

BRB No. 06-0362 BLA

BRUCE D. JONES)
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 Claimant-Petitioner)
)
 v.) DATE ISSUED: 09/19/2006
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Gregory E. Hull (Millikin & Fitton Law Firm), Hamilton, Ohio, for claimant.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (04-BLA-6830) of Administrative Law Judge Robert L. Hillyard rendered 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). Claimant filed his claim for benefits on January 28, 2002. Director's Exhibit 1. The administrative law judge credited claimant with three and one-third years of coal mine employment and accepted the concessions by the Director, Office of Workers' Compensation Programs (the Director), that claimant established the existence of pneumoconiosis and that he is totally disabled by a respiratory or pulmonary impairment, pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). However, the administrative law judge found that the evidence did not establish that

claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c), or that his 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 his analysis of the medical opinion evidence.¹ The Director has filed a motion to remand this case to the district director for further evidentiary development. In support of this motion, the Director states that he has failed to fulfill his statutory duty, pursuant to Section 413(b), 30 U.S.C. 932(b), to provide claimant with a complete pulmonary evaluation.²

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pursuant to 20 C.F.R. §718.203(c), the administrative law judge found that there was no credible evidence that claimant's pneumoconiosis arose out of coal mine employment. Specifically, the administrative law judge found that Dr. Wehr, who examined claimant on behalf of the Department of Labor, did not address the issue, and that Dr. Rubio, claimant's treating physician, did not credibly link claimant's pneumoconiosis to his coal mine employment. However, the Director now concedes that the administrative law judge "erred in finding Dr. Wehr's opinion silent on disease causation because, by diagnosing coal workers' pneumoconiosis, Dr. Wehr attributed the clinical pneumoconiosis seen on x-ray to claimant's coal work history, thereby

¹ Claimant filed his brief on April 21, 2006. Consequently, the Board's April 25, 2006 order directing claimant to either file a brief or show cause why his appeal should not be dismissed, is moot.

² We affirm as unchallenged on appeal the administrative law judge's finding that claimant established three and one-third years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

establishing the necessary causal connection between claimant's clinical pneumoconiosis and his coal mine employment. 20 C.F.R. §718.203(c)."³ Motion to Remand at 3 n.1

Pursuant to 20 C.F.R. §718.204(c)(1), the administrative law judge found that Dr. Wehr's opinion that claimant's "predominant disability" is due to chronic obstructive pulmonary disease (COPD) rather than coal workers' pneumoconiosis, Director's Exhibit 5 at 6, established that there was "no total disability due to pneumoconiosis" Decision and Order at 13. The Director informs the Board that Dr. Wehr did not address whether the diagnosed COPD arose out of coal mine employment and thus, did not address whether the COPD constituted "legal pneumoconiosis."⁴ Motion to Remand at 4; *see* 20 C.F.R. §718.201(a)(2). Additionally, the Director indicates that Dr. Wehr did not address whether pneumoconiosis is a "substantially contributing cause" of claimant's totally disabling impairment, as required by 20 C.F.R. §718.204(c)(1). Motion to Remand at 5. A review of Dr. Wehr's report supports the Director's position. Director's Exhibit 5.

Therefore, the Director requests that the denial of benefits be vacated and the case remanded to the district director "to obtain a supplemental report from Dr. Wehr assessing the cause of Mr. Jones' COPD and the cause of his disabling respiratory impairment." Motion to Remand at 7. Claimant opposes the Director's motion to remand. However, upon review we conclude that a remand to the district director is appropriate because of the Director's concession that Dr. Wehr's opinion fails to meet the Director's statutory obligation to provide claimant with a complete pulmonary evaluation sufficient to substantiate his claim. *See Hodges v. BethEnergy Mines Inc.*, 18 BLR 1-84, 1-93 (1994)(granting the Director's motion to remand for a complete pulmonary evaluation to be provided); *Petry v. Director, OWCP*, 14 BLR 1-98, 1-100 (1990)(*en banc*)(same); *Hall v. Director, OWCP*, 14 BLR 1-51, 1-53 (1990)(*en banc*)(same).

³ Dr. Wehr diagnosed "coal workers' pneumoconiosis" due to claimant's "exposure history." Director's Exhibit 5 at 4.

⁴ The Director explains that "[b]ecause [claimant] concededly has a totally disabling pulmonary impairment, the etiology of his COPD is crucial to the merits of the claim." Motion to Remand at 5.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is vacated, the Director's motion is granted, and the case is remanded to the district director for a complete pulmonary evaluation to be provided to claimant, and for reconsideration of his 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