

BRB No. 07-0107 BLA

B. R.)	
)	
Claimant-Petitioner)	
)	DATE ISSUED: 07/31/2007
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-05924) of Administrative Law Judge Adele Higgins Odegard 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). Initially, the administrative law judge found that this case involves a subsequent claim filed on August 27, 2004 pursuant to 20 C.F.R. §725.309(d).¹ The administrative law judge then credited claimant with twenty-four

¹ Claimant filed his initial claim with the Department of Labor on February 5, 1993, which was denied by the district director. Director's Exhibit 1. Administrative Law Judge J. Michael O'Neill issued a Decision and Order on August 29, 1995 denying

years of coal mine employment,² based on a stipulation of the parties, and adjudicated the claim under 20 C.F.R. Part 718. Weighing the medical evidence submitted since the denial of claimant's prior claim, the administrative law judge determined that claimant established the existence of pneumoconiosis, and thus, found that claimant satisfied his burden, under Section 718.203(d), of proving a change in one of the applicable conditions of entitlement that had been previously adjudicated against him. However, the administrative law judge found that the medical evidence failed to establish that claimant had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he is not totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), has failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. In a Motion to Remand, the Director responds, urging the Board to vacate the administrative law judge's denial of benefits and remand the case for the Director to satisfy his 30 U.S.C. §923(b) obligation.

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).

benefits. Judge O'Neill found that the evidence of record was insufficient to establish the existence of pneumoconiosis and also insufficient to establish a totally disabling respiratory or pulmonary impairment. Accordingly, benefits were denied. Director's Exhibit 1. Pursuant to claimant's appeal, the Board affirmed Judge O'Neill's denial of benefits, holding that Judge O'Neill's finding that claimant failed to establish total disability was supported by substantial evidence. [*B.R.*] *v. Director, OWCP*, BRB No. 95-2141 BLA (Apr. 25, 1996)(unpub.); Director's Exhibit 1. Claimant filed a petition for modification on December 11, 1996, which was denied by the district director in a proposed decision dated February 28, 1997. Director's Exhibit 1. No further action was taken on this claim.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

We first address claimant's contention that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. In a Motion to Remand, the Director agrees that he has not satisfied his obligation under Section 413(b) by virtue of Dr. Simpao's opinion.³ Specifically, the Director agrees that, because the administrative law judge rationally discredited the opinion of Dr. Simpao on the issue of total disability, the evaluation of the physician selected by the miner is incomplete. Director's Motion to Remand at 4-5. The Director further states, "the case must be remanded for the Director to satisfy his Section 923(b) obligation."⁴ *Id.* at 5. Because the Director concedes that he has not satisfied his statutory obligation, we remand this case to the district director to provide claimant with a complete and credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §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 (1994); *Petry v. Director, OWCP*; 14 BLR 1-98 (1990). Consequently, we vacate the administrative law judge's denial of benefits.⁵

³ Claimant contends that neither Dr. Baker's nor Dr. Simpao's opinion satisfies the Director's burden of providing claimant with a complete, credible pulmonary evaluation. Claimant's Brief at 4. However, as the Director states, only Dr. Simpao was selected by claimant to perform the complete pulmonary evaluation that the Director is obliged to provide under 30 U.S.C. §923(b). Director's Motion to Remand at 3; Director's Exhibit 9. Although Dr. Baker provided a medical opinion at the request of the Director, he was not selected by claimant to provide the opinion. Thus, Dr. Baker's report was not submitted pursuant to the Director's statutory obligation to enable each claimant to substantiate his claim with a complete pulmonary evaluation. Director's Motion to Remand at 5.

⁴ The Director states that on remand, the district director should obtain a supplemental opinion from Dr. Simpao addressing whether claimant's pulmonary impairment would preclude claimant from performing his usual coal mine employment; and, in obtaining the supplemental opinion, the district director should ensure that Dr. Simpao is aware of the exertional requirements of claimant's usual coal mine employment. Director's Motion to Remand at 5-6.

⁵ In view of our disposition of this case, we decline to address any additional contentions of the parties' in this appeal. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated 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 the evidence of record.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge