BRB No. 99-0352 BLA
Case No. 84-BLA-1893

OSCAR ETTERS (Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	on RECONSIDERATION

Appeal of the Decision and Order on Remand of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr., Raleigh, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Barry H. Joyner (Howard M. Radzely, 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer has filed a timely Motion for Reconsideration requesting the Board to reconsider its Decision and Order of August 22, 2000, in the captioned case which arises under 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] In that decision, the Board affirmed the administrative law judge's finding that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Etters v. Peabody Coal Co.*, BRB No. 99-0352 BLA (Aug. 22, 2000) (unpublished). The Board also affirmed the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). *Id.* The Board further affirmed the administrative law judge's finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)

[1]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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions 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 February 21, 2001, the Board issued an order requesting supplemental briefing in the instant case. By Order dated June 15, 2001, the Board held this case in abeyance for the duration of the briefing, hearing and decision schedule set by the United States District Court for the District of Columbia in *Chao*.

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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations. By Order dated August 22, 2001, the Board notified the parties that the instant case was no longer in abeyance.

(2000). *Id.* The Board, therefore, affirmed the administrative law judge's award of benefits. *Id.* Employer presently argues that the Board erred in affirming the administrative law judge's finding that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Employer contends, *inter alia*, that claimant cannot establish a material change in conditions because he should have been awarded benefits on his original claim. Employer also contends that the Board erred in holding that *Freeman United Coal Mining Co. v. Foster,* 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994) and *Peabody Coal Co. v. Vigna,* 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994) were distinguishable from the case at hand. Claimant responds in support of the Board's affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, noting his disagreement with the employer's contention that claimant cannot establish a material change in conditions because his initial claim arguably should have been approved. In a reply brief, employer reiterates its previous arguments.

Employer contends that claimant cannot establish a material change in conditions because claimant should have been awarded benefits based upon his original claim for benefits. We disagree. The United States Court of Appeals for the Fourth Circuit has noted that such an argument is "as easily stated as it is counterintuitive: [claimant] must now lose because he clearly should have won [in his prior claim.]." *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 1360, 20 BLR 2-227, 2-232 (4th Cir. 1996), *cert. denied* 510 U.S. 1090 (1997). Noting that it must assume that the previous denial was correct, the Fourth Circuit explained that:

> If the [denial of the prior claim] is "final" in a legal sense, we must accept the correctness of its legal conclusion – [claimant] was not eligible for benefits at that time – and that determination is as off-limits to criticism by the respondent as by the claimant. Only by repudiating the [prior] judgment and its necessary factual underpinning can no change in [claimant's] condition be found. We believe that such repudiation is improper.

Rutter, 86 F.3d at 1361, 20 BLR at 2-232.

In the instant case, the administrative law judge properly accepted the correctness of the denial of claimant's prior 1973 claim.

Employer also contends that the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction the instant case arises, has not adopted the "one element" test for determining whether a material change in conditions has been established. The Board previously rejected employer's contention that the administrative law judge applied an improper material change in conditions standard. The Board held that the administrative law

judge reasonably determined that claimant's prior 1973 claim was denied because he failed to establish that he was totally disabled due to pneumoconiosis. *Etters, supra*. The Board, therefore, recognized that in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence had to support either a finding of total disability pursuant to 20 C.F.R. §718.204(c) (2000) or a finding of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000).[2]

Employer also argues that the Board exceeded its role in deciding that the drop in values on claimant's pulmonary function studies and arterial blood gas studies demonstrated a material change in conditions. In its 2000 Decision and Order, the Board stated:

> The administrative law judge...found that the newly submitted evidence was sufficient to establish that claimant was "**now** totally disabled due to his pulmonary/respiratory impairments." 1999 Decision and Order on Remand at 9 (emphasis added). Moreover, the evidence reveals a deterioration in claimant's pulmonary condition. The sole pulmonary function study submitted in connection with claimant's 1973 claim, a study conducted on June 10, 1980, produced a FEV1 value of 1.49 and an MVV value of 57.4. Director's Exhibit 19. Each of claimant's subsequent pulmonary function studies submitted in connection with the instant 1983 claim produced lesser FEV1 and MVV values. Director's Exhibit 21; Claimant's Exhibits 8, 9; Employer's Exhibit 14.
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> Claimant's arterial blood gas studies also revealed a deterioration in claimant's condition. The sole arterial blood gas study submitted in connection with claimant's 1973 claim, a study conducted on June 10, 1980, produced a resting pO2 value of 80.8 and an exercise pO2 value of 94.2. Director's Exhibit 25. Each of claimant's subsequent arterial blood gas studies submitted in connection with the instant 1983 claim produced lesser pO2 values at rest and exercise. Director's Exhibit 21; Claimant's Exhibits 8, 9; Employer's Exhibit 14.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

> Claimant submitted Dr. McFarlane's medical report in connection with his 1973 claim. Dr. McFarlane examined claimant on June 10, 1980. In a report dated June 10, 1980, Dr. McFarlane indicated that claimant's physical activities were "severely limited." Director's Exhibit 23. The administrative law judge found that the newly submitted medical opinions of Drs. Ringhofer, Khan and Tuteur all supported a finding that claimant suffered from a totally disabling respiratory or pulmonary condition. 1999 Decision and Order on Remand at 9; Claimant's Exhibits 1, 8, 9; Employer's Exhibits 13, 23. Dr. Tuteur noted that:
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> > The clinical manifestations of coal workers' pneumoconiosis (persistent late inspiratory crackles) and physiologic manifestations of coal workers' pneumoconiosis (desaturation of oxygen during exercise) **have developed since 1984**.
>
> Claimant's Exhibit 9 (emphasis added).

Etters, *supra* (footnotes omitted).

Although the administrative law judge did not explain in detail how the newly submitted evidence supported a deterioration in claimant's pulmonary condition, the Board properly determined that the evidence credited by the administrative law judge supported such a determination. Inasmuch as it was supported by substantial evidence, the Board affirmed the administrative law judge's finding that the newly submitted medical evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Etters*, *supra*. The Board, therefore, affirmed the administrative law judge's finding that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* We find no basis to disturb our prior determination.

Employer next contends that the Board erred by refusing to permit it to supplement the record with additional evidence regarding a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The Board also previously rejected this contention, stating that:

> Employer had notice of the type of evidence that would be relevant to consideration of each of the elements of entitlement which previously defeated the claim, and thus to the issue of a material change in

> conditions, and had the opportunity to submit such evidence at trial. Thus, as the standard enunciated by the Seventh Circuit in *McNew* and *Spese* did not change employer's evidentiary burden or the type of evidence relevant to meeting the burden of proof for establishing a material change in conditions pursuant to Section 725.309, these decisions do not compel the reopening of the record. *See Troup v. Reading Anthracite Co.*, 22 BLR 1-11 (1999)(*en banc*).

Etters, *supra*.

We find no basis to disturb our prior holding on this issue.

Employer finally argues that the Board, in affirming the administrative law judge's finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis, erred in refusing to apply *Freeman United Coal Mining Co. v. Foster,* 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994) and *Peabody Coal Co. v. Vigna,* 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). Subsequent to the issuance of the Board's 2000 Decision and Order, the Department of Labor revised the applicable regulations. Section 718.204(a) of the revised regulations provides in part that "any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a). This revision clarifies "that 'total disability' does not take into consideration any disabling nonrespiratory conditions, *i.e.*, a miner may be totally disabled for purposes of the [Act] notwithstanding the existence of any independently disabling nonrespiratory/pulmonary impairments." 65 Fed. Reg. 79,946 (2000). This change emphasizes the Department of Labor's disagreement with *Vigna* (holding claimant's entitlement precluded by disabling stroke which was unrelated to coal mine employment and which predated evidence of total disability due to pneumoconiosis). *Id.*

We further note that *Vigna* and *Foster* address whether disabling "nonrespiratory" conditions preclude a claimant's entitlement to benefits. There is no evidence in the instant case of any disabling "nonrespiratory" condition. We, therefore, reject employer's argument that the Board erred in not applying the reasoning set out in *Vigna* and *Foster*.

The revised regulations, however, have adopted a new disability causation standard. Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment.

> Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

Because the administrative law judge has not addressed whether the evidence satisfies the disability causation standard set out at 20 C.F.R. §718.204(c)(1), we vacate the administrative law judge's finding that the evidence is sufficient to establish that claimant's total disability was due to pneumoconiosis and remand the case for further consideration.

Accordingly, we grant employer's Motion for Reconsideration and modify our Decision and Order of August 22, 2000. The administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge