

BRB No. 09-0748 BLA

ROBERT E. PURIFOY, SR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
U.S. STEEL MINING COMPANY)	
)	DATE ISSUED: 07/23/2010
Employer-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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Robert E. Purifoy, Sr., Birmingham, Alabama, *pro se*.

Kary B. Wolfe and Timothy M. Davis (Jones, Walker, Waechter, Poitevent, Carrère & Denègre LLP), Birmingham, Alabama, for employer.

Emily Goldberg-Kraft (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2007-BLA-06037) of Administrative Law Judge Janice K. Bullard rendered on a subsequent claim filed pursuant to the provisions of the Black Lung

Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(l))(the Act).¹ Adjudicating the claim pursuant to the regulations at 20 C.F.R. Part 718, the administrative law judge adopted the prior findings of eleven and one-half years of coal mine employment and employer's designation as the responsible operator. The administrative law judge found that the newly submitted evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge found that, although claimant established that he was totally disabled, he did not prove that he has pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), or that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally asserts that the administrative law judge erred in denying benefits, that his condition has changed since the prior denial and alleges that the pulmonary evaluation performed by his treating physician, Dr. Dey, was erroneously omitted from the record. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has responded, and requests that the Board remand the case to the district director to cure the defects in the Department of Labor (DOL) sponsored pulmonary evaluation performed by Dr. Gaggar.²

¹ Claimant filed his first claim for benefits on April 19, 1999. Director's Exhibit 1. After a formal hearing, Administrative Law Judge Gerald M. Tierney issued a Decision and Order – Denying Benefits, on July 12, 2001, finding that claimant failed to establish the existence of pneumoconiosis. *Id.* On appeal, the Board affirmed the denial of benefits. *Purifoy v. U.S. Steel Mining Co.*, BRB No. 01-0893 BLA (May 21, 2002)(unpub.). Claimant filed a second claim on June 1, 2004. Director's Exhibit 2. The district director denied benefits on March 23, 2005, finding that the evidence did not establish any element of entitlement. *Id.* Claimant took no action until he filed the current subsequent claim on July 25, 2006. Director's Exhibit 4. Upon claimant's request, and without objection, Administrative Law Judge Janice K. Bullard (the administrative law judge), decided the case on the record and issued her Decision and Order on June 18, 2009, which is the subject of this appeal.

² We affirm the administrative law judge's findings that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, as they are unchallenged by the parties on appeal, and are not adverse to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.³ 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).

Impact of the Recent Amendments

By Order dated May 4, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148. *Purifoy v. U.S. Steel Mining Co.*, BRB No. 09-0748 BLA (May 4, 2010)(unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and remained pending as of March 23, 2010, the effective date of the amendments. In particular, Section 1556 reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Employer and the Director have responded.

Employer requests that the Board affirm the administrative law judge's Decision and Order Denying Benefits and contends that the amendments to the Act are not applicable to a living miner's claim and, in the alternative, that the presumption cannot be invoked, as claimant's coal mine employment history is less than fifteen years. Employer further argues that the evidence that the administrative law judge relied upon in finding that claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis is sufficient to rebut the Section 411(c)(4) presumption. The Director notes that the administrative law judge adopted Administrative Law Judge Gerald M. Tierney's finding of eleven and one-half years of coal mine employment and maintains that, "unless the [c]laimant presents new evidence that proves that he has at least fifteen years of underground mining or its equivalent in surface mining, Section 411(c)(4) does not apply to this case." Director's Response to Order at 2-3. The Director also reiterates his request that the Board remand this case to the district director to provide "a supplementary pulmonary evaluation that is legally sufficient under Section 413(b) of the Act." *Id.* at 3. Based on the parties' responses and our review, we hold that the amendments do not affect the adjudication of this claim, because there is no evidence,

³ The record indicates that claimant's last year of coal mine employment was in Alabama. Director's Exhibits 1, 2, 5. Accordingly, the Board will apply the law 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*).

and no allegation, that claimant has at least fifteen years of coal mine employment. Director's Exhibits 1, 2, 5.

The Merits of Entitlement

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), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84 n.3 (1994). In the present case, the administrative law judge noted that Dr. Gaggar diagnosed coal workers’ pneumoconiosis and found that, while he is well qualified, his diagnosis was “not entitled to weight” because he did not identify any evidence supporting his diagnosis and “no such evidence is apparent from the record.” Decision and Order at 11. The administrative law judge concluded: “the fact that [c]laimant has a breathing problem and a history of coal dust exposure is not enough to support a finding of clinical or legal pneumoconiosis without some explanation or evidence linking the two.” *Id.*

In his response brief, the Director asserts that he has not satisfied his obligation under Section 413(b), 30 U.S.C. §923(b), because Dr. Gaggar’s pulmonary evaluation failed to address the elements of legal and clinical pneumoconiosis. The Director argues that, although the administrative law judge properly found that Dr. Gaggar conducted all the required tests that ultimately met the minimal quality standards, Dr. Gaggar “failed to link his opinion that claimant had coal workers’ pneumoconiosis to any objective tests results” and “merely stated that [c]laimant’s cardiopulmonary diagnosis derived from coal dust exposure.” Director’s Response Letter at 4. The Director specifically argues that the deficiency is problematic because, although the administrative law judge found that the improved post-bronchodilator pulmonary function test results were not indicative of pneumoconiosis, she did not address the cause of the fixed impairment demonstrated by the results, which were still qualifying. The Director argues that “had Dr. Gaggar addressed the pneumoconiosis issue more fully and credibly, the [c]laimant might have established both the existence of the disease and its contribution, if any, to his disability.” Director’s Response Letter at 5.

Because the Director concedes that he has not satisfied his statutory obligation, we vacate the denial of benefits and remand this case to the district director to provide claimant with a complete 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*, 18 BLR at 1-88; *Petry v. Director, OWCP*; 14 BLR 1-98 (1990).

Accordingly, the administrative law judge’s Decision and Order Denying Benefits is affirmed in part, vacated in part and the case is remanded to the district director for further evidentiary development necessary to satisfy the DOL’s statutory obligation

pursuant to 30 U.S.C. §923(b), as implemented by 20 C.F.R. §725.406, to remedy the defects present in Dr. Gaggar's evaluation and for reconsideration of this claim under 20 C.F.R. §§718.202, 718.203 and 718.204(c), if reached.⁴

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴ On remand, the administrative law judge should also consider claimant's allegation that the "examination results," by Dr. Dey, his "pulmonary doctor," were "omitted from the record." Claimant's Letter of Appeal at 1. Our review indicates that the record contains admission records from Medical Center East, including consultation summaries in which Dr. Dey described claimant's pulmonary status. Employer's Exhibit 3. The administrative law judge acknowledged the presence of documents from Medical Center East in the record, but did not specifically mention Dr. Dey's consultation reports. Decision and Order at 10.