

BRB No. 01-0460 BLA

EARL H. FIFE)

Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED:

DECISION and ORDER

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

Earl H. Fife, Pikeville, Kentucky, *pro se*.

Rita Roppolo (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL
,
Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (1999-BLA-1092) of Administrative Law Judge Joseph E. Kane denying benefits on a request for modification of a duplicate claim¹ filed pursuant to the provisions of Title IV of the Federal

¹Claimant filed a claim under the Black Lung Benefits Act on January 9, 1981. Director's Exhibit 18-86. This claim was denied by the district director on March 18, 1981. Director's Exhibit 18-65. A duplicate claim was filed on February 6, 1990 and denied by the district director on November 19, 1991. Director's Exhibits 18-61, 18-89. The instant duplicate claim, filed on May 4, 1993, was denied by Administrative Law Judge Richard Malamphy on June 17, 1996. Director's Exhibit 34. Subsequently, claimant's appeal of Judge Malamphy's Decision and Order was considered a request for modification of the instant duplicate claim.

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² The administrative law judge found that claimant did not establish the existence of

Director's Exhibit 35, 36.

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp. 2d 47 (D.D.C. 2001).

pneumoconiosis pursuant to 20 C.F.R §718.202(a)(2000) or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds requesting the Board to vacate the administrative law judge's Decision and Order denying benefits and remand the case to the district director for the development of additional medical evidence.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. *See 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 supported by substantial evidence, are rational, and are consistent with applicable law. 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 (1985).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204(2000); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

The Director argues that the opinion of Dr. Sundaram, who examined claimant at Director's request, is unclear and did not meet the Director's obligation to provide claimant with a complete pulmonary evaluation. Director's Exhibit 6. We agree. Therefore, we grant the Director's request to remand this case, given the Director's concession that the Department of Labor has not met its obligation to provide claimant with a complete and credible evaluation as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*).

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, at no expense to claimant, and for reconsideration of the merits of this claim in light of our Decision and Order and all the evidence of record.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge