U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0273 BLA

GARRY L. FARMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LBJ ENERGY INCORPORATED	)	DATE ISSUED: 04/18/2017
	)	
and	)	
	)	
CONNECTICUT INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Remand to the District Director to Complete the Pulmonary Evaluation of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe, Brad A. Austin and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia for claimant.

Matthew Moynihan (Penn, Stuart & Eskridge), Bristol, Virginia/Tennessee for employer/carrier.

Jeffrey S. Goldberg (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

BOGGS, Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order of Remand to the District Director to Complete the Pulmonary Evaluation (2013-BLA-05648), rendered by Administrative Law Judge Larry S. Merck on a subsequent miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge determined that the report of Dr. Gallai, who provided claimant with the Department of Labor (DOL)-sponsored examination, was insufficient to constitute a complete pulmonary evaluation as required by 20 C.F.R. §725.406. Specifically, the administrative law judge found that Dr. Gallai did not adequately assess whether claimant is totally disabled from a respiratory standpoint. The administrative law judge also noted that because Dr. Gallai's pulmonary evaluation is several years old, it does not a reflect claimant's current condition. Therefore, the administrative law judge remanded the case to the district director so that the DOL could provide claimant with a new pulmonary evaluation.

In response, employer filed the present appeal, arguing that the administrative law judge erred in finding that Dr. Gallai's examination of claimant was insufficient to constitute a complete pulmonary evaluation. In addition, employer contends that the administrative law judge abused his discretion in ordering the Director, Office of Workers' Compensation Programs (the Director), to provide a new pulmonary evaluation rather than seeking clarification from Dr. Gallai on the issue of total disability. Claimant responds, urging the Board to affirm the administrative law judge's Decision and Order remanding the case to the district director for a complete pulmonary evaluation. The Director responds in support of employer's position, asserting that Dr. Gallai's report of his examination of claimant constituted a complete pulmonary evaluation.

[1] Claimant filed his claim for benefits on January 26, 2011. Director's Exhibit 2. The district director issued a proposed decision and order denying benefits on December 13, 2011. Director's Exhibit 30. Claimant filed a request for modification on October 31, 2012, which the district director denied on February 13, 2013. Director's Exhibits 33, 39. Claimant timely requested a hearing and the case was transferred to the Office of Administrative Law Judges. Director's Exhibits 41, 44. A hearing was scheduled for March 24, 2016.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

Employer's appeal is interlocutory in nature. The Board follows the well-established rule of federal practice forbidding piecemeal appeals on interlocutory matters. *See Cochran v. Westmoreland Coal Co.*, 21 BLR 1-89, 1-92 (1998). An exception to the final judgment rule, known as the "collateral order exception," applies only when the order appealed satisfies three conditions. The order must: (1) conclusively determine the disputed question; (2) resolve an important issue that is completely separate from the merits of the case; and (3) be effectively unreviewable on appeal from a final judgment. *See Gulfstream Aerospace Corp. v. Mayacamus Corp.*, 485 U.S. 271, 276 (1988); *Cochran*, 21 BLR at 1-92. In addition, the Board may determine that review is "necessary to properly direct the course of the adjudicatory process[.]" *Tignor v. Newport News Shipbuilding and Dry Dock Co.*, 29 BRBS 135, 137 (1995).

Based on the factual circumstances of this case, we accept employer's interlocutory appeal for the purpose of directing adjudication of the present claim. The claim was forwarded to the Office of Administrative Law Judges more than three years ago and is currently in denial status, while the present appeal has been pending before the Board for several months. Allowing the administrative law judge's remand order to take effect at this point would only serve to further delay the adjudication of this claim. The possibility that claimant can potentially establish entitlement by establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304, independent of whether he received a complete pulmonary evaluation, provides another basis for addressing employer's interlocutory appeal. *See R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, 24 BLR 1-129, 1-137 (2009) (en banc) (accepting interlocutory appeals from administrative law judge orders remanding for a complete pulmonary evaluation).

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. The implementing regulation at 20 C.F.R. §725.406(a) provides that "[a]

[2] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibits 3, 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a); *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*], 24 BLR at 1-137. Further, the regulation at 20 C.F.R. §725.456(e) mandates, "[i]f the administrative law judge concludes that the complete pulmonary evaluation provided pursuant to §725.406 . . . fails to address the relevant conditions of entitlement in a manner which permits resolution of the claim, the administrative law judge 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[.]" 20 C.F.R. §725.456(e) (internal citation omitted).

The DOL meets its statutory obligation to provide a complete pulmonary evaluation when the examining physician performs the medical tests required by 20 C.F.R. §725.406(a), and specifically links each conclusion in his or her medical opinion to those medical tests. *See Greene*, 575 F.3d at 641-42, 24 BLR at 2-221; *Blackburn*, 24 BLR at 1-137.

In this case, Dr. Gallai examined claimant at the request of the DOL on April 22, 2011. Director's Exhibit 10. Dr. Gallai conducted a chest x-ray, pulmonary function study, blood gas study, and echocardiogram (EKG). *Id*. The chest x-ray that Dr. Gallai considered was interpreted by Dr. DePonte, a Board-certified radiologist and B reader, as positive for simple pneumoconiosis and as containing "evidence of progressive massive fibrosis, with large [B] opacities." *Id*. According to Dr. Gallai, the pulmonary function study showed "minimal obstructive lung disease" and the blood gas study indicated mild hypoxia. *Id*. The EKG was normal "with occasional premature complex, [and] a borderline AV conduction delay." *Id*.

Dr. Gallai was asked to assess the "degree of severity of the [chronic respiratory or pulmonary disease], particularly in terms of the extent to which the impairment prevents the [claimant] from performing his . . . last coal mine job of one year's duration." *Id*. Dr. Gallai responded:

> Although the [claimant's] pulmonary function is only minimally abnormal and he has currently no significant exercise intolerance, to a reasonable degree of medical certainty, further exposure to coal dust for an individual with progressive pulmonary fibrosis, would accelerate the already progressive process. Furthermore, the current treatment for progressive massive fibrosis is to avoid coal dust. Thus, [claimant] cannot return to his

> former occupation in the coal mining industry as it will accelerate the already clinical progressive massive fibrosis.[3]

Id.

The administrative law judge determined that Dr. Gallai's opinion was insufficient to constitute a complete pulmonary evaluation because he was "unable to ascertain from Dr. Gallai's medical report whether [c]laimant is totally disabled from a respiratory standpoint as that term is defined in the regulations." Decision and Order at 3. The administrative law judge also determined that "the DOL-sponsored pulmonary evaluation took place almost five years ago. *Id*. at 4. Thus, this stale evidence no longer provides an accurate reflection of [c]laimant's current condition and will be even further out of date after remand." *Id*. Therefore, the administrative law judge specified that the case should be remanded to the district director for a new, complete pulmonary evaluation. *Id*.

Employer and the Director argue that the administrative law judge erred in finding that Dr. Gallai's examination did not constitute a complete pulmonary evaluation, pursuant to 20 C.F.R. §725.406. Employer further contends that even if the administrative law judge did not err in remanding the case to the district director, it was unnecessary to obtain a new evaluation.

In reviewing the administrative law judge's finding on the issue of whether claimant received a complete pulmonary evaluation, the overall standard the Board applies is whether the administrative law judge exceeded his discretion in finding that Dr. Gallai did not address a requisite element of entitlement,[4] in this case, total respiratory or pulmonary disability. *See* 20 C.F.R. §725.456(e); *Greene*, 575 F.3d at 641-42, 24 BLR at 2-221. We agree with employer and the Director that the administrative law judge's finding was neither rational, nor supported by substantial evidence, and therefore, was not within his discretion.

[3] The administrative law judge noted that although Dr. Gallai completed Form CM-988, Medical History and Examination for Coal Mine Workers' Pneumoconiosis, some of it was illegible. Decision and Order at 3. Therefore, the administrative law judge relied on the section labeled "Impairment" in the typed version of Dr. Gallai's evaluation. Director's Exhibit 10.

[4] The first prong of the standard is whether Dr. Gallai obtained the objective evidence outlined in 20 C.F.R §725.406(a). *See* 20 C.F.R. §725.456(e). The parties do not dispute that Dr. Gallai's examination of claimant satisfied this requirement.

As summarized *supra*, Dr. Gallai stated: "Although [claimant's] pulmonary function is only minimally abnormal and he has currently no significant exercise intolerance, to a reasonable degree of medical certainty, further exposure to coal dust . . . would accelerate the already progressive process" of claimant's pulmonary fibrosis. Director's Exhibit 10. Dr. Gallai then concluded, claimant "cannot return to his former occupation in the coal mining industry as it will accelerate the already clinical progressive massive fibrosis." *Id*.

As the Director observes, Dr. Gallai's conclusion that claimant has "no significant exercise intolerance" indicates that Dr. Gallai believed that claimant could perform his usual coal mine work from a pulmonary standpoint. Director's Letter Brief at 3, *citing Wetzel v. Director, OWCP*, 8 BLR 1-139, 142 (1985). This inference is made virtually unavoidable by the fact that Dr. Gallai immediately followed his description of what claimant's objective testing showed with a specific statement that claimant should not return to his coal mine work, not because he incapable of performing it, but because it would worsen his progressive massive fibrosis. Director's Exhibit 10. As the Director maintains, "[i]n essence, Dr. Gallai found that [claimant] was physically capable of doing his coal mine work but advised against it to avoid further dust exposure." Director's Letter Brief at 3. Well-established precedent holds that a prohibition on further dust exposure is not a diagnosis of a totally disabling respiratory or pulmonary impairment. *See Migliorini v. Director, OWCP*, 898 F.2d 1292, 1296, 13 BLR 2-418, 2-425 (7th Cir. 1990); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Consequently, Dr. Gallai's report provides the administrative law judge with sufficient information to make a determination as to whether claimant is totally disabled as defined in 20 C.F.R. §718.204(b). That is all that is required under the Act. *See Greene*, 575 F.3d at 641-42, 24 BLR at 2-221 (A physician's failure to provide a detailed explanation of his opinion on a requisite element of entitlement does not render a pulmonary evaluation incomplete); *Lane v. Union Carbide Corp*., 105 F.3d 166, 172-73, 21 BLR 2-34, 2-45-46 (4th Cir. 1997) (When a physician indicates that the miner suffered no impairment, it is unnecessary to compare the exertional requirements of the miner's job duties to the finding of no impairment); *Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534, 7 BLR 2-209, 2-210 (11th Cir. 1985) (A medical opinion need not be phrased in terms of "total disability" for it to be relevant to the determination of the issue of total disability.). Therefore, we reverse the administrative law judge's finding that Dr. Gallai's report of his examination of claimant failed to satisfy the Director's obligation to provide claimant with a complete pulmonary

evaluation pursuant to 20 C.F.R. §725.406(a).[5] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, we reverse the administrative law judge's Decision and Order of Remand to the District Director to Complete the Pulmonary Evaluation and remand the case to the administrative law judge for adjudication on the merits.

SO ORDERED.

JUDITH S. BOGGS,
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

[5] Upon determining that Dr. Gallai's opinion was incomplete, the administrative law judge found that the appropriate remedy was a new pulmonary evaluation due to the fact that Dr. Gallai's opinion was "stale." Decision and Order at 4. Based on our holding that Dr. Gallai's opinion is complete, we need not address this aspect of the administrative law judge's remand order.

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues in accepting employer's interlocutory appeal, but I respectfully dissent from their decision to reverse the administrative law judge's order remanding this case to the district director to correct a deficiency in Dr. Gallai's Department of Labor-sponsored pulmonary evaluation of claimant.

The question presented in this case is whether the Department provided claimant with a complete pulmonary evaluation as required under Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. §923(b).[6] The purpose of such evaluation is to "develop the medical evidence necessary to determine each claimant's entitlement to benefits." 20 C.F.R. §718.101(a). Consistent with that purpose, a complete pulmonary evaluation must include "a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a). Importantly, the complete pulmonary evaluation must also "address the relevant conditions of entitlement . . . in a manner which permits resolution of the claim." 20 C.F.R. §725.456(e).

The determination of whether a Department-sponsored evaluation "fails to address the relevant conditions of entitlement . . . in a manner which permits resolution of the claim" is committed to the discretion of the administrative law judge. 20 C.F.R. §725.456(e). If such pertinent information is lacking, the administrative law judge "shall, *in his or her discretion*, remand the claim to the district director with instructions to develop only such additional evidence as is required[.]"[7] *Id*. (emphasis added). Based on the record before the Board, and in consideration of the parties' arguments, I would hold that the administrative law judge did not exceed his authority in determining that Dr. Gallai's report did not constitute a "complete pulmonary evaluation" pursuant to 20 C.F.R. §§725.406 and 725.456(e).

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[6] Pursuant to Section 413(b) of the Black Lung Benefits Act, "Each miner who files a claim for benefits . . . 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).

[7] A similar requirement applies to the district director:

> If any medical examination or test conducted [as part of claimant's complete pulmonary evaluation] . . . does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director *must* schedule the miner for further examination and testing.

20 C.F.R §725.406(c) (emphasis added).

Dr. Gallai examined claimant on behalf of the Department on April 22, 2011 and submitted a report of his examination.[8] Director's Exhibit 10. As the administrative law judge noted, Dr. Gallai indicated that claimant had complaints of difficulty breathing going up two flights of stairs; his x-ray was positive for clinical pneumoconiosis "with evidence of progressive massive fibrosis;" his pulmonary function test revealed "minimal obstructive lung disease;" and his arterial blood gas study revealed "mild hypoxia." Decision and Order at 3, *quoting* Director's Exhibit 10. On the issue of "Impairment," Dr. Gallai stated:

> Although the [claimant's] pulmonary function is only minimally abnormal and he has currently no significant exercise intolerance, to a reasonable degree of medical certainty, further exposure to coal dust for an individual with progressive pulmonary fibrosis, would accelerate the already progressive process. Furthermore, the current treatment for progressive massive fibrosis is to avoid coal dust. Thus, [claimant] cannot return to his former occupation in the coal mining industry as it will accelerate the already clinical progressive massive fibrosis.

Director's Exhibit 10.

Based on Dr. Gallai's opinion, the administrative law judge rationally concluded that he is unable to ascertain whether claimant is totally disabled from a respiratory standpoint. Decision and Order at 3, *citing* 20 C.F.R. §718.204(b)(1)(i).[9] Although Dr. Gallai noted that claimant last worked for employer as a continuous miner operator, a bolter, and a scooper, he did not identify the exertional requirements of claimant's usual coal mine work, or otherwise offer an opinion as to whether claimant has the respiratory capacity to perform such work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000) (vacating a finding that a miner was not totally disabled where the administrative law judge "improperly did not consider whether [the

[8] Dr. Gallai also completed, by hand, Form CM-988, Medical History and Examination for Coal Mine Workers' Pneumoconiosis. Director's Exhibit 10. The administrative law judge declined to rely on the handwritten form because some of it was illegible; he instead relied upon Dr. Gallai's "typed version of his evaluation." Decision and Order at 3.

[9] Pursuant to Section 718.204(b), "a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment, which, standing alone, prevents or prevented the miner . . . [f]rom performing his or her usual coal mine work[.]" 20 C.F.R. §718.204(b)(1)(i).

physicians] had any knowledge of the exertional requirements of [the miner's] work"); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997). Dr. Gallai's statement that claimant has "mild hypoxia" and "minimally abnormal" pulmonary function with "currently no significant exercise intolerance," without more, does not constitute an opinion that claimant is, or is not, totally disabled. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-124 (even a mild respiratory impairment can be totally disabling when compared to the exertional requirements of a miner's last coal mine employment); *Lane*, 105 F.3d at 172, 21 BLR at 2-45-46. Nor does his statement that claimant should avoid further dust exposure to prevent the acceleration of his "already clinical progressive massive fibrosis" constitute an opinion addressing total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989) (a recommendation against further dust exposure does not constitute an opinion regarding a miner's ability to perform coal mine work). Consequently, I would hold that the administrative law judge acted within his discretion in finding that Dr. Gallai did not address a relevant condition of entitlement – total disability – in a manner that permits resolution of the claim.[10] 20 C.F.R. §725.456(e). Thus, I would affirm the administrative law judge's finding that Dr. Gallai's report does not constitute a complete pulmonary evaluation pursuant to 20 C.F.R. §§725.406 and 725.456(e).

[10] In so holding, I decline to adopt the interpretation of Dr. Gallai's opinion proposed by the Director, Office of Workers' Compensation Programs (the Director). The Director argues that Dr. Gallai's statement that claimant has "'no significant exercise intolerance' leads to the clear inference that [claimant] could perform his usual coal mine work from a pulmonary standpoint." Director's Letter Brief at 3. The Director asserts that this "is an especially reasonable reading" in light of Dr. Gallai's advice that claimant should avoid further exposure to coal dust because it could worsen his complicated pneumoconiosis. *Id.* As an initial matter, the adoption of such an interpretation by this Board would exceed the scope of our review authority and infringe upon the administrative law judge's duty to evaluate the evidence, draw inferences, and assess its probative value. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012). Moreover, while it is true that a physician's opinion need not be phrased in terms of "total disability" specifically, Dr. Gallai's opinion on this issue is not so "apparent from the record" that it renders the administrative law judge's finding irrational or unsupported by the evidence. *Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534, 7 BLR 2-209, 2-210 (11th Cir. 1985) (affirming a finding of total disability where the physician "did no analysis of job content" but "limited claimant's daily physical activity to one block of walking or climbing a few stairs").

Citing *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009), employer asserts that the administrative law judge "was bound to accept the report of Dr. Gallai as a complete pulmonary evaluation unless a finding was made that conclusions in the report were not linked to the required testing." Employer's Brief at 6. Contrary to employer's assertion, the court in *Greene* examined the *sufficiency* of a physician's opinion on the issue of total disability, not whether the physician failed to *offer* an opinion on the issue.[11] *Greene*, 575 F.3d at 642, 24 BLR at 2-221. Unlike the medical opinion at issue in *Greene*, wherein Dr. Baker opined that the miner does not "have the respiratory capacity to perform the work of a coal miner or to perform comparable work" based on the miner's FEV1 value of 60 and PO2 value of 69, in the present claim Dr. Gallai did not render an opinion as to whether claimant is totally disabled. Federal Respondent's Supplemental Appendix at 14, *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009) (No. 08-4094); Director's Exhibit 10. Thus, the holding in *Greene* that Dr. Baker adequately "linked" his conclusion of total disability to the results of the miner's objective testing does not support employer's argument that Dr. Gallai's report similarly constitutes a complete pulmonary evaluation.[12] *Greene*, 575 F.3d at 642, 24 BLR at 2-221.

Nevertheless, I agree with employer that, with respect to the appropriate remedy, the administrative law judge exceeded his discretion in ordering that claimant receive a new complete pulmonary evaluation because Dr. Gallai's testing "no longer provides an accurate reflection of [c]laimant's current condition." Decision and Order at 4. Pursuant to 20 C.F.R. §725.456(e), an administrative law judge's authority to remand a case to the district director for further evidentiary development is limited to obtaining "only such additional evidence as is required." 20 C.F.R. §725.456(e). The administrative law judge specified that the only portion of Dr. Gallai's evaluation that was inadequate was his statement regarding whether claimant is totally disabled. Decision and Order at 3. Accordingly, I would modify the administrative law judge's remand order to permit clarification from Dr. Gallai on the issue of total disability, rather than to provide claimant with a new complete pulmonary evaluation. *See, e.g., McClanahan v. Brem*

[11] The court specifically noted that the pulmonary evaluation at issue in *Greene*, conducted by Dr. Baker, "address[ed] each of the elements a claimant must prove to obtain benefits." *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 640, 24 BLR 2-199, 2-218 (6th Cir. 2009).

[12] Furthermore, the court in *Greene* in no way disposed of the requirement that a Department-sponsored pulmonary evaluation must "address[] all of the essential elements of entitlement" in order for the Department to "fulfill[] its obligations under the Act and its implementing regulations." *Greene*, 575 F.3d at 640, 24 BLR at 2-218 (citation omitted).

Coal Company, LLC, 25 BLR 1-165, 1-169-70 (2016) (the purported need for more recent evidence of a miner's medical condition does not constitute "good cause" for requiring claimant to undergo a third pulmonary evaluation at employer's request).

For the foregoing reasons, I concur in my colleagues' decision to accept employer's interlocutory appeal, but would affirm, as within his discretion, the administrative law judge's finding that Dr. Gallai's opinion does not constitute a complete pulmonary evaluation pursuant to 20 C.F.R. §§725.406 and 725.456(e). On remand, I would instruct the district director to seek clarification from Dr. Gallai on the issue of total respiratory or pulmonary disability.

GREG J. BUZZARD
Administrative Appeals Judge