

BRB No. 12-0441 BLA

JOHN A. MARCHINES)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 03/11/2013
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

John A. Marchines, Lakeland, Florida, *pro se*.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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, without the assistance of counsel, the Decision and Order (10-BLA5917) of Administrative Law Judge Daniel F. Solomon denying benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case, involving a claim filed on April 5, 2002, is before the Board for the second time.

In the initial decision, Administrative Law Judge Stuart A. Levin credited claimant with twelve years and eleven months of coal mine employment,¹ and found that the

¹ Claimant's last coal mine employment was in Virginia. Director's Exhibits 6, 9 at 25-27. Accordingly, the Board will apply the law of the United States Court of

evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). However, Judge Levin found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, Judge Levin denied benefits.

On review of claimant's appeal, the Board noted that the Director, Office of Workers' Compensation Programs (the Director), conceded that the Department of Labor failed to provide claimant with a complete pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.² 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. The Board, therefore, vacated Judge Levin's Decision and Order, and remanded the case to the district director to allow for a complete pulmonary evaluation and for reconsideration of the merits of the claim in light of all of the evidence of record. *Marchines v. Director, OWCP*, BRB No. 09-0728 BLA (May 27, 2010) (unpub.).

On remand, the district director provided claimant with a second pulmonary evaluation conducted by Dr. Rao on July 22, 2010. Director's Exhibit 60. The case was returned to the Office of Administrative Law Judges and was assigned to Administrative Law Judge Daniel F. Solomon (the administrative law judge).

In a Decision and Order dated April 30, 2012, the administrative law judge considered all of the evidence, including Dr. Rao's July 22, 2010 medical report, and found that it did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director has filed a response, urging the Board to remand the case to the district director for further development of the medical evidence in order to provide claimant with a complete pulmonary evaluation.

Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

² The Director, Office of Workers' Compensation Programs (the Director), conceded that the Department of Labor (DOL) failed to satisfy its obligation to provide claimant with a complete pulmonary evaluation because Dr. Rao, the physician who conducted the DOL-sponsored pulmonary evaluation, relied on both an exaggerated smoking history and an understated coal mine employment history.

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).

The Act requires that “[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.” 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; see *Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994).

On the facts of this case, we grant the Director’s request to remand this case, given the Director’s concession that the Department of Labor failed to provide claimant with a complete pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.³ 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199 (6th Cir. 2009); *R.G.B. [Blackburn] v. Southern Ohio Coal Co.*, 24 BLR 1-129 (2009) (en banc). Consequently, we vacate the administrative law judge’s denial of benefits.

³ The Director concedes that the administrative law judge reasonably found that Dr. Rao’s 2010 opinion was equivocal and vague with regard to whether claimant’s coal mine dust exposure contributed to his chronic obstructive pulmonary disease and chronic bronchitis. Director’s Brief at 3; Decision and Order at 3; Director’s Exhibit 60. Consequently, the Director concedes that Dr. Rao failed to completely and credibly address whether claimant suffers from legal pneumoconiosis. *Id.* Because Dr. Rao’s opinion does not completely address an essential element of entitlement, i.e., whether claimant suffers from pneumoconiosis, the Director concedes that the DOL failed to satisfy its obligation to provide claimant with a complete pulmonary evaluation. Director’s Brief at 3-4. The Director requests that the case be remanded so that Dr. Rao can provide a supplemental report addressing whether claimant’s respiratory impairment is due to coal mine dust exposure. *Id.* at 4. The Director requests that Dr. Rao also specifically address whether claimant is totally disabled from a respiratory standpoint. *Id.* at 4 n.1.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded to the district director for further development of the evidence 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