

BRB No. 06-0417 BLA

HOWARD S. MIDDLETON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/25/2006
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (Howard M. 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: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5662) of Administrative Law Judge Joseph E. Kane (the administrative law judge) denying benefits on a subsequent 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).<sup>1</sup> The administrative law judge credited claimant with twenty-nine years of coal mine employment and adjudicated this claim

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<sup>1</sup>Claimant filed his first claim on June 30, 1988. Director's Exhibit 1. This claim was denied by the district director because the evidence did not show that claimant was totally disabled by pneumoconiosis. *Id.* Because claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on July 26, 2002. Director's Exhibit 3.

pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found the newly submitted evidence insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), has failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. The Director responds, urging the Board to affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). The Director also urges the Board to remand the case for the Director to either obtain a new evaluation of claimant or to remedy the defects in Dr. Simpao's report.

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. 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).

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 response brief, the Director agrees that he has not satisfied his obligation under Section 413(b) by virtue of Dr. Simpao's opinion. Specifically, the Director agrees that because the administrative law judge rationally discredited the opinion of Dr. Simpao on the issue of total disability, the record is devoid of an opinion from the Director on the determinative issue of total disability. Director's Brief at 3-4. The Director further states, "the case must be remanded for [him] either to obtain a new evaluation of claimant, or to remedy the defects in Dr. Simpao's report." *Id.* at 4. Because the Director 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, 1-89-90 (1994); *Petry v. Director, OWCP*; 14 BLR 1-98 (1990). Consequently, we vacate the administrative law judge's denial of benefits.<sup>2</sup>

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<sup>2</sup>In view of our disposition of this case, we decline to address the parties' additional contentions in this appeal. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the 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 our Decision and Order and all the evidence of record.

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge