



BRB No. 23-0384 BLA

AZARIA HATFIELD (o/b/o THOMAS HATFIELD, deceased) )  
 )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 APOGEE COAL COMPANY, LLC )  
 )  
 and )  
 )  
 ARCH COAL, INCORPORATED )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest )

**NOT-PUBLISHED**

DATE ISSUED: 10/30/2024

DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Azaria Hatfield, Clinton, Tennessee.

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

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

BOGGS and JONES, Administrative Appeals Judges:

Claimant appeals, without representation,<sup>1</sup> Administrative Law Judge (ALJ) Dana Rosen’s Decision and Order on Remand Denying Benefits (2018-BLA-05967) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case is before the Board for the second time.

In her initial decision denying benefits, the ALJ credited the Miner<sup>2</sup> with at least fifteen years of underground coal mine employment. However, she found the Miner failed to establish a totally disabling pulmonary or respiratory impairment and thus could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018),<sup>3</sup> or establish entitlement under 20 C.F.R. Part 718. 20 C.F.R. §718.204(b)(2). Thus, she denied benefits.

Pursuant to the Miner’s appeal, the Board affirmed the ALJ’s findings that the Miner failed to establish total disability based on the evidence of record.<sup>4</sup> *Hatfield v. Apogee Coal*

---

<sup>1</sup> 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 does not represent Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995) (Order).

<sup>2</sup> The Miner died on October 20, 2022, while the case was pending before the ALJ on remand. Director’s Exhibit 72. Claimant is the Miner’s daughter and is pursuing the claim on behalf of his estate. Director’s Exhibit 71.

<sup>3</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

<sup>4</sup> The Board affirmed the ALJ’s findings that: 1) the pulmonary function study evidence did not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(i), as all the qualifying studies were invalid; 2) the arterial blood gas studies did not support a finding of total disability under 20 C.F.R. §718.204(b)(2)(ii) as both studies were non-qualifying; 3) there was no evidence of cor pulmonale with right sided congestive heart failure under 20 C.F.R. §718.204(b)(2)(iii); and 4) Dr. Ajjarapu’s medical opinion, the only opinion to diagnose total disability, was not well-reasoned and thus could not support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *Hatfield v. Apogee Coal Co.*, BRB Nos. 20-0342 BLA and 20-0342 BLA-A, slip op. at 5 & n.10, 6-7 (Dec. 14, 2021) (unpub.). The Board further affirmed the ALJ’s finding that the evidence before her failed to establish total disability when weighed together. *Id.* at 7.

A “qualifying” pulmonary function study or arterial blood gas study yields values equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R.

Co., BRB Nos. 20-0342 BLA and 20-0342 BLA-A, slip op. at 3-7 (Dec. 14, 2021) (unpub.). However, the Board also found it was unclear whether the Department of Labor (DOL) had satisfied its obligation to provide the Miner with a complete pulmonary evaluation<sup>5</sup> given the pulmonary function study obtained by the DOL was deemed invalid; therefore, it remanded the case to the ALJ to determine whether the district director needed to provide the Miner with an additional opportunity to produce a valid pulmonary function study.<sup>6</sup> *Id.* at 7-9. The Board directed that if an additional pulmonary function study was required and obtained, then the ALJ was to consider whether entitlement could be established in light of the new evidence when the case was returned to the Office of Administrative Law Judges (OALJ). *Id.* at 9.

On February 16, 2023, the ALJ remanded the claim to the district director to obtain an additional pulmonary function study. Director's Exhibits 61, 63. However, the Miner had died on October 20, 2022; therefore, the district director was unable to comply with the ALJ's instruction and returned the claim to the OALJ. Director's Exhibits 72, 77.

In a Decision and Order on Remand, the subject of the current appeal, the ALJ again found Claimant failed to establish total disability. Because Claimant failed to establish an essential element of entitlement, the ALJ denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits. Employer and its Carrier (Employer) respond, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has not filed a response.

---

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

<sup>5</sup> The Act requires that "[e]ach miner who files a claim . . . shall upon request 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) ("[e]ach miner who files a claim for benefits under the Act must be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation"), and 725.406; *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-93 (1994). If a study is invalid based on lack of effort, the Miner is entitled to "one additional opportunity to produce a satisfactory result." 20 C.F.R. §725.406(c).

<sup>6</sup> The Board also determined the ALJ erred in failing to address several arguments raised by Employer in its post-hearing brief disputing its assignment as the responsible operator. It ordered the ALJ to address those arguments if she found Claimant entitled to benefits on remand. *Hatfield*, BRB Nos. 20-0342 BLA/A, slip op. at 11-12.

In an appeal filed 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 Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>7</sup> 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).

### **Invocation of the Section 411(c)(4) Presumption – Total Disability**

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had a totally 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 or comparable gainful work.<sup>8</sup> 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 ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *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 ALJ again found Claimant failed to establish total disability by any means. Decision and Order on Remand at 6, 10-11.

While the Miner's death precluded the district director from obtaining another pulmonary function study, the ALJ again reviewed the pulmonary function studies to determine if they could be relied upon pursuant 20 C.F.R. §718.103(c). Decision and Order on Remand at 5-6. The regulation states that “[i]n the case of a deceased miner, where no pulmonary function tests are in substantial compliance with paragraphs (a) and (b) and Appendix B, noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the tests demonstrate technically valid results obtained with good cooperation of the miner.” 20 C.F.R. §718.103(c).

---

<sup>7</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 6.

<sup>8</sup> The ALJ found the Miner's usual coal mine employment required heavy labor. Decision and Order on Remand at 7.

There were three qualifying pulmonary function studies, dated November 11, 2015, August 18, 2016, and August 17, 2018.<sup>9</sup> Decision and Order on Remand at 5-6; Director's Exhibits 21, 26; Employer's Exhibit 2. The ALJ deemed all these tests invalid given the Miner's inability to perform the maneuvers required to perform the testing, which she found did not demonstrate "technically valid results obtained with good cooperation of the miner." Decision and Order on Remand at 5-6; 20 C.F.R. §718.103(c). She found the November 11, 2015 study demonstrated inadequate effort; she rejected Dr. Gaziano's opinion and credited Dr. Ajarapu's opinion that the study should not be used to determine disability because Dr. Ajarapu gave a more detailed explanation regarding variable effort demonstrated by the flow-volume curve and the observation that the Miner had difficulty performing the maneuvers due to "chemotherapy-induced nausea."<sup>10</sup> Decision and Order on Remand at 5-6; Director's Exhibits 21, 25, 31. The ALJ also found the August 18, 2016 pulmonary function study could not be relied upon given the technician's comments that the Miner was unable to complete the test due to coughing and gagging and Dr. Ajarapu's comment stating "not an interpretation." Decision and Order on Remand at 6; Director's Exhibit 26. Finally, she found the August 17, 2018 study could not be relied upon as Dr. Rosenberg noted incomplete effort and the Miner vomited after every MVV maneuver. Decision and Order on Remand at 6; Employer's Exhibit 2.

Because the ALJ considered the relevant evidence and her findings are supported by substantial evidence, we affirm her determination that none of the qualifying studies can be relied upon to establish total disability when considering 20 C.F.R. §718.103(c). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005). Thus, we also affirm her finding that Claimant cannot establish total disability under 20 C.F.R. §718.204(b)(2)(i).

As the ALJ's findings regarding the pulmonary function studies do not alter her rejection of Dr. Ajarapu's opinion, which the Board previously affirmed, we need not again address the ALJ's findings that the medical opinion evidence does not support total disability. *Hatfield*, BRB Nos. 20-0342 BLA/A, slip op. at 7; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Remand at 7-10.

---

<sup>9</sup> There were three other pulmonary function studies dated March 19, 2014, July 29, 2015, and June 20, 2017, which were non-qualifying. *See Hatfield*, BRB Nos. 20-0342 BLA/A, slip op. at 4; Director's Exhibit 26; Employer's Exhibit 3 at 27, 39.

<sup>10</sup> The Miner was diagnosed with non-Hodgkin's lymphoma in 2005 and testified he underwent various treatments including chemotherapy at various times until December 2016. Employer's Exhibit 7 at 39-45.

Finally, the ALJ addressed the Miner's statements regarding his physical condition to determine if they could support a finding of total disability. Decision and Order on Remand at 10-11 (citing 20 C.F.R. §718.204(d)(4)) ("Statements made before death by a deceased miner about his . . . physical condition are relevant and shall be considered in making a determination as to whether the [M]iner was totally disabled at the time of [his] death."); *see also* 20 C.F.R. §718.305(b)(3),(4). The ALJ noted the Miner's hearing testimony that he experienced shortness of breath, dizziness, and nausea and had a difficult time climbing stairs. Decision and Order on Remand at 10; Hearing Transcript at 26. She also noted his explanations that he "c[ould]n't breathe," was fatigued, and could not do a lot of the things he used to do. Decision and Order on Remand at 11; Hearing Transcript at 28-29.

While the ALJ found the Miner's statements are supportive of a conclusion that he could not do his previous coal mine employment, she found they are insufficient on their own to offset the other evidence of record. Decision and Order on Remand at 11. As it is within the ALJ's discretion to weigh the evidence, we affirm her findings. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). Therefore, we also affirm the ALJ's finding that Claimant failed to establish total disability, an essential element of entitlement. Decision and Order on Remand at 11; *see Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

Accordingly, we affirm the ALJ's Decision and Order on Remand Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the denial of benefits. When this claim was previously before the Board, this panel remanded the claim to the ALJ to resolve whether the DOL provided the Miner with "an opportunity to substantiate

his or her claim by means of a complete pulmonary evaluation” as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §725.406. The relevant regulation relied upon by the Board states:

If the [ALJ] concludes that the complete pulmonary evaluation provided pursuant to §725.406, or any part thereof, fails to comply with the applicable quality standards . . . the [ALJ] shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing.

20 C.F.R. § 725.456(e). Because the ALJ determined that the pulmonary function study performed as part of the Miner’s DOL pulmonary evaluation was invalid, i.e., it did not meet “the applicable quality standards,” the Board necessarily remanded the claim for the ALJ to ensure that the Miner was properly afforded an opportunity to retake the test. *See* 20 C.F.R. §725.406(c) (requiring the district director to schedule miners for additional testing when the initial DOL testing is invalid).

On remand, the ALJ returned the claim to the district director to afford the Miner an opportunity to undergo another test to substantiate his claim. Director’s Exhibits 61, 64. But by the time the ALJ issued that decision the Miner had died, making his retaking of the test an impossibility. Director’s Exhibit 77.

The ALJ and the majority treat the Miner’s death as rendering moot any issues relating to the DOL pulmonary evaluation. By that logic, they can proceed to deny the claim despite the incompleteness of the statutorily required testing. The applicable regulation at 20 C.F.R. §725.456, however, plainly provides Claimant with another remedy. If any test performed as part of the DOL pulmonary evaluation is invalid, the ALJ “shall” choose between one of two options (but has “discretion” as to which one she selects): either “remand the claim to the district director” for additional testing “or allow the parties a reasonable time to obtain and submit such evidence.” 20 C.F.R. §725.456(e).

Because the Miner had died by the time the ALJ issued her decision, it was an abuse of discretion for her to remand the claim to the district director to conduct further testing on the now-deceased Miner. Thus, under the regulation, one option remains: the ALJ should have given Claimant the opportunity to submit additional evidence to account for the fact that the DOL did not provide the Miner a complete pulmonary evaluation to substantiate his claim. In a case such as this, where the Miner died years after initially

filing his claim (but while it was still pending), such evidence might include pulmonary function studies subsequently performed as part of the Miner's treatment, along with a supplemental opinion from the DOL examining doctor based on that evidence. The point of this example is not to dictate the evidence Claimant must submit but, rather, to demonstrate that there may in fact be a remedy available beyond having the Miner undergo additional testing.

As I explained in a similar case, *Gregory v. Eastover Mining Co.*:

In light of [our] holding that [the Miner] was denied a remedy under Section 725.456(e), the Board cannot [affirm] the denial of benefits simply because he is deceased. Now that it is apparent remand for additional testing is an impossibility, the proper course, required by the controlling regulation, is to remand the claim for the [ALJ] to determine what "additional evidence is required" to remedy the defect and the manner best suited for [the Miner's] estate to obtain that evidence.

*Gregory*, BRB Nos. 19-0250 BLA/A, slip op. at 6, 2020 WL 5366126 at \*4 (Aug. 12, 2020) (unpub.) (Buzzard, J., dissenting).

I, therefore, dissent.

GREG J. BUZZARD  
Administrative Appeals Judge