

BRB No. 09-0199 BLA

H.P.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JAMES RIVER COAL COMPANY)	DATE ISSUED: 08/26/2009
c/o ACORDIA EMPLOYERS SERVICE)	
)	
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 – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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 (2004-BLA-05909) of Administrative Law Judge Larry S. Merck 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). Initially, the administrative law judge found that this case involves a subsequent claim, filed on June 7, 2002, pursuant to 20 C.F.R. §725.309(d).¹ Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge then credited claimant with 10.15 years of coal mine employment and found that employer, James River Coal Company, is the responsible operator.² Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant established total respiratory disability and, thus, found that claimant established a change in one of the applicable conditions of entitlement pursuant to Section 725.309(d). However, addressing the merits of entitlement, the administrative law judge found that the medical evidence, as a whole, failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established, based on the x-ray or medical opinion evidence pursuant to Section 718.202(a)(1), (4). Claimant additionally contends that because the administrative law judge discredited Dr. Simpao's report with regard to the issue of the existence of pneumoconiosis, 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 urges affirmance of the administrative law judge's denial of benefits.

In a Motion to Remand, the Director responds, stating that he agrees with claimant that he has failed to provide claimant with a complete and credible pulmonary evaluation,

¹ Claimant filed his initial claim with the Department of Labor on November 15, 1990, which was denied by the district director by reason of abandonment on March 25, 1991. Director's Exhibit 1. Claimant filed a second application for benefits on April 1, 1996, which was denied by the district director because claimant failed to establish any of the elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 1. Claimant filed an additional claim on March 13, 2000, which was denied by the district director on June 27, 2000 and again on September 5, 2000. Following transfer of the case to the Office of Administrative Law Judges, claimant filed a Motion to Voluntarily Withdraw the Claim, which was granted by Administrative Law Judge Rudolf L. Jansen on July 12, 2001. Director's Exhibit 1. Claimant then filed his current claim on June 7, 2002. Director's Exhibit 3.

² By Order of Continuance dated October 3, 2006, the administrative law judge found James River Coal Company to be the responsible operator liable for this claim.

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 for further proceedings. Employer responds to the Director's Motion to Remand, contending that the Director's Motion to Remand addresses an issue neither raised by the petitioner, nor raised by the Director in a cross-appeal and, therefore, it is not properly before the Board. In addition, employer notes that while Dr. Simpao did not address the issue of legal pneumoconiosis, this issue was addressed by the other physicians, including Dr. Baker and that the administrative law judge found that the weight of the medical opinions failed to establish the existence of legal pneumoconiosis.

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 applicable law, they are binding upon this Board and may not be disturbed.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe 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. *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 one 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 a Motion to Remand,⁴ the Director agrees that he has not satisfied, by virtue of Dr. Simpao's opinion, his obligation under Section 413(b), to provide claimant, in each new claim, with a complete pulmonary evaluation that addresses all elements of

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mining employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

⁴ Contrary to employer's contention, a Motion to Remand is separate and distinct from a response brief, and, therefore, in filing a Motion to Remand, the Director, Office of Workers' Compensation Programs (the Director), is not limited to raising arguments that either respond to arguments raised in claimant's petition for review or support the decision below. *See* 20 C.F.R. §§802.212, 802.219; *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84, 1-91 (1994).

entitlement.⁵ Specifically, the Director agrees that, because the administrative law judge properly determined that Dr. Simpao did not address the issue of legal pneumoconiosis, the Department did not provide claimant with a medical opinion that addresses all of the elements of entitlement. Director’s Motion to Remand at 4. The Director further states, “the Department of Labor has not fulfilled its statutory obligation to provide a complete pulmonary evaluation in conjunction with [H.P.]’s claim and a remand is necessary.”⁶ *Id.* at 4. Because the Director correctly concedes that he has not satisfied his statutory obligation, we remand this case to the district director to provide claimant with a complete and 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, 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.⁷

⁵ Employer contends that, while Dr. Simpao did not address the issue of legal pneumoconiosis, it was addressed by the other physicians, including Dr. Baker and, thus, the administrative law judge properly found that the evidence is insufficient to establish the existence of legal pneumoconiosis. Employer’s Objection to Remand at 2. Contrary to employer’s contention, only Dr. Simpao was selected by claimant to perform the complete pulmonary evaluation that the Director is obliged to provide under 30 U.S.C. §923(b) and, therefore, it is Dr. Simpao’s opinion that the Director is obligated to ensure addresses all of the elements of entitlement. 30 U.S.C. §923(b); *Hodges*, 18 BLR at 1-91.

⁶ The Director states that on remand, the district director should obtain a supplemental opinion from Dr. Simpao addressing whether claimant suffers from any cardiopulmonary diagnosis other than coal workers’ pneumoconiosis as seen on x-ray. In addition, the Director states that the supplemental report should assess the cause of claimant’s “severe degree obstructive airways disease and its impact on claimant’s disabling respiratory impairment.” Director’s Motion to Remand at 4-5.

⁷ In view of our disposition of this case, we decline to address any additional contentions of the parties in this appeal. *Hodges*, 18 BLR at 1-89-90.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is vacated, and this case is remanded to the district director to allow for a complete pulmonary evaluation, at no expense to claimant, and for reconsideration of the merits of this 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