

BRB No. 05-0106 BLA

GEORGE ASHER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’)	DATE ISSUED: 09/20/2005
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

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: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-5826) of Administrative Law Judge Rudolf L. Jansen 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 accepted the parties’ stipulation to ten years of coal mine employment and adjudicated this case pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge noted that the instant claim is a subsequent claim pursuant to 20 C.F.R. §725.309, and he found the newly submitted evidence insufficient to demonstrate the element of entitlement previously

adjudicated against claimant, namely total disability.¹ The administrative law judge, therefore, denied benefits.

On appeal, claimant contends that in view of the administrative law judge's findings regarding Dr. Baker's opinion, the Director, Office of Workers' Compensation Programs (the Director), has failed to fulfill his statutory obligation to provide claimant with a complete, credible pulmonary evaluation, pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). The Director responds, agreeing with claimant, that he has not fulfilled his obligation. The Director, therefore, requests that the Board vacate the administrative law judge's Decision and Order and remand the case to the district director so that he may supplement Dr. Baker's opinion.

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. 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).

Claimant argues that, given the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv) that Dr. Baker's opinion is poorly reasoned and documented, the Director has failed to provide him with a complete, credible pulmonary evaluation as required under Section 413(b) of the Act, 30 U.S.C. §923(b).² The Director agrees that Dr. Baker's evaluation of claimant does not satisfy the statutory obligation to provide claimant with a complete and credible pulmonary evaluation. Specifically, the Director contends that he must provide claimant with another opportunity "to produce satisfactory

¹ The prior claim, filed on January 6, 1992, was denied by Administrative Law Judge George P. Morin in a Decision and Order Denying Benefits issued on May 31, 1995. Judge Morin noted that claimant had filed four prior claims. Judge Morin found the medical opinion evidence sufficient to establish the existence of pneumoconiosis; however, he found the evidence insufficient to establish total disability. Therefore, Judge Morin denied benefits. The Board affirmed Judge Morin's denial of benefits. *Asher v. Director, OWCP*, BRB No. 95-1731 BLA (Apr. 12, 1996)(unpub.). Director's Exhibit 1. Claimant filed the instant claim for benefits on May 7, 2001. Director's Exhibit 3.

² Dr. Baker examined claimant on September 5, 2001 and diagnosed coal workers' pneumoconiosis, COPD, hypoxemia, chronic bronchitis and ischemic heart disease. He opined that the degree of claimant's impairment is "mild with decreased FEV1, decreased PO2, chronic bronchitis and Coal Workers' Pneumoconiosis 1/0." Director's Exhibit 11.

results on pulmonary function testing, and then...obtain a supplemental report from Dr. Baker assessing [claimant's] respiratory impairment, if any....” Director’s Brief at 6; *also see* 20 C.F.R. §725.406(a). We defer to the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87 (1994). We, therefore, remand this case to the district director pursuant to 30 U.S.C. §923(b).

Accordingly, the administrative law judge’s Decision and Order – Denying Benefits is vacated and this case is remanded to the district director for further processing consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge