

BRB No. 09-0444 BLA

CECIL BOWLING)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 11/24/2009
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Steven K. Robison (Montgomery, Elsner & Pardieck), Seymour, Indiana, for claimant.

Barry H. Joyner (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank 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 the Decision and Order (08-BLA-5661) of Administrative Law Judge Donald W. Mosser 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). This case involves a claim filed on April 23, 2007. After crediting claimant with at least eleven years of coal mine employment,¹ the

¹ The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 4, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Although the administrative law judge found that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he found that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant also challenges the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Board to remand the case to the district director for him to provide claimant with a complete pulmonary evaluation.²

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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 (1994).

On the facts of this case, we grant the Director's request to remand this case, given the Director's concession that the Department of Labor failed to provide claimant with a complete pulmonary evaluation, sufficient to constitute an opportunity to substantiate his

² The Director, Office of Workers' Compensation Programs (the Director), further contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

claim, as required by the Act.³ 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, BLR (6th Cir. 2009); *Hodges*, 18 BLR at 1-93. Consequently, we vacate the administrative law judge's denial of benefits.⁴

³ The Director concedes that the Department of Labor (DOL) failed to satisfy its obligation to provide claimant with a complete pulmonary evaluation because the DOL physician, Dr. Repsher, determined that the pulmonary function study that he administered was “medically invalid for interpretation.” Director’s Exhibit 7. Dr. Repsher noted that claimant’s degree of cooperation during an August 14, 2007 pulmonary function study was “poor.” *Id.* The regulations provide that, if an objective test is not administered or reported in substantial compliance with the provisions of 20 C.F.R. Part 718, 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). Moreover, “[w]here the deficiencies in the report 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.” *Id.* The Director notes that the absence of a valid pulmonary function study was not harmless, because it “may have impacted Dr. Repsher’s findings on both the existence of pneumoconiosis and total disability.” Director’s Brief at 2.

⁴ In view of our disposition of this case, we decline to address any of the 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 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 all of the evidence of record.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge