

BRB No. 02-0359 BLA

JOHN DAMICO)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Eugene Scalia, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (01-BLA-0258) of Administrative Law Judge Michael P. Lesniak 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).¹ Adjudicating this duplicate claim² pursuant to 20 C.F.R. Part 718,

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Claimant is John Damico, the miner, who filed his first application for benefits on September 17, 1970, which was finally denied on November 19, 1981. Director’s Exhibit 35.

the administrative law judge credited claimant with twelve years of qualifying coal mine employment. Next, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b), elements that were previously adjudicated against claimant. The administrative law judge, therefore, found that claimant failed to demonstrate a material change in conditions under 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in failing to credit the medical opinion of Dr. Schaaf, and consequently, erred in failing to find the existence of pneumoconiosis and total respiratory disability. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge correctly declined to credit the opinions of Dr. Schaaf and the opinions of Drs. Malhotra and Ignacio, which were provided by the Director. The Director contends, therefore, that the case must be remanded to the district director because the Director failed to provide claimant with a complete, credible pulmonary evaluation as required by the Act.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 the 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'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

It is well established that the Department of Labor (DOL) has a statutory duty to

Claimant took no further action on this claim. On December 23, 1999, claimant filed a duplicate application for benefits, which is the subject of the appeal before us. Director's Exhibit 1.

³ We affirm the administrative law judge's finding regarding length of coal mine employment inasmuch as this determination is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 6-7.

arrange and pay for a miner's complete pulmonary examination pursuant to 30 U.S.C. §923(b). *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *accord Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990). Likewise, the Board has held that DOL must provide claimant with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim, as required by the Act. *See Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990) (*en banc*). As the Director correctly avers, the administrative law judge found that while the opinions of Drs. Malhotra and Ignacio were well documented, they were not well reasoned because both physicians failed to explain how the underlying documentation supported the opinions that claimant did not suffer from coal workers' pneumoconiosis and, Dr. Ignacio did not provide an opinion with respect to total disability. Decision and Order at 8-10; Director's Exhibits 13, 38. Hence, inasmuch as Drs. Malhotra and Ignacio did not provide credible opinions addressing all issues of entitlement, the Director concedes that he has failed to provide claimant with a complete pulmonary examination as required by Section 413(b) of the Act, 30 U.S.C. §923(b). *See* 20 C.F.R. §§718.101, 725.405(b). Hence, we grant the Director's request, vacate the Decision and Order of the administrative law judge in part, and remand the case to the district director to provide claimant with a complete, credible, pulmonary evaluation addressing all issues of entitlement, particularly, the existence of pneumoconiosis and total disability, *see* 20 C.F.R. §§718.202(a), 718.204(b), in accordance with Section 413(b) of the Act. *See Pettry, supra; Hall, supra*. If, on remand, claimant affirmatively establishes the existence of one of the elements previously adjudicated against him, then claimant has demonstrated a material change in conditions as a matter of law, *see* 20 C.F.R. §725.309 (2000); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 317, 20 BLR 2-76, 2-94 (3d Cir. 1995), and the district director must consider whether all the evidence of record, including that submitted with the previous claim, supports a finding of entitlement to benefits. *See Swarrow, supra*. Because we grant the request by the Director to remand this case for a complete, credible, pulmonary evaluation, we need not address claimant's argument on appeal that the administrative law judge erred in not crediting the opinion of Dr. Schaaf.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed in part and vacated in part, and this case is remanded to the district director for proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge