

BRB No. 03-0786 BLA

OLIVER LITTLE)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 04/29/2004
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Oliver Little, Mayking, Kentucky, *pro se*.

Timothy S. Williams (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order (2002-BLA-5127) of Administrative Law Judge Rudolf L. Jansen denying benefits with respect to 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 The administrative law judge credited claimant with 8.38 years of coal mine employment and considered the claim, filed on February 5, 2001, pursuant to the regulations set forth in 20 C.F.R. Part 718 (2002).² The administrative law judge found that although claimant

¹ Claimant was represented by counsel before the administrative law judge.

² There are some notations on the Department of Labor's employment history forms indicating that claimant may have filed an earlier application for benefits.

established total disability pursuant to 20 C.F.R. §718.204(b)(2), he did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Claimant asserts generally that the evidence of record is sufficient to prove that he is entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), has responded and urges the Board to vacate the denial of benefits and remand the case to the district director, as claimant was not provided with a complete and credible pulmonary evaluation in accordance with Section 413(b) of the Act, 30 U.S.C. §923(b).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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 considering the evidence relevant to the existence of pneumoconiosis pursuant to Section 718.202(a) and total disability due to pneumoconiosis under Section 718.204(c), the administrative law judge determined that the two medical opinions of record, authored by Drs. Alam and Baker, were insufficient to establish claimant's burden as to either element of entitlement. The opinion of Dr. Alam, one of claimant's treating physicians, is contained in his response to a letter from claimant's counsel in which the doctor indicated that claimant suffers from lung problems which are attributable, in part, to coal dust exposure. Director's Exhibit 10. Dr. Baker examined claimant at the request of the Department of Labor (DOL) and on Form CM-988, recorded diagnoses of chronic obstructive pulmonary disease, hypoxemia, and chronic bronchitis. Director's Exhibit 8B. Dr. Baker noted that each of these conditions was caused by smoking and coal dust exposure. *Id.* The doctor further determined that

Director's Exhibits 2, 3. The administrative law judge determined correctly, however, that the record does not contain any documents from a prior claim and neither party has raised the issue of whether this case presents a duplicate claim or a request for modification. The Director, Office of Workers' Compensation Programs (the Director), states in his response that claimant filed a claim for benefits on August 22, 2000, which he subsequently withdrew. The Director concedes that the record contains no documentation of this claim and that the administrative law judge acted properly in treating the February 5, 2001 filing as an initial claim.

claimant has a severe pulmonary impairment and that each of the diagnosed conditions contributes equally to the claimant's impairment. On a supplemental form, however, Dr. Baker checked "no" in response to a question concerning whether claimant has an occupational lung disease which was caused by his coal mine employment. *Id.* Dr. Baker reiterated this negative response when asked the same question in subsequent correspondence from DOL. Director's Exhibit 9. Dr. Baker also answered "no" when asked if he could diagnose pneumoconiosis even though he read claimant's x-ray as negative for the disease. *Id.*

The administrative law judge acted within his discretion as trier-of-fact in discrediting Dr. Alam's opinion under Sections 718.202(a) and 718.204(c) because the physician did not identify any objective evidence in support of his diagnosis of a coal dust related pulmonary condition and did not offer an opinion as to the issue of total disability.³ Decision and Order at 9, 10; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994).⁴ In addition, the administrative law judge rationally determined that Dr. Baker's opinion was entitled to little weight under Sections 718.202(a) and 718.204(c) based upon the inconsistencies in Dr. Baker's statements regarding the presence of a coal dust related pulmonary condition. *Id.*; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

It is well established that DOL has a statutory duty to provide the miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate his claim. 30 U.S.C. §923(b); *Hodges*, 18 BLR 1-84; *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *accord Cline v. Director, OWCP*, 972 F.2d 234, 14 BLR 2-102 (8th Cir. 1992); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*). In the present case, the Director concedes that he failed to provide claimant with a complete pulmonary evaluation addressing the elements of entitlement because Dr. Baker's reports

³ After the case record was sent to the Board, claimant submitted an additional letter from Dr. Alam to the administrative law judge, which the administrative law judge forwarded to the Board. Claimant also sent a copy of this letter to the Board. In an unpublished Order, the Board informed claimant that this evidence could not be addressed by the Board, but could form the basis for a request for modification. *Little v. Director, OWCP*, BRB No. 03-0786 BLA (Oct. 28, 2003)(unpublished Order).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last year of qualifying coal mine employment occurred in the Commonwealth of Kentucky. Director's Exhibit 7; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

did not credibly address either the existence of pneumoconiosis or total disability due to pneumoconiosis. We grant, therefore, the Director's request to vacate the administrative law judge's Decision and Order denying benefits on the miner's claim and remand this case to the district director for further development of the medical evidence.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is vacated and the case is remanded to the district director for further development of the evidence consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge