

BRB No. 07-0103 BLA

L.C.)
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 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 12/31/2007
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2004-BLA-06377) of Administrative Law Judge Adele Higgins Odegard 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 March 12, 2001, pursuant to 20 C.F.R. §725.309(d).¹ The administrative law judge then credited claimant with fourteen years of

¹ Claimant filed his initial claim with the Department of Labor on March 7, 1980, which was denied by Administrative Law Judge William A. Pope II, in a Decision and

coal mine employment,² based on a stipulation of the parties, and she adjudicated the claim under 20 C.F.R. Part 718. Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), and also erred in finding the medical opinion evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). In addition, claimant contends that the administrative law judge erred in admitting two x-ray readings in excess of the evidentiary limitations pursuant to 20 C.F.R. §725.414. 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. In a Motion to Remand, the Director responds, urging the Board to vacate the administrative law judge's denial of benefits and remand the case for the Director to satisfy his obligation under Section 413(b) of the Act, 30 U.S.C. §923(b).³

Order Denying Benefits issued on November 4, 1987. Judge Pope found that claimant failed to establish invocation of the interim presumption pursuant 20 C.F.R. §727.203(a) and failed to establish entitlement under 20 C.F.R. Part 410. Director's Exhibit 1. No further action was taken on this claim. Claimant filed a second application for benefits on December 28, 1985, 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 2. Claimant filed additional claims on June 17, 1997 and October 29, 1998, which were denied by the district director on October 8, 1997 and February 5, 1999, respectively. Director's Exhibits 3, 4. In both claims, the district director found that claimant failed to establish any of the elements of entitlement under Part 718 and, therefore, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.*

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 6.

³ In addition, the Director, Office of Workers' Compensation Programs (the Director), notes that employer, Utilities Coals, Incorporated, was liquidated in bankruptcy

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 Motion to Remand, the Director agrees with claimant's contention that Dr. Baker's report of his examination of claimant does not satisfy the Director's obligation under Section 413(b) of the Act, 30 U.S.C. §923(b). Specifically, the Director concurs with claimant that, since the administrative law judge "permissibly determined that Dr. Baker's legal pneumoconiosis diagnosis ... was not credible because it was poorly explained and undocumented and that Dr. Baker failed to fully address the disability element of entitlement," the evaluation by the physician selected by the miner is incomplete. Director's Motion to Remand at 5. Consequently, the Director states, "the Department of Labor has not fulfilled its statutory obligation to provide a complete pulmonary examination in conjunction with [claimant's] claim, and a remand is necessary." Director's Motion to Remand at 6. 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 (1994); *Petry v. Director, OWCP*; 14 BLR 1-98 (1990). Consequently, we vacate the administrative law judge's findings under Sections 718.202(a) and 718.204(b)(2), and the denial of benefits.⁴

on September 30, 2004, and that no surety bond was identified to cover the period of claimant's employment. Director's Motion to Remand at 4. The Director states that the Black Lung Disability Trust Fund is now the party responsible for the payment of any benefits. *Id.* Consequently, the Director has requested that employer be dismissed as a party to the proceedings and removed from the case caption. *Id.* We hereby grant the Director's request.

⁴ In view of our disposition of this case, we decline to address any additional contentions of the parties 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, who must provide claimant with a complete pulmonary evaluation, at no expense to claimant, and for reconsideration of the merits of this claim in light of all of the evidence of record.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge