BRB No. 01-0459 BLA

JAMES E. MACKEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order - Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Kathy L. Snyder and William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Timothy S. Williams (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.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (1999-BLA-0606) of Administrative Law Judge Gerald M. Tierney 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). Initially, the administrative law judge determined that the instant claim was a duplicate claim pursuant to 20 C.F.R. §725.309(d) (2000),[1] filed on July 7, 1998.[2] Adjudicating the claim pursuant to 20 C.F.R. Part 718 (2000),[3] the administrative law judge credited

[1] The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 2000 Code of Federal Regulations is applicable. See 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

[2] Claimant filed his initial claim for benefits on June 28, 1973, which was denied by the district director on September 29, 1980. Director's Exhibit 31. Claimant filed a second claim on July 5, 1983, which was denied by the district director on March 14, 1984. Director's Exhibit 32. On June 9, 1993, claimant filed his third application for benefits. Director's Exhibit 33. This claim was denied by the district director by reason of abandonment, finding that claimant failed to adequately pursue the claim. Director's Exhibit 33.

[3] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety of 1969, amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven 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). The Board subsequently issued an Order on February 21, 2001 requesting supplemental briefing in the instant 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. Aug. 9, 2001). The court's decision renders moot those

claimant with at least forty years of coal mine employment, found Valley Camp Coal Company to be the properly identified responsible operator and found that claimant has one dependent, his wife. Addressing the merits of the duplicate claim, the administrative law judge accepted employer's concession that the evidence of record was now sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment. Hearing Transcript at 11. However, the administrative law judge found that the newly submitted evidence of record was insufficient to establish that pneumoconiosis is a contributing cause of the claimant's total disability pursuant to 20 C.F.R. §718.204(b) (2000).[4] Consequently, the administrative law judge found that claimant failed to establish a material change in conditions because he did not establish by a preponderance of the evidence that he is totally disabled due to pneumoconiosis pursuant to Section 718.204 (2000). Accordingly, the administrative law judge denied benefits.

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge failed to determine whether the evidence of record, old and new, was sufficient to establish that claimant is suffering from pneumoconiosis, prior to his consideration of whether pneumoconiosis was a contributing cause of claimant's totally disabling respiratory or pulmonary impairment. In addition, claimant contends that the administrative law judge failed to consider all of the relevant evidence of record and also that the administrative law judge did not adequately discuss the weight he accorded the evidence of record and his conclusions. In response, employer urges affirmance of the administrative law judge's denial of benefits, arguing that the administrative law judge properly found that claimant failed to establish a material change in conditions pursuant to Section 725.309(d) (2000), because the newly submitted evidence is insufficient to establish that claimant's total disability was due to pneumoconiosis.

In addition, employer challenges its designation as the properly identified responsible operator. Employer contends that it should have been dismissed because claimant's employment with employer did not contribute to his total

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arguments made by the parties regarding the impact of the challenged regulations.

[4] The provision pertaining to disability causation previously set forth at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c) (2001), while the provision pertaining to total respiratory disability, previously set forth at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) (2001).

disability due to pneumoconiosis under 20 C.F.R. §725.493(a)(6) (2000). Additionally, employer argues that it should be dismissed because of the mismanagement of the claim by the Office of Workers' Compensation Programs.

In response to claimant's appeal, the Director, Office of Workers' Compensation Programs (the Director), argues that the case should be remanded to the administrative law judge for further consideration. In particular, the Director contends that the administrative law judge's acceptance of the employer's concession of a totally disabling respiratory impairment establishes one of the elements previously adjudicated against claimant and, thus, establishes a material change of conditions pursuant to Section 725.309(d) (2000). Therefore, the Director contends that the administrative law judge erred in finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(d) (2000) and, thus, erred in failing to consider all of the evidence of record, old and new, in considering each of the elements of entitlement. The Director also asserts that the Board should not address employer's arguments concerning its designation as responsible operator because the argument was not properly raised in a cross-appeal.[5]

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).

Section 725.309 (2000) 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) (2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in considering whether claimant has established a material change in conditions, the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether claimant has proven at least one element of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director,*

[5] The parties do not challenge the administrative law judge's decision to credit claimant with at least forty years of coal mine employment or his finding that claimant was suffering from a totally disabling respiratory impairment. Therefore, these finding are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

OWCP [Rutter II], 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).

The most recent prior claim in this case, filed in 1993, was denied by reason of abandonment because claimant did not pursue the claim with due diligence after receiving a notice from the district director that the claim would be denied if claimant did not actively pursue the claim. Director's Exhibit 33. The administrative law judge, therefore, determined that in order to establish a material change in conditions, claimant must establish one of the elements adjudicated against him in the denial of his 1983 claim. Decision and Order at 3. The 1983 claim was denied because the evidence of record did not show that claimant was totally disabled by pneumoconiosis.[6] Director's Exhibit 32.

Initially, in addressing the duplicate claim, the administrative law judge stated that the issue of total respiratory disability due to pneumoconiosis has two elements. First, claimant must establish a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(c) (2000), and second, that pneumoconiosis was a contributing cause of claimant's disability, 20 C.F.R. §718.204(b) (2000). Decision and Order 3; 20 C.F.R. §718.204; *see Hobbs v. Clinchfield Coal Co.* [*Hobbs II*], 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1

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[6] Specifically, the district director's denial form, Ltr. CM-1000a, states:

> [the evidence] does not show that you are totally disabled by the disease. Totally disabled means you are unable to perform the type of work required by your coal mine work because of a breathing impairment caused by pneumoconiosis (black lung disease).

Director's Exhibit 32.

(1986)(*en banc*). Herein, the administrative law judge found that employer conceded that claimant now suffers from a totally disabling respiratory or pulmonary impairment. Decision and Order at 3; Hearing Transcript at 11. However, the administrative law judge found that the newly submitted evidence was insufficient to establish that pneumoconiosis was a contributing cause of claimant's total respiratory disability. Decision and Order at 4. Consequently, he found that claimant failed to establish a material change in conditions because both elements of Section 718.204 (2000) were not established. Decision and Order at 4.

Based on the facts of this case, we vacate the administrative law judge's denial of benefits and hold, as a matter of law, that claimant has establish a material change in conditions pursuant to Section 725.309(d) (2000). As the administrative law judge properly stated, the 1983 claim was denied because claimant failed to establish that he was suffering from a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. Decision and Order at 3; Director's Exhibit 32. However, contrary to the administrative law judge's conclusion, the issue of total disability due to pneumoconiosis encompasses two distinct elements, total respiratory disability, and the cause of that disability, 20 C.F.R. §718.204(b), (c) (2001) and, thus, in order to establish a material change in conditions, claimant need establish only one of those two elements. The administrative law judge's acceptance of employer's concession of a totally disabling respiratory or pulmonary impairment, therefore, establishes a material change in conditions because it establishes one of the elements previously adjudicated against claimant. Decision and Order at 3; Hearing Transcript at 11; 20 C.F.R. §725.309(d) (2000); *Rutter II*, *supra*. Consequently, we reverse the administrative law judge's finding that claimant failed to establish a material change in conditions and remand the case to the administrative law judge for further consideration. *Id*. On remand, the administrative law judge must consider all of the evidence of record, old and new, to determine whether claimant has established the existence of pneumoconiosis arising out of his coal mine employment. 20 C.F.R. §§718.202(a), 718.203; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000). If, on remand, the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, he must then determine whether claimant's pneumoconiosis is a "substantially contributing cause" of his total respiratory disability. 20 C.F.R. §718.204(c) (2001).

Lastly, we turn to employer's challenge of the administrative law judge's finding that it was the properly named responsible operator. In its Brief in Response to Claimant's Petition for Review (Employer's Brief), employer argues

that the administrative law judge erred in determining that it was the properly named responsible operator. Specifically, employer contends that it established that claimant's employment with Valley Camp did not contribute to his totally disabling respiratory impairment and, therefore, rebutted the presumption of contribution set forth at Section 725.493(a)(6) (2000). Employer's Brief at 23-27. In addition, employer contends that it should have been dismissed as the putative responsible operator, arguing that the mismanagement of this claim by the Office of Workers' Compensation Programs, resulted in employer being denied its due process rights. *Id*.

The Board has consistently held, however, that arguments in response briefs must be limited to those which respond to issues raised in petitioner's brief and those in support of the decision below, and that other arguments will not be considered by the Board. 20 C.F.R. §802.212(b); *Barnes v. Director, OWCP,* 18 BLR 1-55 (1994); *Shelesky v. Director, OWCP,* 7 BLR 1-1034 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983); *see also Malcomb v. Island Creek Coal Co.,* 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Dalle-Tezze v. Director, OWCP,* 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987). Moreover, where the prevailing party below seeks to contest adverse findings of fact or conclusions of law, those contentions must be raised in the form of a cross-appeal. 20 C.F.R. §802.201(a)(2); *Barnes, supra; King, supra*. However, if the challenge by the party prevailing below supports the result of the decision, then that party may advance "any argument or raise any issue in a response brief which will maintain the *status quo* of the decision." *King*, 6 BLR at 1-91; *see also Malcomb, supra; Barnes, supra*. Inasmuch as employer's response brief is neither a cross-appeal nor does it provide an alternative basis upon which to affirm the ultimate disposition of the administrative law judge on this issue, we decline to a address employer's arguments relevant to its identification as the responsible operator. *See Malcomb, supra; Barnes, supra; King, supra*.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is reversed in part, vacated in part, and the case is remanded to the administrative law judge for further proceedings.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge