

BRB No. 08-0499 BLA

J.P.)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 02/25/2009
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

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

Rocco V. Valvano, Jr. (Mazzoni & Karam), Scranton, Pennsylvania, for claimant.

Michelle S. Gerdano (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 (07-BLA-5218) of Administrative Law Judge Janice K. Bullard (the administrative law judge) rendered 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).¹ The

¹ Claimant's first application for benefits, filed on August 9, 1995, was denied by the district director on August 21, 1995, because claimant submitted no proof that he worked as a coal miner. Director's Exhibit 1. Claimant did not further pursue his 1995 claim. Claimant's second claim for benefits, filed on March 8, 2002, was denied by an administrative law judge who found that although claimant established that he worked as

administrative law judge credited claimant with fourteen years of coal mine employment² and found that the medical evidence developed since the previous denial did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202 or total disability pursuant to 20 C.F.R. §718.204(b)(2). Specifically, the administrative law judge found that two conflicting readings of a new x-ray did not support a finding of pneumoconiosis pursuant to Section 718.202(a)(1), and that the only new medical report, submitted by the Director, Office of Workers' Compensation Programs (the Director), as the complete pulmonary evaluation provided to claimant by the Department of Labor, was insufficiently reasoned and supported to establish that claimant has pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge found that the same medical report, prepared by Dr. Levinson, was "silent on the issue" of whether claimant is totally disabled pursuant to Section 718.204(b)(2)(iv). Decision and Order at 11. Accordingly, the administrative law judge found that the new evidence did not establish a change in an applicable condition of entitlement, and she denied benefits. *See* 20 C.F.R. §725.309(d).

On appeal, claimant asserts that the administrative law judge erred in her analysis of the medical opinion evidence regarding the existence of pneumoconiosis and total disability. The Director responds, conceding that he failed to fulfill his statutory duty, pursuant to Section 413(b), 30 U.S.C. 923(b), to provide claimant with a complete pulmonary evaluation. Accordingly, the Director requests that this case be remanded to the district director for further evidentiary development.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

a coal miner, he did not establish that he had pneumoconiosis or a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). Director's Exhibit 2. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. [*J.P.*] *v. Director, OWCP*, BRB No. 04-0207 BLA (Nov. 10, 2004)(unpub.). On March 28, 2006, claimant filed the instant claim.

² The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibits 6, 8, 9, 11, 12. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that “one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final.” 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2). Claimant’s prior claim was denied because he failed to establish the existence of pneumoconiosis and that he was totally disabled by a respiratory or pulmonary impairment. Director’s Exhibit 2. Consequently, claimant had to submit new evidence establishing either of these elements to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3)

As noted, Dr. Levinson’s report was the only new medical opinion. Based on a physical examination, smoking and employment histories, chest x-ray, EKG, and pulmonary function and blood gas studies, Dr. Levinson diagnosed claimant with coal workers’ pneumoconiosis due to coal mine work, and chronic obstructive pulmonary disease (COPD) “largely” due to cigarette smoking. Director’s Exhibit 16. Dr. Levinson concluded that claimant has a “mild” pulmonary impairment, that is “largely” due to COPD, “but also due to coal workers’ pneumoconiosis to a lesser degree.” Director’s Exhibit 16 at 4. The administrative law judge found that Dr. Levinson’s diagnosis of pneumoconiosis was based on his own positive reading of an x-ray that was outweighed by the negative reading of a more highly qualified physician, and his diagnosis was otherwise unsupported by the objective medical evidence. Decision and Order at 7-8. With respect to the issue of total disability, the administrative law judge found that, although Dr. Levinson diagnosed claimant with a mild impairment, he did not address “whether and to what extent Claimant is disabled,” and thus was “silent on the issue of Claimant’s impairment.” Decision and Order at 10-11.

The Director states that although the administrative law judge’s findings are supported by substantial evidence, “Given the . . . finding that Dr. Levinson’s diagnosis of pneumoconiosis is unreasoned and given the doctor’s failure to fully address the issue of total disability, the Director . . . has failed to provide Claimant with a complete pulmonary [evaluation] as required by Section 413(b) of the Act, 30 U.S.C. §923(b).”³

³ The Act requires that “[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.” 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406.

Director's Brief at 5. Further, the Director informs the Board that Dr. Levinson's report was incomplete on the issue of whether claimant has legal pneumoconiosis, because Dr. Levinson did not address whether claimant's COPD, due "largely" to smoking, had any other causes, including coal mine dust exposure. Director's Brief at 5 n.4; *see* 20 C.F.R. §718.201(a)(2). The Director therefore requests that the Board remand this case to the district director so that Dr. Levinson can be given the opportunity to supplement and explain his medical opinion on all the issues of entitlement.

Because the Director concedes that Dr. Levinson's opinion fails to meet the Director's statutory obligation to provide claimant with a complete pulmonary evaluation sufficient to substantiate his claim, we grant the Director's request that the case be remanded to the district director for further development of the evidence. *See Hodges v. BethEnergy Mines Inc.*, 18 BLR 1-84, 1-93 (1994)(granting the Director's motion to remand for a complete pulmonary evaluation to be provided); *Petry v. Director, OWCP*, 14 BLR 1-98, 1-100 (1990)(*en banc*)(same); *Hall v. Director, OWCP*, 14 BLR 1-51, 1-53 (1990)(*en banc*)(same).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated and this 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.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge