

BRB No. 93-1777 BLA

ROBERT C. D. PHILLIPS)
)
 Claimant-Petitioner)
)

v.)

EASTERN ASSOCIATED COAL)
 CORPORATION)
 Employer-Respondent)

DATE ISSUED:

DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent)

DECISION and ORDER

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Robert C. D. Phillips, Merritt Island, Florida, *pro se*.
 Jill M. Otte (Thomas S. Williamson, Jr., 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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (91-BLA-8015) of Administrative Law Judge Robert G. Mahony 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 involves a duplicate claim issue. Claimant filed his first claim for benefits on June 29, 1973. This claim was finally denied on March 27, 1980 as claimant failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Claimant took no further action on the initial claim. Claimant filed a second claim for benefits on May 5, 1983. Following a

hearing on the claim, Administrative Law Judge Robert G. Mahony considered the claim pursuant to 20 C.F.R. §725.309(c), determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and thus, failed to establish a material change in conditions pursuant to Section 725.309(c). Accordingly, benefits were denied. Claimant appeals this denial. The Director, Office of Workers' Compensation Programs (the Director), responds, in a motion to remand, requesting that the case be remanded to the district director for the development of additional medical evidence.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 725.309(c), a second claim must be denied as a duplicate claim on the grounds of the denial of the prior claim unless claimant establishes a material change in conditions. See 20 C.F.R. §725.309. In determining whether claimant has established a material change in conditions, the administrative law judge must consider the relevant and probative new evidence in light of the previous denial to determine if there is a reasonable possibility that the evidence, if credited on the merits, could change the prior administrative result. This determination by the administrative law judge is to be made without weighing the new evidence supportive of a finding of a material change against any contrary evidence. If the administrative law judge finds that claimant has established a material change in conditions, claimant is entitled to have his new claim considered on the merits. See *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). In the instant case, the record contains x-ray and medical opinion evidence which, if fully credited, could change the prior administrative result. See Director's Exhibits 9, 12, 63. Thus, the administrative law judge erred in finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(c). See *Shupink, supra*. As a result, the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(c) is reversed and the administrative law judge's denial of benefits is vacated.

Additionally, in her motion to remand, the Director states that the Department of Labor (DOL) has failed to provide claimant with a complete pulmonary evaluation to develop evidence relevant to a determination of his entitlement to federal black lung

benefits.¹ Given the Director's concession that the DOL has failed to develop probative medical opinion evidence in conjunction with the miner's second claim, the case is remanded to the district director for the development of additional medical evidence. See *Petry v. Director, OWCP*, 14 BLR 1-98 (1990). Further, after the additional medical evidence has been obtained by the district director, the case is to be forwarded to the Office of Administrative Law Judges for consideration of the merits of the claim, and all of the relevant evidence of record, pursuant to 20 C.F.R. Part 718. See *Shupink, 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 district director for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

¹The record contains a medical report from Dr. A. Swamy, who examined claimant at the request of the DOL. See Director's Exhibit 9. Dr. Swamy, who diagnosed pneumoconiosis with chronic obstructive pulmonary disease, performed an arterial blood gas study which yielded qualifying results and a pulmonary function study which yielded non-qualifying results. See Director's Exhibits 7, 8, 9. The arterial blood gas study, which was performed on July 12, 1983, was found to be technically unacceptable by Dr. Kraman, a DOL consulting physician, and the x-ray relied upon by Dr. Swamy was reread as negative, at the request of the DOL, by Drs. Sargent and Gaziano. See Director's Exhibits 8, 11, 12, 13, 56. Thus, the Director concedes that it has failed to satisfy its obligation to provide claimant with a credible evaluation of his pulmonary condition. See Director's Brief at 5.