

BRB No. 04-0602 BLA

ELY SMITH)
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 Claimant-Petitioner)
)
 v.)
)
 E.J.J.L., INCORPORATED) DATE ISSUED: 03/23/2005
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Ely Smith, Tazewell, Tennessee, *pro se*.¹

John T. Chafin (Chafin & Davis), Prestonsburg, Kentucky, for employer.

Jeffrey S. Goldberg (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:

¹Judy M. Stapleton, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the

Claimant, representing himself, appeals the Decision and Order (03-BLA-5944) of Administrative Law Judge Mollie W. Neal denying benefits on 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).² This case involves a duplicate claim filed on May 7, 2002.³ After crediting claimant with twenty-five years of coal mine employment, the administrative law judge found that the medical opinion evidence was sufficient to

administrative law judge's decision, but Ms. Stapleton is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

² The 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.

³The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on June 3, 1991. Director's Exhibit 1. In a Decision and Order dated February 23, 1994, Administrative Law Judge Earl E. Thomas found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* Accordingly, Judge Thomas denied benefits. *Id.* Claimant filed an appeal with the Board on April 11, 1994. By Order dated May 23, 1994, the Board dismissed claimant's appeal as untimely filed. *Smith v. E.J.J.L., Inc.*, BRB No. 94-2341 BLA (May 23, 1994) (Order) (unpublished). Claimant filed a request for modification on May 23, 1995. Director's Exhibit 1. In a Proposed Decision and Order dated June 7, 1995, the district director denied claimant's request for modification because it was untimely filed. *Id.*

Claimant filed a second claim on October 11, 1995. Director's Exhibit 1. In a Decision and Order dated February 1, 1999, Administrative Law Judge Jeffrey Tureck found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Accordingly, Judge Tureck denied benefits. *Id.* By Decision and Order dated February 8, 2000, the Board affirmed Judge Tureck's denial of benefits. *Smith v. E.J.J.L., Inc.*, BRB No. 99-0484 BLA (Feb. 8, 2000) (unpublished). Claimant subsequently filed a timely request for modification. Director's Exhibit 1. However, on November 20, 2001, claimant requested that his claim be withdrawn so that he could refile under the "new" regulations. *Id.* By Order dated February 1, 2002, Administrative Law Judge John C. Holmes, noting no objection from employer, granted claimant's motion and withdrew his claim "without prejudice." *Id.*

Claimant filed a third claim on May 7, 2002. Director's Exhibit 3.

establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence was sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.⁴ On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Board to remand the case to the district director in order to allow him to provide claimant with a complete pulmonary evaluation.

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).

We grant the Director's request to remand this case, given the Director's concession that the Department of Labor failed to provide the miner with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); see *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*). Consequently, we vacate the administrative law judge's denial of benefits.⁵

⁴The administrative law judge issued an Errata on April 2, 2004, correcting a misidentification of miner's filing month on page 4 of his decision and providing the full address for the Associate Solicitor for Black Lung Benefits in a final paragraph regarding the parties' appeal rights.

⁵The Director, Office of Workers' Compensation Programs (the Director), also contends that the administrative law judge failed to comply with the evidentiary limitations set forth at 20 C.F.R. §725.414. The Director specifically argues that the administrative law judge erred in allowing employer to submit "one too many x-ray readings in support of its affirmative case." Director's Brief at 3. In this case, claimant and employer should have been limited to submit, in support of their respective

Accordingly, the administrative law judge's Decision and Order is vacated and the case is remanded to the district director to allow for a complete pulmonary evaluation and for reconsideration of the merits of this claim in light of all of the evidence of record.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

affirmative cases, no more than two chest x-ray interpretations. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i).