

BRB No. 08-0421 BLA

D.G. )  
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 Claimant-Petitioner )  
 )  
 v. ) DATE ISSUED: 02/19/2009  
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 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent ) DECISION and ORDER

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

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

Sarah M. Hurley (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank  
James, Acting 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 – Denying Benefits (2006-BLA-05575)  
of Administrative Law Judge Joseph E. Kane (the administrative law judge) 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

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<sup>1</sup> Claimant filed a claim for benefits on June 4, 1997, which was denied by  
Administrative Law Judge Joseph E. Kane (the administrative law judge) in a Decision  
and Order dated April 28, 1999. Director's Exhibit 1 at 99. The administrative law judge  
determined that claimant failed to establish total disability. *Id.* Claimant's subsequent  
claim was filed on April 1, 2005. Director's Exhibit 3.

administrative law judge credited claimant with nine and one-half years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) and further found, therefore, that claimant did not 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 challenges the administrative law judge's determination that the newly submitted medical opinion evidence did not support a finding of total disability pursuant to Section 718.204(b)(2)(iv). Claimant also asserts that the Department of Labor (DOL) did not provide him with a complete and credible pulmonary evaluation as required under the Act. In response, the Director, Office of Workers' Compensation Programs (the Director), agrees that remand to the district director is necessary, as DOL did not satisfy its obligation to provide claimant with an opportunity to substantiate his claim with a complete pulmonary evaluation.<sup>2</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.<sup>3</sup> 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, 363 (1965).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinions of Drs. Simpao and Mettu. Dr. Simpao examined claimant on April 22, 2005 at the request of DOL and reported that claimant suffered from a "mild impairment as eviden[ced] by his [pulmonary function study], EKG, physical findings, and symptomatology." Director's Exhibit 14. Dr. Simpao indicated that claimant "would not be able to perform any coal mining duties due to his pulmonary impairment and disabled [sic] to orthopedic problems." *Id.* Dr. Mettu examined claimant on February 7, 2006 at the request of DOL and diagnosed chronic bronchitis that "could be due to dust exposure," and mild obstructive airways disease. Director's Exhibit 28. Dr. Mettu indicated that claimant's blood gas study was normal and that his pulmonary

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<sup>2</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that the newly submitted evidence was insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

function study was not valid, but did not otherwise address the issue of total disability. *Id.*

The administrative law judge determined that Dr. Simpao's opinion was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), as it was unclear whether he diagnosed a totally disabling pulmonary impairment or whether he concluded that claimant was totally disabled due to the combined effects of a pulmonary impairment and "orthopedic problems." Decision and Order at 9; Director's Exhibit 14. With respect to Dr. Mettu's opinion, the administrative law judge found that "it does not support [c]laimant's entitlement to benefits," because Dr. Mettu "did not expressly address whether [c]laimant is totally disabled." Decision and Order at 9; Director's Exhibit 28. The administrative law judge determined that the newly submitted medical opinion evidence was insufficient to establish total disability under Section 718.204(b)(2)(iv) and, therefore, that claimant failed to prove a change in an applicable condition of entitlement pursuant to Section 725.309(d). Decision and Order at 10.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). In the present case, the Director has acknowledged that DOL did not satisfy its statutory obligation, as Dr. Simpao did not clearly address the issue of total disability. Director's Letter Brief at 4. The Director maintains, therefore, that "this case must be remanded to the district director to obtain clarification of [Dr. Simpao's] opinion or to provide claimant with another complete or credible pulmonary evaluation, if necessary."<sup>4</sup> *Id.* at 4. Based upon the Director's position, we hereby vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), his finding that claimant did not demonstrate a change in an applicable condition of entitlement under Section 725.309(d), and the denial of benefits.

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<sup>4</sup> The Director also concedes that Dr. Mettu's opinion is "flawed," because he rendered an equivocal opinion as to the existence of legal pneumoconiosis and failed to state an opinion as to whether claimant is totally disabled. Director's Letter Brief at 4 n.4.



Accordingly, this case is remanded to the district director for further evidentiary development necessary to satisfy DOL's statutory obligation pursuant to 30 U.S.C. §923 (b), as implemented by 20 C.F.R. §725.406.

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