

BRB No. 04-0769 BLA

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| TERRY M. COUCH  | ) |                         |
|   | ) |                         |
| Claimant-Petitioner   | ) |                         |
|   | ) |                         |
| v.  | ) |                         |
|   | ) |                         |
| SHAMROCK COAL COMPANY,<br>INCORPORATED  | ) | DATE ISSUED: 06/09/2005 |
|   | ) |                         |
| and   | ) |                         |
|   | ) |                         |
| JAMES RIVER COAL COMPANY  | ) |                         |
|   | ) |                         |
| Employer/Carrier-<br>Respondents  | ) |                         |
|   | ) |                         |
| DIRECTOR, OFFICE OF WORKERS'<br>COMPENSATION PROGRAMS, UNITED<br>STATES DEPARTMENT OF LABOR | ) |                         |
|   | ) |                         |
| Party-in-Interest   | ) | DECISION and ORDER      |

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, 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 (03-BLA-5932) of Administrative Law Judge Daniel J. Roketenetz 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).<sup>1</sup> This case involves a claim filed on October 22, 2001.<sup>2</sup> After crediting claimant with twenty-one years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that the evidence was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge also found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible

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<sup>1</sup> 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.

<sup>2</sup> Claimant initially filed a claim for benefits on December 1, 1998. Director's Exhibit 1. In a Decision and Order dated March 15, 2000, Administrative Law Judge Joseph E. Kane found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* Judge Kane also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Accordingly, Judge Kane denied benefits. *Id.* By Decision and Order dated April 10, 2001, the Board affirmed Judge Kane's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Couch v. Shamrock Coal Co.*, BRB No. 00-0657 BLA (Apr. 10, 2001) (unpublished). The Board, therefore, affirmed Judge Kane's denial of benefits. *Id.* Although claimant filed a request for modification, he subsequently filed a motion to withdraw his claim. Director's Exhibit 1. In a Proposed Decision and Order dated August 30, 2001, the district director granted claimant's request to withdraw his claim. *Id.* The district director notified the parties that, if no response was received within thirty days, the claim would be deemed withdrawn and "considered not to have been filed." *Id.* There is no indication that any party filed a response within the thirty day period.

Claimant filed a second claim on October 22, 2001. Director's Exhibit 3.

pulmonary examination sufficient to constitute an opportunity to substantiate his claim. The Director has filed a response, urging the Board to remand the case to the district director in order to allow him to provide claimant with a complete, credible pulmonary evaluation. Employer responds in support of the administrative law judge's denial of benefits. Employer also notes its disagreement with the contentions of claimant and the Director that the Department of Labor failed to provide claimant with a complete, credible pulmonary evaluation.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

We grant the Director's request to remand this case, given the Director's concession that the Department of Labor failed to provide claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 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*). Consequently, we vacate the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order is vacated and the case is remanded to the district director to allow for a complete pulmonary evaluation and for reconsideration of the merits of this claim in light of all of the evidence of record.

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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BETTY JEAN HALL  
Administrative Appeals Judge