U.S. Department of Labor

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

BRB No. 18-0087 BLA

ROBERT E. LEE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/16/2018
	)	
AMERICAN ENERGY, LLC	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Robert E. Lee, St. Paul, Virginia.

Cody F. Fox (Penn Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order – Denying Benefits (2015-BLA-05663) of Administrative Law Judge Alan L. Bergstrom, rendered 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 involves a miner's claim filed on November 15, 2013.

The administrative law judge accepted the parties' stipulation that claimant had more than twenty-nine years of coal mine employment. He also found that claimant did not establish that he has complicated pneumoconiosis and thus did not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2012). He further determined that claimant did not establish a totally disabling respiratory impairment, an essential element of entitlement, and denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer/carrier (employer) responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief alleging error in the administrative law judge's finding that claimant failed to establish total disability. Employer responds that contrary to the Director's assertions, the administrative law judge properly weighed the evidence relevant to total disability and substantial evidence supports the denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86-87 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial

[1] Robin Napier, a benefits counselor with Stone Mountain Health Services, St. Charles, Virginia, filed an appeal on behalf of claimant, but Ms. Napier is not representing claimant on appeal. *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

evidence, and in accordance with law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R Part 718, a claimant must prove that he has pneumoconiosis; his pneumoconiosis arose out of coal mine employment; he has a totally disabling respiratory or pulmonary impairment; and his total disability is due to pneumoconiosis. 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. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989). A claimant can also establish entitlement to benefits with the aid of the presumptions at Sections 411(c)(3) and 411(c)(4) of the Act. 30 U.S.C. §§921(c)(3), (4).

I. Invocation of the Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act establishes an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether claimant has invoked the irrebuttable presumption. *See E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

Relevant to 20 C.F.R. §718.304(a), the record contains three x-rays dated December 18, 2013, August 15, 2014, and July 2, 2015. The administrative law judge determined correctly that none of the x-ray readers reported an opacity of greater than one centimeter in diameter.[3] Decision and Order at 15. He also accurately found that the record does not

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Employer's Exhibit 3 at 1; Director's Brief at 4 n.4.

[3] Drs. DePonte and Miller, who are dually-qualified as B readers and Board-certified radiologists, read the December 18, 2013 x-ray as positive for simple pneumoconiosis only,

contain biopsy evidence diagnosing massive lesions under 20 C.F.R. §718.304(b). *Id*. Although the administrative law judge did not make an explicit finding at 20 C.F.R. §718.304(c), there is no other medical evidence in the record indicating that claimant has a condition which would yield results equivalent to the criteria set forth in prongs (a) or (b) of 20 C.F.R. §718.304. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Thus, the administrative law judge properly concluded that claimant did not establish that he has complicated pneumoconiosis. We therefore affirm his finding that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 20 C.F.R. §718.304; *see Scarbro*, 220 F.3d at 255; Decision and Order at 15.

II. Invocation of the Section 411(c)(4) Presumption – Total Disability

Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground coal mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Once invoked, the burden shifts to the employer to disprove that the miner has pneumoconiosis or that no part of his totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1).

The administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption is based on his finding that claimant did not establish that he is totally disabled. A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by qualifying[4] pulmonary function studies or arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv).

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while Dr. Adcock, also dually-qualified, read the x-ray as negative for simple and complicated pneumoconiosis. Director's Exhibits 10, 14; Claimant's Exhibit 3. Dr. Adcock interpreted the x-rays dated August 15, 2014 and July 2, 2015 as negative for simple and complicated pneumoconiosis. Director's Exhibit 11; Employer's Exhibit 1.

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Relevant to 20 C.F.R. §718.204(b)(2)(i), the record contains five pulmonary function studies. The pulmonary function study dated October 30, 2013, performed without the use of bronchodilators, produced values that qualify as totally disabling. Claimant's Exhibit 4. The March 26, 2014 pulmonary function study results were non-qualifying before and after the use of bronchodilators. Director's Exhibits 10, 14. The pulmonary function study performed without bronchodilators on August 1, 2014 produced qualifying values. Claimant's Exhibit 5. The August 15, 2014 pulmonary function study results were non-qualifying before and after the use of bronchodilators. Director's Exhibit 11. Finally, the pulmonary function study conducted on July 2, 2015 produced qualifying values before and after the use of bronchodilators. Employer's Exhibit 1.

The administrative law judge observed that the studies dated August 15, 2014 and July 2, 2015 did not include statements regarding claimant's effort, understanding, or cooperation in performing the required maneuvers. Decision and Order at 17. He then stated:

> Since none of the FVC . . . test results were at or below the table listed value for the Claimant's age and height, whether the results were qualifying turned on the FEV1/FVC ratio. The qualifying results had a FEV1/FVC ratio at, or 1 point below, the qualifying 55 value. The non-qualifying results were 1 to 5 points above that value. Because pneumoconiosis is a latent and progressive disease, the pulmonary function studies display fluctuations in the Claimant's pulmonary function that are not expected in the progressively disabling disease of pneumoconiosis arising out of coal mine employment.

Id. The administrative law judge concluded that the pulmonary function study evidence was, "at best," in equipoise and therefore insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*.

The Director contends that the administrative law judge did not explain his finding and, "to the extent [he] is suggesting that the [pulmonary function study] results could not prove disability because they are variable, he is wrong as a matter of law." Director's Brief at 4. The Director also maintains that the administrative law judge conflated the issues of the existence of pneumoconiosis and the presence of a totally disabling impairment by characterizing variability in pulmonary function study results as inconsistent with pneumoconiosis. Employer argues that the administrative law judge set forth the rationale for his finding, consistent with the evidence.

We agree with the Director that the administrative law judge erred in identifying variability as a factor in his weighing of the pulmonary function studies, as this conflicts

with the decision of the United States Court of Appeals for the Fourth Circuit in *Greer v. Director, OWCP*, 940 F.2d 88 (4th Cir. 1991). The court, within whose jurisdiction this case arises, rejected the idea that the variability of pulmonary function study results alone is a rational basis for finding that a miner has not established total disability: "on any given day, it *is* possible to do better, and indeed to exert more effort, than one's typical condition would permit." *Greer*, 940 F.2d at 90-91. We also agree that the administrative law judge did not identify the rationale underlying his finding that the pulmonary function study evidence is at best in equipoise. Further, although the administrative law judge noted that the August 15, 2014 and July 2, 2015 tests do not include statements about claimant's effort, understanding, or cooperation, he did not render a determination as to whether those studies are valid. Decision and Order at 17.

In addition, the administrative law judge omitted the non-qualifying pre-bronchodilator study dated May 24, 2016 from consideration, based on his finding that it was "not in evidence." Decision and Order at 12, 13, 20. This determination appears to conflict with the administrative law judge's admission of the study into the record as part of Employer's Exhibit 4, and his summary of it as a "hospitalization and treatment record[] for respiratory or pulmonary related disease" submitted by employer. Hearing Transcript at 10-11; Decision and Order at 8-9. If properly admitted into the record, the administrative law judge's failure to address this relevant evidence requires remand. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 254-55 (4th Cir. 2016). For the reasons set forth above, we must vacate the administrative law judge's finding that the pulmonary function study evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[5] the administrative law judge considered the medical opinions of Drs. Ajjarapu, Sargent, and McSharry. At the request of the Department of Labor, Dr. Ajjarapu performed a complete pulmonary evaluation on December 18, 2013, and diagnosed a moderate pulmonary impairment and hypoxemia that would prevent claimant from performing his usual coal mine work. Director's Exhibit 10. Because the pulmonary function study Dr. Ajjarapu obtained was invalidated, a repeat study was done on March 26, 2014. *Id.* After reviewing this study, Dr. Ajjarapu stated that claimant has a "severe pulmonary impairment and that he would not be able to do his

[5] Under 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge accurately found that none of the arterial blood gas studies yielded qualifying results. Decision and Order at 7, 15, 17-18; Director's Exhibits 10, 11; Employer's Exhibit 1. He also accurately found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 18. We therefore affirm the administrative law judge's findings that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii).

previous coal mine employment."[6] *Id.* Dr. Sargent examined claimant on August 15, 2014, and reviewed a portion of claimant's medical records. Director's Exhibit 11. He opined that claimant has a moderate obstructive ventilatory impairment that would not prevent him from doing his usual coal mine job as a repairman. Director's Exhibit 11; Employer's Exhibit 2. In reports dated January 21, 2015 and March 24, 2015, Dr. Ajjarapu reviewed Dr. Sargent's pulmonary function study and medical report. Director's Exhibit 15. She acknowledged Dr. Sargent's diagnosis of a non-disabling moderate impairment on pulmonary function testing, but nonetheless stated that she "stand[s] by [her] original opinion that this individual is totally and completely disabled . . . ." *Id.* She further explained that the impairment seen on pulmonary function testing, and claimant's difficulty breathing with exertion, "would prevent him from performing his coal mine employment," which required heavy lifting. *Id.* Dr. McSharry examined claimant on July 2, 2014 and performed a record review. Employer's Exhibit 1. In his report, dated August 1, 2015, he diagnosed a totally disabling respiratory impairment. *Id.* On October 5, 2016, Dr. McSharry submitted a report detailing his review of the pulmonary function study performed on May 24, 2016. Based on the study's non-qualifying values, he stated, "I now find this claimant not to have disability on the basis of spirometry (although his testing is very close to the disability range)." Employer's Exhibit 3.

In rendering findings under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge reviewed and evaluated each physician's opinion. Decision and Order at 17-19. He found Dr. Ajjarapu's diagnosis of a totally disabling impairment "not well[-]reasoned" and "entitled to little weight." *Id.* at 19. He found Dr. Sargent's determination that claimant is not totally disabled "well[-]documented, forthright, well-reasoned and entitled to great weight." *Id.* at 20. The administrative law judge excluded Dr. McSharry's October 5, 2016 report from consideration because the May 24, 2016 pulmonary function study he reviewed was not "in evidence." *Id.* Addressing Dr. McSharry's August 1, 2015 report diagnosing a totally disabling respiratory impairment, the administrative law judge stated:

> Dr. McSharry's medical opinion is well[-]documented and conveys his concern of the Claimant being considered totally disabled based solely on one marginal pulmonary function test. This same concern was addressed

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[6] Claimant testified that his usual coal mine work as a repairman at the face of the mine required heavy lifting. Hearing Transcript at 13. Dr. Ajjarapu reported that claimant's job required lifting and carrying heavy objects. Director's Exhibit 10. Dr. McSharry reported that claimant's last job as repairman required regular moderately strenuous exertion and occasional heavy exertion. Employer's Exhibit 1. Dr. Sargent reported that claimant's last work as a repairman required occasional heavy manual labor. Director's Exhibit 15.

> above in the discussion of the pulmonary function testing admitted into evidence and a finding that the Claimant has a totally disabling respiratory/pulmonary impairment based solely on pulmonary function test results is contrary to the findings of this presiding Judge. Accordingly, Dr. McSharry's medical opinion on total disability under the [Act] is given little weight.

Id. The administrative law judge concluded that the medical opinion evidence was insufficient to establish total disability. *Id.* Weighing the evidence together, he determined that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2) and, therefore could not invoke the Section 411(c)(4) presumption. *Id.*

The Director asserts that the administrative law judge did not provide an adequate explanation for his weighing of the medical opinions under 20 C.F.R. §718.204(b)(2)(iv). Employer maintains that the administrative law judge rationally discredited Dr. Ajjarapu's opinion diagnosing a totally disabling respiratory impairment and permissibly gave greatest weight to Dr. Sargent's contrary opinion.

We agree with the Director. Although the administrative law judge summarized each medical opinion, he rendered credibility determinations with respect to Dr. Ajjarapu and Dr. Sargent without clearly identifying his underlying rationale.[7] *See* 5 U.S.C. §557 (requiring that every adjudicatory decision 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 . . . ."). Further, the administrative law judge's finding that Dr. McSharry's August 1, 2015 diagnosis of total disability is contrary to the weight of the pulmonary function studies cannot be affirmed, as we have vacated his weighing of the evidence at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 20. Additionally, to the extent the administrative law judge intended to discredit Dr. McSharry for diagnosing total disability based on only "one marginal pulmonary function test," that finding cannot be affirmed, as a physician may base a diagnosis of total disability on non-qualifying test results. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) (The regulation at 20 C.F.R. §718.204(b)(2)(iv) explicitly provides that a physician may base a reasoned medical judgment that a miner is totally disabled on non-qualifying test results). Finally,

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[7] Additionally, in summarizing Dr. Ajjarapu's opinion, the administrative law judge noted that she "could not account for the discrepancy" in the data she obtained versus the data obtained by Dr. Sargent. Decision and Order at 19. The administrative law judge failed, however, to consider that Dr. Ajjarapu specifically opined that her review of Dr. Sargent's testing did not change her opinion that claimant has a totally disabling pulmonary impairment. Director's Exhibit 15.

the administrative law judge appears to have misstated that the May 24, 2016 pulmonary function study is not part of the record, and thus erred in determining that Dr. McSharry's October 5, 2016 report should be rejected for relying on non-record evidence. Decision and Order at 20.

We must therefore vacate the administrative law judge's findings under 20 C.F.R. §718.204(b)(2)(iv) and remand the case for him to reconsider the medical opinion evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We must also vacate his findings that the evidence as a whole is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2), and that claimant failed to invoke the Section 411(c)(4) presumption.

III. Remand Instructions

The administrative law judge must first reconsider whether the pulmonary function studies are sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). He must reconsider his finding that the May 24, 2016 study is not "in evidence,"[8] and render a determination as to the validity of the studies dated August 15, 2014 and July 2, 2015.[9] Decision and Order at 12, 13, 20; 20 C.F.R. §§718.103(b)(5), 725.414(a)(3). In resolving the conflicts in the pulmonary function study evidence, the administrative law judge cannot rely solely on the variability of the test results. *See Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719 (4th Cir. 1993); *Greer*, 940 F.2d at 90-91.

The administrative law judge then must reconsider the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv) by addressing the comparative credentials of the

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[8] Because this pulmonary function study was in claimant's treatment records, the quality standards at 20 C.F.R. §718.103 are not strictly applicable, and employer was not required to designate it under the evidentiary limitations at 20 C.F.R. § 725.414(a)(3). 20 C.F.R. §§718.101(b), 725.414(a)(4); *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). The administrative law judge must nevertheless determine if the pulmonary function study results are sufficiently reliable to support a finding of total disability. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000) ("Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.").

[9] A study need not precisely conform to the quality standards at 20 C.F.R. §718.103(c), but rather must be in "substantial compliance." 20 C.F.R. §718.101(b); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc).

respective physicians,[10] the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). The administrative law judge must reconsider Dr. McSharry's opinion based on his determination as to whether the non-qualifying pulmonary function study performed on May 24, 2016 is in evidence. If he decides that the study was properly admitted, he must address Dr. McSharry's opinion as expressed in his initial report and his supplemental report.[11] Should the administrative law judge determine that the May 24, 2016 pulmonary function study was, or should have been, excluded, he must reconsider Dr. McSharry's initial report without factoring in the excluded study or the supplemental report.[12]

If the administrative law judge finds that claimant established total disability on remand, he must determine whether claimant demonstrated that at least fifteen of his "more than 29 years" of coal mine employment were qualifying for purposes of invoking the Section 411(c)(4) presumption.[13] Decision and Order at 3; 30 U.S.C. §921(c)(4); 20 C.F.R.

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[10] Although the administrative law judge identified the qualifications of Drs. Ajjarapu, Sargent, and McSharry, he did not consider them when weighing their opinions at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 6 n.8, 7 nn.9-10, 19-20.

[11] In weighing Dr. McSharry's October 5, 2016 report, the administrative law judge must also consider his findings regarding the reliability of the May 24, 2016 study, as that study formed the basis of Dr. McSharry's supplemental opinion.

[12] When first considering Dr. McSharry's opinion, the administrative law judge stated, "Dr. McSharry's medical opinion is well[-]documented and *conveys his concern of the Claimant being considered totally disabled based solely on one marginal pulmonary function test*[.]" Decision and Order at 20 (emphasis added). If the administrative law judge refers to the emphasized language on remand, he must identify where in Dr. McSharry's admitted report he expressed the concern described. We further note again that, contrary to the administrative law judge's determination, he cannot discredit Dr. McSharry's medical opinion on the ground that the physician relied on non-qualifying pulmonary function studies. *Id.*; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000).

[13] The administrative law judge accepted the parties' stipulation to more than twenty-nine years of coal mine employment but made no determination as to whether the employment was in underground mines or in conditions substantially similar to those in an

§718.305(b)(1)(i); *see Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-28-29 (2011). If claimant invokes the presumption, the administrative law judge must address whether employer has rebutted the presumption pursuant to 20 C.F.R. §718.305(d)(1). If the administrative law judge again finds that claimant cannot prove total disability at 20 C.F.R. §718.204(b)(2), however, he must deny benefits, as claimant will have failed to establish an essential element of entitlement. *See Anderson*, 12 BLR at 1-112. Finally, the administrative law judge must set forth his findings on remand in accordance with the Administrative Procedure Act, 5 U.S.C. §§500-591, as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

Accordingly, the Decision and Order – Denying Benefits is affirmed in part, vacated in part, and remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

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underground mine, as required by Section 411(c)(4). *See* 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 3.