

BRB No. 03-0742 BLA

PAUL VARNEY)
)
 Claimant-Petitioner)
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 v.)
)
 KENTUCKY CARBON CORPORATION)
)
 and)
)
 LIBERTY MUTUAL INSURANCE) DATE ISSUED:
 06/24/2004)
 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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Paul Varney, Pikeville, Kentucky, *pro se*.

Barry H. Joyner (Howard 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order – Denying Benefits (01-BLA-1196) of Administrative law Judge Thomas F. Phalen, Jr. 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 This case involves a duplicate claim filed on December 4, 2000.² After crediting claimant with twenty-seven years and seven months of coal mine employment, the administrative law judge found the newly submitted evidence, when compared with the sum of the previously submitted evidence, sufficient to establish a worsening of claimant’s condition and the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and that, therefore, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). With regard to the merits, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) and (a)(4). The administrative law judge then found claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and found that the presumption was not rebutted. In addition, the administrative law judge found the evidence of record sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found, however, the evidence insufficient to establish that claimant’s total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers’ Compensation Programs (the

¹The 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.

²Claimant filed a prior claim on February 12, 1997. Director’s Exhibit 16. In a Decision and Order dated July 7, 1999, Administrative Law Judge Robert L. Hillyard credited claimant with twenty-seven years of coal mine employment, and found the evidence insufficient to establish any of the elements of entitlement pursuant to 20 C.F.R. Part 718 (2000). *Id.* Accordingly, Judge Hillyard denied benefits. *Id.* Claimant took no further action in pursuit of benefits until filing the instant duplicate claim on December 4, 2000. Director’s Exhibit 1.

Director), has filed a Motion to Remand for a complete, credible pulmonary evaluation. Employer has not filed a response brief in this case.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 his Motion to Remand, the Director urges the Board to remand this case to the district director to fulfill the Department of Labor's obligation that claimant be provided with a complete, credible pulmonary evaluation. The Department of Labor is required by statute, regulation and case law to provide claimant with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990).

The Director notes that while he provided claimant with an examination by Dr. Ammisetty, who found that claimant is totally disabled by severe obstructive lung disease attributable to both smoking and pneumoconiosis, the administrative law judge rejected the opinion.³ The Director contends that, therefore, claimant was not afforded a complete, credible pulmonary evaluation with regard to disability causation,⁴ and, thus, the Department of Labor's statutorily imposed

³The administrative law judge properly discounted Dr. Ammisetty's opinion because the doctor failed to provide an explanation for his conclusion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 20-21; Director's Exhibit 4.

⁴The Director notes that the record contains the additional opinions of Drs. DeGuzman and Sundaram, which, if credited, could support a finding of disability causation under Section 718.204(c), as well as the contrary opinion of Dr. Jarboe, all of which the administrative law judge discounted. The administrative law judge correctly found that Dr. DeGuzman did not offer an opinion on the cause of claimant's totally disabling respiratory impairment in his 1999 report, and correctly discounted Dr. DeGuzman's 1997 opinion because Dr. DeGuzman did not provide any explanation for his conclusion that claimant's totally disabling respiratory impairment was due to both cigarette smoking and coal dust exposure, but instead "just attributed [c]laimant's impairment to the two risk factors for

duty has not been satisfied. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b); *Hodges*, 18 BLR at 1-89, 90; *Petry*, 14 BLR at 1-100. Consequently, we vacate the administrative law judge's decision denying benefits, and remand this case to the district director to provide claimant with a complete, credible pulmonary evaluation provided by the Department of Labor, and for reconsideration of the merits of the claim in light of the new evidence.

pulmonary disease that [c]laimant provided to him.” *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 19; Director's Exhibit 19; Claimant's Exhibit 1. The administrative law judge properly discounted Dr. Sundaram's opinion, dated March 24, 1997, on the basis that Dr. Sundaram did not rely upon an accurate smoking history, having merely indicated that claimant stopped smoking in 1990. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); Decision and Order at 20; Director's Exhibit 16. The administrative law judge also properly discounted Dr. Sundaram's opinion because the doctor made no attempt to support his conclusions with findings he made during his examination. *Clark*, 12 BLR at 1-155; Decision and Order at 21; Director's Exhibit 16. Finally, the administrative law judge properly discounted Dr. Jarboe's opinion, dated December 29, 1997, that claimant's impairment is due entirely to cigarette smoking, because Dr. Jarboe contended that claimant suffers from neither pneumoconiosis nor a totally disabling respiratory impairment. Director's Exhibit 16. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993); Decision and Order at 20; Director's Exhibit 16.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is vacated, and this case is remanded to 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