

BRB No. 09-0297 BLA

ROBIN G. CURRENCE )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 GAMBLE COALS, INCORPORATED ) DATE ISSUED: 12/29/2009  
 )  
 and )  
 )  
 WEST VIRGINIA COAL WORKERS' )  
 PNEUMOCONIOSIS FUND )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

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

Robin G. Currence, Mill Creek, West Virginia, *pro se*.

Ashley M. Harman, Christina N. Morgan, William S. Mattingly, and William P. Margelis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Emily Goldberg-Kraft (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank 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, without the assistance of counsel, appeals the Decision and Order (06-BLA-5734) of Administrative Law Judge Daniel L. Leland (the administrative law judge) denying benefits on a subsequent claim<sup>1</sup> 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). The administrative law judge credited claimant with eight years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found that the new evidence did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

Claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, contending that he has failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation and urging the Board to remand the case to the district director for a complete pulmonary evaluation. In response to the Director's letter brief, employer contends that Dr. Scattaregia provided a complete pulmonary evaluation to claimant. Alternatively, employer contends that if Dr. Scattaregia's pulmonary evaluation was incomplete, then liability for the payment of benefits should shift to the Black Lung Disability Trust Fund (Trust Fund) because it was prejudiced by the Director's failure to raise this issue earlier in the litigation of the case.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *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,

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<sup>1</sup> Claimant filed his first claim on January 9, 1997. Director's Exhibit 1. This claim was finally denied by a claims examiner on May 9, 1997 because the evidence did not establish any element of entitlement. *Id.* Claimant filed this claim on May 11, 2005. Director's Exhibit 3.

supported by substantial evidence, and in accordance with law.<sup>2</sup> 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).

The Director states that he has failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. The Director argues that he has not satisfied his obligation under Section 413(b) of the Act, 30 U.S.C. §923(b), because the evaluation he provided did not include a credible opinion on the determinative issues of legal pneumoconiosis and total disability. The Director specifically asserts that because the administrative law judge properly found that Dr. Scattaregia’s diagnosis of legal pneumoconiosis was insufficiently explained and his opinion that claimant was totally disabled from a respiratory impairment was equivocal, he has failed to provide claimant with a complete pulmonary evaluation. The Director further argues that “[t]he problems with Dr. Scattaregia’s report cannot be considered harmless because the opinions of Drs. Bellotte and Castle, to the extent they are unfavorable to the claimant’s case, are too flawed to credit.”<sup>3</sup> Director’s Letter at 4.

In a report dated July 19, 2008, Dr. Scattaregia opined that claimant has chronic bronchitis and chronic obstructive pulmonary disease related to genetics, environment, and coal dust, and that he has a moderate obstructive and a mild restrictive impairment which may have prevented him from performing his last coal mine employment job. Director’s Exhibit 27.

In his Decision and Order, the administrative law judge found that the evidence did not establish the existence of legal pneumoconiosis at Section 718.202(a)(4) or total disability at Section 718.204(b)(2)(iv). At Section 718.202(a)(4), the administrative law judge gave no weight to Dr. Scattaregia’s opinion because “[it] is poorly reasoned as [Dr. Scattaregia] did not provide any explanation for his conclusion that [claimant’s] chronic

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<sup>2</sup> The record indicates that claimant was employed in the coal mining industry in West Virginia. Director’s Exhibits 1, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>3</sup> The Director argues that Dr. Bellotte’s decision to rule out coal dust exposure solely because of its remoteness in time is suspect, since it is based on a premise at odds with the regulatory scheme as the Department of Labor has determined that pneumoconiosis may be a latent and progressive disease. The Director also argues that the administrative law judge mischaracterized Dr. Bellotte’s opinion concerning the issue of total disability. Lastly, the Director argues that Dr. Castle’s opinion is not well-reasoned on the issues of pneumoconiosis and total disability.

bronchitis and chronic obstructive pulmonary disease were caused in part by coal dust.” Decision and Order at 5. Conversely, the administrative law judge credited the opinions of Drs. Bellotte and Castle because “[they] provided well reasoned and documented opinions determining that [claimant] does not have any pulmonary disease related to his coal dust exposure and that his pulmonary impairment is caused by his morbid obesity and other medical conditions.” *Id.* at 5. In addition, the administrative law judge noted that Drs. Bellotte and Castle are [B]oard certified pulmonary specialists and Dr. Scattaregia’s qualifications are not in the record.” *Id.* With regard to Section 718.204(b)(2)(iv), the administrative law judge further concluded that the medical opinion evidence was insufficient to establish total disability, by stating:

Dr. Bellotte and Dr. Castle found that [claimant] does not have a totally disabling pulmonary impairment and attributed his breathing difficulties primarily to his morbid obesity. Dr. Scattaregia determined that [claimant’s] pulmonary impairment “may” have limited his last coal mine job but his opinion is equivocal and I give it little weight.

*Id.* at 6.

The Director argues that the administrative law judge discredited Dr. Scattaregia’s diagnosis of legal pneumoconiosis because it was not reasoned, even without weighing the doctor’s opinion against the contrary medical opinions at Section 718.202(a)(4). Further, as the Director argues, the administrative law judge’s finding that Dr. Scattaregia’s rendered an equivocal disability opinion cannot be considered claimant’s fault and the problems with the doctor’s report on this issue cannot be considered harmless, as the administrative law judge mischaracterized Dr. Bellotte’s disability opinion. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). After weighing the disability opinions of Drs. Scattaregia, Bellotte, and Castle at Section 718.204(b)(2)(iv), the administrative law judge found that claimant was not totally disabled. Decision and Order at 6. However, contrary to the administrative law judge’s finding that Dr. Bellotte opined that claimant does not have a totally disabling pulmonary impairment, Dr. Bellotte, in a report dated May 31, 2007, opined that “[claimant] is totally and permanently disabled to the extent that he would be unable to perform his regular coal mining duties as a face man or work requiring similar effort.”<sup>4</sup> Employer’s Exhibit 12; *see Tackett*, 7 BLR at 1-706. Thus, the administrative law judge erred in weighing the conflicting medical opinions at Section 718.204(b)(2)(iv). The Director argues that “the

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<sup>4</sup> Additionally, during a deposition dated October 3, 2007, Dr. Bellotte opined that “[claimant] was totally and permanently disabled and I don’t think he’d ever be able to return to the mines.” Employer’s Exhibit 15 (Dr. Bellotte’s Deposition at 17-18).

record evidence does not clearly establish no legal pneumoconiosis or no total disability, contrary to [the administrative law judge's] determination." Director's Letter Brief at 5.

As required by Section 413(b) of the Act, 30 U.S.C. §923(b), the Director has a statutory obligation to provide a complete pulmonary evaluation of the miner. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). On the facts of this case, we grant the Director's request to remand this case to the district director, given the Director's concession that he failed to provide claimant with a complete pulmonary evaluation, sufficient to constitute an opportunity to substantiate his claim, as required by the Act. 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.401, 725.405(b), 725.406; 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*, 18 BLR at 1-89-90; *Petry v. Director, OWCP*; 14 BLR 1-98 (1990); cf. *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, BLR (6th Cir. 2009) (holding that miner received complete pulmonary evaluation because physician's report addressed all elements of entitlement, even if lacking in persuasive detail).<sup>5</sup> Consequently, we vacate the administrative law judge's denial of benefits.<sup>6</sup>

Employer contends that because it was prejudiced by the Director's failure to raise the completeness of Dr. Scattaregia's pulmonary evaluation earlier in the litigation of this case, liability for the payment of benefits must transfer to the Trust Fund. Specifically, employer argues that the Director's failure to raise the issue of the completeness of Dr. Scattaregia's pulmonary evaluation prior to the issuance of the administrative law judge's

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<sup>5</sup> Citing *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, BLR (6th Cir. 2009), employer contends that Dr. Scattaregia's report satisfied the Director's statutory obligation to provide claimant with a complete pulmonary evaluation, as Dr. Scattaregia conducted all of the required medical tests and addressed each of the requisite elements of entitlement. Employer asserts that the quality of the rationale supporting Dr. Scattaregia's opinion is not required by Section 725.406 to satisfy the requirements of a complete pulmonary evaluation. Employer maintains that the Director's duty is to provide a complete pulmonary evaluation, and not a compelling or persuasive pulmonary evaluation justifying an award of benefits. While decisions rendered by a circuit court can provide guidance in cases that do not arise within its jurisdiction, they are not binding in cases that arise in other jurisdictions. Because this case arises within the jurisdiction of the Fourth Circuit, and the Fourth Circuit has not adopted the holding of the Sixth Circuit, we decline to apply the holding of *Greene* in this case.

<sup>6</sup> In light of our disposition of this case, we decline to address the administrative law judge's findings on the merits. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).

Decision and Order was a major infringement of employer's due process rights, as it will significantly increase employer's cost of litigation. Employer also argues that the Director's failure to raise this issue prior to the issuance of the administrative law judge's Decision and Order should be viewed as a form of waiver. Employer maintains that the Director had several opportunities to address this issue, as a formal hearing was conducted and closing argument briefs were submitted prior to the issuance of the administrative law judge's Decision and Order.

Contrary to employer's assertion that its due process rights were violated by the Director's failure to raise the completeness of Dr. Scattaregia's pulmonary evaluation earlier in the litigation of this case, we are not persuaded that employer will be unable to mount a meaningful defense because of a remand of the claim to the district director for a complete pulmonary evaluation. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Venicassa v. Consolidation Coal Co.*, 137 F.3d 197, 21 BLR 2-277 (3d Cir. 1998). Further, while a remand may result in further delay of the adjudication of this claim, and the parties may incur increased litigation costs based on the evidentiary development undertaken by the district director, these factors do not rise to the level of a due process violation that requires transfer of the liability to the Trust Fund. *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002). In the absence of a showing that there will be a significant infringement on the due process rights of the parties, we fail to see how employer is unduly prejudiced by the Director's concession, on appeal before the Board, that he failed to provide claimant with a complete pulmonary evaluation. *R.G.B., et. al. v. Southern Ohio Coal Co., et. al. [Blackburn]*, BLR , BRB Nos. 08-0491 BLA, 08-0521 BLA, 08-0463 BLA, 08-0464 BLA, 08-0465 BLA (Aug. 28, 2009) (*en banc*). Consequently, we reject employer's contention that liability for the payment of benefits in this case must transfer to the Trust Fund.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded to the district director for a complete pulmonary evaluation to be provided to claimant and for reconsideration of his claim in light of the new evidence.

SO ORDERED.

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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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BETTY JEAN HALL  
Administrative Appeals Judge