

BRB No. 03-0803 BLA

MYRON SHINO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/25/2004
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5099) of Administrative Law Judge Janice K. Bullard denying benefits 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).<sup>1</sup> The administrative law judge credited claimant with four and one-quarter

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<sup>1</sup>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). As the instant claim was filed after the effective date of the amended regulations, all citations to the regulations refer to the amended regulations.

years of coal mine employment based on the parties' stipulation and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718.<sup>2</sup> Based on the concession of the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge found the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), and a "material" change in conditions pursuant to 20 C.F.R. §725.309. On the merits, however, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.202(a) overall, and 718.203. The administrative law judge also found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. Lastly, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The Director contends, in a Motion to Remand, that he has not fulfilled his statutory obligation to provide a complete and credible pulmonary evaluation of claimant.<sup>3</sup>

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>2</sup>Claimant filed the initial claim on October 16, 1996. Director's Exhibit 1. On December 21, 1998, Administrative Law Judge Robert D. Kaplan issued a Decision and Order denying benefits, *id.*, which the Board affirmed, *Shino v. Director, OWCP*, BRB No. 99-0427 BLA (Jan. 14, 2000)(unpub.). Judge Kaplan's denial was based on claimant's failure to establish the existence of pneumoconiosis and total disability. Director's Exhibit 1. Because claimant did not pursue this claim any further, the denial became final. Claimant filed the most recent claim on June 4, 2001. Director's Exhibit 2.

<sup>3</sup>Since the administrative law judge's length of coal mine employment finding is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Director contends that he has not fulfilled his statutory obligation to provide a complete and credible pulmonary evaluation of claimant. Specifically, the Director asserts that there is no credible medical opinion from him addressing the issues of pneumoconiosis or total disability due to pneumoconiosis, and thus, there is no medical opinion submitted by the Director that satisfies his burden of providing the miner with a complete and credible pulmonary evaluation, as required by Section 413(b) of the Act, 30 U.S.C. §923(b).<sup>4</sup> *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).

The pulmonary evaluation provided by the Director is that of Dr. Talati. Dr. Talati, in an October 12, 2001 report, diagnosed simple coal workers' pneumoconiosis and opined that claimant suffers from a mild pulmonary impairment that prevents him from performing his last coal mine job. Director's Exhibit 9. Dr. Talati also opined that claimant's coal workers' pneumoconiosis contributed to his disabling pulmonary impairment. *Id.* In a subsequent report dated January 17, 2002, Dr. Talati opined that claimant did not suffer from pneumoconiosis, but may have adult onset asthma. Director's Exhibit 10. Dr. Talati additionally opined that claimant suffers from a mild pulmonary impairment. *Id.* In response to interrogatories by claimant dated March 25, 2003, Dr. Talati answered "yes" when asked if adult onset asthma satisfies the definition of pneumoconiosis. Claimant's Exhibit 1. However, Dr. Talati answered "yes" and "no" when asked if claimant's asthma was causally related to coal dust exposure. *Id.* In explaining why he answered "no," Dr. Talati stated, "[n]eed to rule out bronchial asthma as simple pneumoconiosis in nonsmokers usually doesn't have abnormal spirometry." *Id.* Additionally, when asked if asthma contributes to claimant's disabling pulmonary impairment, Dr. Talati answered "[y]es." *Id.* Dr. Talati specifically stated, "Yes certainly pulmonary impairment precludes further working in coal mine as any pulmonary disease is going to be aggravated on further exposure to coal dust." *Id.*

With regard to the issue of pneumoconiosis, the administrative law judge permissibly discredited the opinion of Dr. Talati because it is inconsistent with Dr. Talati's subsequent opinions in that Dr. Talati diagnosed simple coal workers' pneumoconiosis on October 12, 2001, but opined that claimant does not suffer from pneumoconiosis on January 17, 2002, and then opined that adult onset asthma satisfies the definition of pneumoconiosis on March

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<sup>4</sup>The record consists of two previously submitted reports by Drs. Levinson and McAndrew, and one newly submitted report by Dr. Talati. With respect to the previously submitted reports, Dr. McAndrew diagnosed coal workers' pneumoconiosis, while Dr. Levinson diagnosed arteriosclerotic heart disease, chronic atrial fibrillation and coronary artery disease. Director's Exhibit 1. The administrative law judge permissibly discounted Dr. McAndrew's opinion because it was based on an inaccurate coal mine employment history. *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). The administrative law judge stated that "[Dr. McAndrew] relied upon an exaggerated coal mine employment history of ten years." Decision and Order at 7.

25, 2003. *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-799 (1984). In considering the opinions of Dr. Talati, the administrative law judge specifically stated:

His first diagnosis of pneumoconiosis was based on a coal mine employment history that was almost double that actually established by [c]laimant...He also based that opinion on a positive X-ray; however, a better qualified reader, Dr. Navani, interpreted the same film as negative, and I credited Dr. Navani's interpretation over Dr. Gaia's. After being asked by the Director to consider only four years of coal mine employment, Dr. Talati opined that [c]laimant's condition did not meet the legal definition of pneumoconiosis; he suspected adult-onset asthma. Finally, after [c]laimant issued interrogatories, Dr. Talati again changed his determination, this time opining that the adult-onset asthma was due at least in part to coal dust exposure. However, even at that, he added that bronchial asthma had to be ruled out because the pulmonary function study results did not harmonize with simple pneumoconiosis. I consider this a less than definitive diagnosis of pneumoconiosis...Dr. Talati has doubts about his own finding.

Decision and Order at 8 (citations omitted).

In addition, the administrative law judge permissibly discredited Dr. Talati's disability causation opinion because it is not reasoned and documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge stated, "because of Dr. Talati's equivocal diagnosis of pneumoconiosis, I find his attribution of disability to the disease equally tenuous." Decision and Order at 9. The administrative law judge also stated that "[Dr. Talati] did not address the extent to which obesity or congestive heart failure contributed to disability and, in fact, questioned whether the spirometric results could even be caused by [c]laimant's simple pneumoconiosis." *Id.*

Since the administrative law judge properly discredited the medical opinion submitted by the Director, and since the Director urges remand so that he may fulfill his statutory obligation to provide a complete and credible pulmonary evaluation of claimant, *see* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b); *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); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990), we remand the case to the district director to develop evidence that will fulfill the Director's

obligation in this regard.<sup>5</sup> See 20 C.F.R. §725.405(b); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Toler v. Eastern Associated Coal Corp.*, 12 BLR 1-49 (1988); *Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986); *Farber v. Island Creek Coal Co.*, 7 BLR 1-428 (1984); see also 20 C.F.R. §725.405(c); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, 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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<sup>5</sup>In view of our remand of the case to the district director to develop evidence that will fulfill the Director's obligation to provide claimant with a complete and credible pulmonary evaluation, we decline to address claimant's contentions at 20 C.F.R. §§718.202(a)(4), 718.203 and 718.204(c). *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge