Decision and Order at 22. Substantial evidence supports the administrative law judge's finding. We therefore affirm the administrative law judge's determination that the August 22, 2012 pulmonary function study is invalid.

Finally, the administrative law judge considered the results of pulmonary function studies contained in Dr. DiMeo's treatment notes. The administrative law judge noted that Dr. DiMeo conducted twelve pulmonary function studies after the denial of claimant's prior claim (April 7, 2010, August 11, 2010, December 8, 2010, June 6, 2011, August 12, 2011, January 12, 2012, June 12, 2012, November 6, 2012, March 12, 2013,

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<sup>7</sup> Dr. Castle invalidated the results of the January 27, 2012 pulmonary function study, explaining that:

The flow volume loops show less than maximal effort. The volume time curves show less than maximal effort throughout the entirety of the maneuver. There is significant hesitation at the onset of exhalation. The volume time curves showed little more than passive exhalation.

Employer's Exhibit 5. Dr. Rosenberg invalidated the results of the study because claimant's effort was incomplete and erratic. Employer's Exhibit 7 at 10-11.

May 30, 2013, November 20, 2013, and April 23, 2014).<sup>8</sup> Decision and Order at 11-12, 22; Claimant’s Exhibits 4, 5. The administrative law judge found that all of these studies, with the exception of the December 8, 2010 study, produced qualifying values.<sup>9</sup> *Id.*

Although the qualifying pulmonary function studies, if credited, would support a finding of total disability, the administrative law judge noted that Dr. DiMeo’s records “contain consistent remarks about [claimant’s] inadequate effort.” Decision and Order at 23. The administrative law judge, therefore, permissibly questioned the reliability of the nine pulmonary function studies in which Dr. DiMeo questioned claimant’s effort.<sup>10</sup> *See Clark*, 12 BLR at 1-155; Decision and Order at 22-23.

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<sup>8</sup> Because Dr. DiMeo’s pulmonary function studies were not generated in connection with claimant’s claim for benefits, they are not subject to the quality standards set forth at 20 C.F.R. §718.105. 20 C.F.R. §718.101(b); *J.V.S. [Stowers] v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). However, the Department of Labor’s comments to the regulations explain that evidence not subject to the quality standards must still be assessed for reliability by the fact finder:

The Department note[s] that [20 C.F.R.] §718.101 limits the applicability of the quality standards to evidence “developed \* \* \* in connection with a claim for benefits” governed by 20 CFR [P]arts 718, 725, or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

<sup>9</sup> A “qualifying” pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

<sup>10</sup> The record reflects that Dr. DiMeo provided the following comments regarding the various pulmonary function studies: April 7, 2010 (“very poor effort”); August 11, 2010 (values “well below his best baseline”); June 6, 2011 (“great deal of difficulty in complying with the study because of coughing and accuracy is questioned”); August 12, 2011 (“did not give maximum effort”); January 12, 2012 (“really cannot comply with the study”); June 12, 2012 (“clearly not maximum effort”); November 6, 2012 (“very variable efforts”); March 12, 2013 (“effort was quite questionable . . . has not given a good effort in some time”); and April 23 2014 (“question effort”). Director’s Exhibits 17; Claimant’s Exhibits 4, 5; Employer’s Exhibit 9, 10, 12.

Although Dr. DiMeo did not comment upon claimant's effort in performing the May 30, 2013 and November 20, 2013 pulmonary function studies, the administrative law judge noted that Dr. Rosenberg invalidated the results of those studies. Based upon his review of the flow-volume curves, Dr. Rosenberg opined that claimant provided incomplete effort during these tests.<sup>11</sup> Employer's Exhibit 8. The administrative law judge found that Dr. Rosenberg was "well-qualified to give an opinion," and adequately explained why the May 30, 2013 and November 20, 2013 pulmonary function studies were invalid. Decision and Order at 23. Because it is supported by substantial evidence, the administrative law judge's determination that the May 30, 2013 and November 20, 2013 pulmonary function studies are invalid is affirmed.

Because the administrative law judge permissibly found that the results of the new qualifying pulmonary function studies are invalid, we affirm his finding that the new pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

#### **Section 718.204(b)(2)(ii), (iii)**

The administrative law judge correctly noted that the three new arterial blood gas studies of record conducted on April 5, 2011, October 14, 2011, and March 22, 2012 are non-qualifying. Decision and Order at 13, 19; Director's Exhibits 14, 17; Employer's Exhibit 1. Consequently, we affirm the administrative law judge's finding that the new blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Because there is no evidence of record indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge also properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 19.

#### **Section 718.204(b)(2)(iv)**

In considering whether the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. DiMeo and Fernandes. In a treatment note dated December 7, 2009, Dr. DiMeo stated that claimant "would appear to be totally disabled from ever working at the level he would need for coal mining, thus making him totally disabled from his previous employment . . . ." Claimant's Exhibit 5. However, the

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<sup>11</sup> Dr. Rosenberg explained that on both pulmonary function studies, "incomplete efforts were provided based on the shape of the flow-volume curves." Employer's Exhibit 8 at 1-2. Dr. Rosenberg noted further that on the November 20, 2013 study, the FEV1 varied by 240 cc and the FVC by 330 cc, and that on the May 30, 2013 study, the FEV1 varied by 510 cc and the FVC by 640 cc. *Id.*

administrative law judge permissibly discredited Dr. DiMeo's opinion because he found that it was not sufficiently reasoned.<sup>12</sup> See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; Decision and Order at 23; Claimant's Exhibit 5. The administrative law judge also noted that Dr. Fernandes's opinion, that claimant is totally disabled, was contingent upon the validity of claimant's April 5, 2011 pulmonary function study. Decision and Order at 23; Director's Exhibit 14. Having found that the April 5, 2011 pulmonary function study was invalid, the administrative law judge permissibly accorded less weight to Dr. Fernandes's opinion. See *Clark*, 12 BLR at 1-155; *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984); Decision and Order at 23. Because there is no other new medical opinion evidence supportive of a finding that claimant suffers from a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that the new medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the new evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2),<sup>13</sup> we affirm the administrative law judge's determination that claimant failed to establish that the applicable condition of entitlement has changed since the date of the denial of his prior claim. 20 C.F.R. §725.309(c). We, therefore, affirm the administrative law judge's denial of benefits.

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<sup>12</sup> The administrative law judge accurately noted that Dr. DiMeo "did not explain the basis for his opinion." Decision and Order at 23.

<sup>13</sup> Because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 is inapplicable. See 20 C.F.R. §§718.204(b)(1), 718.304; Decision and Order at 19. Further, we note that, because claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge