



BRB No. 17-0320 BLA
Case No. 2015-BLA-05352

AARON GAMBILL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOL, INCORPORATED)	
)	
and)	
)	
CONSOL ENERGY, INCORPORATED)	DATE ISSUED: 07/20/2018
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	ORDER

Claimant has appealed, without the assistance of counsel, the Decision and Order of Administrative Law Judge Richard M. Clark denying benefits on a subsequent claim. The administrative law judge found the pulmonary function study administered by Dr. Habre on June 12, 2013, as part of claimant's Department of Labor (DOL)-sponsored pulmonary evaluation, invalid. He therefore discredited Dr. Habre's opinion that claimant is totally disabled. After the close of the briefing period in this appeal, the Board asked the Director, Office of Workers' Compensation Programs (the Director), to file a brief addressing whether the administrative law judge was required to remand this case to the district director for claimant to be provided with a complete pulmonary evaluation.

The Director responds that, on the facts of this case,¹ she “cannot definitively say that the Director fulfilled her obligation of providing [claimant] with a complete pulmonary evaluation that included a valid [pulmonary function study].” Director’s Brief at 4. Therefore, she requests that the Board vacate the administrative law judge’s Decision and Order and remand the case to the district director to allow claimant the opportunity to undergo a new pulmonary function study, and for Dr. Habre, or another physician if he is unavailable, to reconsider whether claimant is totally disabled based on the results of the new study. *Id.*

Employer responds that the Director met her obligation to provide claimant with a complete pulmonary evaluation because Dr. Habre performed all the necessary testing and linked his conclusions to those tests. Employer’s Brief at 4-5. Although employer concedes that the June 12, 2013 pulmonary function study was invalid, it argues that the Director fulfilled her obligation because the deficiencies in the study were due to claimant’s lack of effort and, thus, were beyond the Director’s control. *Id.* at 5.

We reject employer’s argument. The regulations provide:

If any medical examination or test conducted under paragraph (a) of this section is not administered or reported in substantial compliance with the provisions of part 718 of this subchapter, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director must schedule the miner for further examination and testing.

20 C.F.R. §725.406(c). Moreover, “[w]here 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.” *Id.*; see *Johnson v. Director, OWCP*, 890 F.2d 416 (Table), 1989 WL 144348 (6th Cir. Nov. 30, 1989) (unpub.) (remand “necessary” where claimant gave “suboptimal” effort on DOL-sponsored pulmonary function study because the district director “must allow the claimant the opportunity to undergo further

¹ The Director, Office of Workers’ Compensation Programs (the Director), notes that Dr. Habre initially concluded that the June 12, 2013 pulmonary function study was invalid, but after a Department of Labor (DOL) consulting physician concluded without explanation that the study was valid, Dr. Habre accepted that conclusion and relied on the study. Director’s Brief at 4. The Director notes further that the administrative law judge later “resolved [the] apparent conflict among the DOL providers by crediting the employer’s expert[’s]” opinion that the June 12, 2013 pulmonary function study was invalid. *Id.*

testing” when testing is not in compliance with quality standards). The record reflects that claimant was not afforded that additional opportunity.

Therefore, on the facts of this case, we grant the Director’s request, vacate the administrative law judge’s Decision and Order denying benefits, and remand this 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 is unavailable, reconsider whether claimant is totally disabled based on that study. *See* 30 U.S.C. §923(b), 20 C.F.R. §§718.101(a), 725.406.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge