

BRB No. 05-0320 BLA

KIROL GENE HUDSON)	
)	
Claimant-Petitioner)	
v.)	
)	
JULIANA MINING COMPANY)	DATE ISSUED: 09/20/2005
)	
and)	
)	
WEST VIRGINIA COAL WORKERS’)	
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-)	
Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS’)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits Daniel K. Roketenetz, Administrative Law Judge, United States Department of Labor.

Robert E. Tablack, Youngstown, Ohio, for claimant.

Robert Weinberger (West Virginia Coal-Workers’ Pneumoconiosis Fund, Workers’ Compensation Defense Division), Charleston, West Virginia, for employer/carrier.

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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (04-BLA-6249) of Administrative Law Judge Daniel J. Roketenetz 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). The administrative law judge found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge also found that in light of the failure of the evidence to establish a totally disabling respiratory impairment disability causation could not be established pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits on the claim.

On appeal, claimant contends that the medical opinion of Dr. Murty establishes entitlement to benefits. Citing *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984), claimant contends that, because the administrative law judge rejected Dr. Murty’s opinion as incredible, the Department of Labor (DOL) has failed to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate his claim as required pursuant to Section 413(b) of the Act. 30 U.S.C. §923(b). *See* 20 C.F.R. §§718.101(a); 725.406(a). Claimant contends, therefore, that benefits should be awarded on the claim or that the case should be remanded to provide claimant a more reliable medical opinion. Employer/carrier responds contending that *Newman* is not controlling in this case which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.¹ In addition, employer/carrier asserts that Dr. Murty did provide claimant with a complete pulmonary evaluation and that the administrative law judge correctly found that claimant failed to establish the existence of pneumoconiosis as Dr. Murty did not make a finding of clinical or legal pneumoconiosis. Regarding total disability, employer/carrier contends that the administrative law judge properly found that total disability was not established as the results of diagnostic tests did not establish total disability, there was no evidence showing cor pulmonale with right-sided congestive heart failure, and the opinion of Dr. Murty was entitled to diminished weight. The Director, Office of Workers’ Compensation Programs, (the Director) responds, stating that he will not contest claimant’s request to have the case remanded for a new pulmonary evaluation because, as the administrative law judge found, Dr. Murty did not address whether claimant’s respiratory

¹ Employer’s argument that *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984) is not controlling in this case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, is not dispositive. The Director is required to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate his claim by statute. 30 U.S.C. §923(b).

condition fell within the definition of legal pneumoconiosis, and whether claimant's pulmonary condition precluded him from performing coal mine employment; he also failed to directly respond to the district director's follow-up letters asking him to clarify his findings on these issues.

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).

Claimant contends that the administrative law judge erred in rejecting Dr. Murty's opinion because he did not find that claimant's chronic obstructive airways disease was chronic. Claimant contends that since Dr. Murty found it unlikely that claimant could be employed because of his extreme dyspnea, it would be reasonable to infer that claimant's condition was chronic. Claimant also contends that Dr. Murty's finding, *i.e.*, that claimant cannot be employed because of his extreme dyspnea, establishes total disability. Alternatively, claimant contends that since the administrative law judge found that Dr. Murty's opinion was incredible (as well as illegible in places), he was not provided with a complete, credible pulmonary evaluation as required by the Act and the case must, accordingly, be remanded so that he can be provided with a more reliable opinion.

In light of the Director's concession that claimant was not provided with a complete credible pulmonary evaluation, and having reviewed the administrative law judge's Decision and Order and Dr. Murty's opinion, which does appear to be illegible in several places, Director's Exhibit 12, we vacate the administrative law judge's denial of benefits and we remand this case to the district director with instructions that claimant be provided with a complete, credible pulmonary evaluation as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101(a); 725.406(a); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-88 n.3 (1994), *see also Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman*, 745 F.2d at 1166, 7 BLR at 2-31.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is vacated, and the case is remanded to the district director for further proceedings consistent with this appeal.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge