



BRB No. 16-0666 BLA

WAYNE D. POWERS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CUMBERLAND RIVER COAL)	
COMPANY/ARCH COAL,)	
INCORPORATED)	
)	DATE ISSUED: 09/26/2017
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 Morris D. Davis,
Administrative Law Judge, United States Department of Labor.

Wayne D. Powers, Norton, Virginia.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for
employer/carrier.

BEFORE: HALL, Chief Administrative Appeals Judge, BUZZARD and
ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order Denying Benefits (2013-BLA-05035) of Administrative Law Judge Morris D. Davis 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 June 1, 2011.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),² the administrative law judge credited claimant with thirty-one years of qualifying coal mine employment, but found that the evidence failed to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant could not invoke the rebuttable presumption at Section 411(c)(4), or establish entitlement under the alternative provisions at Part 718.³ Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer 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 the issue raised to be whether the Decision and Order below is supported by

¹ Robin Napier, 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. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (unpub. Order).

² 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.

³ 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).

substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act 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. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability can be established by: pulmonary function studies showing values equal to, or less than, those in Appendix B; blood gas studies showing values equal to, or less than, those set forth in Appendix C; evidence that the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure; or a physician's reasoned medical opinion that the miner's respiratory or pulmonary condition is totally disabling. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the five pulmonary function studies of record. The administrative law judge found that none of the studies, including the September 28, 2011 study obtained by Dr. Alam as part of the Department of Labor (DOL)-sponsored pulmonary evaluation, is valid for the purpose of establishing total disability under the regulatory criteria.⁵ Decision and Order

⁴ The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

⁵ The administrative law judge noted that Dr. Jarboe reviewed the pulmonary function studies and concluded that they are all invalid due to inconsistent and suboptimal effort. Decision and Order at 10. With respect to the September 28, 2011 study, the administrative law judge noted that while Dr. Jarboe explained his conclusion, Dr. Alam simply noted that claimant's effort and cooperation were "good," and Dr. Michos, who reviewed the test, indicated by check mark and "without comment," that the test was acceptable. Decision and Order at 9-10. The administrative law judge permissibly accorded greater weight to Dr. Jarboe's "well-reasoned" interpretation to conclude that the September 28, 2011 test is invalid. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-323, 2-330 (4th Cir. 1998); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997); Decision and Order at 10.

at 9-10. 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 any 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). Decision and Order at 10.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Alam and Jarboe. Based on the results of his September 28, 2011 pulmonary function study, Dr. Alam opined that claimant has a “mild pulmonary impairment as [his] FEV1 improved [after the administration of a bronchodilator].”⁶ Director’s Exhibit 12. Dr. Jarboe stated that because none of claimant’s pulmonary function studies produced valid results, “it is impossible to accurately assess the presence of any ventilatory impairment.” Director’s Exhibit 18. The administrative law judge stated that “[n]either physician said that claimant was totally disabled” or that claimant’s pulmonary or respiratory condition prevented him from performing his previous coal mine work. Decision and Order at 13. Thus, the administrative law judge concluded that claimant failed to establish total disability based on the medical opinion evidence, and the evidence overall. 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.

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. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. Here, the administrative law judge specifically found that Dr. Alam administered an invalid pulmonary function test as part of the DOL-sponsored pulmonary evaluation. Moreover, Dr. Alam based his opinion as to whether claimant is totally disabled solely on the results of the invalid test. Thus, under the facts of this case, we hold that Dr. Alam’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-

⁶ On the September 28, 2011 pulmonary function test report, Dr. Alam stated that the results reflected “[s]evere airflow obstruction [with] positive bronchodilator response making it mild airflow obstruction.” Director’s Exhibit 12. We note that the Department of Labor (DOL) has recognized that post-bronchodilator values do not provide an adequate assessment of a miner’s disability. *See* 45 Fed. Reg. 13,682 (Feb. 29, 1980). Thus the test to establish total disability is whether a miner can perform his usual coal mine employment, not whether he can perform his usual employment *if he takes medication*. *See* 20 C.F.R. §718.204(b)(1)(i).

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.⁷ 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *Hodges v. BethEnergy Mines Inc.*, 18 BLR 1-84, 1-93 (1994).

⁷ 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 DOL-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 Dr. Jarboe's opinion that the results of the September 28, 2011 test are invalid due to inconsistent and suboptimal effort. Decision and Order at 10; Director's Exhibits 18, 19. Dr. Alam's opinion on the issue of total disability is based solely on the results of that invalid test. Director's Exhibit 12.

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

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge