

BRB No. 07-1020 BLA

D.B. )  
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 Claimant-Petitioner )  
 )  
 v. ) DATE ISSUED: 08/21/2008  
 )  
 ANNE BROOKE COAL CORPORATION )  
 )  
 and )  
 )  
 EMPLOYERS INSURANCE OF WAUSAU )  
 )  
 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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (04-BLA-6577) of Administrative Law Judge Alice M. Craft rendered on a subsequent claim<sup>1</sup> filed on August 4, 2003, 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). Based on claimant's testimony and Social Security records, the administrative law judge credited claimant with at least sixteen years of coal mine employment,<sup>2</sup> and found that the medical evidence developed since the denial of claimant's previous claim failed to 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 establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that, because Dr. Baker, who examined claimant on behalf of the Department of Labor, did not state an opinion as to whether claimant is totally disabled, the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete pulmonary evaluation, as required under the Act. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director responds, arguing that a remand to the district director for a complete pulmonary evaluation is not needed in this case.<sup>3</sup>

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,

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<sup>1</sup> Claimant's initial claim for benefits, filed on January 18, 1996, was denied by an administrative law judge on March 26, 1999, because claimant failed to establish that he was totally disabled due to a respiratory or pulmonary impairment. Director's Exhibit 1 at 52. Pursuant to claimant's appeal, the Board affirmed the denial of benefits on September 29, 2000. *Id.* at 17. The record does not indicate that claimant took any further action on his initial claim.

<sup>2</sup> The law of the United States Court of Appeals for the Sixth Circuit is applicable as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings 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), and that claimant, therefore, did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Claimant’s sole argument on appeal is that the Director failed to provide him with a complete pulmonary evaluation. Specifically, claimant asserts that, because Dr. Baker “relied upon a pulmonary function study . . . that did not conform to the applicable quality standards,” and was uncertain as to whether claimant was totally disabled, Dr. Baker’s report “was obviously not a complete report . . . .” Claimant’s Brief at 2. Claimant therefore asserts that the administrative law judge “should have remanded the instant claim so that a clarification could have been provided.” *Id.* The Director responds, asserting that Dr. Baker’s examination fulfilled the Director’s obligation to provide a complete pulmonary evaluation. The Director explains that claimant’s “poor effort on [two] ventilatory tests,” not any failure on the part of the Director, resulted in Dr. Baker’s inability to assess the degree of claimant’s pulmonary impairment, if any. Director’s Brief at 2. We agree with the Director.

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); *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). The regulations provide that a 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). In the event a test result is unreliable due to the miner’s “lack of effort,” the Director must afford the miner “one additional opportunity to produce a satisfactory result.” 20 C.F.R. §725.406(c).

The record reflects that Dr. Baker examined claimant on September 8, 2003. Director’s Exhibit 13. Dr. Baker recorded claimant’s employment, family and medical histories, his complaints and symptoms, and administered an x-ray, pulmonary function study, blood gas study, and an electrocardiogram. Because claimant’s poor effort rendered the initial pulmonary function study invalid, Dr. Baker administered a second pulmonary function study on November 3, 2003, that was also determined to be invalid and unreliable due to claimant’s poor effort. Director’s Exhibit 13.

In his medical report, Dr. Baker diagnosed clinical coal workers’ pneumoconiosis, legal pneumoconiosis, and arteriosclerotic heart disease. Dr. Baker reported that claimant’s blood gas study was normal and that his “effort was poor” on the pulmonary function studies. Director’s Exhibit 13. Although Dr. Baker indicated that he was uncertain as to the extent of claimant’s pulmonary impairment, Dr. Baker stated that claimant’s pneumoconiosis and heart disease contributed “fully” to any impairment. Director’s Exhibit 13. The administrative law judge noted that “Dr. Baker could not state

the degree of severity of the impairment due to the lack of effort on pulmonary function testing.”<sup>4</sup> Decision and Order at 11.

We agree with the Director that Dr. Baker could not fully assess claimant’s pulmonary condition because of claimant’s failure to cooperate on two pulmonary function studies that were provided to him by the Director, as required by Section 725.406. Thus, there was no failure by the Director to provide a complete pulmonary evaluation. Contrary to claimant’s assertion, “the Director is not required to force [Dr. Baker] to reach a conclusion where the miner has created a lack of objective medical documentation.” Director’s Brief at 3. Consequently, under the facts of this case, we agree that a remand is not necessary, as the Director met his obligation to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §725.406; *Hodges*, 18 BLR at 1-93.

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<sup>4</sup> The administrative law judge found that Drs. Broudy and Hippensteel were also unable to determine whether claimant is totally disabled, because all of his pulmonary function studies were invalid. Decision and Order at 14.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge