

BRB No. 02-0753 BLA

JUNIOR WATTS)
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS=) DATE ISSUED: 07/11/2003
) COMPENSATION PROGRAMS,
) UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

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

Zaring P. Robertson (Morgan, Madden, Brashear & Collins), Richmond, Kentucky, for claimant.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (01-BLA-0828) of Administrative Law Judge Joseph E. Kane 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).¹ Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative

¹ The 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

law judge, based on his review of the evidence, accepted the parties' stipulation that claimant worked in qualifying coal mine employment for thirty-nine years. The administrative law judge also accepted the parties' stipulation to the existence of pneumoconiosis arising out of coal mine employment. The administrative law judge found, however, that claimant failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. ' 718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in failing to credit the medical opinion of Dr. Baker, and consequently, erred in failing to find total respiratory disability established. The Director, Office of Workers' Compensation Programs (the Director), states that he has failed to provide claimant with a complete, credible pulmonary evaluation as required by the Act and for that reason he requests that the case be remanded to the district director. In response, claimant argues that the Director's motion to remand is untimely because the Director's argument concerning the evidence should have been raised before the administrative law judge.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 the applicable law, they are binding upon 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

It is well established that the Department of Labor has a statutory duty to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate his claim. 30 U.S.C. ' 923(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990) (*en banc*); 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). Accordingly, because the Director has conceded that he did not provide claimant with a complete, credible evaluation, the case must be remanded for him to do so.

² We affirm the administrative law judge's finding regarding length of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment inasmuch as these determinations are unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 8.

Hence, we affirm in part and vacate in part the Decision and Order of the administrative law judge, and grant the Director=s motion to remand the case to the district director to provide claimant with a complete, credible, pulmonary evaluation or, in the alternative, to provide Dr. Wicker with the valid April 2001 pulmonary function study to review. *See Pettry*, 14 BLR 1-198; *Hall*, 14 BLR 1-51. If, on remand, claimant affirmatively establishes total respiratory disability pursuant to Section 718.204(b)(2), then the district director should determine whether claimant=s total disability is due to pneumoconiosis under Section 718.204(c). 20 C.F.R. ' 718.204(b), (c).³

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

³ Claimant=s argument that the motion to remand is untimely is rejected. 30 C.F.R. ' 923(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990).