

BRB No. 04-0900 BLA

WILLIAM D. BISHOP)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
U.S. STEEL MINING COMPANY)	DATE ISSUED: 06/16/2005
)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-6278) of Administrative Law Judge Michael P. Lesniak (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 at least twenty-two years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.¹ The administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).² Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). In the alternative, claimant argues 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. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director has filed a response, urging the Board to remand the case to the district director to allow him to provide claimant with a complete and credible pulmonary evaluation.³

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 issue of total disability, 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 to remand this case to the district director, 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

¹Employer conceded the existence of pneumoconiosis arising out coal mine employment. Transcript at 6, 7.

²Because the administrative law judge found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b), he concluded that the issue of total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) was moot. Decision and Order at 6.

³Since 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).

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, 1-89-90 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990). Consequently, we vacate the administrative law judge's denial of benefits.⁴

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 the evidence of record.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁴In view of our disposition of this case, we decline to address claimant's contentions at 20 C.F.R. §718.204(b)(2)(iv). *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).