BRB No. 07-0605 BLA

J.F.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 04/08/2008
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier ("employer") appeals the Decision and Order Awarding Benefits (05-BLA-5816) of Administrative Law Judge Adele Higgins Odegard 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 instant claim is a subsequent claim, which she determined was timely filed.[1] The administrative law judge credited claimant with forty-two years of coal mine employment.[2] She found the newly submitted evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge therefore found that claimant established a change in the applicable conditions of entitlement and she awarded benefits. *See* 20 C.F.R. §725.309(d).

On appeal, employer asserts that the administrative law judge erred by failing to consider the evidence submitted with the prior claim, and it generally asserts that the administrative law judge erred in weighing the medical evidence regarding entitlement. Claimant has not responded. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

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. If a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White*

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[1] The record reflects that claimant filed a previous claim for benefits, which was finally denied by the district director on January 29, 2003, because claimant did not establish the existence of pneumoconiosis, that pneumoconiosis arose out of his coal mine employment, or that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. Claimant filed this claim for benefits on March 15, 2004. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Coal Co., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis arising out of coal mine employment, pursuant to Section 718.202 and 718.203, or total respiratory or pulmonary disability due to coal mine employment pursuant to Section 718.204(b) and (c). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis, or that he is totally disabled, to obtain consideration of the merits of the subsequent claim. 20 C.F.R. §725.309(d)(2),(3).

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis. However, employer's comments concerning the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4) are general and lack specificity, such that employer has not raised any specific allegation of error by the administrative law judge. Because employer has failed to identify any error made by the administrative law judge in her evaluation of the evidence pursuant to Section 718.202(a)(4), employer has not provided the Board with a basis for reviewing the administrative law judge's finding. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). At best, employer's assertions regarding the administrative law judge's findings pursuant to Section 718.202(a)(4) are a general request to the Board to reweigh the evidence. The Board is prohibited from reweighing the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's finding that the newly submitted evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

In view of the foregoing, we affirm the administrative law judge's finding that claimant has established a change in one of the applicable conditions of entitlement pursuant to Section 725.309. 20 C.F.R. §725.309. Having found a change in an applicable condition of entitlement, the administrative law judge should next have considered all of the evidence of record in order to determine whether claimant has established each of the elements of entitlement. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Although the administrative law judge stated "Based upon applicable law and my review of all of the evidence, I find that the Claimant has established all of the elements of entitlement," Decision and Order at 27, there is no indication that the administrative law judge specifically considered the evidence submitted with the prior claim. Therefore, we vacate the award of benefits. On remand, the administrative law judge must consider all of the evidence of record on the merits of the claim and address each element of entitlement in determining whether claimant has established entitlement to benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Because we vacate the award of benefits, we need not address most of employer's challenges to the administrative law judge's findings.

However, to avoid any repetition of error on remand, we consider employer's assertion regarding the administrative law judge's consideration of the opinions of Drs. Broudy and Cohen regarding total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found that Dr. Broudy's opinion, that claimant was not totally disabled, was not based on a "thorough understanding" of claimant's last coal mine employment, and therefore, gave less weight to his opinion. Decision and Order at 26. By contrast, the administrative law judge accorded significant weight to Dr. Cohen's opinion, that claimant was totally disabled, because she found that Dr. Cohen considered the requirements of claimant's last coal mine employment, "acknowledging that the work 'required very heavy lifting' and 'extremely heavy exertion' such as 'carrying [replacement parts] for distances up to 50 to 100 feet.'" Decision and Order at 26. Employer asserts that the basis provided by the administrative law judge for according less weight to Dr. Broudy's opinion was improper, because Dr. Broudy reviewed Dr. Cohen's opinion, and was therefore aware of the work history provided by Dr. Cohen.

Dr. Broudy examined claimant on April 29, 2004, and diagnosed moderately severe chronic obstructive airways disease. Dr. Broudy noted that claimant's pulmonary function study results exceeded the federal criteria for disability, and he opined that claimant could resume his previous job as a heavy equipment operator. Dr. Broudy stated that claimant had no evidence of a respiratory impairment or pulmonary disability arising from his coal mine employment.

In his report, Dr. Cohen detailed claimant's coal mine employment history. He noted that claimant worked as a heavy equipment mechanic "with exertion requirements being roughly no greater than having to carrying 100 pounds up to 100ft [sic] up to 3-4 times each day." Claimant's Exhibit 2. In addition to detailing claimant's jobs from 1956 on, Dr. Cohen detailed the job requirements in claimant's last coal mine employment for employer from 1991 through 2001. The physician noted that claimant's coal mine employment was performing heavy equipment repair, and stated:

> In this last job he was required to maintain and repair heavy equipment including coal trucks. He used hand tools, air operated tools and jacks. He had to lift and carry heavy replacement parts for this equipment. He had to carry objects weighing as much as 100 lbs 50 to 100 feet frequently throughout the day.

Claimant's Exhibit 2. Dr. Cohen described this job as requiring "extremely heavy exertion" and he opined that claimant's "moderate obstructive lung disease" and moderate diffusion impairment were "disabling for his work as a coal miner." *Id.*

Dr. Broudy reviewed Dr. Cohen's report and stated:

> I disagree with the conclusions reached by Dr. Cohen . . . . I disagree with him when he stated that he did not have the capacity to do his previous coal mine work because of his decreased respiratory function.
>
> I, therefore, disagree with Dr. Cohen when he opines that this gentleman had coal workers (sic) pneumoconiosis, and that it caused him significant respiratory impairment.

Employer's Exhibit 1.

Since the record reflects that Dr. Broudy reviewed Dr. Cohen's report, which the administrative law judge found demonstrated a "thorough understanding of the Claimant's employment history, and the requirements of his last coal mine employment," Decision and Order at 26, the administrative law judge on remand should consider that Dr. Broudy was aware of Dr. Cohen's summary of claimant's employment history, when she weighs the medical opinions.

In evaluating the evidence pursuant to Section 718.204(b)(2)(iv) on remand, the administrative law judge must determine what claimant's usual coal mine employment was, and compare the evidence regarding the exertional requirements of that job with the medical opinions regarding claimant's physical abilities. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). In addition, the administrative law judge must weigh together all of the contrary probative evidence regarding disability, like and unlike, to determine whether claimant has established total disability pursuant to Section 718.204(b)(2). *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987).

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

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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BETTY JEAN HALL
Administrative Appeals Judge