

BRB No. 08-0385 BLA

L.S.)
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 Claimant-Petitioner)
)
 v.)
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 LEECO, INCORPORATED)
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 and)
)
 ACORDIA EMPLOYERS SERVICE) DATE ISSUED: 09/29/2008
)
 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 on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Michelle S. Gerdano (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 on Remand (04-BLA-6598) 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 is before the Board for the second time with respect to this subsequent claim.¹ In the original Decision and Order, Administrative Law Judge Daniel J. Roketenetz adjudicated this claim pursuant to 20 C.F.R. Part 718, credited claimant with twenty years of qualifying coal mine employment and found that because claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), claimant established that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Addressing the merits of entitlement, Judge Roketenetz found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), but failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant appealed the denial of benefits. The Board affirmed, as unchallenged, Judge Roketenetz's determination that claimant established twenty years of coal mine employment; however, the Board vacated Judge Roketenetz's determination that claimant failed to establish disability causation. While the Board held that Judge Roketenetz rationally discredited Dr. Baker's opinion as it was insufficient to establish total disability due to pneumoconiosis, the Board held that Judge Roketenetz improperly discounted Dr. Simpao's opinion. Consequently, the Board vacated Judge Roketenetz's finding pursuant to Section 718.204(c) and remanded the case for further proceedings. [*L. S.*] *v. Leeco, Inc.*, BRB No. 06-0425 BLA (Oct. 26, 2006) (unpub.).

Due to the retirement of Judge Roketenetz, the case was assigned to Administrative Law Judge Donald W. Mosser (the administrative law judge) on remand. Addressing the evidence relevant to the issue of disability causation, the administrative law judge found the opinions of Drs. Rosenberg and Vuskovich entitled to less weight because these physicians did not diagnose pneumoconiosis. Likewise, the administrative law judge found Dr. Baker's disability causation opinion undermined because his opinion concerning total disability was insufficient. Lastly, the administrative law judge found that Dr. Simpao's disability causation opinion was brief and conclusory and therefore, it was unreasoned and unsupported. Accordingly, the administrative law judge found that

¹ Claimant filed his first application for benefits on August 10, 1993, which was denied on February 2, 1994 and administratively closed. Director's Exhibit 1. Claimant did not further pursue this claim. Claimant filed a second application for benefits on August 25, 2003, which is pending on appeal. Director's Exhibit 3.

claimant failed to establish total disability due to pneumoconiosis under Section 718.204(c), and that claimant's entitlement to benefits was precluded.

On appeal, claimant argues that the administrative law judge erred in failing to find that the opinions of Drs. Simpao and Baker established total disability due to pneumoconiosis under Section 718.204(c). Claimant additionally contends that because the administrative law judge found the opinion of Dr. Simpao, a physician who examined him at the behest of the Department of Labor, neither reasoned nor sufficiently explained, the Director, Office of Workers' Compensation Programs (the Director), failed to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate his claim. In response to claimant's appeal, employer/carrier (employer) urges affirmance of the administrative law judge's denial of benefits. The Director has filed a Motion to Remand stating that he has failed to provide claimant with a complete and credible pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. §923(b), and, for that reason, he requests that the case be remanded to the district director. Employer responds to the Director's Motion to Remand, contending that claimant is entitled to a complete pulmonary evaluation, which was provided by Dr. Simpao, not necessarily a dispositive one and, that remand of the case is not warranted merely because a physician's opinion was found unreasoned.

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.² 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that because the administrative law judge found the opinion of Dr. Simpao, a physician who examined him at the behest of the Department of Labor, neither reasoned nor sufficiently explained, the Director failed to provide him with a complete, credible pulmonary evaluation sufficient to substantiate his claim. The Director agrees, contending that the administrative law judge determined that the opinion of Dr. Simpao was deficient because Dr. Simpao failed to provide a rationale or to explain his attribution of the claimant's total disability to pneumoconiosis. Hence, the Director states that he failed to provide claimant with a complete pulmonary examination as required by the Act. Consequently, the Director moves the Board to remand the case to the district director so that the Director can fulfill his statutory obligation to supplement Dr. Simpao's report.

² The law of the United States Court of Appeals for the Sixth Circuit applies because the miner was employed in coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

It is well established that the Department of Labor has a statutory duty to provide claimant with a complete pulmonary evaluation sufficient to substantiate his claim. 30 U.S.C. §923(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990) (*en banc*); *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). Because the Director concedes that he has failed to provide claimant with such an evaluation, we grant claimant's and the Director's request that the case be remanded to the district director for further proceedings consistent with this opinion. *See Petry*, 14 BLR at 1-198; *Hall*, 14 BLR at 1-51.

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is vacated, and this case is remanded to the district director for further evidentiary development 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