U.S. Department of Labor

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

BRB No. 24-0038 BLA

SONNY BROCK Claimant-Petitioner v. STRAIGHT CREEK MINING and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/22/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Sonny Brock, Flat Lick, Kentucky.

Michael A. Pusateri (Greenberg Traurig, LLP) Washington D.C., for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without representation,[1] Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Denying Benefits on Remand (2013-BLA-05251) rendered on a subsequent claim[2] filed on February 17, 2012, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Board for a second time.

In the initial Decision and Order Denying Benefits in a Subsequent Claim, ALJ Peter B. Silvain, Jr., credited Claimant with 20.46 years of surface coal mine employment.[3] He found that Claimant failed to establish a totally disabling respiratory or pulmonary

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[1] On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the ALJ's decision, but she is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant filed five prior claims. Director's Exhibits 1, 2. His most recent prior claim, filed on December 22, 2003, was denied by the district director on August 25, 2004, because he failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 2.

When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he 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 failed to establish a totally disabling respiratory or pulmonary impairment, and therefore he had to submit new evidence establishing total disability in order to have the claim reviewed on the merits. 20 C.F.R. §§718.204(b)(2), 725.309(c); *see White*, 23 BLR at 1-3; Director's Exhibit 2.

[3] ALJ Silvain noted that because all of Claimant's coal mine employment was at a surface mine, he would have to establish that the conditions were "substantially similar" to those of an underground mine in order to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(2); 78 Fed. Reg. 59104-05 (Sept. 25, 2013). Because Claimant could not establish total disability, ALJ Silvain found this inquiry moot. Initial Decision and Order at 9 n.40.

impairment and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4) (2018), establish entitlement under 20 C.F.R. Part 718, or establish a change in an applicable condition of entitlement. 20 C.F.R. §§ 718.204(b)(2), 725.309. ALJ Silvain further found Claimant did not establish complicated pneumoconiosis and could not invoke the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. He therefore denied benefits.

Pursuant to Claimant's appeal, the Board vacated ALJ Silvain's reliance on the most recent pulmonary function study to find that the pulmonary function study evidence as a whole did not establish total disability because he relied solely on the recency of the study without explaining why it was most probative of Claimant's current condition. *Brock v. Straight Creek Mining*, BRB No. 18-0398 BLA, slip op. at 4-8 (Oct. 31, 2019) (unpub.); 20 C.F.R. §718.304(c). Further the Board agreed with Employer's assertion that ALJ Silvain erred in assessing the validity of the qualifying pulmonary function studies, because he did not adequately discuss the evidence challenging the validity of those studies. *Id.* at 6-7. Because his weighing of the pulmonary function study evidence affected his weighing of the medical opinion evidence and the evidence as a whole on the issue of total disability, the Board also vacated those findings and instructed ALJ Silvain to reconsider the pulmonary function study evidence and medical opinion evidence on remand. *Id.* at 8.

In his Decision and Order Denying Benefits on Remand, the subject of this appeal, ALJ Sellers (the ALJ)[5] found that the pulmonary function study evidence and medical opinion evidence did not support a finding of total disability and therefore Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2).[6] Decision and Order on Remand

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[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[5] On July 18, 2023, ALJ Sellers notified the parties that ALJ Silvain was no longer with the Office of Administrative Law Judges and that the case had been assigned to him. Decision and Order on Remand at 2. The parties were given an opportunity to object, but none did. *Id.*

[6] The Board previously affirmed ALJ Silvain's findings that the blood gas studies do not establish total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); *Brock v. Straight Creek Mining*, BRB No. 18-0398 BLA, slip op. at 8 n.15 (Oct. 31, 2019) (unpub.).

at 8, 10. Consequently, the ALJ found that Claimant did not establish a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c), and denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has declined to file a response.

In an appeal a claimant files without representation, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist a claimant in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits.[8] *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).

Invocation of the Section 411(c)(4) Presumption — Total Disability

To invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018), Claimant must establish he has a totally

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[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 12.

[8] The Board previously affirmed ALJ Silvain's determination that there is no evidence of complicated pneumoconiosis and therefore Claimant cannot invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *Brock*, BRB No. 18-0398 BLA, slip op. at 4 n.7.

disabling respiratory or pulmonary impairment. 20 C.F.R. §718.305(b)(1)(iii). 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). 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 ALJ must consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *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).

Pulmonary Function Studies

On remand, in compliance with the Board's instructions, the ALJ considered the validity of the four new pulmonary function studies and then determined whether they are sufficient to support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order on Remand at 1-9. When weighing the pulmonary function studies, an ALJ must determine whether they are in substantial compliance with the regulatory quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The ALJ must then, in his role as factfinder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). However, in the absence of evidence to the contrary, compliance with the quality standards is presumed. 20 C.F.R. §718.103(c). Thus, the party challenging the validity of a study has the burden to establish the results are suspect or unreliable. *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984).

January 16, 2012 pulmonary function study

The ALJ noted the January 16, 2012 study was "performed under the auspices" of Dr. Craven, who is Board-certified in family medicine. Decision and Order on Remand at 4; Director's Exhibit 24. The study was qualifying[9] and no post-bronchodilator results

[9] A "qualifying" pulmonary function study yields results equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

were obtained. Director's Exhibit 24. The administering nurse, Melissa Muse,[10] indicated the study was acceptable and reproducible, and that Claimant had good cooperation and effort. *Id.* Although Dr. Craven signed the report, the ALJ found it was unclear whether Dr. Craven actually observed the study. Decision and Order on Remand at 4; Director's Exhibit 24.

Dr. Rosenberg, a Board-certified pulmonologist, reviewed the study's tracings and opined Claimant's "efforts were incomplete based on the shape of the flow-volume and volume-time curves." Employer's Exhibit 7 at 5. Dr. Vuskovich, who is Board-certified in occupational medicine, also reviewed the study's tracings and similarly opined that Claimant "did not put forth the effort required to generate valid spirometry results." Employer's Exhibit 8 at 4.

The ALJ noted that because the study was nonqualifying, the validity was not necessarily critical. Decision and Order on Remand at 5. Based on the physicians' qualifications, the ALJ permissibly found the study's validity called into question; further, he found that even if the study was valid, it still did not support a finding of total disability. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order on Remand at 5.

May 16, 2012 pulmonary function study

Dr. Habre's[11] May 16, 2012 study was conducted as part of the Department of Labor's (DOL's) complete pulmonary evaluation of Claimant and produced qualifying results before and after bronchodilators.[12] Director's Exhibit 23 at 18. As the ALJ noted, neither the study report nor the DOL ventilatory study form contained a statement regarding Claimant's cooperation or comprehension. Decision and Order on Remand at 5;

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[10] Melissa Muse is a Licensed Practical Nurse with Stone Mountain Health Services in St. Charles, Virginia, who is National Institute for Occupational Safety and Health (NIOSH) certified. Director's Exhibit 24 at 1.

[11] Dr. Habre is Board-certified in internal medicine, pulmonary disease, sleep medicine, and critical care medicine. Director's Exhibit 23.

[12] Dr. Habre initially administered a pulmonary function study in conjunction with Claimant's DOL-sponsored complete pulmonary evaluation on March 8, 2012. Director's Exhibit 23. However, because Dr. Gaziano invalidated the study due to less-than-optimal effort, cooperation, and comprehension, the DOL provided Claimant with a second pulmonary function study on May 16, 2012. *Id.*; *see* 20 C.F.R. §725.406(c) (where deficiencies are the result of a lack of effort on the part of the miner, he will be afforded "one additional opportunity to produce a satisfactory result").

see Director's Exhibit 23. While Dr. Habre signed his name on the DOL form indicating that the test was performed in accordance with specifications and instructions set forth by the DOL, the ALJ determined "this statement is not true," as those instructions require a statement regarding the cooperation and comprehension of the miner. *Id.* (citing 20 C.F.R. §718.103(b)(5)). Dr. Gaziano, a DOL consultant who is Board-certified in pulmonary medicine, validated the study by checking a box that said, "Vents are acceptable." Director's Exhibit 23 at 12, 15. Drs. Vuskovich and Rosenberg also reviewed the tracings from the study and both doctors found the test invalid because of insufficient effort. Employer's Exhibits 7 at 4, 8 at 7-8.

The ALJ found Dr. Habre's attestation worthy of "no weight" as the ALJ found that the doctor "does not address the Claimant's effort and understanding." Decision and Order on Remand at 5; Director's Exhibit 23 at 18. Further, the ALJ found that while Dr. Gaziano is Board-certified in pulmonary medicine, he offered no explanation of his findings nor was he able to observe Claimant performing the study. Decision and Order on Remand at 5-6; Director's Exhibit 23 at 12. Similarly, the ALJ found Dr. Rosenberg is Board-certified in pulmonary medicine, but determined he did not explain why the shape of the flow-volume and volume-time curves demonstrated incomplete effort. Decision and Order on Remand at 6; Employer's Exhibit 7 at 4. The ALJ also gave less weight to Dr. Vuskovich's opinion because he is not a pulmonologist and did not explain how he was able to determine from the tracings that Claimant's efforts were submaximal. Decision and Order on Remand at 6; Employer's Exhibit 8 at 7-8. The ALJ observed that, overall, the quality of the validity evidence is "very poor." Decision and Order on Remand at 6. However, he permissibly found that given that Drs. Rosenberg and Vuskovich "at least provided some explanation," "the weight of the evidence supports a finding that this study is invalid." Decision and Order on Remand at 6; *see Banks*, 690 F.3d at 489.

January 10, 2013 pulmonary function study

The ALJ noted the January 10, 2013 study was "performed under the auspices" of Dr. Craven and was qualifying and no post-bronchodilator results were obtained. Decision and Order on Remand at 7; Claimant's Exhibit 2. The administering nurse, Ms. Muse, indicated Claimant had good effort and cooperation. Claimant's Exhibit 2.

Dr. Rosenberg reviewed the study's tracings and observed that "efforts were not maximal based on the shape of the flow-volume curves. Hesitation was evident." Employer's Exhibit 9 at 1. Dr. Vuskovich also reviewed the study's tracings and observed Claimant's "respiratory rate and tidal volume were not sufficient to generate a valid MVV result" and that Claimant "did not put forth the effort required to generate a valid FEV1 result[]." Employer's Exhibit 8 at 5.

The ALJ noted that while Board precedent allows greater weight to be given to the opinion of the physician or technician who administered the test, there is no evidence that Dr. Craven was present during the test and no statement from her concerning Claimant's effort. *Id.* Further, the ALJ surmised that an LPN,[13] rather than a technician, would not have any specialized training or experience in administering pulmonary function studies, and therefore the ALJ gave the LPN's signature on the printout recording of Claimant's effort and cooperation on the test "very little weight." *Id.* Although it is unclear how the ALJ would know the qualifications of a LPN to conduct pulmonary function testing, the ALJ nonetheless permissibly credited Drs. Rosenberg's and Vuskovich's opinions based on their qualifications as Board-certified pulmonologists. We therefore affirm the ALJ's conclusion that the January 10, 2013 study is invalid on that basis. See *Banks*, 690 F.3d at 489; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order on Remand at 7.

May 13, 2014 study

Dr. Rosenberg conducted the May 13, 2014 study, which produced nonqualifying results before the administration of bronchodilators.[14] Employer's Exhibit 5. The technician administering the study noted that Claimant had good understanding, cooperation, and effort. *Id.* at 3. However, Dr. Rosenberg indicated "[e]fforts not maximal." Employer's Exhibit 5 at 2. The technician was identified on the form as an "RCP/CRT," which the ALJ interpreted as "Respiratory Care Practitioner/Certified Respiratory Therapist." Decision and Order on Remand at 7. Because the technician was trained in respiratory treatment and was present during the exam, the ALJ gave the technician's comments probative weight and permissibly found the study valid. *Banks*, 690 F.3d at 489; *Crisp*, 866 F.2d at 185; Decision and Order on Remand at 7. He noted that Claimant's efforts on the exam were "good enough to be adequate" and "it accurately reflects at least his minimum ventilatory capacity." Decision and Order on Remand at 7; *see Anderson v. Youghiogheny & Ohio Coal Co.*, 7 BLR 1-152, 1-154 (1984) (non-qualifying ventilatory study that represents poor cooperation is still a valid measure of the lack of respiratory disability); *see also Crapp v. United States Steel Corp.*, 6 BLR 1-476, 1-479 (1983).

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[13] The ALJ noted that the signature attesting to good cooperation and effort belonged to an "LPN," which he interpreted to mean licensed practical nurse. Decision and Order at 6.

[14] Post-bronchodilator results were not obtained for this study. Employer's Exhibit 5.

Weighing the pulmonary function study evidence as a whole, the ALJ found that the only valid studies of record produced non-qualifying values. Decision and Order on Remand at 8. The ALJ noted that even if he found the January 10, 2013 study valid and ignored that the May 13, 2014 study is the most recent, Claimant would still be unable to establish total disability because "at best the evidence would be inconclusive" and therefore insufficient to meet Claimant's burden. *Id.* at 8-9.

As the ALJ permissibly found the only qualifying new pulmonary function studies (those administered on May 16, 2012, and January 10, 2013) were invalid, he rationally determined Claimant was unable to establish total disability under 20 C.F.R. §718.204(b)(2)(i) based on the new evidence. *See* 20 C.F.R. §718.101(b) ("any evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered"); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Medical Opinion Evidence

The ALJ next considered the medical opinions of Drs. Habre, Rosenberg, and Vuskovich. Decision and Order on Remand at 9-10; Director's Exhibit 23; Employer's Exhibits 7-9.

Dr. Habre conducted the DOL-sponsored complete pulmonary evaluation of Claimant on March 8, 2012, and diagnosed a completely disabling lung disease "[b]ased on his [pulmonary function study]."[15] Director's Exhibit 23 at 42. While Dr. Habre did not supplement his report after the second (May 16, 2012) pulmonary function study, the ALJ stated that he agreed with ALJ Silvain's assumption "that his opinion would not change based on the latter study, since both studies produced qualifying values." Decision and Order on Remand at 9 (citing Initial Decision and Order at 24). As noted above, the March 8, 2012 pulmonary function study Dr. Habre relied on was invalidated and the ALJ permissibly found the subsequent May 16, 2012 study is also invalid. Thus, the ALJ permissibly discredited Dr. Habre's opinion because the studies on which he relied "were not the product of good effort." Decision and Order on Remand at 9; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Crisp*, 866 F.2d at 185.

Dr. Rosenberg examined Claimant on May 13, 2014, prepared an initial report based on the exam and a review of additional medical records, and issued a June 16, 2016

[15] Dr. Habre also observed moderate hypoxemia based on the blood gas study values but relied solely on the pulmonary function study values when opining that Claimant "[would] not be able to perform any strenuous activity or intense labor as required by his job as a coal auger operator." Director's Exhibit 23 at 42.

supplemental report based on a review of the January 10, 2013 pulmonary function study. Employer's Exhibits 7, 9. He opined that from a pulmonary perspective, Claimant is not totally disabled from performing his usual coal mine employment. Employer's Exhibit 7 at 10. He specifically commented that Claimant's "current pulmonary functions were performed with much better efforts than in relationship to Dr. Habre's testing," noting that Dr. Habre's studies were invalid and "cannot be used as an accurate measure of [Claimant's] functional status." *Id.* Dr. Rosenberg also noted that even though Claimant's May 13, 2014 study had normal values, "the efforts were still not maximal and the record values could have been greater than measured." *Id.* After reviewing the January 10, 2013 pulmonary function study, Dr. Rosenberg opined that the study was not valid and therefore cannot be used to assess Claimant's degree of impairment. Employer's Exhibit 9 at 1-2. As discussed above, the ALJ agreed with Dr. Rosenberg that the January 16, 2012, May 16, 2012, and January 10, 2013 pulmonary function studies are invalid. Thus, the ALJ permissibly gave "substantial weight" to Dr. Rosenberg's opinion, finding his reasoning persuasive and bolstered by his credentials and the breadth of the medical records he reviewed. Decision and Order on Remand at 9-10; *Rowe*, 710 F.2d at 255; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985) (ALJ may properly credit medical opinions that are consistent with the objective evidence).

Finally, Dr. Vuskovich reviewed the medical records and prepared a February 25, 2016 report, finding all of the new pulmonary function studies invalid except for Dr. Rosenberg's May 13, 2014 study. Employer's Exhibit 8 at 3-5, 7-12. He concluded that the medical records he reviewed "showed that [Claimant] had normal ventilatory capacity and normal pulmonary oxygen transfer." *Id.* at 16. The ALJ noted that Dr. Vuskovich opined some of Claimant's objective testing did not show any abnormality based on Claimant's age and the altitude where the testing was conducted.[16] Decision and Order on Remand at 10. We see no error in the ALJ's permissible finding that Dr. Vuskovich's opinion is entitled to "reduced weight" based on his "qualified statement" and "his lack of board-certification in pulmonary medicine." Decision and Order on Remand at 10; *see Banks*, 690 F.3d at 489.

As the ALJ permissibly discredited the opinion of Dr. Habre, the only physician who opined Claimant has a totally disabling respiratory impairment, we affirm the ALJ's finding that Claimant did not establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv). Further, as there is no contrary probative evidence, we affirm

[16] Dr. Vuskovich made these statements concerning the new blood gas studies conducted on March 8, 2012, and May 13, 2014, and the November 6, 1986 and January 15, 2004 blood gas studies conducted during Claimant's prior claim. Employer's Exhibit 8 at 8, 11, 13-14.

that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2) based on the new evidence and therefore also failed to establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). We, therefore, affirm the ALJ's denial of benefits.

Accordingly, the ALJ's Decision and Order Denying Benefits on Remand is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge