

U.S. Department of Labor

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



BRB No. 18-0141 BLA

PAUL EDWARD HOOPER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LUCKY BRANCH COAL COMPANY,	)	DATE ISSUED: 03/22/2019
INCORPORATED	)	
	)	
and	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
	)	
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 Denying Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Paul Edward Hooper, Whitesburg, Kentucky.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2016-BLA-05296) of Administrative Law Judge Richard M. Clark 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 miner's claim filed on October 2, 2014.

The administrative law judge credited claimant with between fifteen and sixteen years of underground coal mine employment, but found the evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Thus he found claimant could not invoke the rebuttable presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4),<sup>1</sup> or establish entitlement under the alternative provisions at Part 718, and he denied benefits.<sup>2</sup>

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer/carrier responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial

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<sup>1</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the miner establishes fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in underground mines, and a totally disabling respiratory impairment. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

<sup>2</sup> 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 was 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

evidence, and in accordance with law.<sup>3</sup> 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 considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner’s total disability is established by: qualifying<sup>4</sup> pulmonary function studies or arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). If the administrative law judge finds that total disability has been established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff’d on recon.*, 9 BLR 1-236 (1987) (en banc).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered pulmonary function studies administered on December 10, 2014, January 7, 2015, and July 15, 2015. Decision and Order at 7, 11-12; Director’s Exhibits 13, 23; Employer’s Exhibit 1. He found none of the studies, including the December 10, 2014 study obtained by Dr. Ajarapu as part of the Department of Labor (DOL)-sponsored pulmonary evaluation, valid for the purpose of establishing total disability under the regulatory criteria.<sup>5</sup> Decision and

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<sup>3</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant’s coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibits 2, 4; Hearing Transcript at 35.

<sup>4</sup> A “qualifying” pulmonary function study or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A “non-qualifying” study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

<sup>5</sup> With respect to the December 10, 2014 study, the administrative law judge noted that while Drs. Rosenberg and Vuskovich explained their conclusions, Dr. Ajarapu merely reported that the study was validated by Dr. Gaziano, who checked a box on a form indicating the vents were acceptable. Director’s Exhibits 14, 21, 24; Employer’s Exhibit 1. The administrative law judge permissibly accorded greater weight to the more detailed interpretations offered by Drs. Rosenberg and Vuskovich to conclude that the December 10, 2014 test is invalid. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR

Order at 11-12. The administrative law judge also found that the arterial blood gas study evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), and that the record does not contain evidence that claimant has cor pulmonale with right-sided congestive heart failure, by which claimant could establish total disability under 20 C.F.R. §718.204(b)(2)(iii). *Id.* at 12-13.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Ajjarapu, Rosenberg and Castle, together with claimant's treatment records. Decision and Order at 13-19; Director's Exhibits 13, 21-23; Claimant's Exhibits 4-7; Employer's Exhibits 1, 3, 4. Based on the results of her pulmonary function study, Dr. Ajjarapu diagnosed a totally disabling pulmonary impairment. Director's Exhibits 13, 21. Drs. Rosenberg and Castle opined that claimant is not totally disabled from a pulmonary perspective. Director's Exhibit 23; Employer's Exhibits 1, 3, 4. The administrative law judge assessed the credibility of only Dr. Ajjarapu's opinion, as she was the sole physician to diagnose a totally disabling pulmonary impairment. Decision and Order at 19. The administrative law judge found that her opinion was entitled to diminished weight because she based her diagnosis of a totally disabling pulmonary impairment on an invalid pulmonary function study. Thus, the administrative law judge concluded that claimant failed to establish total disability based on the medical opinion evidence, and the evidence overall.<sup>6</sup> *Id.* Because claimant failed to establish total disability, a requisite element of entitlement under Section 411(c)(4) and Part 718, the administrative law judge denied the claim.<sup>7</sup> *Id.* at 20.

### **Complete Pulmonary Evaluation**

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C.

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2-537, 2-553 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 11.

<sup>6</sup> The administrative law judge found claimant's treatment records do not contain any evidence that would tend to establish total pulmonary or respiratory disability. Decision and Order at 20.

<sup>7</sup> While the administrative law judge did not determine whether claimant could invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, we note there is no evidence in the record that claimant had complicated pneumoconiosis. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304.

§923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. Here, the administrative law judge specifically found that Dr. Ajjarapu administered an invalid pulmonary function test as part of the DOL-sponsored pulmonary evaluation. Decision and Order at 11. Moreover, Dr. Ajjarapu based her opinion as to whether claimant is totally disabled solely on the results of the invalid test. Director's Exhibits 13, 21. Thus, under the facts of this case, we hold that Dr. Ajjarapu's report is incomplete on the issue of total disability, a requisite element of entitlement. See *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199, 2-221 (6th Cir. 2009); *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990). We therefore vacate the administrative law judge's denial of benefits and remand the case to the district director for evidentiary development necessary to cure the defects in claimant's DOL-sponsored pulmonary evaluation, such that claimant is provided an opportunity to substantiate his claim by complete pulmonary evaluation, as required by the Act.<sup>8</sup> 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *Hodges*, 18 BLR at 1-93.

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<sup>8</sup> The regulation at 20 C.F.R. §725.406 specifically provides that where deficiencies in a report of a pulmonary function test are "the result of 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). Further, the regulation at 20 C.F.R. §725.456 provides for the development of additional evidence where any part of the Department of Labor-sponsored pulmonary evaluation "fails to comply with the applicable quality standards, or fails to address the relevant conditions of entitlement in a manner which permits resolution of the claim." 20 C.F.R. §725.456(e) (internal citation omitted). Here, the administrative law judge credited the opinions of Drs. Rosenberg and Vuskovich that the results of the December 10, 2014 test are invalid due to inconsistent and suboptimal effort. Decision and Order at 11; Director's Exhibit 24; Employer's Exhibit 1. Dr. Ajjarapu's opinion on the issue of total disability is based solely on the results of that invalid test. Director's Exhibits 13, 21.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated and the case is remanded to the district director for further development of the evidence and for reconsideration of the merits of this claim in light of the new evidence.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge