

BRB No. 99-0481 BLA

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

Appeal of the Decision and Order Denying Living Miner's Benefits of
Thomas M. Burke, Administrative Law Judge, United States
Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for
claimant.

Jennifer U. Toth (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, BROWN,
Administrative Appeals Judge, and NELSON, Acting Administrative
Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Living Miner's Benefits (97-BLA-1747) of Administrative Law Judge Thomas M. Burke on a duplicate 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). Adjudicating this duplicate claim¹ pursuant to 20 C.F.R. Part 718, the administrative law judge credited the

¹ Claimant is Albert Concini, the miner, who filed eight applications for benefits as

parties' stipulation that claimant established twenty-seven years of qualifying coal mine employment and the existence of pneumoconiosis under 20 C.F.R. §718.202(a). However, the administrative law judge found that claimant failed to demonstrate a material change in conditions under 20 C.F.R. §725.309(d) because claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the medical evidence of record establishes a material change in his condition because the evidence is supportive of total disability. The Director, Office of Workers' Compensation Programs (the Director) responds, filing a Motion to Remand the case to the district director on the basis that he failed to provide claimant with a complete, credible pulmonary examination as required by the Act. Therefore, the Director requests that the Board vacate the Decision and Order of the administrative law judge and remand the case for further proceedings.²

follows: June 15, 1979, March 8, 1982, August 2, 1983, September 17, 1984, September 12, 1985, October 2, 1986, October 3, 1987, and February 8, 1988. Director's Exhibits 1, 42-45. Except for the September 1984 claim that claimant withdrew, all of these claims were denied. Of the most recent claims, the application filed on October 3, 1987 was denied by the district director on October 21, 1987. Director's Exhibit 45. Claimant took no further action on this claim and filed the pending application for benefits on February 8, 1988, Director's Exhibit 1; this claim is the subject of the case *sub judice*.

² We affirm the administrative law judge's findings regarding length of coal mine employment and the existence of pneumoconiosis inasmuch as these determinations are unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-

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 the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director contends that, notwithstanding the administrative law judge's permissible weighing of Dr. Montner's opinion, claimant was not afforded a reliable and complete pulmonary examination as required by Section 413(b) of the Act, 30 U.S.C. §923(b). See 20 C.F.R. §§718.101, 725.405(b). Specifically, the Director argues that the administrative law judge found the opinion of Dr. Montner, the physician who examined claimant on behalf of the Department of Labor, not probative because Dr. Montner did not explain his conclusion that claimant's respiratory condition is coal dust related or his opinion that the pulmonary condition played a "small part" in claimant's disability. See Decision and Order at 9; Director's Exhibit 34. The Director asserts, therefore, that he has not fulfilled his statutory obligation of providing claimant with a complete and credible pulmonary evaluation associated with this claim.

It is well established that the Department of Labor (DOL) has a statutory duty to arrange and pay for a miner's complete pulmonary examination pursuant to 30 U.S.C. §923(b). *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); see *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); accord *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990). Likewise, the Board has held that DOL must provide claimant with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim, as required by the Act. See *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990) (*en banc*). As the Director correctly avers, the administrative law judge found that Dr. Montner's opinion, that claimant's chronic obstructive pulmonary disease was "probably" due to coal dust exposure and constituted a "small part" of claimant's impairment, was not probative because he did not explain his opinion. Decision and Order at 9; Director's Exhibit 34. Inasmuch as Dr. Montner did not render a credible examination and opinion sufficient to substantiate this claim, we agree with the Director that DOL has failed to provide

30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2.

claimant with a complete pulmonary examination as required by Section 413(b) of the Act, 30 U.S.C. §923(b). See 20 C.F.R. §§718.101, 725.405(b). Hence, we grant the Director's request, vacate the Decision and Order of the administrative law judge in part, and remand this case to the district director to provide claimant with a credible, complete pulmonary evaluation in accordance with Section 413(b) of the Act. *See Pettry, supra; Hall, supra.*

Accordingly, the Decision and Order Denying Living Miner's Benefits of the administrative law judge is affirmed in part and vacated in part, and this case is remanded to the district director for proceedings consistent with this opinion.³

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

³ Our decision to vacate the administrative law judge's Decision and Order and remand the case for further proceedings obviates the need to address claimant's arguments on appeal.