BRB No. 97-0746 BLA

ALFRED E. DELP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMCO, INCORPORATED	)	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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Alfred E. Delp, Beckley, West Virginia, *pro se*.

Christopher D. Mullen (Shaffer & Shaffer), Madison, West Virginia, for employer.

Edward Waldman (Marvin Krislov, Deputy Solicitor for National Operations; 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order on Remand (94-BLA-1650) of Administrative Law Judge Michael P. Lesniak 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 1993 duplicate

claim,[1] is before the Board for the second time. In the initial decision, Administrative Law Judge Julius A. Johnson found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, Judge Johnson denied benefits. By Decision and Order dated May 30, 1996, the Board vacated Judge Johnson's finding that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Delp v. Armco, Inc.,* BRB No. 95-1109 BLA (May 30, 1996) (unpublished). The Board remanded the case for consideration of whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to the standard set out in *Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992). *Id.*

Due to Judge Johnson's unavailability, Administrative Law Judge Michael P. Lesniak (the administrative law judge) reconsidered the claim on remand. The administrative law judge noted that subsequent to the issuance of the Board's May 30, 1996 Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, 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. The administrative law judge noted that claimant's previous claim was denied because he failed to establish that he was totally disabled due to pneumoconiosis. Because the administrative law judge found the newly submitted evidence insufficient to establish total disability due to pneumoconiosis, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. 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 filed a Motion to Remand, urging the Board to remand the case to the administrative law judge to reconsider whether the newly submitted evidence is sufficient to establish a material

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on July 12, 1973. Director's Exhibit 40. The district director denied the claim on January 16, 1981. *Id.*

Claimant filed a second claim on July 6, 1984. Director's Exhibit 40. In a Decision and Order dated June 6, 1992, Administrative Law Judge Edward J. Murty, Jr. denied the claim. *Id.* There is no indication that claimant took any further action in regard to his 1984 claim. Claimant filed a third claim on July 9, 1993. Director's Exhibit 1.

change in conditions pursuant to 20 C.F.R. §725.309.

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).

As the administrative law judge correctly noted in his Decision and Order on Remand, the Fourth Circuit 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. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). Administrative Law Judge Edward J. Murty, Jr. denied claimant's prior 1984 claim because he failed to establish that he was totally disabled pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 40. 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 pursuant to 20 C.F.R. §718.204(c).

The administrative law judge properly found that the newly submitted pulmonary function study, a study conducted on September 8, 1993, was non-qualifying. Decision and Order on Remand at 3; Director's Exhibit 14. The administrative law judge also correctly noted that the newly submitted arterial blood gas study, a study conducted on September 8, 1993, produced non-qualifying values. Decision and Order on Remand at 3; Director's Exhibit 16. The record does not contain any evidence of cor pulmonale with right sided congestive heart failure. Consequently, the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3).

The Director, however, contends that the administrative law judge, in his 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), mischaracterized Dr. Daniel's opinion. We agree. The administrative law judge indicated that Dr. Daniel opined that claimant's arterial blood gas study revealed a pulmonary abnormality which "would **exhibit** performing heavy manual labor." Decision and Order at 3 (emphasis added). The administrative law judge found that Dr. Daniel's opinion was insufficient to support a finding of total disability. Decision and Order at 3. Contrary to the administrative law judge's characterization, Dr. Daniel actually opined that claimant's arterial blood gas study revealed a pulmonary abnormality which "would **inhibit** performing heavy manual labor." Director's Exhibit 15 (emphasis added). Inasmuch as the administrative law judge's evidentiary analysis does not coincide with the evidence of record, the administrative law judge committed error. *See generally Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

In its May 30, 1996 Decision and Order, the Board noted that Dr. Daniel's opinion, that claimant is totally disabled for heavy labor, could be sufficient to demonstrate total disability under Section 718.204(c)(4), depending upon the exertional requirements of claimant's usual coal mine employment. *Delp*, *supra*, slip op. at 3. On remand, the administrative law judge is instructed to consider the exertional requirements of claimant's usual coal mine work in connection with Dr. Daniel's medical report to determine whether Dr. Daniel's opinion supports a finding of total disability. *See Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *DeFelice v. Consolidation Coal Co.*, 5 BLR 1-275 (1982). We, therefore, remand the case to the administrative law judge to reconsider whether the newly submitted medical opinion evidence is sufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4).

If, on remand, the administrative law judge finds the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4), he must then weigh all the relevant, newly submitted evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(c), *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*), thereby establishing a material change in condition pursuant to 20 C.F.R. §725.309.

Should the administrative law judge, on remand, find the newly submitted evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, he must consider claimant's 1993 claim on the merits. *See Shupink , supra*.

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

REGINA C. McGRANERY
Administrative Appeals Judge