

BRB No. 92-0273 BLA

WILLIAM ARNOLDI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WYOMING FUEL COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED:
	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER on RECONSIDERATION

Appeal of the Decision and Order on Remand of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

C. William Mangum (J. Davitt McAteer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer has timely filed a Motion for Reconsideration of the Board's Decision and Order in *Arnoldi v. Wyoming Fuel Co.*, BRB No. 92-0273 BLA (Jun. 19, 1995)(unpub.), in which the Board affirmed the Decision and Order on Remand (86-BLA-4850) of

Administrative Law Judge Alexander Karst awarding 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). See 20 C.F.R. §802.407(a). In *Arnoldi*, the Board, citing *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992), affirmed the administrative law judge's finding pursuant to 20 C.F.R. §725.309, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(1), 718.204(b), (c), and the award of benefits.

On reconsideration, employer contends that the case must be remanded for the administrative law judge to apply the proper standard for establishing a material change in conditions pursuant to Section 725.309, that the administrative law judge erred in applying the true doubt rule in weighing the evidence of record, and that the Board erred in affirming the administrative law judge's weighing of the x-ray evidence pursuant to Section 718.202(a)(1) and the medical opinion evidence pursuant to Section 718.204(c)(4) and (b). Claimant and the Director, Office of Workers' Compensation Programs (the Director), are not participating on reconsideration.

Subsequent to the issuance of the Board's Decision and Order, the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this claim arises, held in *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), that in order to establish a material change in conditions pursuant to Section 725.309, claimant 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." The administrative law judge must compare the "evidence obtained after [the] prior denial to evidence considered in or available at the time of [the] prior claim..." to determine if claimant's condition in these elements has "worsened

materially since the time of his earlier denial...." In footnotes, the Court clarified that the Administrative Law Judge cannot consider evidence that could have been produced in the prior proceedings or re-evaluations of this evidence, applying the theory of res judicata. See *Brandolino, supra*. Because the administrative law judge has not had the opportunity to apply the Court's holding in *Brandolino* to the evidence in this case, we vacate our affirmance of the administrative law judge's finding pursuant to Section 725.309 and remand the case for the administrative law judge to apply the appropriate standard in weighing the evidence pursuant to Section 725.309.

Employer next contends that the Board erred in affirming the administrative law judge's application of the true doubt rule. In *Arnoldi*, the Board did not address the administrative law judge's application of the true doubt rule in this case, as it was not challenged by employer on appeal. *Arnoldi, supra*. However, subsequent to the issuance of the administrative law judge's Decision and Order, the United States Supreme Court, in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), held that the true doubt rule violates Section 7(c) of the Administrative Procedure Act and may not be applied in weighing the evidence to aid a claimant in meeting his burden of proof. In this case, in making his findings pursuant to Sections 718.202(a)(1) and 718.204(b) and (c), the administrative law judge weighed the evidence of record and did not find that the evidence was equally probative. Decision and Order on Remand at 2. However, after finding that claimant met the requirements of entitlement, the administrative law judge stated that "at the very least, the evidence is "contrary but equally probative" and that the doubt would have to be resolved in claimant's favor. Decision and Order on

Remand at 3. Because it is not clear whether the administrative law judge applied the true doubt rule in weighing the evidence in this case, the administrative law judge, on remand, must clarify whether or not he found the evidence to be equally probative and applied the true doubt rule. Thus, if the administrative law judge finds that claimant established a material change in conditions pursuant to Section 725.309, and if he did apply the true doubt rule, then the administrative law judge must reweigh the evidence of record pursuant to Sections 718.202(a)(1) and 718.204(b), (c).

Additionally, as the arguments raised by employer regarding the Board's affirmance of the administrative law judge's weighing of the x-ray evidence pursuant to Section 718.202(a)(1) and the medical opinion evidence pursuant to Section 718.204(b), (c) have been previously considered by the Board, we decline to reconsider them now. See *Witherow v. Rushton Mining Co.*, 8 BLR 1-232 (1985).

Accordingly, we grant employer's motion for reconsideration, vacate our prior holding pursuant to Section 725.309 and remand the case for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge