

BRB No. 05-0265 BLA

WILLIAM COLWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/28/2005
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

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

Barry H. Joyner (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5736) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) denying benefits on a subsequent 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> The administrative law judge

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<sup>1</sup>Claimant filed his first claim on June 20, 1994. Director's Exhibit 1. On October 28, 1996, Administrative Law Judge Donald W. Mosser issued a Decision and Order denying benefits because claimant failed to establish the existence of pneumoconiosis and total disability. *Id.* The Board affirmed Judge Mosser's denial of benefits on the basis of claimant's failure to establish total disability. *Colwell v. Director, OWCP*, BRB No. 97-0318

credited claimant with 5.4 years of coal mine employment and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Consequently, the administrative law judge found the evidence sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Turning to the merits of the case, the administrative law judge found the evidence sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), has failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. The Director responds, urging the Board to affirm the administrative law judge's length of coal mine employment finding, his total disability findings at 20 C.F.R. §718.204(b)(2)(i)-(iii) and his rejection of Dr. Baker's disability opinion. The Director also urges the Board to vacate the administrative law judge's disease causation finding at 20 C.F.R. §718.203. Further, the Director indicates he will not contest claimant's request for a new pulmonary evaluation by the Director.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We first address claimant's contention that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. In a response brief, the Director states that claimant requested "a remand for a new pulmonary evaluation by the Director under Section 413(b)." Director's Brief at 3. The Director further

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BLA (Oct. 29, 1997)(unpub.). Claimant filed a request for modification on February 2, 1998. Director's Exhibit 1. On December 31, 1998, Judge Mosser issued a Decision and Order denying benefits because claimant failed to establish a change in conditions and a mistake in a determination of fact. *Id.* The Board affirmed Judge Mosser's denial of benefits on the basis of claimant's failure to establish total disability, based on all the evidence of record. *Colwell v. Director, OWCP*, BRB No. 99-0393 BLA (Jan. 11, 2000)(unpub.). Claimant filed his most recent claim on February 5, 2001. Director's Exhibit 2.

states, “[a]fter review of the record, the Director will not contest claimant’s request.” *Id.* In view of the Director’s position, we grant claimant’s request and remand this 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. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.401, 725.405(b); *see Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*; 14 BLR 1-98 (1990). Consequently, we vacate the administrative law judge’s denial of benefits.<sup>2</sup>

Accordingly, the administrative law judge’s Decision and Order denying benefits is vacated and the case is remanded to the district director to allow for a complete pulmonary evaluation, at no expense to claimant, and for reconsideration of the merits of this claim in light of our Decision and Order and all the evidence of record.

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

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<sup>2</sup>In view of our disposition of this case, we decline to address the parties’ additional contentions in this appeal. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).