BRB No. 95-1111 BLA

DOUGLAS W. FLYNN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GRUNDY MINING COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
	)	DECISION and ORDER
Party-in-Interest	)	On RECONSIDERATION

Appeal of the Decision and Order on Remand of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), Washington, D.C., for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer has filed a Motion for Reconsideration requesting *en banc* review of the Board's Decision and Order in *Flynn v. Grundy Mining Co.* [*Flynn IV*], BRB No. 95-1111 BLA (July 27, 1995)(unpub.), wherein the Board affirmed the administrative law judge's award of benefits on a duplicate claim.

In discussing the instant case the Board, in *Flynn IV,*[1] first noted that in order to establish a material change in conditions under *Ross*, claimant must now prove, through the submission of new evidence, that he is totally disabled and/or that his disability is due to pneumoconiosis. *See Flynn IV, supra*. In applying this standard the Board held

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[1]The Board's decision in *Flynn IV* contains a complete and thorough discussion of the protracted procedural history of the instant case. *Flynn v. Grundy Mining Co.* [*Flynn IV*], BRB No. 95-1111 BLA (July 27, 1995)(unpub.). Consequently, it is unnecessary for the Board to presently reiterate that history in order to render its disposition of employer's Motion for Reconsideration.

that inasmuch as the administrative law judge has considered all of the new evidence, favorable and unfavorable, and permissibly determined that the 1984 medical opinion of Dr. Fritzhand is sufficient to establish total disability at 20 C.F.R. §718.204(c), claimant has established a material change in conditions as a matter of law. *Id*.

In its Motion for Reconsideration, employer argues that the Board improperly made a *de novo* finding that the evidence is sufficient to establish a material change in conditions under the standard enunciated by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Employer asserts that the case must be remanded for the administrative law judge to explain whether he merely disagreed with the previous characterization of Dr. Fritzhand's opinion, or whether he believes there is some rational basis to conclude that there is a qualitative difference between Dr. Fritzhand's 1980 and 1984 opinions.

Explicitly rejecting the Board's standard in *Spese v. Peabody Coal Co.,* 11 BLR 1-174 (1988), *dismissed with prejudice*, No. 88-3309 (7th Cir., Feb. 6, 1989)(unpub.),[2] the Sixth Circuit, in *Ross*, held that in order to determine whether a material change in conditions is established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Ross, supra.* The Sixth Circuit noted that "if the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change." *Ross*, 42 F.3d at 997, 998, 19 BLR at 2-19. The Court further acknowledged that the administrative law judge in *Ross* did not properly analyze the facts, since he never discussed how the later evidence differed qualitatively from the evidence previously submitted which had been deemed insufficient to establish the requisite element of entitlement with regard to the first claim. The Court, therefore, noted that it was unable to discern on the record whether the administrative law judge merely disagreed with the previous characterization of the strength of the evidence or whether Ross indeed had shown the existence of a material change in his condition since the earlier denial. Consequently, the Sixth Circuit remanded *Ross* to the administrative law judge for further consideration

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[2]Under *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988), *dismissed with prejudice*, No. 88-3309 (7th Cir., Feb. 6, 1989)(unpub.), the administrative law judge is required to examine the newly submitted evidence to determine whether there is a reasonable possibility that it would change the prior administrative result. The Sixth Circuit rejected the *Spese* standard because it confuses the delineation in 20 C.F.R. §725.309(d), which limits requests for modification of a decision wrongly decided to be filed within one year, with requests based on a material change in conditions. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Specifically, the Court concluded that the *Spese* standard is too broad, since it includes evidence never presented but available at the time of the initial hearing, which although relevant to a request for modification, is not relevant to establishing a material change in conditions and thus, should not be considered. *Id.*

of this issue.

In the instant case, employer's interpretation of *Ross* is correct, in that the Sixth Circuit requires that a miner show that there has been a worsening in his physical condition in order to have his claim reconsidered on the merits more than one year after the prior final denial. *Ross, supra*. Consequently, we grant employer's Motion for Reconsideration. We hold that a determination that the miner's physical condition has worsened is a requisite part of the duplicate claims analysis at 20 C.F.R. §725.309(d) under *Ross,* and as such shall be applied to all cases arising within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

In his Decision and Order on Remand, the administrative law judge noted the existence of Dr. Fritzhand's two medical opinions in his summary of the medical evidence, Decision and Order on Remand dated February 7, 1995, at 6, and explicitly stated in his discussion of the medical report evidence at Section 718.204, that Dr. Fritzhand's 1984 medical report is "the only report in which he mentioned a disability." Decision and Order on Remand dated February 7, 1995, at 8. It may be inferred from this statement,[3] that the administrative law judge did, in fact, agree with the previous Department of Labor characterization that Dr. Fritzhand's 1980 opinion is insufficient to establish a totally disabling respiratory impairment arising out of coal mine employment. Thus, it is conceivable that the administrative law judge permissibly concluded that claimant established a material change in conditions under the applicable standard in *Ross*. However, the evidence of record appears equally open to an interpretation that the administrative law judge merely disagreed with the previous characterization of the strength of Dr. Fritzhand's 1980 opinion, and as such, believed only that the district director was mistaken in issuing a denial of the initial claim. Given that more than one year has passed since the prior denial, claimant would not be entitled to benefits on this basis. *See* 20 C.F.R. §§725.309; 725.310.

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[3]This is particularly true given that the administrative law judge relied exclusively on Dr. Fritzhand's 1984 opinion in rendering his determinations regarding claimant's condition. Moreover, as the administrative law judge acknowledged, Dr. Fritzhand, in his 1984 opinion, diagnoses pneumoconiosis for the first time.

As employer notes in its Motion for Reconsideration, Dr. Fritzhand appears to have drawn the same conclusion regarding claimant's physical condition in each of his two medical opinions.[4] In his July 26, 1980, medical report Dr. Fritzhand specifically opined that claimant had shortness of breath and could "ambulate on level ground no more than 200 feet." In his subsequent report of June 16, 1984, Dr. Fritzhand opined that claimant could "ambulate on level terrain no more than 300 feet." Thus, as employer maintains, it may be reasonably construed that Dr. Fritzhand limited claimant more in 1980 than he did in 1984. The administrative law judge is therefore initially required to explain why Dr. Fritzhand's 1980 opinion either does or does not establish total disability. In the event that the administrative law judge finds that both of Dr. Fritzhand's opinions support a finding of disability, he must then articulate what distinguishes Dr. Fritzhand's finding of total disability in 1984, such that it is now

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[4]As acknowledged by the Board in *Flynn v. Grundy Mining Co. [Flynn III]*, BRB No. 91-1348 BLA (Apr. 4, 1994)(unpub.), Administrative Law Judge V. M. McElroy found, in his Decision and Order on Remand, that the two opinions of Dr. Fritzhand were essentially the same. Specifically, Judge McElroy commented that "Dr. Fritzhand made the same assessment in his report dated June 16, 1984," Decision and Order on Remand dated April 29, 1991, at 5, as he made in his prior 1980 medical opinion.

sufficient to establish the requisite material change in conditions.[5]

Inasmuch as we are unable to discern from the record whether the administrative law judge merely disagreed with the previous characterization of the evidence or whether claimant has shown a material change in his condition since the earlier denial, we must vacate our holding that claimant has established a material change in conditions as a matter of law. This case is remanded to the administrative law judge for consideration of the relevant evidence on this issue under the standard enunciated in *Ross*. *See Ross, supra.* In light of the administrative law judge's prior determination

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[5]Additionally, it is unclear from the record whether the Department of Labor [DOL] ever considered Dr. Fritzhand's 1980 opinion in issuing the final denial of the prior claim. In a letter to claimant dated June 10, 1980, the district director informed claimant that the evidence is not sufficient for approval of his claim. In addition, the district director notified claimant that he would be contacted "in the near future" by Dr. Fritzhand for medical tests authorized by the DOL. While Dr. Fritzhand's first examination of claimant occurred prior to the issuance of the final denial in claimant's first claim on June 15, 1981, the record does not specify what evidence was considered by the district director at that time. Moreover, in *Flynn III* the Board noted, in its discussion of employer's contention regarding 20 C.F.R. §725.308, that the record does not indicate when claimant was initially made aware of Dr. Fritzhand's 1980 determination; this despite the fact that claimant was certainly aware of DOL's final denial issued June 15, 1981. Thus, even if the administrative law judge finds that Dr. Fritzhand's two opinions similarly support a finding of total disability, claimant nevertheless may have established a material change in conditions if it is determined that Dr. Fritzhand's 1980 medical opinion was not considered by the district director in the issuance of his denial of claimant's initial claim.

that Dr. Fritzhand's 1984 opinion establishes a totally disabling respiratory impairment, the administrative law judge, on remand, must explain whether he merely disagreed with the previous characterization of Dr. Fritzhand's 1980 medical report or whether claimant has shown, through the submission of Dr. Fritzhand's 1984 medical opinion, a material change in his condition since the earlier denial. If the administrative law judge determines that claimant has established a material change in conditions, claimant is entitled to benefits since employer has not raised any contentions in its Motion for Reconsideration regarding our affirmance of the administrative law judge's finding of entitlement on the merits. Thus, that holding stands under the law of the case doctrine. *See Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1984). If, however, the administrative law judge concludes that he merely disagreed with the prior denial of benefits, the instant claim must be denied. *See* 20 C.F.R §725.309(d); *Ross, supra.*

Accordingly, we grant employer's Motion for Reconsideration, vacate our prior holding that claimant has established a material change in conditions as a matter of law,[6] and remand this case for further consideration of the duplicate claims issue consistent with this opinion. In all other regards, our prior decision in *Flynn IV* is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[6]Inasmuch as we grant the relief requested by employer in its Motion for Reconsideration, we deny employer's request for *en banc* review.