

BRB No. 12-0514 BLA

DENNIE A. GWINN )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 DRUMMOND COMPANY, )  
 INCORPORATED )  
 ) DATE ISSUED: 05/23/2013  
 Employer-Respondent )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Dennie A. Gwinn, Pleasant Grove, Alabama, *pro se*.

Will A. Smith (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Dominique V. Sinesi (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (10-BLA-5588) of Administrative Law Judge Ralph A. Romano denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C.

§§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on July 30, 2009.<sup>1</sup>

Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

Applying amended Section 411(c)(4), the administrative law judge noted that the parties stipulated to more than fifteen years of coal mine employment.<sup>2</sup> However, the administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that claimant failed to invoke the Section 411(c)(4) presumption. The administrative law judge also found that claimant was not entitled to benefits under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Board to remand the case to the district director for further development of the medical evidence in order to provide claimant with a complete pulmonary evaluation. In a reply brief, employer argues that claimant was provided with a complete pulmonary evaluation.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are

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<sup>1</sup> Claimant filed three previous claims for benefits, all of which were finally denied. Director's Exhibits 1-3. Claimant's most recent prior claim, filed on July 7, 2006, was denied by the district director on February 13, 2007, because claimant did not establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 3.

<sup>2</sup> Claimant's most recent coal mine employment was in Alabama. Director's Exhibit 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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).

The Act requires that “[e]ach miner who files a claim . . . shall upon request 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; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994).

On the facts of this case, 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 pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act.<sup>3</sup> 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406; *R.G.B. [Blackburn] v. S. Ohio Coal Co.*, 24 BLR 1-129 (2009) (en banc); *see also Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199 (6th Cir. 2009). Consequently, we vacate the administrative law judge’s denial of benefits.<sup>4</sup>

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<sup>3</sup> The Director, Office of Workers’ Compensation Programs (the Director), concedes that the Department of Labor (DOL) failed to satisfy its obligation to provide claimant with a complete pulmonary evaluation because Dr. Barney, the physician who conducted the DOL-sponsored pulmonary evaluation, failed to address whether claimant is totally disabled from a respiratory or pulmonary impairment. Director’s Brief at 2. Because Dr. Barney’s opinion does not completely address an essential element of entitlement, i.e., whether claimant is totally disabled, the Director concedes that the DOL failed to satisfy its obligation to provide claimant with a complete pulmonary evaluation. *Id.* The Director requests that the case be remanded so that Dr. Barney can provide a supplemental report addressing whether claimant suffers from a totally disabling respiratory or pulmonary impairment and, if so, whether that impairment is due to pneumoconiosis. *Id.*

<sup>4</sup> In the interest of judicial economy, we note our agreement with employer that the administrative law judge erred in concluding that the parties stipulated that claimant has more than fifteen years of coal mine employment. There is no evidence in the record that employer stipulated to fifteen years of coal mine employment. Moreover, before finding that claimant has invoked the Section 411(c)(4) presumption, the administrative law judge must determine whether claimant’s coal mine employment was in an underground mine, or in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27-28 (2011). Finally, we instruct the administrative law judge, on remand, to address the admissibility

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded to the district director for further development of the evidence and for reconsideration of the merits of this claim in light of all the evidence.

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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REGINA C. McGRANERY  
Administrative Appeals Judge

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of evidence submitted by employer, namely Dr. Scott's interpretation of an April 22, 2011 x-ray, and Dr. Hasson's May 3, 2011 medical report. Employer's Exhibits 1, 2.