BRB No. 93-1849 BLA

JOHN N. HODGES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	DATE ISSUED:
	)	
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 of Reno E. Bonfanti, Administrative Law Judge, United States Department of Labor.

John Hodges, Buckhannon, West Virginia, *pro se*.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Edward Waldman (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (92-BLA-0276) of Administrative Law Judge Reno E. Bonfanti denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case involves a duplicate claim. *See* 20 C.F.R. §725.309. The administrative law judge credited claimant, as conceded by employer, with thirty-five years of coal mine employment, Decision and Order at 2, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1),

718.203(b), but that claimant failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. 718.204(c). The administrative law judge then found that claimant failed to establish a material change in conditions pursuant to Section §725.309. Accordingly, the administrative law judge denied benefits.

The Director, Office of Workers' Compensation Programs, (the Director), as a party-in-interest, responded by filing a Motion to Remand, urging that the case should be remanded to the district director for further development of the medical evidence. In support of this motion, the Director asserted that she has failed to fulfill her statutory duty, pursuant to Section 413(b), 30 U.S.C. §923(b), of providing claimant with a complete and credible pulmonary evaluation. Employer responded to the Director's Motion to Remand for a complete pulmonary examination of claimant by requesting oral argument on this issue. On June 7, 1994, oral argument was held in this case.

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). In the instant decision, we also address the issues raised by the Director's Motion to Remand[1] and employer's response to that motion. The Board's scope of review is defined by statute. If the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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).

We first address employer's argument that the Director, as a party-in-interest, does not have standing to contest the issue of whether claimant has been provided with a complete pulmonary evaluation. Previous cases involving the Director's statutory obligation to provide claimant with a complete pulmonary evaluation have involved instances where no responsible operator had been identified and, thus, the Director was the respondent in

[1]Inasmuch as the Director has filed a Motion to Remand, *see* 20 C.F.R. §802.219, the restrictions on briefs filed under Section 802.212, *see Malcomb v. Island Creek Coal Co.*, 15 F.3d 364 (4th Cir. 1994), are inapplicable. We also note that, pursuant to Section 21(b)(4) of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §921(b)(4), the Board is authorized to remand a case on its own motion or at the request of the Secretary, who is represented before the Board by the Director. Section 21(b)(4) is incorporated into the Act by Section 422(a) of the Act, 30 U.S.C. §932(a).

those cases. *See Cline v. Director, OWCP,* 917 F.2d 9 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc); Hall v. Director, OWCP,* 14 BLR 1-51 (1990). Consequently, this case provides the Board with an opportunity to examine arguments advanced by an employer for the first time.

The Act provides that the Director is a party to any Black Lung proceeding before the Board, 30 U.S.C. §932(k); *see* 20 C.F.R. §§725.360(a)(5), 802.201(a); *cf. Andryka v. Rochester & Pittsburgh Coal Co.,* 14 BLR 1-34 (1990). The Director not only has standing to represent the government's interests in cases in which the Director is the respondent and in those situations where the Black Lung Disability Trust Fund is secondarily liable in the event an employer does not pay benefits, *see Krolick Contracting Corp. v. Benefits Review Board,* 558 F.2d 685, 689 (3d Cir. 1977), but also has standing to ensure the proper enforcement and lawful administration of the Black Lung program, *see* 20 C.F.R. §725.465(d); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc order*); *Capers v. The Youghiogheny and Ohio Coal Co.,* 6 BLR 1-1234, 1-1237 (1984), especially in *pro se* cases as here. It is noted, for example, that the Director has exercised her standing to assert employer's rights if employer has been denied due process of law. *See Pendleton v. United States Steel Corp.*, 6 BLR 1-815, 1-818-819 (1984).

In support of the Director's contention that she has standing to raise the complete pulmonary evaluation issue, the Director asserts that Congress was aware of the fact that coal mine operators would be responsible for benefits in many cases at the time it mandated that the Department of Labor provide each claimant with a complete pulmonary examination. Director's [Supp.] Brief at 7. We note that the complete pulmonary evaluation provision was added to Section 413(b) under the 1978 amendments to the Act, Pub.L. 95-239, 92 Stat. 95 (1978)(the Black Lung Benefits Reform Act); Pub.L. 95-227, 92 Stat. 11 (1978)(the Black Lung Revenue Act), which established the Black Lung Disability Trust Fund, *see* 30 U.S.C. §§923, 932; 26 U.S.C. §9501. At that time, responsible operators had been respondents in Department of Labor Black Lung proceedings since the implementation of Part C on January 1, 1974, *see* 30 U.S.C. §932(e); *see also* 30 U.S.C. §925; *see generally Helen Mining Co. v. Director, OWCP [Burnsworth],* 924 F.2d 1269, 14 BLR 2-146 (3d Cir. 1991). Furthermore, the regulations implementing Section 413(b) of the Act do not make a distinction between cases where the Director is a respondent and cases in which she is a party-in-interest. *See* 20 C.F.R. §§718.101, 718.401, 725.405, 725.406; *cf.* 20 C.F.R. §725.701A(b)(2)(providing distinct procedures for the payment of medical benefits under Part C to Part B beneficiaries in cases in which a responsible operator could be identified for purposes of liability and those cases in which no responsible operator could be identified, *see Zaccaria v. North*

American Coal Co. 9 BLR 1-119, 1-121-123 (1986)). Consequently, we hold that, pursuant to Section 432(k), the Director occupies a unique position in proceedings under the Act, such that application of the general prohibition against the raising of another party's rights,[2] *see Warth v. Seldin*, 422 U.S. 490, 499-500, 95 S.Ct. 2197, 2205 (1975), is negated.

[2]Employer's reliance on *I.T.O. Corp. v. Benefits Review Board [Adkins]*, 542 F.2d 903 (4th Cir. 1976), Oral Argument Transcript at 15, is misplaced. Although the United States Court of Appeals for the Fourth Circuit held in *I.T.O. Corp.*, a case arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, that the Director does not necessarily have standing in cases before the United States Court of Appeals, the court nonetheless stated that the Director does have standing, automatically, before the Board. The court thus concluded that the Secretary is a "party" before the Board even if he is not adversely affected or aggrieved by the decision below. *I.T.O. Corp.*, 542 F.2d at 909.

Employer also raises the issue of the timeliness of the Director's request for remand, asserting that the Director is barred from raising the Section 413(b) issue at this point in the adjudication of the claim. Employer contends that the Director is bound by the district director's initial determination that claimant was not entitled to benefits and urges that the district director and the Director had numerous opportunities to review the medical evidence to determine that it did not include a complete pulmonary evaluation within the meaning of Section 413(b).[3] Employer further contends that the Director's failure to attend the hearing or to exhaust administrative remedies below, Employer's [Supp.] Brief at 6, including the filing of a motion for reconsideration of the administrative law judge's decision or a petition for modification, Employer's [Initial] Brief at 3, precludes the Director's intervention at this point. Employer finally contends that allowing the Director to submit new evidence at this stage violates due process and unfairly prejudices employer's case, and undermines the efficient administration of the Act. Employer's [Supp.] Brief at 5. We do not find employer's contentions meritorious.

[3]The conclusion that the Director has failed to provide claimant with a complete and credible pulmonary evaluation may arise because the administrative law judge finds a medical opinion incomplete, *i.e.,* the physician has failed to answer a specific question relevant to a contested issue of entitlement, or because the administrative law judge finds that the opinion, although complete, lacks credibility. Although the Director should have ascertained prior to the administrative hearing level, when Dr. Scattergia's opinion was admitted, that the opinion was incomplete and, therefore, insufficient to fulfill the Department of Labor's statutory obligation, *see generally Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984), the fair adjudication of claimant's case cannot be undermined by such lapse on the part of the Director, *see generally Beckett v. Raven Smokeless Coal Co.*, 14 BLR 1-43, 1-45 (1990).

In regard to the issue of the credibility of a medical opinion, although this issue is not dispositive in the instant case, we note that a flaw in employer's timeliness argument is that the credibility of a medical opinion is not resolved until the administrative law judge has rendered a decision and order. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Moreover, an opinion may on its face be complete and credible, but nonetheless may be rejected by the administrative law judge as not credible in parts. *See Drummond Coal Co. v. Freeman,* 733 F.2d 1523 (11th Cir. 1984). Consequently, in such a case, the Director will not know that she has not fulfilled her statutory duty until after the issuance of the decision and order by the administrative law judge.

Contrary to employer's assertion, even though the district director initially determined that claimant was not entitled to benefits, the Director is not precluded from later taking a different position, *see Pavesi v. Director, OWCP,* 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); moreover, the Director's request that claimant be provided an opportunity to substantiate his claim pursuant to Section 413(b) is not tantamount to urging that claimant has established entitlement to benefits. In addition, we reject employer's contention that the Director has waived the right to raise the issue of claimant's right to a complete and credible pulmonary evaluation because the Director was unrepresented at the hearing. The Board, applying Section 725.360(a)(5), has held that, whether the Director participates at the hearing or not, the Director is a party-in-interest at all stages of the adjudication in a claim for benefits under the Act. *Bosser v. United States Steel Corp.*, 7 BLR 1-478 (1984); *see also Slone v. Wolf Creek Collieries, Inc.*, 10 BLR 1-66 (1987).

We hold that the Director has timely raised the issue of claimant's right to a complete pulmonary evaluation. Furthermore, while employer and claimant are permitted to develop evidence, *see, e.g.*, 20 C.F.R. §725.414, the Director is statutorily mandated to provide claimant with an opportunity for a complete pulmonary evaluation in order to substantiate his claim, 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b). Moreover, the regulations do not provide a time limit on the Director's right to obtain additional medical evidence. *See* 20 C.F.R. §§718.401, 735.406(b), 725.407(b); *see also Cline, supra; Newman, supra; Pettry, supra; Hall, supra*. Finally, although the Board will not, as a general rule, address issues that are initially raised on appeal, the Board has held that cases involving the failure to apply a statutory provision below constitute an exception to that rule. *Free v. Director, OWCP*, 6 BLR 1-450, 1-452-53 (1983); *see also Martin v. Director, OWCP,* 7 BLR 1-73 (1984). We thus conclude that the Director's failure to raise this Section 413(b) issue before the administrative law judge does not bar the raising of that issue at this time.[4] *Cf. Kincell v. Consolidation Coal Co.*, 9 BLR 1-221 (1986); *Cornett v. Director, OWCP*, 9 BLR 1-179 (1986)(*en banc)*.

[4]We note, however, that the efficient processing of this claim would have been served more effectively had the Director reviewed the record at an earlier stage in the adjudication of the claim and acted to fulfill the Director's statutory obligation at that time. *See generally Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993)(noting, in conjunction with ordering that award be entered on remand, lengthy delays in the adjudication of the claim).

We also reject employer's assertion that the regulatory provisions governing practice before the Office of Administrative Law Judges that limit the introduction of new evidence after the hearing, 29 C.F.R. §18.54, preclude the Director from submitting evidence in compliance with Section 413(b) once the record has been closed by the administrative law judge. Section 18.54 is not an obstacle to permitting the introduction of new evidence since that regulation applies only to adjudicatory proceedings before the Office of Administrative Law Judges, and the Director is requesting that this case be remanded to the office of the district director, *see Pettry*, *supra*; *Hall*, *supra*. In addition, Section 18.54 applies to hearings on Black Lung claims only to the extent that it is not in conflict with the Act or the regulations promulgated thereunder. *See Smith v. Westmoreland Coal Co.*, 12 BLR 1-39 (1988).

Employer also contends that the Director is attempting to circumvent the normal procedures for introducing evidence before the administrative law judge as provided for by Section 725.456, which requires that evidence be exchanged among the parties at least twenty days prior to hearing unless the parties agree to waive this requirement or good cause is shown, 20 C.F.R. §725.456(b). Employer's [Supp.] Brief at 5. We reject employer's assertions and hold that allowing employer the opportunity to submit evidence in response to the evidence developed on remand cures any procedural defects in regard to the presentation of employer's case. *See generally* 20 C.F.R. §725.456(b)(2); *Bethlehem Mines Corp. v. Henderson,* 939 F.2d 143, 16 BLR 21 (4th Cir. 1991); *North American Coal Corp. v. Miller,* 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). Consequently, we reject employer's assertion that granting the Director's motion for remand would deprive employer of a full and fair hearing.

Based on the foregoing, we hold that the Director's request for remand to fulfill the Director's statutory obligation under Section 413(b) is properly before us. We turn now to the parties' arguments regarding whether claimant has been provided with a complete and credible pulmonary evaluation for the purposes of Section 413(b) of the Act. In both the Motion to Remand and supplemental brief, the Director states that, since Dr. Scattergia, the physician who examined claimant on behalf of the Department of Labor, did not address the issue of whether claimant was totally disabled, claimant has not been provided with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim as required by the Act and regulations, *see* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Newman, supra*; *Pettry, supra*. Employer responds that claimant has been provided with a complete and credible pulmonary evaluation since the record contains complete and credible medical opinions from Drs. Bellotte and Fino, which were submitted by employer.

Drs. Bellotte and Fino opined that claimant retains the necessary respiratory capacity to perform his last coal mine work as a dispatcher.[5] Employer's Exhibits 2, 3, 4. Employer urges that to require that the evaluation be provided solely by a physician engaged by the Director implies that the opinions of physicians submitted by employer are biased, which would be in conflict with the Board's decision in *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc). Employer's [Supp.] Brief at 11. We hold that the opinions submitted by employer are, as urged by the Director, *see Director, OWCP v. Mangifest*, 826 F.2d 1318, 1323-1324, 10 BLR 2-220, 229-230 (3d Cir. 1987)(applying principle that the Director's interpretation of a regulatory or statutory provision should be accorded deference unless it is "plainly" erroneous), insufficient to meet the Director's statutory duty of providing claimant with "an opportunity to substantiate his claim," *see Lester v. Director, OWCP,* 993 F.2d 1143, 1146, 17 BLR 2-114, 2-117-118 (4th Cir. 1993)(holding that claimant's interpretation of the Act was contrary to both statutory language and congressional intent expressed therein); *Norfolk v. Western Railway Co. v. Roberson,* 918 F.2d 1144, 1147, 14 BLR 2-110, 2-113 (4th Cir. 1990)(addressing unambiguous congressional intent expressed in the statute); *Lucas v. Director, OWCP*, 14 BLR 1-112, 1-114 (1990)(*en banc)*(addressing principle that statutory construction properly begins with an examination of the literal language of a statute and the ordinary meaning of the words used therein), under the mandate of Section 413(b) of the Act, 30 U.S.C. §423(b); *see* 20 C.F.R. §§718.401, 725.405(b), 725.407(a). This conclusion is not contrary to the Board's holding in *Melnick,* in which the Board held that, unless an administrative law judge identifies a specific basis for finding that a physician's opinion reflects bias on behalf of employer or claimant, the administrative law judge should not

[5]The Board has held that claimants are entitled to an updated complete pulmonary evaluation in duplicate claims. *Hall v. Director, OWCP,* 14 BLR 1-51 (1990)(*en banc*). In this duplicate claim, *see* Director's Exhibits 1, 27, therefore, the issue of whether claimant has received a complete and credible pulmonary evaluation must be confined to an analysis of the medical opinions that have been submitted since the denial of claimant's initial claim, Director's Exhibit 14; Employer's Exhibits 2, 3, 4.

accord greater weight to other opinions of record that were provided by physicians engaged by the Department of Labor. *Melnick,* 16 BLR at 1-35-36. The decision in *Melnick* thus prohibits the administrative law judge from according the opinions of physicians engaged by the Department of Labor a presumption of greater credibility based on that status alone and does not concern the question of whether submission of a medical opinion by a physician engaged by an employer provides claimant "an opportunity to substantiate" his claim within the meaning of Section 413(b) of the Act.

Turning to the opinion of Dr. Scattergia, the physician who examined claimant on behalf of the Department of Labor, we note that he did not answer question "8a" on the Department of Labor physical examination report form CM-988, regarding whether claimant has a totally disabling respiratory impairment.[6] Director's Exhibit 14. Dr. Scattergia did answer question "8b" and noted that coal workers' pneumoconiosis contributes significantly to the impairment. *Id.* The administrative law judge accordingly found that Dr. Scattergia gave no indication that he found claimant to be incapacitated from performing his usual coal mine work. Decision and Order at 11. Thus, as urged by the Director, Dr. Scattergia's opinion is incomplete and therefore does not fulfill the requirements for a complete and credible pulmonary evaluation under Section 413(b). Consequently, we vacate the decision of the administrative law judge denying benefits and grant the Director's Motion to Remand this case to the district director in order to provide claimant with a complete and credible pulmonary evaluation.[7] *See Pettry,*

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[6]Question 8 of the Department of Labor physical examination report form, Form CM-988, that was utilized by Dr. Scattergia, reads as follows:

> Question 8 Impairment: If the patient has chronic respiratory or pulmonary disease, give your medical assessment - with rationale - of:
>
> 8a. The degree of severity of the impairment, particularly in terms of the extent to which the impairment prevents the patient from performing his/her current or last coal mine job of one year's duration: (Refer to section B.1.a. of this form).
>
> 8b. The extent to which each of the diagnoses listed in D6. above contributes to the impairment.

Director's Exhibit 14.

[7]The Director has stated that she intends to seek, initially, a response from Dr. Scattergia to the Department of

supra; Hall, supra. Employer should be permitted the opportunity to respond to the evidence. *See Henderson, supra; Miller, supra.*

Labor physical examination report form question concerning the extent of claimant's respiratory impairment. Director's [Supp.] Brief at 2 n.2; Oral Argument Transcript at 34.

In the interest of avoiding the repetition of error on remand when the case is again before the administrative law judge, we now address the administrative law judge's evaluation of the evidence pertinent to entitlement.[8] We reverse the administrative law judge's finding that claimant failed to establish a material change in conditions in this duplicate claim pursuant to Section 725.309, inasmuch as the record contains newly submitted evidence, *i.e.,* a qualifying blood gas study, Claimant's Exhibit 1, which, if credited, could change the prior administrative result. *See Shupink v. LTV Steel Co.*, 17 BLR 1-24, 1-27-28 (1992); 20 C.F.R. §725.309. Relevant to the issue of total respiratory disability under Section 718.204(c), on remand, the administrative law judge should reconsider all of the contrary probative medical evidence pursuant to Section 718.204(c).[9] *See Fields v. Island Creek Coal Co.,* 10 BLR 1-19, 1-22 (1987); *Rafferty v. Jones & Laughlin Steel Corp.,* 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.,* 9 BLR 1-195, 1-198 (1986), *aff'd on recon. en banc,* 9 BLR 1-236 (1987). Furthermore, if reached, the administrative law judge must determine whether pneumoconiosis was a contributing cause of claimant's disability pursuant to Section 718.204(b). *See Hobbs v. Clinchfield Coal Co.,* 917 F.2d 790, 792, 15 BLR 2-225, 2-227 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.,* 914 F.2d 35, 38, 14 BLR 2-68, 2-76-77 (4th Cir. 1990); *see also Scott v. Mason Coal Co.,* 14 BLR 1-37, 1-39 (1990).

Accordingly, the Decision and Order denying benefits is affirmed in part, reversed in part, vacated in part, and the case is remanded to the district director for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief

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[8]We affirm the administrative law judge's length of coal mine employment determination and his finding that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) as these findings are neither adverse to the *pro se* claimant here nor challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[9]As noted by the Director in her Motion to Remand, Director's Motion to Remand at 4 n.4, the administrative law judge may not mechanically accord determinative weight to later evidence that is non-qualifying, Director's Exhibits 18, 27; Claimant's Exhibit 1; Employer's Exhibit 2, and therefore inconsistent with the principle that pneumoconiosis is a progressive disease. *See Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 8; 20 C.F.R. §718.204(c)(2).

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge