

BRB No. 12-0432 BLA

EDGAR WHITAKER)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 03/26/2013
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-BLA-05400) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim¹ filed on

¹ Claimant has filed five previous claims for benefits. Director's Exhibits 1-2. His first three claims, filed on September 13, 1978, April 27, 1984, and June 4, 1987, respectively, were denied because he was unable to prove any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed his fourth claim for benefits on March 27, 2000, but subsequently requested that the claim be withdrawn. *Id.* Claimant filed his fifth claim for benefits on October 26, 2001, which was ultimately denied on September 23, 2005, by Administrative Law Judge Rudolph L. Jansen, who determined that claimant

May 15, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge found that claimant established ten and one-half years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was insufficient to establish total disability and, thus, demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that he is not totally disabled.² Claimant further contends that, insofar as Dr. Rasmussen did not obtain satisfactory pulmonary function testing, the Director, Office of Workers' Compensation Programs (the Director), has failed to provide him with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required by 20 C.F.R. §725.406. The Director responds and requests that the case be remanded to the district director in order for the Department of Labor (DOL) to satisfy its statutory obligation to provide claimant with a complete pulmonary evaluation.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

had pneumoconiosis but was not totally disabled. Director's Exhibit 2. The Board affirmed the denial. *Whitaker v. Director, OWCP*, BRB No. 05-0185 BLA (Feb. 27, 2007) (unpub.). Claimant took no further action until he filed the current subsequent claim.

² In rendering his argument on appeal, claimant cites to 20 C.F.R. §718.204(c). Claimant's Brief at 2. Under the revised regulations, which became effective on January 19, 2001, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b)(2).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

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, 1-88 n.3 (1984). The regulation at 20 C.F.R. §725.406(a) provides that “[a] complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study.” 20 C.F.R. §725.406(a); *see Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199, 2-221 (6th Cir. 2009). Further, the regulation at 20 C.F.R. §725.406(c) mandates that “[i]f any medical examination or test conducted under paragraph (a) of this section is not administered or reported in substantial compliance with the provisions of part 718 of this subchapter, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director shall schedule the miner for further examination and testing.” 20 C.F.R. §725.406(c). The regulation specifically provides that “[w]here the deficiencies in the report [prepared by the physician conducting the DOL-sponsored pulmonary evaluation] are the result of a lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result.” 20 C.F.R. §725.406(c).

In this case, Dr. Rasmussen examined claimant on June 10, 2008, at the request of the DOL. Director’s Exhibit 13. Dr. Rasmussen indicated that claimant’s pulmonary function testing was “unsatisfactory” because claimant “completed seven attempts without reproducible [graphs] and said he was unable to do more[,] and wanted to leave.” *Id.* The Director notes that claimant underwent additional pulmonary function testing with Dr. Dahhan on January 12, 2009, at the DOL’s request in accordance with 20 C.F.R. §725.406(c). *See* Director’s Letter Brief at 2; Director’s Exhibit 13. Because “Dr. Rasmussen, [c]laimant’s chosen DOL-sponsored physician, did not review the results or give an opinion concerning total respiratory impairment based on that test,” the Director asserts that claimant has not received a complete pulmonary evaluation. Director’s Letter Brief at 2. The Director contends that “the case must be remanded for Dr. Rasmussen to review the January 2009 pulmonary function test results and give an opinion on the issues of entitlement.” *Id.* The Director specifically instructs:

Dr. Rasmussen [must] be informed that “the Director accepts, based upon past admissions concerning the weight of the [x]-ray evidence, that [c]laimant suffers from clinical pneumoconiosis[.] Further, in light of the fact that total respiratory disability is one of the issues in dispute, Dr. Rasmussen should also be informed that [c]laimant’s last coal mine work required him to work in a repair shop rebuilding old mine equipment, by, inter alia, cutting and welding. The doctor should also be told of the physical requirements of [c]laimant’s last job. Finally, because Dr. Rasmussen, in discussing disability, included consideration of [c]laimant’s heart condition, the doctor should be asked if [c]laimant has a totally

disabling respiratory impairment (i.e., cannot perform his usual coal mine work) without regard to non-respiratory factors such as [c]laimant's heart condition. Accordingly, this case must be remanded to [the district director] for further development of the medical evidence as discussed above.

Id. at 2-3 (internal citations omitted).⁴

Based on the Director's concession that claimant did not receive a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(b)(2), 725.309 and the denial of benefits, and remand this case in accordance with the Director's request.⁵ *See Greene*, 575 F.3d at 641-42, 24 BLR at 2-221.

⁴ The Director also states that, "[b]ecause the physical requirements of [c]laimant's last job are not clear," the district director "should detail the variances in [c]laimant's physical requirements and ask [Dr. Rasmussen] if [c]laimant's respiratory condition renders him totally disabled based upon the different physical requirements." Director's Letter Brief at 3 n. 1, *citing* Director's Exhibit 6 at 2; 2003 Hearing Transcript at 14-15.

⁵ Because we vacate the denial of benefits, it is not necessary that we address claimant's argument that the administrative law judge erred in finding that he is not totally disabled at 20 C.F.R. §718.204(b)(2).

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 and for reconsideration of the merits of this claim in light of the new evidence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge