

BRB Nos. 13-0385 BLA
and 13-0385 BLA-A

CARL WILLIAMSON)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 ALLEY BRANCH COAL COMPANY) DATE ISSUED: 04/18/2014
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners)
)
 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 Drew A. Swank,
Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC),
Morgantown, West Virginia, for employer/carrier.

Jonathan P. Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James,
Associate Solicitor; Michael J. Rutledge, Counsel for Administrative
Litigation and Legal Advice), Washington, D.C., for the Director, Office of
Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and

HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer/carrier (employer) cross-appeals, the Decision and Order Denying Benefits (2012-BLA-5553) of Administrative Law Judge Drew A. Swank rendered on a miner's claim filed on October 8, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant worked for more than twenty-one years in underground coal mine employment and he found that employer was the properly designated responsible operator. Addressing the merits, the administrative law judge found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). However, the administrative law judge found that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the blood gas study and medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii) and (iv). In response, employer urges affirmance of the administrative law judge's denial of benefits, arguing that the administrative law judge's findings are supported by substantial evidence.

In its cross-appeal, employer challenges the administrative law judge's determination that it is the putative responsible operator liable for the payment of any benefits awarded. Claimant has not responded to employer's cross-appeal.

The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, urging the Board to vacate the administrative law judge's Decision and Order denying benefits. With respect to claimant's appeal of the denial of benefits, the Director states that the case should be remanded to the district director in order for the Director to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Additionally, with respect to employer's cross-appeal, the Director now concedes that employer should be dismissed as the responsible operator, and that the Black Lung Disability Trust Fund (Trust Fund) is liable for the payment of any benefits awarded.¹

¹ We affirm, as unchallenged on appeal, the administrative law judge's decision to credit claimant with at least twenty-one years in underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.² 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

At Section 718.204(b)(2)(iv), the administrative law judge considered the medical reports of Drs. Rasmussen, Fino and Rosenberg, finding that none of the physicians concluded that claimant has a totally disabling pulmonary impairment. Decision and Order at 15. Specifically, the administrative law judge found that Dr. Rasmussen, who examined claimant on behalf of the Department of Labor pursuant to Section 413(b), 30 U.S.C. 923(b), did not offer an opinion as to whether claimant is capable of performing his last coal mine employment, and that Drs. Fino and Rosenberg opined that claimant is capable, from a respiratory standpoint, of performing his usual coal mine employment. *Id.*; Director's Exhibits 12, 13, 48; Employer's Exhibit 1.

The Director argues that he failed to meet his obligation to provide a complete and credible pulmonary evaluation because Dr. Rasmussen did not adequately address claimant's degree of respiratory disability. Director's Motion to Remand at 2. The Director asserts that, as the administrative law judge properly noted, Dr. Rasmussen did not address the issue of whether claimant is totally disabled from a respiratory or pulmonary standpoint, and his opinion is therefore insufficient to enable the administrative law judge to determine whether claimant is totally disabled. *Id.* The Director explains that the omission by Dr. Rasmussen "was not harmless, because [claimant's] claim foundered on that issue." *Id.* The Director therefore requests that the Board vacate the administrative law judge's denial of benefits, and "the case should be remanded to the district director so that Dr. Rasmussen may prepare a supplemental opinion addressing disability and cure any defect in his opinion." *Id.*

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant was employed in the coal mining industry in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

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. In view of the Director’s concession that Dr. Rasmussen’s report is incomplete and, therefore, fails to meet the Director’s statutory obligation, we vacate the administrative law judge’s denial of benefits and remand the case to the district director to provide claimant with a complete pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.³ 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199, 2-221 (6th Cir. 2009); *R.G.B. [Blackburn] v. Southern Ohio Coal Co.*, 24 BLR 1-129, 1-147-48 (2009) (en banc); *Hodges v. BethEnergy Mines Inc.*, 18 BLR 1-84, 1-93 (1994); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

After the district director has provided claimant with a complete pulmonary evaluation, the case shall be returned to the Office of Administrative Law Judges for adjudication on the merits of entitlement. Because this claim was filed after January 1, 2005, and claimant was credited with more than fifteen years of underground coal mine employment, the administrative law judge must consider whether the evidence establishes that claimant is entitled to the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).⁴ If the administrative law judge finds that claimant has established a total respiratory disability pursuant to Section 718.204(b) and is, therefore, entitled to the presumption that he is totally disabled due to pneumoconiosis at amended Section 411(c)(4), he must then determine whether employer has submitted affirmance evidence sufficient to rebut the presumption. 30 U.S.C. §921(c)(4)(2012); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Moreover, in light of our decision to vacate the administrative law judge’s denial of benefits, we will address employer’s cross-appeal, challenging its designation as the

³ In light of our decision to vacate the administrative law judge’s denial of benefits, we decline to address claimant’s further allegations of error, as the evidentiary record may be altered on remand.

⁴ Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. In pertinent part, amended Section 411(c)(4), 30 U.S.C. §921(c)(4)(2012), provides a rebuttable presumption of total disability due to pneumoconiosis if claimant establishes at least fifteen years in underground, or substantially similar, coal mine employment and a totally disabling respiratory impairment.

putative responsible operator. Employer specifically argues that the administrative law judge erred in finding that claimant worked for employer for a full calendar year pursuant to 20 C.F.R. §§725.101(a)(32) and 725.494(c). Additionally, employer contends that the administrative law judge failed to consider whether Marrowbone Development Company, a subsequent employer, should have been determined to be the responsible operator, and, therefore, liable for the payment of benefits, if awarded. The Director now concedes that employer should be dismissed as the responsible operator. 20 C.F.R. §725.465(b); Director's Motion to Remand at 2. The Director further states the Trust Fund accepts liability for any benefits payable in this case. *Id.* Thus, we grant the Director's motion.

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 district director for a complete pulmonary evaluation to be provided to claimant and for reconsideration of his claim in light of all the evidence. Moreover, employer is dismissed as the responsible operator and liability for any benefits awarded is transferred to the Trust Fund.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge