BRB No. 00-0135 BLA

MILLER BELLICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VESTA MINING COMPANY	)	
	)	DATE ISSUED:
Employer-Respondent	)	
	)	
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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Miller Bellich, Meadville, Pennsylvania, *pro se*.

Christopher Pierson (Davies, McFarland & Carroll, P.C.), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order on Remand (97-BLA-1633) of Administrative Law Judge Daniel L. Leland denying benefits 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 instant case involves a duplicate claim filed on September 9, 1996. In the initial Decision and Order, the administrative law

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on December 20,

judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. By Decision and Order dated July 9, 1999, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §725.309 and remanded the case to the administrative law judge for further consideration of whether the newly submitted medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). *Bellich v. Vesta Mining Co.*, BRB No. 98-1325 BLA (July 9, 1999) (unpublished).

On remand, the administrative law judge found that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *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); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been 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. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). Claimant's prior 1971 claim was denied because claimant failed to establish that he was totally disabled. Director's Exhibit 34. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support a finding of total disability.

1971. Director's Exhibit 34. The SSA denied the claim on February 15, 1972, October 10, 1973, September 29, 1978 and April 18, 1979. *Id.* The Department of Labor denied the claim on July 13, 1979. *Id.* There is no evidence that claimant took any further action in regard to his 1971 claim.

Claimant filed a second claim on September 9, 1996. Director's Exhibit 1.

In its previous decision, the Board affirmed the administrative law judge's findings that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(3). *Bellich*, *supra*.

The Board also held that the administrative law judge, in his consideration of the newly submitted medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(4), acted within his discretion in according considerable weight to the opinions of Drs. Wald, Fino and Basheda that claimant does not suffer from a totally disabling respiratory or pulmonary impairment. *Bellich*, *supra*. The Board also held that the administrative law judge permissibly discredited Dr. Lebovitz's opinion that claimant suffered from a totally disabling respiratory impairment because his opinion was based in part upon a pulmonary function study that was invalidated by two reviewing physicians. *Id.*

The Board, however, vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) and remanded the case to the administrative law judge with instructions to (1) consider and to address the weight accorded the 1985 and 1997 awards by the Pennsylvania Bureau of Workers' Compensation; (2) address Dr. Alpern's deposition testimony regarding the validity of his July 17, 1984 pulmonary function study and to address the effect of this study on the validity of his medical opinion; and (3) consider Dr. Morgan's deposition testimony regarding the amount of coal dust exposure necessary to develop coal workers' pneumoconiosis and to discuss the impact of this testimony on the credibility of his opinion that claimant does not have a totally disabling respiratory impairment arising out of his coal mine employment. *Bellich*, *supra*.

On remand, the administrative law judge found that the 1985 and 1997 awards by the Pennsylvania Bureau of Workers' Compensation did not have any bearing on the instant case. Decision and Order on Remand at 1. The administrative law judge noted that these decisions "did not refer to any evidence of record" and were, therefore, not binding on him. *Id.* at 1-2.

The finding of a state workers' compensation board is not binding on an administrative law judge. *See Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984). It is a matter within the administrative law judge's discretion to determine what weight to give a state workers' compensation board finding. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). We agree with the administrative law judge that the findings of the Pennsylvania Bureau of Workers' Compensation are insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) because the record does not indicate the legal or medical criteria upon which the state board relied in reaching its findings of total disability. *See Compton v.*

[2]In his Brief, claimant notes that Dr. Alpern's October 24, 1984 medical report is referenced in the 1985 Decision and that Dr. Lebovitz's April 26, 1994 report is referenced in the 1997 Decision. We note, however, that the administrative law judge independently considered both Dr. Alpern's October 24, 1984 report and Dr. Lebovitz's April 26, 1994

Itmann Coal Co., 7 BLR 1-644 (1985); Director's Exhibit 29. Consequently, we hold that the administrative law judge acted within his discretion in not according any weight to the 1985 and 1997 awards granted by the Pennsylvania Bureau of Workers' Compensation.

The administrative law judge, on remand, found that Dr. Alpern's July 17, 1984 pulmonary function study conformed to the quality standards set out at 20 C.F.R. §718.103. Decision and Order on Remand at 2. The administrative law judge, however, properly questioned the validity of the July 17, 1984 pulmonary function study inasmuch as it was invalidated by a better qualified physician, Dr. Wald. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order on Remand at 2. The administrative law judge also properly discredited Dr. Alpern's finding of total disability because it was based in part upon the invalidated July 17, 1984 pulmonary function study. *See Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); Decision and Order on Remand at 2; Director's Exhibit 29. Inasmuch as these findings are based upon substantial evidence, they are affirmed.

The administrative law judge finally reconsidered Dr. Morgan's opinion. The administrative law judge properly found that while Dr. Morgan's comment that very few

---

report. The Board previously affirmed the administrative law judge's discrediting of Dr. Lebovitz's opinion. *See Bellich v. Vesta Mining Co.*, BRB No. 98-1325 BLA (July 9, 1999) (unpublished). As discussed *infra*, we also affirm the administrative law judge's discrediting of Dr. Alpern's opinion of total disability.

[3]Dr. Alpern administered the July 17, 1984 pulmonary function study. Director's Exhibit 29. Dr. Wald invalidated claimant's July 17, 1984 pulmonary function study, explaining that:

> A review of [the July 17, 1984] tracings shows that effort was indeed less than maximal. The vital capacity curve again is undulating, indicating that full expiratory effort was not obtained. I also note that the vital capacity curves obtained by Dr. Alpern show a duration of expiration of two seconds or less. Unless the vital capacity curve is extended for approximately five seconds, it cannot be considered valid. Therefore, I do not think the ventilation studies obtained by Dr. Alpern are significant because of poor effort.

Director's Exhibit 30.

Dr. Wald is Board-certified in Internal Medicine. Director's Exhibit 30. Although Dr. Alpern testified that he is also Board-certified in Internal Medicine, his Board-certification is through the American College of Chest Physicians, not the American Medical Association. Director's Exhibit 29.

miners develop pneumoconiosis with less than ten years of underground employment might diminish the credibility of his opinion regarding the existence of pneumoconiosis, it did not undermine Dr. Morgan's opinion regarding the extent of claimant's pulmonary impairment. Decision and Order on Remand at 2; Director's Exhibit 30. The existence of pneumoconiosis and the existence of a totally disabling respiratory or pulmonary impairment are two separate elements of entitlement. 20 C.F.R. §§718.202(a), 718.204(c); *see generally Jarrell v. C & H Coal Co.*, 9 BLR 1-52 (1986) (Brown, J., concurring and dissenting); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983). We, therefore, hold that the administrative law judge properly relied upon Dr. Morgan's opinion in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).

Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Consequently, we also affirm the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *See Swarrow*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge