

BRB No. 07-0198 BLA

W.B.)
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 Claimant-Petitioner)
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 v.)
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 STANCO EQUIPMENT, INCORPORATED) DATE ISSUED: 09/24/2007
)
 and)
)
 AMERICAN MINING INSURANCE)
 COMPANY)
)
 Employer/Carrier-Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

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

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for
employer/carrier.

Barry H. Joyner (Jonathan L. Snare, Acting 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 Denying Benefits (05-BLA-5425) of Administrative Law Judge Janice K. Bullard 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). Based on a stipulation of the parties, the administrative law judge credited claimant with seventeen years of coal mine employment, Decision and Order at 3, and adjudicated the claim pursuant to 20 C.F.R. Part 718 in light of claimant's December 15, 2003 filing date. Addressing the merits of entitlement, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, she further found that the evidence did not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish that he has a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). In addition, claimant contends that the Director, Office of Workers' Compensation Programs (the Director), 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), because the administrative law judge concluded that "Dr. Simpao possessed no special qualifications as a pulmonary physician, and that he made no findings regarding the issue of total pulmonary disability." Claimant's Brief at 5. Employer responds, urging that the denial of benefits be affirmed. The Director, in response, argues that the Board should reject claimant's contention that he failed to provide him with a complete pulmonary evaluation. The Director asserts that any defect in Dr. Simpao's opinion did not affect the outcome of the case because the administrative law judge ultimately found Dr. Simpao's opinion outweighed by the contrary evidence. Director's Letter Brief at 2. However, the Director notes that the Solicitor's file includes a questionnaire completed by Dr. Simpao, which addresses claimant's pulmonary capacity. The Director further states that this questionnaire was submitted to the district director, but was not included in the formal record before the administrative law judge. Director's Letter Brief at 2, n.2. The Director however asserts that the case need not be remanded because Dr. Simpao's opinion would still be insufficient to establish entitlement.¹

The Board's scope of review is defined by statute. The administrative law judge's

¹ We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, and her finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish entitlement to benefits in a living miner’s claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.² See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

We first address claimant’s contention that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. In finding that Dr. Simpao’s report fails to establish total disability, the administrative law judge found that while diagnosing a moderate impairment, this diagnosis is “not further explained anywhere in Dr. Simpao’s report.” Decision and Order at 15. However, in his response to the Board, the Director acknowledges that a portion of Dr. Simpao’s medical report was not included in the record before the administrative law judge. Director’s Letter Brief at 2, n.2. Specifically, the Director states that the Solicitor’s file includes a questionnaire completed by Dr. Simpao, which addresses claimant’s pulmonary capacity to perform his usual coal mine employment.³ The Director asserts that Dr. Simpao’s questionnaire was submitted to the district director, but acknowledges that it is unclear why it was not included in the formal record before the administrative law judge. *Id.* Thus, in light of the Director’s concession that Dr. Simpao’s medical report, as forwarded to the administrative law judge, is not a complete and accurate account of the physician’s January 8, 2004 medical assessment on the dispositive issue in this case, we remand this case to the district director to provide a complete copy of Dr. Simpao’s medical report, for consideration. 30 U.S.C. §923(b); 20

² As claimant’s last coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Director’s Exhibit 3; see *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ The Director states that on the questionnaire, Dr. Simpao checked the box indicating that claimant does not retain the pulmonary capacity to perform his usual coal mine employment and, therefore, indicated that claimant was totally disabled. Director’s Letter Brief at 2 n.2.

C.F.R. §§718.101, 725.401, 725.405(b); *see Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*; 14 BLR 1-98 (1990). Consequently, we vacate the administrative law judge's denial of benefits.⁴

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴ In view of our disposition of this case, we decline to address the parties' additional contentions in this appeal. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).