BRB No. 00-0565 BLA

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<tr><td>JOSEPH TRYBUS

Claimant-Respondent

v.

BETHENERGY MINES, INCORPORATED

Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
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DECISION AND ORDER</td></tr>
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Appeal of the Decision and Order on Modification-Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Helen H. Cox (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Modification-Awarding Benefits (99-BLA-0383) of Administrative Law Judge Michael P. Lesniak with respect to 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).[1] The administrative law judge accepted the parties' stipulation that claimant has pneumoconiosis arising out of coal mine employment. The administrative law judge considered the newly submitted evidence and determined that it supported a finding of a change in conditions, as it demonstrated that claimant is now totally disabled. The administrative law judge further determined that the evidence of record was sufficient to establish that claimant is totally disabled due, at least in part, to pneumoconiosis. Accordingly, benefits were awarded. Employer argues on appeal that the administrative law judge did not properly weigh the medical opinions of record. Claimant has responded and urges affirmance of the award of

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[1]Claimant is Joseph Trybus, a living miner, who filed his first application for benefits on November 20, 1980. In a Decision and Order issued on December 2, 1984, Administrative Law Judge Sydney Harris denied benefits on the ground that claimant failed to establish the presence of a totally disabling respiratory or pulmonary impairment. The Board affirmed the denial of benefits. *Trybus v. Bethenergy Mines, Inc.*, BRB No. 84-2397 BLA (Jan. 30, 1987)(unpub.). Director's Exhibit 105. Claimant filed a second application for benefits on February 29, 1988. Administrative Law Judge George P. Morin denied benefits in a Decision and Order issued on July 12, 1992, as claimant failed to prove that he was totally disabled. *Id.* Claimant filed a timely request for modification. Judge Morin determined that claimant established a change in conditions, but upon weighing all of the evidence of record, he found that claimant did not prove that he was totally disabled. Accordingly, benefits were denied. *Id.* Claimant submitted a third claim for benefits on January 16, 1996. In a Decision and Order issued on July 25, 1997, Administrative Law Judge Michael P. Lesniak (the administrative law judge) found that the newly submitted evidence was insufficient to establish that claimant was suffering from a totally disabling respiratory or pulmonary impairment. Thus, he denied benefits. Claimant filed a Notice of Appeal with the Benefits Review Board, but later requested that the appeal be withdrawn so that he could file a petition for modification. The Board granted claimant's request in an Order dated June 11, 1998 and the case was remanded to the district director. *Trybus v. Bethenergy Mines, Inc.*, BRB No. 97-1615 BLA (June 11, 1998)(unpub. Order); Director's Exhibit 97. After processing by the district director, the case was returned to the administrative law judge.

benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief concerning the merits of this appeal.[2]

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. 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).

The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107(2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). By Order dated February 9, 2001, United States District Court Judge Emmet G. Sullivan enjoined the implementation of forty-seven of these regulatory provisions and stayed all claims pending on appeal before the Board, except for those in which the Board, after briefing by the parties, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001). The Director has filed a brief, asserting that the present case is not affected by the amended regulations, as the arguments raised on appeal can be addressed without reference to the amended regulations. Claimant concurs with the Director. Employer contends that the present case must be stayed on the grounds that the amended regulations pertaining to the opinions of treating physicians, the definition of pneumoconiosis and total disability, and the standard of proof in survivors' claims cannot be implemented prior to the resolution of the case currently before the United States District Court. Employer also asserts that the Board's Order conflicts with that issued by District Judge Sullivan.

Employer's contentions regarding the alleged impact of the challenged regulations are without merit, as none of the regulations employer has identified are relevant to the

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[2]The administrative law judge's finding that the newly submitted pulmonary function studies and blood gas studies do not establish the presence of a totally disabling respiratory or pulmonary impairment and his finding that there is no evidence of cor pulmonale with right sided congestive heart failure are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

disposition of employer's appeal. Although the amended regulations provide that the opinion of a treating physician may be accorded special consideration under certain circumstances, 65 Fed. Reg. 80,047 (2000)(to be codified at 20 C.F.R. §718.104(d)), this provision does not apply to evidence, such as that in the present case, developed prior to January 19, 2001. 65 Fed. Reg. 80,046 (2000)(to be codified at 20 C.F.R. §718.101(b)). The changes to the definition of pneumoconiosis are also not at issue in this case, 65 Fed. Reg. 80,048 (2000)(to be codified at 20 C.F.R. §718.201(a), (c)), as employer stipulated to the existence of pneumoconiosis arising out of coal mine employment based upon medical opinions in which the physicians concluded that claimant has pneumoconiosis as demonstrated by the x-ray evidence of record. Hearing Transcript at 16-17. Similarly, employer refers to the amended regulations regarding survivors' claims filed after January 1, 1982, which do not apply in this case involving a living miner's claim.

Finally, employer contends that the Board's Order regarding the impact of the amended regulations conflicts with District Judge Sullivan's Order, inasmuch as the Board declared that all appeals will proceed unless the parties establish that the outcome will be affected by the amended regulations, while District Judge Sullivan stayed all pending appeals unless the parties demonstrate that a particular case should go forward. We disagree. The Board explicitly stated that District Judge Sullivan's Order "stayed all claims before this Board for the duration of the lawsuit, except where the Board, after briefing by the parties to the pending claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case." *Trybus v. Bethenergy Mines, Inc.*, BRB No. 00-0565 BLA (Feb. 21, 2001)(unpub. Order). Thus, consistent with District Judge Sullivan's Order, the Board indicated that a pending appeal will not proceed unless the Board decides that the regulations at issue do not impact upon the case. The nature of the issue placed before the Board by District Judge Sullivan's Order is not altered by the fact that the absence of a party's response is construed as a position that the challenged regulations do not affect the pending appeal. *Id.* Inasmuch as none of employer's arguments concerning the impact of the challenged regulations has merit, we will address employer's appeal of the administrative law judge's Decision and Order on Modification-Awarding Benefits.

Employer contends with respect to the administrative law judge's weighing of the evidence concerning the issues of total disability and total disability causation that the administrative law judge erred in giving greatest weight to the opinions in which Drs. Schaaf and Karduck stated that claimant is totally disabled due to pneumoconiosis. Specifically, employer asserts that the administrative law judge was mistaken in finding that both Drs. Schaaf and Karduck had treated claimant over a period of time and in crediting Dr. Schaaf's opinion as reasoned and documented. In addition, employer maintains that the administrative law judge did not rely upon a proper basis in

discrediting the contrary opinions of Drs. Strother and Fino. Employer's contentions have merit.

In determining that claimant established that he is totally disabled and that pneumoconiosis is a contributing cause of his total disability, the administrative law judge relied upon the opinion of Dr. Schaaf. Decision and Order at 6-8; *see* Claimant's Exhibit 1. As employer asserts, in contrast to the administrative law judge's characterization of his status, Dr. Schaaf was not one of claimant's treating physicians. *Id*. Rather, he examined claimant in 1994 and in 1999 at the request of claimant's counsel. *See* Claimant's Exhibit 1. In addition, as employer indicates, other than a reference to Dr. Schaaf's knowledge of claimant's lengthy history of coal mine employment and his brief history of cigarette smoking, the administrative law judge did not identify the documentation supporting Dr. Schaaf's diagnosis of a totally disabling pulmonary impairment caused by pneumoconiosis. Decision and Order at 6-8. Inasmuch as the administrative law judge did not properly characterize Dr. Schaaf's opinion and it is not clear from the face of his reports that his opinion is adequately documented, we vacate the administrative law judge's findings as to modification, total disability, and total disability causation and remand the case to the administrative law judge for reconsideration in accordance with applicable law. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995);[3] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

With respect to the opinions of Drs. Fino and Strother, who determined that claimant is not totally disabled due to pneumoconiosis, the administrative law judge determined that they were not adequately reasoned and documented inasmuch as "each physician recognized throughout their opinion that claimant has significant shortness of breath. However, rather than attribute this impairment to anything (either smoking or coal mine employment), each concluded that the claimant has no impairment." Decision and Order at 7; *see* Director's Exhibits 99, 104, 106; Employer's Exhibit 1. Employer is correct in suggesting that the administrative law judge did not provide the rationale for his apparent discrediting of Drs. Fino's and Strother's assertions that the objective evidence did not support a finding of total disability. Moreover, the administrative law judge did not address Dr. Fino's comments regarding the need for objective testing to assess properly claimant's subjective complaints of shortness of breath, nor did the

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[3]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

administrative law judge note, in determining the extent to which the physicians of record had contact with claimant over time, that Dr. Fino examined claimant on four separate occasions and performed six medical record reviews. *See* Director's Exhibit 106-86 at 15-20; Employer's Exhibit 1. Inasmuch as the administrative law judge did not fully consider the opinions of Drs. Strother and Fino, we also vacate the administrative law judge's findings regarding these opinions and instruct the administrative law judge to reconsider them on remand. *See Clark*, *supra*; *Peskie*, *supra*; *Lucostic*, *supra*.

If the administrative law judge once again determines that claimant has established a change in conditions on remand, he must consider entitlement on the merits based upon a consideration of all of the evidence of record and must set forth his findings with respect to this evidence, including the underlying rationale, in his Decision and Order.[4] *See* Administrative Procedure Act, 5 U.S.C. §554, *et seq*., as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Robertson v. Alabama By-*
Products Corp., 7 BLR 1-793 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *Seese v. Keystone Coal Mining Corp.*, 6 BLR 1-149 (1983).

Accordingly, the administrative law judge's Decision and Order on Modification-Awarding Benefits is affirmed in part and vacated in part and this case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[4]Where, as here, a claimant requests modification of a previously denied duplicate claim, the administrative law judge must consider whether the newly submitted modification evidence along with the duplicate claim evidence is sufficient to establish a material change in conditions. *See Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998).

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge