BRB No. 12-0345 BLA

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| EUGENE PRESCOTT | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| CLIFTY MINING COMPANY | ) | |
| | ) | |
| and | ) | |
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| CAPITAL FIRE & MARINE INSURANCE CORPORATION | ) | DATE ISSUED: 02/13/2013 |
| | ) | |
| 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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Eugene Prescott, Winfield, Alabama, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2010-BLA-05820) of Administrative Law Judge Adele Higgins Odegard rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a claim filed on September 21, 2009. Director's Exhibit 2.

The administrative law judge credited claimant with 11.38 years of coal mine employment.[1] Because claimant did not establish at least fifteen years of coal mine employment, the administrative law judge found that he failed to invoke the presumption, under Section 411(c)(4) of the Act, that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). The administrative law judge further found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand. In support of this motion, the Director states that he failed to discharge his statutory duty, pursuant to Section 413(b), 30 U.S.C. 923(b), to provide claimant with a complete pulmonary evaluation.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any

[1] Claimant's coal mine employment was in Alabama. Director's Exhibit 3. 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).

one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

**Complete Pulmonary Evaluation**

The administrative law judge denied benefits because she found that claimant did not meet his burden to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). In so finding, the administrative law judge determined that there was no reasoned medical opinion diagnosing claimant with pneumoconiosis under 20 C.F.R. §718.202(a)(4), that there were no pulmonary function studies for consideration on the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and that there was no reasoned medical opinion that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The Director concedes that he failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. Specifically, the Director concedes that the medical report of Dr. Hasson, who examined claimant on behalf of the Department of Labor, was incomplete because it lacked a valid pulmonary function study.[2] Director's Motion to Remand (Motion) at 5-8; Director's Exhibit 11. The Director explains that the omission was not harmless, because a pulmonary function study is an important clinical method for detecting whether a miner has a respiratory or pulmonary impairment and thus, is relevant to establishing both the existence of pneumoconiosis and total disability. Motion at 7-8. The Director therefore requests that the Board vacate the administrative law judge's findings that claimant does not have pneumoconiosis or a totally disabling respiratory impairment, "and remand the claim to the [administrative law judge] for the Director to supplement Dr. Hasson's [S]ection 923(b) examination." Motion at 8.

[2] The Director notes that Dr. Hasson observed that claimant was unable to produce acceptable and reproducible spirometry data. 20 C.F.R. §718.103; Director's Exhibit 11. When an objective test is not administered or reported in substantial compliance with the provisions of 20 C.F.R. Part 718, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director "shall schedule the miner for further examination and testing." 20 C.F.R. §725.406(c). Moreover, "[w]here the deficiencies in the report are the result of a lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result." *Id.* The Director states that "[t]he record does not indicate whether the district director offered [claimant] a second opportunity to perform a pulmonary function test. Dr. Hasson's examination therefore does not comply with the regulatory requirements for a [S]ection 923(b) complete pulmonary evaluation." Director's Motion to Remand (Motion) at 7.

The Act requires that "[e]ach miner who files a claim . . . 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), implemented by 20 C.F.R. §§718.101, 725.406. In view of the Director's concession that Dr. Hasson's report is incomplete and, therefore, fails to meet the Director's statutory obligation, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2), and her denial of benefits, and remand this case to the administrative law judge for further evidentiary development consistent with the Director's Motion to Remand.[3] *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199, 2-221 (6th Cir. 2009); *R.G.B.* [*Blackburn*] *v. S. Ohio Coal Co.*, 24 BLR 1-129, 1-147 (en banc); *Hodges v. BethEnergy Mines Inc*., 18 BLR 1-84, 1-93 (1994).

**Length of Coal Mine Employment**

Because the administrative law judge's determination of the length of claimant's coal mine employment is relevant to whether claimant can establish invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), we will review the administrative law judge's finding that claimant established 11.38 years of coal mine employment. Based on claimant's Social Security earnings records, the administrative law judge credited claimant with 9.16 years of coal mine employment between 1974 and 1984. Decision and Order at 8. Additionally, finding merit in claimant's assertion that his Social Security earnings records were inaccurate regarding his employment with Frontier Mining, the administrative law judge credited claimant with an additional 0.71 years of coal mine employment in 1983, and 0.51 years of coal mine employment in 1984, raising his total to 10.38 years. *Id*. at 8-9. Finally, the administrative law judge relied on a mining training certificate to credit claimant with a full year of coal mine employment in 1985, arriving at a total of 11.38 years of coal mine employment. *Id*. at 9.

In his letters to the Board, claimant argues that he should also be credited with coal mine employment which he asserts he performed from 1953 to 1960, and from 1986 to 1990, yielding a total of at least twenty years of coal mine employment. Claimant bears the burden of establishing the length of his coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). Here, the administrative law judge explained that she was not persuaded that claimant had any significant coal mine employment before 1974 or after 1985. Decision and Order at 9. Specifically, the administrative law judge noted that claimant's Social Security earnings records do not

[3] The Director states that the administrative law judge "has the discretion to remand the claim to the district director for the additional testing or allow the parties to submit the evidence." Motion at 8, *citing* 20 C.F.R. §725.456(e).

reflect coal mine employment from 1953 to 1960, or from 1986 to 1990; that claimant did not submit pay stubs from those periods, although he submitted pay stubs from other periods of coal mine employment; and that although claimant submitted affidavits from coworkers stating that he had at least twenty years of coal mine employment, none of those affidavits specified that claimant was employed before 1974 or after 1985. *Id*.; Director's Exhibits 7, 8; Claimant's Exhibits 1, 2. Because the administrative law judge's computation was reasonable and it is supported by substantial evidence, we affirm her finding that claimant established 11.38 years of coal mine employment. *See* 20 C.F.R. §725.101(a)(32); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986). We therefore affirm the administrative law judge's determination that, as claimant established fewer than fifteen years of coal mine employment, the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), is not applicable.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, the Director's Motion to Remand is granted, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge