BRB No. 01-0518 BLA

ANDREW SHIFLAR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COLUMBINE 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 of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Andrew Shiflar, Rock Springs, Wyoming, *pro se*.

Lawrence D. Blackman (Blackman & Levine, L.L.C.), Denver, Colorado, for employer.

Barry H. Joyner (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (97-BLA-1485) of Administrative Law Judge Richard K. Malamphy denying benefits in a duplicate 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).[1] In this duplicate claim, the administrative law judge found that the evidence failed to establish the existence of pneumoconiosis, and thus, concluded that claimant had not established a material change in conditions.[2] Accordingly, benefits were denied.[3]

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[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, 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 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 claims, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order 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. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2] Claimant filed his initial application for benefits on May 25, 1977. *See* Director's Exhibit 29. The district director awarded benefits. *Id*. However, following a hearing on the merits, Administrative Law Judge George P. Morin denied benefits in a Decision and Order issued on May 23, 1985. *Id*. On appeal, the Board affirmed the denial of benefits. *Id*.; *see Shiflar v. Monsanto Corp.*, BRB No. 85-1513 BLA (May 21, 1987)(unpub.). Claimant took no further action on that claim, until filing a second application for benefits on December 24, 1990, which he refiled on December 9, 1992. See Director's Exhibit 30. The district director denied benefits on February 3, 1993. *Id*. Although claimant indicated, in a letter dated February 12, 1993, that he intended to submit additional evidence in support of his claim, he did not. Nor did he take any further action on the claim until filing a third application for benefits on April 13, 1994, which the district director denied on September 8, 1994 because there was no evidence of coal workers' pneumoconiosis. *See* Director's Exhibit 31. Claimant took no further action on that claim until he filed the present claim on October 22, 1996. *See* Director's Exhibit 1.

[3] Based on the filing date of October 22, 1996, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. The district director calculated

On appeal, claimant generally challenges the findings of the administrative law judge on the existence of pneumoconiosis and the presence of a totally disabling respiratory impairment due to pneumoconiosis. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand this case for further consideration of a material change in conditions and for further consideration of the medical opinion of Dr. Repsher.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

We find merit in the Director's argument that this case must be remanded for the

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claimant's length of coal mine employment as twenty-four years and 63 days. *See* Director's Exhibit 10. As neither party disagrees with this calculation, it is affirmed. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

[4] We affirm the finding of the administrative law judge on the designation of employer as the responsible operator, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge to reconsider a material change in conditions under the proper legal standard. As this case arises within the appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit, the administrative law judge must apply the standard enunciated in *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996) for deciding whether claimant demonstrated a material change in conditions. In *Brandolino*, the court held that in a duplicate claim:

> [C]laimant must prove for each element that actually was decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied [footnote omitted]. In order to meet the claimant's threshold burden of proving a material change in a particular element, the claimant need not go as far as proving that he or she now satisfies the element [footnote omitted]. Instead...claimant need show only that this element has worsened materially since the time of the prior denial.[5]

Brandolino at 90 F.2d 1511, 20 BLR at 2-319-320.

[5] In a footnote to its decision, the court stated that if the final adjudicator of the prior claim did not decide a particular element, claimant need not prove a material change in conditions in this element to have the merits of entitlement considered. *See Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502,1511, n. 13, 20 BLR 2-302, 2-320 n.13 (10th Cir. 1996). *See Caudill v. Arch of Kentucky, Inc.*, 22 BLR 1-97, 102 (2000)(*recon. en banc*).

Thus, in ascertaining whether claimant has met the threshold requirement of a material change in conditions, the evidence obtained subsequent to the prior denial must be compared to the evidence considered in the prior claim or available at that time.[6] *Id*.

In finding the evidence insufficient to establish the existence of pneumoconiosis, and thus, a material change in conditions, the administrative law judge not only failed to apply the *Brandolino* standard, he improperly reviewed all the evidence of record on the merits. *Id*.; *see* Decision and Order at 4-9. Therefore, we vacate the administrative law judge's finding on material change in conditions, and remand this case for the administrative law judge to reconsider whether a material change in conditions was established pursuant to the standard set forth by the court in *Brandolino*. *See* 20 C.F.R. §725.309 (2000); *Brandolino, supra*. On remand, the administrative law judge should determine the basis for the denial of claimant's prior claim, and then review and weigh the newly submitted evidence to determine whether it establishes a material worsening of claimant's condition for each element of entitlement previously adjudicated against claimant. *Id*.

[6] In *Brandolino*, the court indicated that evidence considered in rejecting the prior claim is probative only to the miner's condition at the time of the earlier denial. *Id*. at 90 F.3d at 1511, 20 BLR at 2-319.

We also agree with the Director that, on remand, the administrative law judge must reconsider his credibility findings regarding the new medical opinions of Dr. Repsher. *See* Employer's Exhibits 1, 2, 6. Specifically, the administrative law judge should review the basis for Dr. Repsher's conclusion that claimant does not suffer from a respiratory or pulmonary impairment. *Id*. In so doing, the administrative law judge needs to review and determine the credibility of Dr. Repsher's medical opinion in light of his statements: that claimant's qualifying blood gas studies are, in fact, normal despite the disability standards table which he said was not adjusted for age,[7] and that coal dust exposure cannot cause lung obstruction.[8] *See* 20 C.F.R. §§718.201;718.202(a)(4); 718.204(b)(2), Appendix C; 65 Fed. Reg. 80053 (December 20, 2000), 45 Fed. Reg. 13712 (February 29, 1980). Furthermore, in

[7] In his deposition, Dr. Repsher testified that, from a purely medical standpoint, the resting blood gas study performed during his examination of claimant on June 9, 1998 was normal, but then acknowledged that this study met the regulatory standards for disability. *See* Employer's Exhibit 6 at p. 18, 23; 20 C.F.R. §718.204(b)(2), Appendix C. Dr. Repsher supported his position that the qualifying blood gas study was normal with reference to the disability table devised by the Department of Labor which he said failed to adjust disability criteria for age, so that the doctor's finding reflects the effects of age on the test results. *See* Employer's Exhibit 6 at p. 18, 23. As the Director correctly points out, the disability table values were adjusted for age. *See* 65 Fed. Reg. 80053 (December 20, 2000), 45 Fed. Reg. 13712 (February 29, 1980). The exercise blood gas study performed on May 11, 1999 meets the regulatory disability standards. *See* 20 C.F.R. §718.204(b)(2), Appendix C.

[8] The recent changes in the regulations includes the presence of an obstructive pulmonary impairment arising out of coal mine employment in the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2).

reviewing Dr. Repsher's medical opinion to determine if it is reasoned and documented, the administrative law judge must consider the differing reasons given by Dr. Repsher regarding both the extent and the cause of claimant's chronic obstructive pulmonary disease, taking into consideration Dr. Repsher's understanding of claimant's smoking history and his opinion on the presence of disabling heart disease in light of the other evidence of record. *See Carson v. Westmoreland Coal Co.*, 18 BLR 1-18 (1994), *modif. on recon.* 20 BLR 1-64 (1996); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fagg v. Amax Coal Co.*, 12BLR 1-77(1988), *aff'd* 865 F.2d 916 (7th Cir. 1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Puleo v. Florence Mining*, 8 BLR 1-198 (1984); Director's Exhibits 13-18; Claimant's Exhibit 1; Employer's Exhibits 1-3, 5, 6. We, therefore, vacate the findings of the administrative law judge on the existence of pneumoconiosis and remand this case for further consideration.

Accordingly, the Decision and Order of the administrative law judge denying 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.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge