BRB No. 99-0313 BLA

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| RUSSELL T. FISHER | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
| | ) | DATE ISSUED: |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | DECISION and ORDER |
| Respondent | ) | |

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

Ronald A. Archer, Houtzdale, Pennsylvania, for claimant.

Jennifer U. Toth (Henry L. Solano, 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, the United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (85-BLA-6319) of Administrative Law Judge Richard K. Malamphy 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). This case involving a duplicate claim is before the Board for the fourth time. The Board discussed fully this claim's procedural history in its previous decision on appeal. *Fisher v. Director, OWCP*, BRB No. 97-0954 BLA (Apr. 28, 1998)(unpub.). We now discuss only those procedural aspects relevant to the issues raised in this appeal.

In a Decision and Order on Remand issued on March 21, 1997, the administrative law judge found that the record established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) but did not establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, he denied benefits.

Pursuant to claimant's appeal and a Motion to Remand filed by the Director, Office of Workers' Compensation Programs (the Director), the Board vacated the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.204(c) and remanded the case for further consideration. Specifically, the Board instructed the administrative law judge to determine whether the medical evidence developed since the previous denial of benefits established a material change in conditions as required by 20 C.F.R. §725.309(d) under the standard of *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The Board also instructed the administrative law judge to reweigh a medical opinion at Section 718.202(a)(4), and then weigh all of the relevant evidence together to determine whether claimant established the existence of pneumoconiosis in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Finally, the Board instructed the administrative law judge to compare certain physicians' notations of physical limitations with the exertional requirements of claimant's usual coal mine employment to determine whether claimant is totally disabled pursuant to Section 718.204(c)(4).

On remand, the administrative law judge found that the medical opinions developed since the prior denial failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and therefore did not demonstrate a material change in conditions. The administrative law judge did not address the new evidence relevant to total disability, however, to determine whether a material change in conditions was established, reasoning that entitlement was precluded because claimant failed to establish the existence of pneumoconiosis in his original claim and in his duplicate claim.

On appeal, claimant contends that the administrative law judge erred in his weighing of the new medical opinions pursuant to Section 718.202(a)(4). The Director has filed a Motion to Remand, contending that the administrative law judge erred by failing to determine whether the new evidence relevant to respiratory disability establishes a material change in conditions pursuant to Section 725.309(d).

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 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where 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 there has been a material change in conditions. 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 pursuant to Section 725.309(d), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Swarrow*, 72 F.3d at 318, 20 BLR at 2-96. If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id*.

As claimant and the Director note, claimant's first claim was denied primarily because the evidence then in the file did not establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c).[1] Director's Exhibit 36. A new medical report by Dr. Goldstein lists physical limitations that may be due to pulmonary disease. Director's Exhibit 22. Consequently, the Board instructed the administrative law judge to compare those limitations with the exertional requirements of claimant's usual coal mine employment and determine whether they support a finding of total respiratory disability. [1998] *Fisher*, slip op. at 5-6. The administrative law judge failed to do so.

The Director urges remand for the administrative law judge to analyze the total

[1] The district director's first denial letter, dated December 10, 1980, informed claimant that he failed to establish pneumoconiosis or total disability. Director's Exhibit 35. Claimant then submitted additional evidence. After considering the additional evidence, the district director issued a second denial letter on July 30, 1982 indicating that the initial finding "remains unchanged . . . ." Director's Exhibit 36 at 1. However, the claims examiner added at the bottom of this letter the notation that "[a]lthough there is evidence in [the] file that the miner has pneumoconiosis, total disability from the disease has not been established." *Id*.

disability evidence. Director's Motion at 9. The record does not support the administrative law judge's conclusion that all of the old and new evidence has been fully considered and found not to establish pneumoconiosis, thus making analysis of the new total disability evidence unnecessary.[2] Therefore, we must remand this case for the administrative law judge to consider whether the evidence relevant to total disability developed since the prior denial establishes a material change in conditions. *See Swarrow, supra*.

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge failed to provide a valid reason for according diminished weight to Dr. Solic's diagnosis of pneumoconiosis. Claimant's Brief at 19-23. Since the prior denial, claimant was examined and tested by Drs. Goldstein and Solic.[3] Director's Exhibits 22, 44. Dr. Goldstein, whose qualifications are not in the record, reported all examination findings and objective test results normal and diagnosed a pulmonary granuloma unrelated to coal dust exposure. Director's Exhibit 22. Dr. Solic, who is Board-certified in Internal Medicine and Pulmonary Disease, reported all physical examination and objective test results to be "normal" except for an x-ray reading of "1/0." Director's Exhibit 44 at 3. Dr. Solic diagnosed "simple coal workers' pneumoconiosis" and indicated that claimant has no pulmonary impairment. Director's Exhibit 44 at 4.

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[2] As noted above, it is not clear from the district director's final denial letter of July 30, 1982 that pneumoconiosis was actually found against claimant in the first claim. Director's Exhibit 36 at 1. Moreover, the administrative law judge in his prior decision credited old and new medical opinions to find pneumoconiosis established at Section 718.202(a)(4). [1997] Decision and Order on Remand at 7. Thus, we cannot say that all of the relevant evidence, old and new, has been fully considered and found not to establish pneumoconiosis.

[3] A brief consultation letter by Dr. Catz does not address the existence of pneumoconiosis. Director's Exhibit 41.

The administrative law judge noted that Dr. Solic possesses superior qualifications, but found that "Dr. Solic's diagnosis rests on the positive chest x-ray as all other pertinent studies were within normal limits. Dr. Solic made no reference to the clinical examination or testing in making the diagnosis." Decision and Order on Remand at 4. Contrary to claimant's contention, it was within the administrative law judge's discretion to assess the report's documentation and reasoning to find that Dr. Solic's medical opinion was essentially no more than a positive x-ray reading, which the administrative law judge did not find persuasive.[4] *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Accordingly, to the extent that the district director in the first claim found that claimant did not establish the existence of pneumoconiosis, Director's Exhibits 35, 36, we hold that the administrative law judge permissibly weighed the new medical opinions to find that they did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and thus did not establish a material change in conditions pursuant to Section 725.309(d). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

In summary, we remand this case for the administrative law judge to consider

[4] The administrative law judge previously considered Dr. Solic's 1/0 reading of the December 19, 1988 x-ray when he found the weight of the x-ray readings considered in light of the readers' radiological credentials to be negative for pneumoconiosis. [1997] Decision and Order on Remand at 2-3; *see Swarrow*, 72 F.3d at 310 n.3, 20 BLR at 2-280 n.3. Claimant did not challenge that finding in the prior appeal.

whether the relevant new evidence establishes a material change in conditions by demonstrating that claimant is totally disabled pursuant to Section 718.204(c). *See Swarrow, supra*. If claimant has established a material change in conditions, the administrative law judge must determine whether all of the record evidence, old and new, supports a finding of entitlement.[5] *Id*.

[5] We reject as meritless claimant's argument that the Director is collaterally estopped from asserting on the merits that claimant does not have pneumoconiosis. Claimant's Brief at 10-17. Even if we assume that the district director clearly found pneumoconiosis established in the first claim, such finding was not necessary to the district director's decision to deny benefits. *See Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 126 F.3d 461, 475 (3d Cir. 1997); *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-138 (1999)(*en banc*). Moreover, if a material change in conditions is established on remand, the administrative law judge must consider whether all of the evidence supports a finding of entitlement. *See Swarrow, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge