

BRB No. 05-0471 BLA

DONALD R. BOWEN (Deceased) <sup>1</sup>	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS’	)	
COMPENSATION PROGRAMS, UNITED	)	DATE ISSUED: 01/19/2006
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Rita A. Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5712) of Administrative Law Judge Thomas F. Phalen, Jr. in a miner’s 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 6.78 years of coal mine employment. Decision and Order at 4. Applying

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<sup>1</sup>Claimant is Donald R. Bowen, the miner, who filed his claim for benefits on January 29, 2001. Director's Exhibit 2. Claimant died on May 3, 2002. Director’s Exhibit 11. The miner’s son, Jeffrey Bowen, who is the administrator of the miner’s estate, is pursuing the miner’s claim. Director’s Exhibit 15; Claimant’s Exhibit 4.

the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(c). *Id.* at 10. However, the administrative law judge also found the evidence insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 11-12. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in discrediting Dr. Hussain's opinion pursuant to Section 718.204(b)(2)(iv). Claimant's Brief at 9-11. Alternatively, claimant asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation as required by the Act. *Id.* at 12-15. The Director responds, asserting that the administrative law judge properly discredited Dr. Hussain's opinion regarding total respiratory disability. Director's Brief at 3. However, the Director requests that this case be remanded for further evidentiary development given the flaws contained in the Department-sponsored evaluation of Dr. Hussain. *Id.* at 3-4.

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).

We grant the Director's request to remand this case, given the Director's concession that the Department of Labor failed to provide the miner with a complete and credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.<sup>2</sup> 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir.

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<sup>2</sup>The Director, Office of Workers' Compensation Programs (the Director), agrees with claimant that further development of the evidence is required because Dr. Hussain's reports "do not sufficiently address all the elements of entitlement." Director's Brief at 3. The Director asserts that the case must be remanded to allow Dr. Hussain to provide a more detailed report. The Director specifically states that Dr. Hussain should (1) discuss the significance of the second set of pulmonary function study results; (2) explain whether any of the respiratory limitations that claimant had prior to his death, without reference to his coronary artery disease, would have affected his ability to perform the work of a truck driver; and (3) state whether these limitations were due to coal mine employment. *Id.* at 3-4. The Director notes that the Department of Labor should also inform Dr. Hussain of the physical requirements of claimant's job as a truck driver. *Id.* at 4 n.1.

1984); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990) (*en banc*). Consequently, we vacate the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is vacated and the case is remanded to the district director for further development of the evidence consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge