

BRB No. 04-0843 BLA

CHARLES HERBERT PENSYL, JR. )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent )

DATE ISSUED: 07/28/2005

DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Helen H. Cox (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5364) of Administrative Law Judge Paul H. Teitler (the administrative law judge) 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). The administrative law judge credited claimant with twelve years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Based on the concession by the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability

due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The Director responds, urging the Board to remand the case to the district director to allow him to provide claimant with a complete and credible pulmonary evaluation. In addition, the Director urges the Board to instruct the administrative law judge to explicitly determine whether good cause exists to include Dr. Barrett's interpretation of the June 25, 2003 x-ray, prior to considering the merits of entitlement, if the case is returned to him.<sup>1</sup>

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director concedes that he has failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Specifically, the Director concedes that there is no credible medical opinion from him addressing the issues of the existence of pneumoconiosis and total disability due to pneumoconiosis, and therefore, he requests remand of the case to the district director to allow for a complete and credible pulmonary evaluation and for reconsideration of this claim in light of the new evidence. We grant the Director's request, given the Director's concession that the Department of Labor failed to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.<sup>2</sup> 30 U.S.C.

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<sup>1</sup>Since the administrative law judge's length of coal mine employment finding is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>2</sup>Moreover, as the Director, Office of Workers' Compensation Programs (the Director), asserts, the administrative law judge erred in admitting into the record Dr. Barrett's negative reading of the June 25, 2003 x-ray without first rendering a finding that the Director established good cause for his late submission. 20 C.F.R. §725.456(b)(3). The administrative law judge should make such a finding before considering the merits of entitlement, if the case is returned to him.

§923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994); *Pettry v. Director, OWCP*; 14 BLR 1-98 (1990). Consequently, we vacate the administrative law judge's denial of benefits and remand the case to the district director for further development of the medical evidence.<sup>3</sup>

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the district director to allow for a complete pulmonary evaluation, at no expense to claimant, and for reconsideration of the merits of this claim in light of our Decision and Order and all of the evidence of record.

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

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<sup>3</sup>In view of our decision to remand the case to the district director to develop evidence that will fulfill the Director's obligation to provide claimant with a complete and credible pulmonary evaluation, we decline to address claimant's contentions at 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.204(c). *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).