BRB No. 01-0492 BLA

LEONARD E. SARGENT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BULLION HOLLOW ENTERPRISES, INCORPORATED	)	
	)	
	)	
Employer-Respondent	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Leonard E. Sargent, Big Stone Gap, Virginia, *pro se*.[1]

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Roppolo (Eugene Scalia, 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.

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand Denying Benefits (1998-BLA-0251) of Administrative Law Judge Pamela Lakes Wood 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).[2] This case involves a duplicate claim and is before the Board for the third time.[3] The administrative law judge

---

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725, 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revision to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On April 10, 2001, the Board issued an order requesting supplemental briefing in this case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). The Court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[3]The relevant procedural history in this case is contained in our prior decision, *Sargent v. Bullion Hollow Enterprises*, BRB No. 99-0668 BLA (Sep. 29, 2000)(unpub.). In that case, the Board affirmed the administrative law judge's finding of thirty-one and one-quarter years of coal mine employment. The Board also affirmed, as unchallenged on appeal, the administrative law judge's determination that the evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(a)(3)(2000) but is sufficient to establish total disability on the merits pursuant to 20 C.F.R. §718.204(c)(2000). The Board vacated the administrative law judge's finding that claimant established a material change in conditions pursuant to 20 C.F.R. §§718.204(c) and 725.309 (2000) because the issue of total disability was not previously addressed, and therefore, could not be considered an element of entitlement previously adjudicated against claimant which could then be considered in determining whether claimant established a material change in conditions. The Board also

determined that the evidence does not establish a worsening of claimant's condition, and thus, found that claimant failed to establish a material change in conditions pursuant to *Flynn v. Grundy Mining Co.*, 21 BLR 1- 40 (1997). The administrative law judge further found that even if a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) were established, the claim would be denied for failure to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000). Accordingly, benefits were denied.

Claimant appeals, generally contending that the administrative law judge erred in her denial of benefits. Employer responds, urging affirmance of the decision. The Director, Office of Workers' Compensation Programs (the Director), has responded, indicating that the evidence should not have been considered pursuant to *Flynn v. Grundy Mining Co*., 21 BLR

---

vacated the finding that claimant established a material change in conditions pursuant to 20 C.F.R. §§718.202(a)(4) and 725.309. The Board remanded the case for the administrative law judge to consider whether the new medical opinion evidence is sufficient to establish that the miner's condition has worsened in accordance with the Board's holding in *Flynn v. Grundy Mining Co*., 21 BLR 1-40 (1997). The Board further addressed employer's contentions regarding the administrative law judge's findings on the merits, holding that the administrative law judge had failed to properly consider the medical opinions by Drs. Paranthaman, Dahhan and Castle pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b). The Board remanded the case for the administrative law judge to provide adequate reasons which comport with the Administrative Procedure Act for her resolution of the conflicting medical opinions, both in her determination of whether a material change in conditions has been established, and if necessary, in her consideration of the claim on the merits. *Sargent v. Bullion Hollow Enterprises*, BRB No. 99-0668 BLA (Sep. 29, 2000)(unpub.)

1-40 (1997) in this case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.

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. *See 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 rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *See O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2001). Failure to establish any one of these elements precludes entitlement. *Roberts v. West Virginia C.W.P Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

As an initial matter, we hold that the Director is correct in asserting that the Board erred in instructing the administrative law judge to consider the evidence pursuant to *Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997), in order to determine whether claimant had established a material change in conditions.[4] Inasmuch as this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, which has held that to establish a material change in conditions, claimant must establish at least one of the elements of entitlement previously adjudicated against him, the holding in *Flynn* is not applicable. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). We therefore vacate the administrative law judge's findings regarding a material change in conditions pursuant to Section 725.309 (2000) and remand this case for reconsideration of the appropriate medical evidence in light of the standard adopted by the Fourth Circuit.

In considering the merits of the claim, the administrative law judge referred to her previous decision and found that her original finding, that Dr. Paranthaman's opinion[5] was

[4]In *Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997), the Board held 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)(2000) under *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 19994), and as such, shall be applied to all cases arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit.

[5]On June 10, 1997, Dr. Paranthaman diagnosed chronic obstructive pulmonary disease

sufficient to establish total disability due to pneumoconiosis, would not comply with the Fourth Circuit's holding in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). The administrative law judge stated:

> Specifically, Claimant cannot establish that pneumoconiosis is a necessary condition of his disability under *Robinson v. Pickands Mathur & Co.*, 914 F.2d 35 (4th Cir. 1990), if the evidence is weighed under the Board's interpretation of *Hicks*. In my original decision, I credited Dr. Paranthaman's opinion that coal mine dust exposure was a contributing factor over the opinions primarily based upon its plausibility in light of the Claimant's 30-plus-year history of underground coal mine employment and less than 25-pack-year smoking history (Footnote below). Such a weighing of the evidence would not survive the Board's interpretation of *Hicks*.

(COPD) and hypertension. He found that claimant's COPD is due to the combined effects of twenty-five pack years of cigarette smoking and coal dust exposure of thirty-five years, while the hypertension is unrelated to dust exposure. He further determined that claimant's functional impairment, relating to his respiratory problem, is severe and totally disabling. Director's Exhibit 10. Dr. Paranthaman also submitted an earlier opinion, dated October 8, 1991. In that opinion, Dr. Paranthaman stated that claimant suffered from pulmonary emphysema and chronic bronchitis secondary to cigarette smoking. He also stated that coal dust exposure for forty years may have an aggravating influence. He further opined that claimant's respiratory impairment is mild to moderate, and that claimant has reduced, but sufficient, respiratory reserve to do the job of a coal miner. Director's Exhibit 32.

> (Footnote) The evidence shows that Claimant smoked less than one half pack of cigarettes daily over a 50 year period, based upon his credible testimony, and that his coal mine employment, which Judge Fath found to be 31 1/4 years, extended over a 41-year period.

Decision and Order on Remand at 3. The administrative law judge concluded that claimant has not established a necessary element of his claim and therefore, could not prevail if the claim were considered on the merits. *Id*.

This finding does not comply with our previous decision, in which we remanded the case to the administrative law judge to reconsider the opinions of Drs. Paranthaman, Dahhan and Castle. The administrative law judge was instructed on remand to provide adequate reasons for her weighing of the opinions in a manner which accords with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), 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), and the decisions of the Fourth Circuit in *Hicks, supra,* and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Thus, the administrative law judge was required to consider the qualifications of the physicians, the explanations of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases for their diagnoses, and then adequately explain her rationale for crediting certain evidence. *See Hick, Akers, supra*. The administrative law judge has failed to adequately explain her finding that Dr. Paranthaman's opinion is insufficient to establish total disability due to pneumoconiosis under the Fourth Circuit case law. As a result, we are unable to review the administrative law judge's findings on this issue and therefore vacate the administrative law judge's weighing of Dr. Paranthaman's opinion.

If, on remand, the administrative law judge finds the new evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and, therefore, a material change in conditions, she must then consider the merits of the claim. *See Rutter, supra*. If, on remand, the administrative law judge reaches the merits of the claim and reaches the issue of disability causation, the administrative law judge should apply the amended regulation set forth in 20 C.F.R. §718.204(c), which provides, in relevant part, that pneumoconiosis must be a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment.[6] This standard is met if the evidence establishes that pneumoconiosis "[h]as a material adverse effect on the miner's respiratory or pulmonary

[6]The regulation concerning the issue of total disability causation, previously set forth in 20 C.F.R. §718.204(b)(2000), is now set forth in 20 C.F.R. §718.204(c)(2001).

condition" or "materially worsens a totally disabling respiratory or pulmonary impairment which was caused by a disease or exposure that is unrelated to coal mine employment." 20 C.F.R. §718.204(c)(2001); *see also Robinson v. Pickands Mather Coal Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge