U.S. Department of Labor

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

BRB No. 19-0078 BLA

KENNETH M. WALLACE Claimant-Petitioner v. E & B COAL COMPANY, INCORPORATED, Self-Insured Through ASHLAND COAL, INCORPORATED, c/o ARCH COAL, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/23/2020 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Kenneth M. Wallace, Banner, Kentucky.

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

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2017-BLA-05823) of Administrative Law Judge Steven D. Bell rendered on a claim filed pursuant to 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 September 25, 2015.

The administrative law judge found claimant established 14.31 years of underground[2] coal mine employment and thus could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Considering whether claimant is entitled to benefits without the presumption, the administrative law judge found he failed to establish total disability at 20 C.F.R. §718.204(b)(2), a requisite element of entitlement, and denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer/carrier (employer) responds in support of the denial. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether substantial evidence supports the Decision and Order Denying Benefits below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (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 evidence, and in accordance with law.[4] 33 U.S.C. §921(b)(3), as

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[1] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on claimant's behalf 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) (Order).

[2] Claimant testified all of his coal mine employment occurred at underground coal mines. Decision and Order at 5; Hearing Transcript at 19.

[3] Under Section 411(c)(4) of the Act, claimant is presumed totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4)(2012); as implemented by 20 C.F.R. §718.305.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 15.

incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, 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. 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). Statutory presumptions may assist claimants to establish the elements when certain conditions are met.

Section 411(c)(4) Presumption - Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish that he worked for at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination based on a reasonable method and supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In determining the length of claimant's coal mine employment, the administrative law judge considered claimant's Social Security Administration (SSA) earnings records and hearing testimony. Decision and Order at 4-9; Director's Exhibits 6, 7; Hearing Transcript at 17-38. For the years from 1976 to 1977, he permissibly credited claimant with a full quarter of coal mine employment for each quarter in which he had at least $50.00 in earnings from coal mine operators as reflected in the SSA earnings statement. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *see also Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019) (administrative law judge may apply the *Tackett* method unless "the miner was not employed by a coal mining company for a full calendar quarter"). Using this method the administrative law judge credited claimant with six quarters, or one and one-half years of coal mine employment in 1976 and 1977.[5] As this finding is supported by substantial

[5] Claimant's SSA earnings records show that he worked for Sharron Coal Company in 1976 and earned $820.00 in the first quarter and $940.00 in the second quarter. Director's Exhibit 8. In 1977, he worked for W.E. Damron Cargo Mining Company and earned $91.00 in the first quarter; for Peggy-O Coal Company and earned $1,184.64 in the

evidence, it is affirmed. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); *Muncy*, 25 BLR at 1-27; Decision and Order at 5-6.

Considering the miner's post-1977 employment, for the years in which he found claimant worked a full calendar year for the same employer, the administrative law judge divided his earnings for each year by the yearly average wage for 125 days as reported in Exhibit 610[6] of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. Decision and Order at 6-9. Where claimant's wages exceeded or were "close to" the 125-day average, the administrative law judge credited claimant with a full year of employment. Using this method, he found claimant had "4 years of coal mine employment between 1979 and 1981" and additional full years of employment in 1983, 1984, 1987, 1991 and 1992, for a total of 9 years. Decision and Order at 6, 7, 8.

For the years in which the beginning and ending dates of claimant's coal mine employment could not be ascertained or his employment lasted less than a calendar year, the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[7] to determine an estimated number of days of employment. He then divided the number of days by 250 to calculate a fraction of a year.[8] Using this method, the administrative law judge credited claimant with 0.45 of a year in 1978, 0.53 of a year in 1982, 0.32 of a year in 1985, 0.11 of a year in 1986, 0.04 of a year in 1988, 0.22 of a year in 1989, 0.72 of a year in 1990, 0.07 of a year in 1991, 0.12 of a year in 1992, 0.32 of a year in 1993, 0.49 of

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second quarter; and for L&L Coal Company and earned $2,568.75 in the third quarter and $1,920.27 in the last quarter. *Id.*

[6] Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, entitled "Average Wage Base," contains the average daily earnings of employees in coal mining and yearly earnings for those who worked 125 days during a year and is referenced in 20 C.F.R. §725.101(a)(32)(iii).

[7] 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii).

[8] The administrative law judge explained that he used 250 days as a divisor because, presuming a 50-week work year and a five-day work week, a miner whose earnings equal 250 days of average daily earnings from coal mine employment will usually have worked for a full calendar year. Decision and Order at 5.

a year in 1994, 0.32 of a year in 1995, and 0.10 of a year in 1996, for a total of 3.81 years.[9] *Id*. at 6, 7, 8, and 9. Thus, he credited claimant with a total of 14.31 years of coal mine employment for the years 1976 through 1996. Pursuant to *Shepherd*, this finding cannot be affirmed.

Subsequent to the administrative law judge's Decision and Order Denying Benefits, the United States Court of Appeals for the Sixth Circuit held in *Shepherd* that a miner need not establish a full calendar year relationship under the regulatory criteria at 20 C.F.R. §725.101(a)(32)(i)-(iii). Rather, to be credited with a full year of employment, a miner need only establish 125 working days during a calendar year, regardless of the duration of his actual employment relationship. *Shepherd*, 915 F.3d at 401-402. Thus, if the miner had greater than 125 working days during a calendar year, he is entitled to credit for a full year of coal mine employment; if he had less than 125 working days, he is entitled to a fraction of the year "based on the ratio of the actual number of days worked to 125." *Id.* at 402.

By making a threshold determination of whether the miner had a full calendar year of employment in each year and using a 250-day work year to calculate fractional years, the administrative law judge undercounted claimant's years of coal mine employment. As the record contains evidence which could establish greater than fifteen years of coal mine employment, we must vacate the administrative law judge's finding that claimant established only 14.31 years of coal mine employment and remand the case for him to reconsider the issue.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine 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 cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative

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[9] Having credited claimant with two full years of employment in 1991 and 1992 with Nats Creek Coal Mining Company, the administrative law judge did not explain why he credited claimant with additional fractional years in 1991 with Courtney Cory Collieries and in 1992 with P B & C Energy, Inc. and J & K Mining, Inc. Decision and Order at 8. Further, although he noted that claimant earned $600.00 from Nats Creek Mining Company in 1993, it is unclear whether he credited claimant with any employment based on these earnings. *Id*. He also did not explain his finding that claimant had four years of employment between 1979 and 1981, a period of three calendar years. *Id*. at 6.

law judge must weigh all relevant evidence supporting a finding of 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). The administrative law judge erred in his consideration of the pulmonary function studies and medical opinions.[10]

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered five pulmonary function studies.[11] The August 21, 2015 study produced qualifying[12] pre-bronchodilator values and included no post-bronchodilator results. Director's Exhibit 19. The November 2, 2015 study produced qualifying values before and after bronchodilation. Director's Exhibit 13. The July 19, 2016 and April 27, 2017 studies study produced non-qualifying values before and after bronchodilation. Employer's Exhibits 4, 7. The June 1, 2017 study produced qualifying pre-bronchodilator values and included no post-bronchodilator results. Claimant's Exhibit 3.

The administrative law judge found all studies were valid except the qualifying November 2, 2015 and June 1, 2017 studies. In rejecting the November 2, 2015 study, he credited the opinion of Dr. Vuskovich that the study is invalid over the contrary opinion of Dr. Ajjarapu. Decision and Order at 21. He found the validity of the qualifying June 1, 2017 study was "call[ed] . . . into account" because it had "drastically" lower values than

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[10] The administrative law judge correctly found none of the three arterial blood gas studies, dated November 2, 2015, July 19, 2016, and April 27, 2017, established total disability and that there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 13, 21, 22; Director's Exhibit 13; Employer's Exhibits 4, 7. We therefore affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii).

[11] The administrative law judge resolved the height discrepancy recorded on the pulmonary function studies, finding that claimant's average reported height was 67 inches and stated that he would use the closest table height of 66.9 inches for purposes of assessing the pulmonary function studies for total disability. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 12 n.116.

[12] 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).

the non-qualifying April 27, 2017 study[13] and was conducted in the same office as the invalid November 2, 2015 study. Decision and Order at 21-22. Having rejected two of the three qualifying studies, the administrative law judge concluded the preponderance of the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

The administrative law judge's determination that the November 2, 2015 study is invalid cannot be affirmed. He noted that Dr. Vuskovich, Board-certified in Occupational Medicine, concluded the test was invalid because: claimant did not show sufficient respiratory rate and tidal volume to generate a valid MVV; he did not put forth the effort required for a valid FVC and FEV1; his initial efforts were not maximum and thus artificially lowered his FEV1; and he prematurely terminated his expiratory efforts and thus artificially lowered his FVC.[14] Decision and Order at 12 n.117; Director's Exhibits 21 at 4, 30 at 8; Employer's Exhibit 1 at 4. The administrative law judge also noted Dr. Ajjarapu, who conducted the November 2, 2015 study, addressed Dr. Vuskovich's criticisms in a supplemental report.[15] Dr. Ajjarapu stated that "Dr. Vuskovich always uses Knudson's [1976 prediction equations] and recalculates and reports that the miner did not put forth [] valid FVC and FEV1 results." Director's Exhibit 62. She further noted the 1976 Knudson's equations were "re-analyzed" in 1983 to conform to the American Thoracic Society recommendations, which "changed predicted values considerably, particularly for forced expiratory flow rates." *Id.* She added that "analyzing data using a different model almost inevitably would give a different answer" and reiterated her opinion that based on the objective testing, claimant is totally disabled. *Id.*

The administrative law judge found Dr. Ajjarapu's "criticism" of Dr. Vuskovich's validation report "went to the way these values were used in the determination of disability and not to his finding that the [study] was invalid for lack of effort." Decision and Order

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[13] The administrative law judge noted that the non-qualifying April 27, 2017 study produced pre-bronchodilator FEV1 values that "more than double" and post-bronchodilator FEV1 values that "nearly double" the FEV1 values of the qualifying June 1, 2017 study. Decision and Order at 21. He further noted that "the differences between the FVC and MVV levels were nearly as great, despite the fact that the test was taken only a month later." *Id.*

[14] Dr. Vuskovich found that the vents were not acceptable because claimant "did not put forth the effort required to generate valid spirometry results." Director's Exhibit 21.

[15] The administrative law judge addressed Dr. Ajjarapu's February 22, 2017 supplemental report in conjunction with his analysis of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). *See* Decision and Order at 21-22; Director's Exhibit 62.

at 22. Thus he credited Dr. Vuskovich's opinion that the November 2, 2015 study is invalid.

Given Dr. Ajjarapu's statement that Dr. Vuskovich used an outdated version of the Knudson's equations "to recalculate [] and report [] that the miner did not put forth [] valid FVC and FEV1 results" on the November 2, 2015 study, the administrative law judge did not explain his finding that Dr. Ajjarapu did not address Dr. Vuskovich's invalidation of the study. Moreover, the administrative law judge did not consider Dr. Gaziano's opinion that the November 2, 2015 study was valid, as the "[v]ents are acceptable." Director's Exhibit 14. Because the administrative law judge did not explain his determination in light of the evidence and failed to address relevant evidence regarding the validity of the qualifying November 2, 2015 pulmonary function study, his analysis does not comport with the requirements of the Administrative Procedure Act (APA),[16] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

The administrative law judge also failed to explain his conclusion that the qualifying June 1, 2017 pulmonary study was called into question because the non-qualifying April 27, 2017 study had significantly higher values and was conducted by the same office that conducted the invalid November 2, 2015 study. Decision and Order at 21-22. Contrary to the administrative law judge's assessment, the fact that one study is valid and non-qualifying does not mean that another study that produced lower values is inherently unreliable. *See Greer v. Director, Office of Workers' Compensation Programs*, 940 F.2d 88, 90 (4th Cir. 1991) (rejecting argument that "higher test results are more reliable than lower ones" because "pneumoconiosis is a chronic condition, and, on any given day, it is possible to do better, and indeed to exert more effort, than one's typical condition would permit"); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 ("We have criticized the practice of routinely ascribing greatest weight to the highest results among valid studies."); *see also* 20 C.F.R. §718.204(b)(2) ("In the absence of contrary, probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993). Nor did the administrative law judge explain why the fact that the same office conducted an earlier study deemed invalid calls into question the validity of a different study conducted a year and a half later. The administrative law judge cited no medical evidence that the June 1, 2017 study is invalid or lacks probative value and thus engaged in medical speculation. *See Dolzanie v. Director, OWCP*, 6 BLR 1-865, 1-867 (1984). We

[16] 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).

therefore vacate his finding that the pulmonary function study evidence did not establish total disability.[17] 20 C.F.R. §718.204(b)(2)(i); *see Wojtowicz*, 12 BLR at 1-165.

Pursuant to 20 C.F.R §718.204(b)(2)(iv), the administrative law judge considered Dr. Ajjarapu's[18] opinion that claimant is totally disabled and the contrary opinions of Drs. Rosenberg[19] and Jarboe.[20] Decision and Order at 22-23; Director's Exhibits 13, 62; Employer's Exhibits 4, 6, 7. He found the opinions of Drs. Rosenberg and Jarboe well-reasoned and supported by the non-qualifying pulmonary function and arterial blood gas studies from 2016 and 2017. He gave less weight to Dr. Ajjarapu's opinion because she relied on the qualifying November 2, 2015 pulmonary function study she conducted without adequately addressing Dr. Vuskovich's opinion that the study was invalid and did not consider Dr. Rosenberg's non-qualifying July 19, 2016 pulmonary function study.

Because the administrative law judge based his determination to discredit Dr. Ajjarapu's opinion in part on his evaluation of the pulmonary function studies, which we have vacated, we must also vacate his findings that claimant did not establish total disability based on the medical opinion evidence or on the evidence overall. 20 C.F.R. §718.204(b)(2), (iv); Decision and Order at 23. We further note that while the administrative law judge accorded less weight to Dr. Ajjarapu's disability opinion because she did not consider the July 19, 2016 pulmonary function study that yielded non-

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[17] We also cannot discern the significance, if any, the administrative law judge ascribed to his statement indicating that the qualifying "August 21, 2015 [pulmonary function study] was taken a year before the next valid [pulmonary function study], which was non-qualifying." Decision and Order at 22.

[18] After she performed a complete pulmonary evaluation of claimant on November 5, 2015, Dr. Ajjarapu opined that he is "totally and completely disabled" from a respiratory standpoint. Director's Exhibit 13. Dr. Ajjarapu provided a supplemental report dated February 22, 2017, and testimony during her January 3, 2018 deposition in which she reiterated her initial opinion that claimant is totally disabled based on the objective tests and does not have the pulmonary capacity to perform his usual coal mine work. Director's Exhibit 62; Employer's Exhibit 6.

[19] In a report dated August 9, 2016, Dr. Rosenberg opined that "from a pulmonary perspective, [claimant] is not disabled from performing his previous coal mine job or other similarly arduous types of labor." Employer's Exhibit 4.

[20] In a report dated February 24, 2018, Dr. Jarboe opined that claimant does not have a totally disabling pulmonary impairment. Employer's Exhibit 7.

qualifying results, he did not impose this same standard on Drs. Rosenberg and Jarboe.[21] Decision and Order at 22. Consequently, based on the administrative law judge's errors and disparate treatment of the medical opinions, we vacate his finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment. *See Wojtowicz,* 12 BLR at 1-165. Because we have vacated the administrative law judge's findings that claimant failed to establish fifteen years of coal mine employment and a totally disabling respiratory impairment, we further vacate his finding that claimant failed to invoke the Section 411(c)(4) presumption.

Remand Instructions

The administrative law judge must address whether claimant established at least fifteen years of underground or substantially similar surface coal mine employment and total disability. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b). If claimant establishes both elements, he invokes the Section 411(c)(4) presumption.[22] 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 claimant is not totally disabled, he may reinstate the denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent,* 11 BLR at 1-27. If claimant establishes total disability but not fifteen years of qualifying coal mine employment, the administrative law judge must determine whether claimant has established the remaining elements of entitlement. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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.

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[21] Dr. Rosenberg did not consider the qualifying pulmonary function studies dated August 21, 2015, and June 1, 2017. Dr. Jarboe did not consider the June 1, 2017 study. He stated he reviewed an August 21, 2015 study and noted it revealed a "restriction with mild air obstruction," but did not otherwise provide an assessment of the test in concluding claimant is not disabled because his "FVC and FEV1 exceed the Federal limits for disability." Employer's Exhibit 7.

[22] Because there is no evidence of complicated pneumoconiosis in the record, claimant is unable to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. 20 C.F.R. §§718.202(a)(3), 718.304.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge