

BRB No. 10-0558 BLA

LEE COLLINS)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 05/31/2011
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 (08-BLA-5827) of Administrative Law Judge Larry S. Merck (the administrative law judge) denying benefits on a subsequent claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-

¹ Claimant filed his first claim on March 7, 1980. Director's Exhibit 1. On November 4, 1987, Administrative Law Judge William A. Pope, II, issued a Decision and Order denying benefits because claimant failed to establish invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a) and entitlement to benefits under Part 410. *Id.* This denial became final because claimant did not pursue the claim any further. Claimant filed his second claim on December 26, 1995. Director's Exhibit 2. The district director denied this claim on June

944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).² The administrative law judge credited claimant with fourteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203. However, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2).³ Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, arguing that the case should be remanded to the district

6, 1996 because claimant failed to establish any of the elements of entitlement. *Id.* Because claimant did not pursue the claim any further, this denial became final. Claimant filed his third claim on June 17, 1997. Director's Exhibit 3. The district director denied this claim on October 8, 1997 because claimant failed to establish any of the elements of entitlement. *Id.* Since claimant did not pursue the claim any further, this denial became final. Claimant filed his fourth claim on October 29, 1998. Director's Exhibit 4. The district director denied this claim on February 5, 1998 because claimant failed to establish any of the elements of entitlement. *Id.* Inasmuch as claimant did not pursue the claim any further, this denial became final. Claimant filed this claim on March 12, 2001. Director's Exhibit 5.

² On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. Because claimant's claim was filed before January 1, 2005, the recent amendments to the Act do not apply in this case.

³ The administrative law judge found that the issue of disability causation pursuant to 20 C.F.R. §718.204(c) was moot because claimant failed to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2).

director in order for the Director to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.⁴ 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 (1965).

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 that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

At Section 718.204(b)(2)(iv), the administrative law judge considered Dr. Baker's reports, dated October 25, 2001,⁵ February 20, 2004,⁶ and March 18, 2008. The

⁴ The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 1-4, 6, 8, 9. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁵ By Order dated December 29, 2003, Administrative Law Judge Joseph E. Kane remanded the case to the district director for the purpose of obtaining a current medical evaluation of claimant. Judge Kane noted that Dr. Baker's 2001 evaluation of claimant on behalf of the Department of Labor was over two years old and that claimant's illness caused his respiratory capacity to diminish considerably in the interim.

⁶ In a Decision and Order denying benefits dated September 21, 2006, Administrative Law Judge Adele Higgins Odegard determined that "Dr. Baker's [2001 and 2004] reports did not specifically address whether the [c]laimant's pulmonary ailments prevented him from continuing in his usual coal mine employment." 2006 Decision and Order at 16. In a Decision and Order disposing of claimant's appeal, the Board noted that the Director, Office of Workers' Compensation Programs (the Director), concurred with claimant that Dr. Baker's 2001 and 2004 reports were incomplete because Dr. Baker failed to fully address the disability element of entitlement. *L.C. [Collins] v. Director, OWCP*, BRB No. 07-0103 BLA, slip op. at 3 (Dec. 31, 2007)(unpub.). Because the Director conceded that he did not satisfy his statutory obligation, the Board remanded the case to the district director to provide claimant with a complete and credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. *Id.*

administrative law judge gave little weight to Dr. Baker's disability opinion in the 2001 report because he found that it was inadequately reasoned, as "Dr. Baker failed to adequately explain how [c]laimant's failure to meet the end of test criteria could have affected the results on the issue of total disability." 2010 Decision and Order at 27. In addition, the administrative law judge gave little weight to Dr. Baker's disability opinion in the 2004 and 2008 reports because he found that "[it] is silent as to whether or not [c]laimant's pulmonary impairment would prevent him from performing his last coal mining job." *Id.* at 28.

The Director argues that he failed to meet his obligation to provide a complete and credible pulmonary evaluation because Dr. Baker did not adequately address claimant's degree of respiratory disability. Specifically, the Director asserts that Dr. Baker's opinions are insufficient to enable the administrative law judge to determine whether claimant is totally disabled. The Director maintains that, although Dr. Baker opined, in his 2001 report, that claimant was not totally disabled, "[Dr. Baker's] two later opinions [in 2004 and 2008] are silent as to whether claimant's respiratory condition would prevent him from performing his usual coal mine employment, and are too ambiguous to permit [the administrative law judge] to infer such a finding." Director's Letter Brief at 5. The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. In view of the Director's concession that Dr. Baker's reports are incomplete and, therefore, fail to meet the Director's statutory obligation, we vacate the administrative law judge's denial of benefits and remand the case to the district director to provide claimant with a complete 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, 725.401, 725.405(b); *see Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199, 2-221 (6th Cir. 2009); *R.G.B. [Blackburn] v. Southern Ohio Coal Co.*, 24 BLR 1-129, 1-147-48 (2009) (*en banc*); *Hodges v. BethEnergy Mines Inc.*, 18 BLR 1-84, 1-93 (1994); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

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 to be provided to claimant and for reconsideration of his claim in light of all the evidence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge