U.S. Department of Labor

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

BRB No. 16-0361 BLA

BOYD SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, ALABAMA, LLC	)	
	)	
	)	DATE ISSUED: 04/27/2017
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Roucco), Birmingham, Alabama, for claimant.

Kary B. Wolfe (Jones Walker LLP), Birmingham, Alabama, for employer.

Barry H. Joyner (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: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

GILLIGAN, Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand (2011-BLA-05246) of Administrative Law Judge Lystra A. Harris denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, involving a subsequent claim filed on March 16, 2010,[1] is before the Board for the second time.

In the initial Decision and Order, Administrative Law Judge Ralph A. Romano credited claimant with twenty-four years of coal mine employment,[2] but found that the new evidence did not establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant failed to invoke the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Accordingly, Judge Romano denied benefits.

Pursuant to claimant's appeal, the Board affirmed Judge Romano's determination that the new evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *Smith v. U.S. Steel Mining Co.*, BRB No. 12-0505 BLA (June 17, 2013)(unpub.). However, the Board vacated Judge Romano's finding that the new pulmonary function study evidence and medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Specifically, the Board held that Judge Romano did not make a specific finding regarding the pulmonary function study evidence, or compare the medical opinions diagnosing a moderate to severe impairment with the exertional requirements of claimant's usual coal mine employment. *Smith*, BRB

[1] Claimant's initial claim, filed on February 5, 2007, was denied by the district director on October 19, 2007, for failure to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment was in Alabama. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

No. 12-0505 BLA, slip op. at 3-5. Accordingly, the Board remanded the case for further consideration.

On remand, due to Judge Romano's unavailability, the case was reassigned to Administrative Law Judge Lystra A. Harris (the administrative law judge). In a Decision and Order on Remand dated March 22, 2016, the administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). The administrative law judge therefore found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and could not invoke the Section 411(c)(4) presumption. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the new pulmonary function study evidence and medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Worker's Compensation Programs (the Director), has filed a response brief, contending that the administrative law judge erred in her consideration of the new pulmonary function study evidence and medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).

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. 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).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge 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 total disability. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing total disability. 20 C.F.R. §725.309(c)(3), (4).

Claimant initially contends that the administrative law judge erred in finding that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge considered four pulmonary function studies conducted on April 22, 2010, August 12, 2010, September 9, 2010, and June 6, 2011.[4] The April 22, 2010 pulmonary function study yielded non-qualifying[5] values both before and after the administration of bronchodilators. Director's Exhibit 8. The August 12, 2010 pulmonary function study yielded qualifying values both before and after the administration of a bronchodilator.[6] Claimant's Exhibit 1. The September 9, 2010 pulmonary function study yielded non-qualifying pre-bronchodilator values, and did not include post-bronchodilator results. Claimant's Exhibit 1. Finally, the June 6, 2011 pulmonary function study yielded qualifying values both before and after the administration of a bronchodilator. Employer's Exhibit 7.

The administrative law judge first weighed the pre-bronchodilator results of the four studies, noting that two studies yielded qualifying values (August 12, 2010 and June 6, 2011), and two studies yielded non-qualifying values (April 22, 2010 and September 9,

[4] The administrative law judge also considered a pulmonary function study conducted on April 8, 2010, but found it to be invalid because it did not include tracings. Decision and Order on Remand at 4.

[5] A qualifying pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[6] The administrative law judge averaged the heights reported in claimant's pulmonary function studies to obtain a height of 68.25 inches. Decision and Order on Remand at 3. In analyzing the August 12, 2010 pulmonary function study, the administrative law judge noted that claimant's height fell between the table heights of 68.1 and 68.5 inches listed in 20 C.F.R. Part 718, Appendix B. Decision and Order on Remand at 4 n.2. The administrative law judge therefore used the table values for the closest greater height of 68.5 inches, and found that the August 12, 2010 pulmonary function study was qualifying. *Id., citing Toler v. E. Associated Coal Corp*., 43 F.3d 109, 116 n.6, 19 BLR 2-70, 2-84 n.6 (4th Cir. 1995). Employer argues that the administrative law judge was bound by Administrative Law Judge Ralph A. Romano's previous determination to round claimant's height down to 68.1 inches and use the table values for that height, under which the August 12, 2010 study is non-qualifying. Employer's Brief at 7-8. We reject employer's argument that the administrative law judge exceeded her authority on remand. The Board vacated Judge Romano's findings as to the pulmonary function study evidence, returning the parties to the status quo ante Judge Romano's decision on that issue. *See Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985).

2010). The administrative law judge indicated that, because claimant's results "var[ied] in the relatively short 14-month period between testing," she "decline[d] to grant more probative weight" to the more recent pulmonary function study values. Decision and Order on Remand at 4. Noting that "pulmonary function testing is effort-dependent and [that] spurious low values can result, but spurious high values are not possible," the administrative law judge found that the pre-bronchodilator pulmonary function study evidence was "in equipoise as to the issue of [c]laimant's total disability." Decision and Order on Remand at 4.

Turning to the post-bronchodilator results, the administrative law judge noted that two studies yielded qualifying values (August 12, 2010 and June 6, 2011), and one study yielded non-qualifying values (April 22, 2010). The administrative law judge determined that all of the post-bronchodilator values "must be accorded minimal weight," because "post-bronchodilator tests are less probative" on the issue of total disability. Decision and Order on Remand at 5. Therefore, the administrative law judge found that the new pulmonary function study evidence was in equipoise and did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id*.

Claimant argues that the administrative law judge did not adequately explain why she found that the pre-bronchodilator pulmonary function evidence was in equipoise, when she reasoned that spurious low values, but not spurious high values, are possible. Specifically, claimant argues that because there is no evidence that claimant's pulmonary function studies were invalid for insufficient effort or cooperation, or other technical defect, the administrative law judge did not set forth a basis for questioning the "validity of the qualifying pre-bronchodilator test results." Claimant's Brief at 6. The Director asserts that the administrative law judge's analysis of the pre-bronchodilator study results was "cursory," and based on the improper assumption that higher test results are necessarily more reliable than lower results. Director's Brief at 4. We agree.

The administrative law judge declined to accord greater weight to the more recent and qualifying pulmonary function study, conducted nine months after the prior study, because she found that the pulmonary function study results varied over the fourteen months in which the studies were conducted. Decision and Order on Remand at 4. As the Director points out, however, claimant's pulmonary function studies do not demonstrate widely disparate values between the qualifying and non-qualifying values. Instead, all of claimant's studies demonstrate values either slightly above or slightly below the qualifying values listed at 20 C.F.R. Part 718, Appendix B. Director's Exhibit 8; Claimant's Exhibit 1; Employer's Exhibit 7.

The administrative law judge further stated that she found the pre-bronchodilator results to be in equipoise because an artificially low result could be produced by subpar effort, while an artificially high value is not possible. Decision and Order on Remand at

4. The record, however, contains no evidence questioning the validity of the qualifying pulmonary function study evidence. Further, courts have cautioned against presuming that higher results are more credible than lower results among valid pulmonary function studies. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719, 18 BLR 2-16, 2-24 (4th Cir. 1993); *Greer v. Director, OWCP*, 940 F.2d 88, 90-91, 15 BLR 2-167, 2-170 (4th Cir. 1991)(recognizing that, because pneumoconiosis is a chronic condition, a miner's functional ability on a pulmonary function study may vary, and thus could measure higher on any given day than its typical level). Therefore, on the facts of this case, the administrative law judge did not adequately explain her weighing of the pre-bronchodilator pulmonary function study results. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Both claimant and the Director further assert that the administrative law judge erred in categorically rejecting claimant's qualifying post-bronchodilator results as non-probative of total disability. *Id.* We agree.

The unpublished case law cited by the administrative law judge when she discredited all of the post-bronchodilator results explains that a *non-qualifying* post-bronchodilator pulmonary function study does not necessarily outweigh a qualifying pre-bronchodilator study, because the Department of Labor has determined that the use of a bronchodilator does not adequately assess a miner's disability. *Gower v. E. Associated Coal Co.*, BRB No. 13-0586 BLA, slip op. at 4-5 (July 29, 2014)(unpub.); *Maynard v. Pen Coal Corp.*, BRB No. 09-0599 BLA, slip op. at 6 n.3 (July 27, 2010) (unpub.); *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980); Decision and Order on Remand at 5. We agree with claimant and the Director, however, that this logic does not necessarily extend to the case where a miner's pre-bronchodilator results are qualifying, and remain so after the administration of bronchodilators.[7] Therefore, the administrative law judge did not adequately explain her weighing of claimant's post-bronchodilator pulmonary function study values. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454, 1-459 (1983). Based on the foregoing errors, we must vacate the administrative law judge's determination that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Claimant and the Director argue that the administrative law judge also erred in finding that the new medical opinion evidence did not establish total disability pursuant

[7] The Director argues that, "[i]f anything, the opposite is true. The tests show that even with [bronchodilator] medication the miner's ability to ventilate remains distinctly abnormal." Director's Brief at 5.

to 20 C.F.R. §718.204(b)(2)(iv). On remand, the administrative law judge determined that claimant's usual coal mine employment as a longwall utility man required him to perform heavy manual labor.[8] Decision and Order on Remand at 6. The administrative law judge then considered the new medical opinions of Drs. Barney and Goldstein. Dr. Barney opined that claimant's pulmonary function study demonstrated a moderate respiratory impairment. Director's Exhibit 9. Dr. Goldstein opined that claimant's pulmonary function study demonstrated a moderate to severe obstructive defect with no improvement following bronchodilators. Employer's Exhibit 1.

The administrative law judge found Dr. Barney's opinion insufficient to establish total disability, because the physician did not express his diagnosis in terms of disability, or in terms of physical limitations that claimant has because of his moderate airflow obstruction. Decision and Order on Remand at 9. The administrative law judge further found that Dr. Barney failed to explain his diagnosis "in light of the fact that all of the diagnostic testing he reviewed was nonqualifying." *Id.* The administrative law judge similarly found Dr. Goldstein's opinion insufficient to establish total disability, because the doctor did not set forth the exertional limitations that would result from claimant's moderate to severe obstruction, and because he failed to explain his diagnosis in light of the non-qualifying pulmonary function studies. *Id*. at 10.

Claimant argues that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine employment with the opinions of Drs. Barney and Goldstein, as instructed by the Board. Claimant's Brief at 8-9. Claimant argues further that the administrative law judge erred in finding the physicians' opinions not to be well-reasoned because the physicians relied upon non-qualifying pulmonary function studies. *Id.* The Director agrees, arguing that the administrative law judge erred in discounting Dr. Barney's opinion for relying on non-qualifying objective studies. Director's Brief at 5. The Director further argues that Dr. Barney's diagnosis is sufficient to establish total disability, when considered in light of the exertional requirements of claimant's usual coal mine employment. *Id.*

Because we have vacated the administrative law judge's findings as to the pulmonary function study evidence, and the administrative law judge's analysis of the pulmonary function studies affected her weighing of the medical opinions, we also vacate the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We instruct the administrative law judge to reconsider on remand whether the medical opinion evidence establishes total

[8] The administrative law judge noted that this job required claimant to stand for over nine hours a day, to crawl, and to lift fifty to one hundred pounds. Decision and Order on Remand at 6.

disability after she has reconsidered the pulmonary function study evidence. The administrative law judge has the discretion to compare the physicians' impairment ratings with the physical requirements of claimant's usual coal mine employment to determine whether the physicians' opinions establish that claimant is totally disabled.[9] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). The administrative law judge should bear in mind that a physician may diagnose a disabling impairment even where the objective studies are non-qualifying. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-259 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); 20 C.F.R. §718.204(b)(2)(iv).

On remand, the administrative law judge must reconsider whether the new pulmonary function study evidence and medical opinion evidence establishes that claimant is totally disabled, pursuant to 20 C.F.R. §718.204(b)(2)(i),(iv). Should the administrative law judge find that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (iv), the administrative law judge must weigh all of the relevant new evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2).[10] *See Fields*, 10 BLR at 1-21; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc).

If the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant will be entitled to invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis.[11] 30

[9] If, on remand, the administrative law judge concludes that Dr. Barney's opinion does not permit a determination of whether claimant is totally disabled, she should remand the case for the district director "to obtain clarification from Dr. Barney on whether he believes that claimant's pulmonary condition precludes him from performing his usual coal-mine employment." Director's Brief at 5 n.10.

[10] If the administrative law judge finds that the new evidence establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), claimant will have established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

[11] Judge Romano previously accepted the parties' stipulation that claimant worked as a miner for twenty-four years, and claimant testified, without contradiction, that all of this work was underground. *Smith v. U.S. Steel Mining Co.*, BRB No. 12-0505 BLA, slip op. at 2, 6 n.9 (June 17, 2013)(unpub.); Hearing Transcript at 16-17, 20-21. Consequently, if claimant is able to establish total disability, he will be entitled to the rebuttable presumption that his total disability is due to pneumoconiosis. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305.

U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). However, if the administrative law judge finds that the evidence does not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), she must deny benefits, as claimant will not have established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and an essential element of entitlement under 20 C.F.R. Part 718. *See Trent v Director, OWCP*, 11 BLR 1-26 (1987).

Accordingly, we vacate the administrative law judge's Decision and Order on Remand denying benefits, and remand this case for further consideration consistent with this opinion.

SO ORDERED.

RYAN GILLIGAN
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues' determinations that the administrative law judge erred in her weighing of the pulmonary function study evidence, and erred in discrediting the medical opinions because the physicians relied on non-qualifying objective study results to diagnose an impairment. However, I respectfully disagree with the decision to remand this case for a third consideration of whether Dr. Barney's opinion establishes

total disability. Instead, I would hold, based on the two administrative law judges' findings thus far, that Dr. Barney's opinion does not meet the Department of Labor's statutory obligation to provide claimant with a complete pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §§725.406, 725.426(e).

Dr. Barney examined claimant on behalf of the Department on June 8, 2010. Director's Exhibit 9. He noted that claimant had complaints of daily wheezing and coughing, as well as shortness of breath when working outside and showering; a physical examination revealed diffuse wheezing on auscultation; a non-qualifying pulmonary function study demonstrated a moderate airflow obstruction; and a non-qualifying arterial blood gas study demonstrated "relative hypoxia at rest." Decision and Order on Remand at 7; Director's Exhibit 9. On the issue of impairment, and "the extent to which the impairment prevents [claimant] from performing his/her current or last coal mine job," Dr. Barney simply stated that claimant "has moderate to severe shortness of breath with activity." Director's Exhibit 9.

Two administrative law judges have considered Dr. Barney's opinion. Both indicated that they were unable to make a determination of whether claimant is totally disabled based on his opinion. The first administrative law judge found that Dr. Barney's opinion was "ambiguous on the issue of total disability," and found that the physician's opinion that claimant suffered from "moderate to severe" shortness of breath was "insufficient to form a conclusion that [c]laimant is totally disabled under the regulations." Decision and Order Denying Benefits at 6. Upon review of claimant's appeal, the Board remanded this case for further consideration of Dr. Barney's opinion because the first administrative law judge did not address Dr. Barney's diagnosis of "moderate airflow obstruction."[12] *Smith v. U.S. Steel Mining Co.*, BRB No. 12-0505 BLA, slip op. at 4-5 (June 17, 2013)(unpub.); Director's Exhibit 9. On remand, the current administrative law judge found that "Dr. Barney's conclusion regarding [c]laimant's total disability is unclear," noting that Dr. Barney's opinion establishes the presence of an impairment but not the extent of the impairment. Decision and Order on Remand at 9. The administrative law judge further found that Dr. Barney did not opine as to the physical limitations that claimant might have as a result of his impairment, did not discuss the exertional requirements of claimant's usual coal mine employment, and "did not offer an opinion as to whether [c]laimant would be able to perform that job." *Id*.

[12] The Board affirmed the first administrative law judge's determination that Dr. Barney's diagnosis of "moderate to severe" shortness of breath "is insufficient to form a conclusion that [c]laimant is totally disabled under the regulations." *Smith v. U.S. Steel Mining Co.*, BRB No. 12-0505 BLA, slip op. at 4 (June 17, 2013)(unpub.).

The Act requires the Department to provide claimant with a "complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406.[13] 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).

Based on the findings of two administrative law judges in this case, it is apparent that Dr. Barney's opinion does not constitute a complete pulmonary evaluation because it does not address a relevant condition of entitlement, total disability, in a manner that permits resolution of the claim. Dr. Barney's mere recitation of claimant's symptoms, such as shortness of breath, does not constitute a diagnosis of a totally disabling respiratory or pulmonary impairment. *See Heaton v. Director, OWCP*, 6 BLR 1-1222 (1984); *Bushilla v. N. Am. Coal Corp.*, 6 BLR 1-365 (1983). Moreover, despite his diagnosis of "moderate airflow obstruction," his failure to discuss the exertional requirements of claimant's usual coal mine employment or offer an opinion as to whether claimant could perform such work, by definition renders his opinion incomplete on the issue of total disability. 20 C.F.R. §718.204(b)(2)(iv) ("[T]otal disability may . . . be found if a physician exercising reasoned medical judgment . . . concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his usual coal mine work]."); *see U.S. Steel Mining Co. v. Dir., OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-239-49 (11th Cir. 2004) (affirming administrative law judge's reliance on physicians who diagnosed total disability "by comparing [claimant's] condition with the requirements of his last job," as the issue of total disability "must be decided on a case-by-case basis and by comparing the miner's pulmonary limitations to the specific exertional demands of his last job"); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000) (holding that administrative law judge "improperly did not consider whether [the physicians] had any knowledge of the exertional requirements of [the miner's] work"). Consequently, I would affirm, as supported by substantial evidence, the administrative law judge's finding that Dr. Barney's opinion is "unclear" and fails to address information that is necessary to the

[13] 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).

determination of whether claimant is totally disabled.[14] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

As the Director concedes, "[i]f the [administrative law judge] (or the Board) were to determine that Dr. Barney's opinion simply does not permit a determination of whether claimant is totally disabled—i.e., the physician failed to address this essential element of entitlement—then the Director would not have met his obligation to provide claimant with a complete pulmonary evaluation." Director's Brief at 5 n.10.

Based on the well-supported findings of the two administrative law judges who have considered Dr. Barney's opinion, it has already been found that Dr. Barney's opinion does not permit a determination of whether claimant is totally disabled. Thus, I would hold that Dr. Barney's report does not constitute a complete pulmonary evaluation pursuant to 20 C.F.R. §§725.406 and 725.456(e). Where the pulmonary evaluation provided by the Department "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. . . ." 20 C.F.R. §725.456(e). Therefore, per the Director's suggestion in his brief, I would vacate the

[14] While it is true that a physician's opinion need not be phrased specifically in terms of "total disability," Dr. Barney's opinion is not so "apparent from the record" that it renders the administrative law judge's findings 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").

denial of benefits with instructions to remand the claim to the district director "to obtain clarification from Dr. Barney on whether he believes that claimant's pulmonary condition precludes him from performing his usual coal-mine employment." Director's Brief at 5 n.10. The claim should then be adjudicated in light of the new evidence.

GREG J. BUZZARD
Administrative Appeals Judge