

BRB No. 98-0625 BLA

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

Appeal of the Decision and Order - Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa, Kingston, Pennsylvania, for claimant.

Jill M. Otte (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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1384) of Administrative Law Judge Robert D. Kaplan 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). This case is on appeal before the Board for a second time. In his initial Decision and Order issued on January 16, 1993, the administrative law judge credited claimant with 1.5 years of qualifying coal mine employment pursuant to the stipulation of the parties, and determined that the present claim, filed on August 16, 1993, was subject to the duplicate claim provisions at 20 C.F.R. §725.309, inasmuch as no action was taken within one year of the

denial of claimant's original claim, filed on August 14, 1981. The administrative law judge then found that the issue of a material change in conditions under Section 725.309 was moot because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, the Board affirmed the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3), and denied the request of the Director, Office of Workers' Compensation Programs (the Director), to hold that the evidence of record was legally insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). The Board, however, granted the Director's motion to remand this case to the district director for further development of evidence because the Department of Labor (DOL) had not met its statutory duty pursuant to 30 U.S.C. §923(b) to provide claimant with a complete, credible pulmonary evaluation regarding all elements of entitlement. *Mangino v. Director, OWCP*, BRB No. 96-0577 BLA (Aug. 26, 1996)(unpublished).

On remand, the district director denied modification of the denial of benefits in this duplicate claim, and claimant subsequently requested a formal hearing before an administrative law judge in order to provide testimony regarding an expanded history of covered coal mine employment. The administrative law judge denied claimant's motion for a formal hearing on the ground that claimant's prior stipulation to 1.5 years of qualifying coal mine employment was binding. In a Decision and Order issued on December 23, 1997, the administrative law judge found that the weight of the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4), and thus denied benefits without reaching the issue of whether claimant established a material change in conditions pursuant to Section 725.309.

In the present appeal, claimant challenges the administrative law judge's denial of claimant's request for a hearing and his findings pursuant to Section 718.202(a)(4). Claimant asserts that a hearing was necessary to clarify the extent of his covered exposure to coal dust, and that additional testimony on this issue might have affected the administrative law judge's credibility determinations at Section 718.202(a)(4). The Director has filed a Motion to Remand, arguing that claimant is entitled to a full evidentiary hearing on modification, including the issue of the length of claimant's covered coal mine employment, which was reexamined before the district director and listed as a contested issue upon transmittal of the case to the

Office of Administrative Law Judges.<sup>1</sup> The Director also maintains that further development of the evidence is necessary in order to satisfy the Director's statutory duty pursuant to 30 U.S.C. §923(b).<sup>2</sup>

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 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).

In order to be entitled to benefits pursuant to 20 C.F.R. Part 718, a miner must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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<sup>1</sup> The Board accepts the Director's Motion to Remand as his response brief herein.

<sup>2</sup> The administrative law judge's finding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3) is affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Turning to the issue of whether the medical opinions of record are sufficient to establish the existence or absence of pneumoconiosis arising out of covered coal mine employment pursuant to Sections 718.202(a)(4), 718.203(c), claimant acknowledges that an administrative law judge is not required to accord greater weight to treating physicians. Nevertheless, claimant argues that the opinions of Drs. Holleran and Aquilina are more credible and entitled to greater weight than the contrary opinion of Dr. Talati because Drs. Holleran and Aquilina treated claimant frequently over an extended period of time, whereas Dr. Talati appeared to primarily rely upon claimant's negative x-ray interpretations rather than a comprehensive assessment of claimant's pulmonary condition. The Director seeks another remand of the case to the district director, conceding that the record still does not contain a credible medical opinion regarding all elements of entitlement. Specifically, while the Director maintains that the administrative law judge properly discounted the opinions of Drs. Holleran and Aquilina because they failed to account for claimant's significant exposure to coal dust after he left covered coal mine employment, and permissibly relied on Dr. Talati's opinion in finding that claimant failed to establish clinical pneumoconiosis, the Director asserts that Dr. Talati's opinion is neither complete nor credible on the issue of "legal" pneumoconiosis as defined in 20 C.F.R. §718.201.<sup>3</sup>

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<sup>3</sup> The Director notes that DOL, in accordance with the Board's remand instructions, secured a new pulmonary evaluation of claimant on October 17, 1996, from Dr. Talati, who was unable to assess the extent of claimant's pulmonary impairment and diagnosed possible bronchial asthma but no pneumoconiosis. Director's Exhibit 57. On January 24, 1997, the district director requested that Dr. Talati review pulmonary functions studies obtained on October 23, 1996, determine the degree of respiratory impairment and the extent to which it alone would prevent claimant from performing his usual coal mine employment, and to state whether, after consideration of claimant's complete medical, smoking and work histories, it was his opinion that claimant's diagnosed bronchial asthma arose, at least in part, out of his covered 1.5 years of coal mine employment. Director's Exhibit 64. On February 27, 1997, Dr. Talati responded that he could not assess the degree of impairment, and that "[c]onsidering negative chest X-ray for CWP and 1.5 years of coal mine employment, it is likely other disease such as bronchial asthma rather than pneumoconiosis to consider." Director's Exhibit 65. The Director asserts that Dr. Talati's supplemental report fails to provide any meaningful clarification of his opinion, but suggests that the physician considered only the presence of clinical disease rather than the broader legal definition of pneumoconiosis as set forth at 20 C.F.R. §718.201. See generally *Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985). Consequently, the Director concedes that Dr. Talati's opinion fails to satisfy the Director's burden of providing a complete, credible evaluation of claimant's pulmonary condition. Director's Brief at 4-5.

Inasmuch as the Black Lung Disability Trust Fund is liable for the payment of benefits in this case, and the Director concedes that DOL did not meet its statutory obligation to provide a complete pulmonary evaluation, see 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.404; *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990), we again remand this case to the district director to obtain a complete, credible medical opinion addressing claimant's pulmonary condition. At the conclusion of modification proceedings before the district director, claimant is entitled to a full evidentiary hearing before an administrative law judge upon request, if necessary, pursuant to 20 C.F.R. §§725.310, 725.451, which would include the issue of the length of claimant's covered coal mine employment.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part and vacated in part, and this case is remanded to the district director for further evidentiary development.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge