

BRB No. 99-0391 BLA

ELI JOHN SIZEMORE)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: _____
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

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

Edmond Collett, Hyden, Kentucky, for claimant.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0496) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge credited claimant with 5.67 years of coal mine employment and adjudicated this claim¹

¹Claimant filed his claim on November 23, 1992. Director's Exhibit 1. On July 9, 1996, Administrative Law Judge Fletcher E. Campbell issued a Decision and Order - Denying Benefits. Director's Exhibit 36. Judge Campbell's denial was

pursuant to the regulations contained in 20 C.F.R. Part 718. The Director, Office of Workers' Compensation Programs (the Director), conceded the existence of pneumo arising out of coal mine employment and a totally disabling respiratory impairment. However, the administrative law judge found that claimant failed to establish total disability due to pneumo pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumo at 20 C.F.R. §718.204(b). The Director responds, urging the Board to remand the case to the district director to provide claimant with a complete and credible pulmonary evaluation.²

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

based on claimant's failure to establish the existence of pneumoconiosis and total disability. *Id.* However, the Board vacated Judge Campbell's Decision and Order and remanded the case to the district director for further development of the evidence in light of the Director's concession that the Department of Labor failed to provide claimant with a complete, credible pulmonary evaluation, as required by Section 413(b) of the Act, 30 U.S.C. §923(b).

²Inasmuch as the administrative law judge's length of coal mine employment finding and the Director's concession and the administrative law judge's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment are not challenged on appeal, we affirm these findings. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Specifically, claimant asserts that the administrative law judge erred in finding that Dr. Baker’s opinion is insufficient to satisfy the disability causation standard established by the United States Court of Appeals for the Sixth Circuit. The administrative law judge considered the only two opinions relevant at 20 C.F.R. §718.204(b), namely the opinions of Drs. Baker and Broudy. Whereas Dr. Baker opined that claimant suffers from a moderate pulmonary impairment due to cigarette smoking and “questionable” coal dust exposure, Director’s Exhibit 36, Dr. Broudy opined that claimant does not suffer from a pulmonary impairment caused by coal mine employment, Director’s Exhibit 36.

In *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), the Sixth Circuit held that a miner must affirmatively establish that his totally disabling respiratory impairment is due “at least in part” to his pneumoconiosis under 20 C.F.R. §718.204(b). Further, in *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997), the Sixth Circuit explained that the term “due to” requires a miner to prove more than a *de minimis* or infinitesimal contribution by pneumoconiosis to his total disability. The Sixth Circuit also explained that the miner’s pneumoconiosis must be more than merely a speculative cause of his disability. Rather, the Sixth Circuit held that a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernable consequence to his totally disabling respiratory impairment. Thus, since Dr. Baker opined that claimant’s pulmonary impairment was caused by “questionable” coal dust exposure, we reject claimant’s assertion that the administrative law judge erred in finding Dr. Baker’s opinion insufficient to satisfy the Sixth Circuit’s disability causation standard. *See Smith, supra*.

Further, claimant asserts, and the Director concedes, that the Director has failed to provide claimant with a complete and credible pulmonary evaluation, as required by Section 413(b) of the Act, 30 U.S.C. §923(b). As noted by the administrative law judge, Decision and Order at 6-7, claimant has the affirmative burden of establishing that his total respiratory disability is due to pneumoconiosis under 20 C.F.R. §718.204(b). *See Smith, supra; Adams, supra*. In the instant case, the Director concedes that the record contains no medical opinion submitted by the Director that adequately addresses the causation inquiry under 20 C.F.R. §718.204(b) so as to satisfy the Director's burden of providing claimant with a

complete and credible pulmonary evaluation, as required by Section 413(b) of the Act, 30 U.S.C. §923(b).³ See *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). Thus, in light of the Director's concession that he has not fulfilled his statutory obligation to provide a complete and credible pulmonary examination 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, supra*; *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990), we vacate the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) and remand the case to the district director to develop evidence that will fulfill the Director's obligation in this regard. 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).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

³As previously noted, Dr. Baker's opinion is equivocal with respect to the cause of claimant's disabling respiratory impairment. Director's Exhibit 36. Further, as the Director concedes, the credibility of Dr. Broudy's opinion, that claimant does not suffer from a pulmonary impairment caused by coal mine employment, is brought into question by the fact that Dr. Broudy did not acknowledge that claimant suffers from pneumoconiosis. Director's Exhibit 36.

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge