**U.S. Department of Labor**

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

BRB No. 18-0611 BLA

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| DENSIL SEXTON | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| BIG I MINING, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| KENTUCKY EMPLOYERS MUTUAL INSURANCE | ) | DATE ISSUED: 08/30/2019 |
| | ) | |
| 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 of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Densil Sexton, Martin, Kentucky.

Lee Jones and Denise Hall Scarberry (Jones & Walters, PLLC) Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (2015-BLA-05899) of Administrative Law Judge Steven D. Bell denying benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). This case involves a claim filed on November 1, 2013.

The administrative law judge credited claimant with twenty-five years of underground coal mine employment,[2] but found the evidence insufficient to establish total respiratory disability. 20 C.F.R. §718.204(b)(2). The administrative law judge denied benefits, finding claimant could not invoke the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4), or establish entitlement under 20 C.F.R. Part 718.

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 substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the administrative law judge's findings if they are rational, supported by substantial evidence, and in accordance with applicable law. 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).

[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. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 21. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. § 921(c)(4) (2012); 20 C.F.R. §718.305.

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

**Total Disability**

A miner is 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). A claimant may establish total disability based on pulmonary function studies, 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). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence.[4] *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).

The administrative law judge considered five pulmonary function studies.[5] 20 C.F.R. §718.204(b)(2)(i). The February 5, 2014 study, conducted by Dr. Ajjarapu, yielded qualifying[6] values before and after the administration of a bronchodilator. Director's

[4] We affirm the administrative law judge's findings that: claimant does not have complicated pneumoconiosis and thus cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act; and he cannot establish total disability at 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 17-18.

[5] The administrative law judge permissibly resolved the height discrepancy reported on the pulmonary function studies by averaging the heights recorded, and finding claimant's height is 70.8 inches. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 114 (4th Cir. 1995); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 8 n.55. He reasonably used the table values for the closest height of 70.9 inches to evaluate the studies. Decision and Order at 8 n.55.

[6] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20

Exhibit 10. The July 17, 2014 pulmonary function study, also conducted by Dr. Ajjarapu, yielded qualifying pre-bronchodilator values and no bronchodilator was administered. Director's Exhibit 16. The January 8, 2015 study, conducted by Dr. Dahhan, yielded qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values. Director's Exhibit 13. The January 16, 2015 study, conducted by Dr. Ajjarapu, yielded qualifying pre-bronchodilator values and no bronchodilator was administered. Claimant's Exhibit 3. The March 12, 2015 pulmonary function study, conducted by Dr. Jarboe, yielded non-qualifying values before and after administration of a bronchodilator. Employer's Exhibit 1.

The administrative law judge observed that four of the five pulmonary function studies had qualifying values pre-bronchodilator. Decision and Order at 18. He also noted the most recent study was non-qualifying before and after administration of a bronchodilator. *Id*. The administrative law judge summarily concluded the pulmonary function studies were "inconclusive" and did not support a finding that claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 18. He later described, when weighing the conflicting medical opinions that "the preponderance of the pulmonary function testing was non-qualifying." Decision and Order at 19.

The administrative law judge's contradictory findings with respect to the pulmonary function studies do not satisfy the Administrative Procedure Act (APA).[7] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Furthermore, we are unable to discern from the administrative law judge's analysis the extent to which he relied on either the pre-bronchodilator or post-bronchodilator values in finding the pulmonary function studies inconclusive.[8] Because the administrative law judge did not adequately explain how he weighed the conflicting

C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[8] The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis." 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980).

evidence, we vacate his determination that claimant did not total disability based on the pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i); *see Wojtowicz*, 12 BLR at 1-165.

In considering the medical opinion evidence,[9] the administrative law judge noted that Dr. Ajjarapu diagnosed claimant as totally disabled, while Drs. Jarboe and Dahhan opined that he is not. Director's Exhibit 10, 13; Employer's Exhibit 1. The administrative law judge found "Dr. Jarboe's opinion, based on the most recent [pulmonary function test] combined with Dr. Dahhan's reasoned opinion, outweighs Dr. Ajjarapu's opinion which failed to adequately take the most recent non-qualifying [pulmonary function test] into account." Decision and Order at 19. Because we have vacated the administrative law judge's weighing of the pulmonary function studies, we vacate his rejection of Dr. Ajjarapu's opinion[10] and his determination that claimant did not establish total disability based on the medical opinion evidence.[11] 20 C.F.R. §718.202(a)(4).

**Remand Instructions**

The administrative law judge must reconsider whether claimant established total disability based on the pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i). He must

[9] The administrative law judge considered three resting arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(ii). The February 5, 2014 study, administrated by Dr. Ajjarapu, was qualifying, while the January 8, 2015 study, administered by Dr. Dahhan, and the March 12, 2015 study, administered by Dr. Jarboe, were non-qualifying. Director's Exhibits 10, 13; Employer's Exhibit 1. The administrative law judge permissibly found claimant did not establish total disability by a preponderance of the blood gas study evidence. 20 C.F.R. §718.204(b)(2)(ii); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 277-78 (1994); *Keathley*, 773 F.3d at 737-40; Decision and Order at 18.

[10] Dr. Ajjarapu indicated she agreed with Dr. Jarboe's initial assessment that claimant is totally disabled. The administrative law judge failed to adequately explain why he discredited Dr. Ajjarapu's opinion since she was aware of Dr. Jarboe's testing. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); Director's Exhibit 68.

[11] The administrative law judge also erred in failing to consider claimant's treatment records, which reflect that claimant has been on supplemental oxygen since 2014, in determining whether claimant is totally disabled. Claimant's Exhibits 4-7; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). On remand, the administrative law judge must consider all relevant evidence in determining if total disability is established.

also reconsider whether the medical opinions establish total disability. 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge must determine the exertional requirements of claimant's usual coal mine employment and consider the physicians' opinions regarding total disability in light of those requirements and their understanding of those requirements. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996). In determining whether the physicians' opinions are reasoned, he must take into account the physicians' qualifications, the explanations given for their findings, the documentation underlying their judgments, the sophistication and bases for their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998). If the administrative law judge finds total disability would be established based on the pulmonary function studies or medical opinions or both, considered in isolation, he must determine whether claimant is totally disabled taking into account the contrary probative evidence. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

If claimant establishes total disability on remand, he invokes the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1), (c)(1). The administrative law judge must then determine whether employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d)(1)(i), (ii). If the administrative law judge finds that claimant is not totally disabled, he may reinstate the denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. In rendering all of his credibility determinations on remand, the administrative law judge must explain his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge