

BRB No. 03-0388 BLA

GLADYS L. HOWELL)
)
 Claimant-Petitioner)
)
 v.)
)
 AGIP COAL USA, INCORPORATED) DATE ISSUED: 01/29/2004
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondent)
)
 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 Robert J. Lesnick,
Administrative Law Judge, United States Department of Labor.

Gladys L. Howell, Elkins, West Virginia, *pro se*.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund),
Charleston, West Virginia, for employer.

Jennifer U. Toth (Howard M. Radzely, Solicitor of Labor; Donald S. Shire,
Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and GABAUER, Administrative Appeals
Judges.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order Denying Benefits (2000-BLA-824) of Administrative Law Judge Robert J. Lesnick, with respect to 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). In response, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Remand, requesting that the Board vacate the administrative law judge's Decision and Order and return the case to the district director so that claimant can be provided with a complete pulmonary examination. Employer has responded and urges the Board to deny the Director's motion. Claimant has not responded.

The relevant procedural history of this case is as follows. Claimant filed an application for benefits on September 4, 1996. Director's Exhibit 1. At the request of the Department of Labor, Dr. Scattaregia examined claimant on October 22, 1996. Director's Exhibit 8. Following an informal conference, the district director issued a Proposed Decision and Order on April 9, 1997, in which benefits were denied on the ground that the evidence was insufficient to establish the existence of pneumoconiosis or that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 29. Claimant appealed this determination on May 15, 1997. Director's Exhibit 33. The district director treated claimant's appeal as a petition for modification and denied it. Director's Exhibit 40. At claimant's request, the case was transferred to the Office of Administrative Law Judges for a hearing and was assigned to Administrative Law Judge Robert J. Lesnick (the administrative law judge). After several continuances, the hearing was held on October 10, 2002.

In his Decision and Order, the administrative law judge found that although the evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(b), the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, benefits were denied. In reaching these findings, the administrative law judge considered and discredited the opinion of Dr. Scattaregia. Dr. Scattaregia diagnosed chronic bronchitis due to "genetics and the environment," but did not indicate whether claimant had a respiratory or pulmonary impairment. Director's Exhibit 8. Upon weighing the evidence relevant to Section 718.202(a)(4), the administrative law judge determined that Dr. Scattaregia "thoroughly documented claimant's histories, complaints and condition." Decision and Order at 13. The administrative law judge further found, however, that Dr. Scattaregia's diagnosis of pneumoconiosis was not reasoned, as he did not provide any basis or explanation for his diagnosis nor did he reference the medical tests that he performed in conjunction with the examination. *Id.*

The Director asserts that because Dr. Scattaregia's report did not adequately address the necessary elements of entitlement, the Department of Labor (DOL) has failed to fulfill its obligation to provide claimant with a complete pulmonary evaluation as required by §923(b) of the Act and 20 C.F.R. §§718.102, 725.405, and 725.406. The Director requests, therefore that the case be remanded to the district director for further development of the evidence. Employer responds, arguing that remand is not necessary, as the administrative law judge found that Dr. Scattaregia's pulmonary evaluation was complete because the doctor "thoroughly documented" claimant's medical and employment histories and symptoms and performed the requisite objective testing. Employer further asserts that had the administrative law judge found Dr. Scattaregia's report incomplete, he could have remanded the case to the district director pursuant to 20 C.F.R. §725.456(e). Finally, employer maintains that the Director waived the issue by not raising it earlier in the adjudicatory process.

After consideration of the Director's arguments and employer's response, we hereby grant the Director's Motion to Remand. Although Dr. Scattaregia took accurate work and medical histories and he performed several medical tests, it does not necessarily follow that his report of the examination constituted a complete pulmonary evaluation. The circuit courts and the Board have long held that DOL has not fulfilled its statutory duty if the physician who performed the pulmonary evaluation at DOL's request has not addressed a necessary element of entitlement. *Collins v. Director, OWCP*, 932 F. 2d 1191, 15 BLR 2-108 (7th Cir. 1991); *Cline v. Director, Office of Workers' Compensation Programs*, 972 F.2d 234, 14 BLR 2-102 (8th Cir. 1992); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166 (8th Cir.1984); *Hodges v. BethEnergy Mines Corp.*, 18 BLR 1-84 (1994); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990). In the present case, the administrative law judge rationally determined that Dr. Scattaregia's opinion did not sufficiently address the issue of the existence of pneumoconiosis, as his diagnosis of chronic bronchitis related to "genetics and the environment" was unexplained. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). In addition, as the Director argues, Dr. Scattaregia did not address the extent or source of any respiratory or pulmonary impairment. Contrary to employer's contention, therefore, these omissions from Dr. Scattaregia's report rendered his evaluation of claimant less than complete, despite the fact that Dr. Scattaregia took accurate work and medical histories and performed several medical tests.

Employer's assertion that the proper remedy in this case was presented by Section 725.456(e)(2000) is also without merit.¹ Under Section 725.456(e), an administrative law judge may remand a case to the district director if he or she finds the documentary

¹ The amended version of 20 C.F.R. §725.456 does not apply to claims, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2.

evidence incomplete as to a particular issue. 20 C.F.R. §725.456(e) (2000). In declining to remand this case based upon his determination that Dr. Scattaregia's diagnosis of pneumoconiosis was unreasoned, the administrative law judge did not abuse the discretion granted to him by Section 725.456(e) (2000). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Farber v. Island Creek Coal Co.*, 7 BLR 1-428, 1-429 (1984); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984). Similarly, we reject employer's contention that the Director waived his right to raise the issue of whether claimant had received a complete pulmonary evaluation by not raising it an earlier stage of the adjudication process. Because employer has the right to respond to evidence developed on remand, employer's ability to mount a meaningful defense is not hindered by granting the Director's Motion at this juncture in the proceedings. *See Lane Hollow Coal Co. v. Director, OWCP, [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

Accordingly, we vacate the administrative law judge's Decision and Order and remand this case to the district director for further development of the evidence.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge