BRB No. 02-0146 BLA

JAMES W. COOK	)	
	)	
Claimant-Respondent	)	
	)	
5.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr., Wolfe & Farmer, Norton, Virginia, for claimant.

Ronald E. Gilbertson, Bell, Boyd & Lloyd PLCC, Washington, D.C., for employer.

Sarah M. Hurley (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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:

Employer appeals the Decision and Order awarding benefits (00-BLA-1094) of Administrative Law Judge Molly W. Neal with respect to 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 is claimant=s third claim for benefits. He filed his first claim in 1989. All of the medical evidence submitted regarding that claim was negative for pneumoconiosis, and the Office of Workers= Compensation Programs denied the claim on the grounds that claimant had not established pneumoconiosis and total disability. Director=s Exhibits 26-1, 26-20. Claimant took no further action, and that claim became final.

In 1997 claimant underwent surgery to remove a portion of his left lung. The pathology report on specimens of lung tissue removed during the surgery diagnosed fibrosis and anthracosis, and moderately differentiated squamous cell carcinoma. Director=s Exhibit 6. In 1998 claimant filed a duplicate black lung benefits claim. Director=s Exhibit 27-1. The evidence submitted relative to that claim included several negative x-rays and a medical report by Dr. Iosif, who concluded that claimant was totally disabled, but not by coal workers= pneumoconiosis. Director=s Exhibit 27-10. There is no indication in the record that claimant submitted the pathology report from the 1997 surgery with his 1998 claim. On November 18, 1998, the Office of Workers= Compensation Programs once again denied the claim on the grounds that claimant had not

established pneumoconiosis and total disability due to pneumoconiosis. Director=s Exhibit 27-14. Claimant took no further action on that claim, and it too became final.

In January 2000 claimant filed his current claim. Director=s Exhibit 1. This time he presented the surgical pathology report in addition to other evidence. Based on the evidence submitted with that claim, the Office of Workers= Compensation Programs found pneumoconiosis and total disability due to pneumoconiosis, and therefore determined that claimant was entitled to benefits. Director=s Exhibits 12, 19. Employer declined to voluntarily commence the payment of benefits and requested a hearing.

Following a hearing and the submission of additional medical evidence, the administrative law judge found claimant had established a material change in conditions pursuant to 20 C.F.R. ' 725.309(d) (1999).[1] She noted that claimant=s two previous claims were denied because he failed to establish the existence of pneumoconiosis and total disability. Decision and Order at 13. She then found that in the current action:

> Employer concedes, and the evidence shows that the Claimant has simple coal workers= pneumoconiosis. Though disputed in the x-ray readings, . . . the biopsy evidence establishes its presence. . . . All of the physicians who have recently examined the Claimant in regards to the issue, have concluded that he has coal workers= pneumoconiosis.

Decision and Order at 13-14, footnote omitted. The administrative law judge also found that A[a]lthough the Employer did not concede so,@ the medical evidence Aundisputedly shows that the Claimant is now totally disabled from a pulmonary or respiratory standpoint.@ *Id*. at 14. The administrative law judge found, Afor these reasons . . . the Claimant has established a material change in conditions since the denial of his previous claim, and that he is entitled to a *de novo* review of his claim for benefits.@ *Id*. She then evaluated all the medical evidence and found claimant=s total disability was caused by pneumoconiosis. *Id*. at 14-16. Accordingly she awarded benefits.[2]

On appeal employer argues the administrative law judge=s findings of a material change in conditions regarding the existence of pneumoconiosis and total disability are erroneous as a matter of law, and her finding of total disability due to pneumoconiosis is not supported by substantial evidence in the record as a whole. On the other hand, claimant argues that substantial evidence supports the administrative law judge=s findings. The Director, Office of Workers= Compensation Programs, as a party-in-interest, argues that employer waived its right to challenge the administrative law judge=s material change in conditions finding regarding pneumoconiosis because A[b]efore the administrative law judge, employer conceded that claimant suffers from pneumoconiosis based on the biopsy report. The administrative law judge correctly based her material change finding on the employer=s concession.@ Letter Brief at 3. Employer responds that the

---

[1] As this claim was pending on January 19, 2001, the revised Section 725.309 regulation does not apply. *See* 20 C.F.R. ' 725.2 (2001).

[2] However, the administrative law judge inexplicably found that A[s]ince benefits were not awarded in this case, the Act prohibits the charging of any fee to Claimant for representation services rendered to Claimant in pursuit of this claim[,]@ and also awarded no attorneys fees. *Id*. at 16.

Director has misapprehended employer=s argument, which is that because pre-1998 evidence (the pathology report) established that claimant had pneumoconiosis, a finding that claimant had pneumoconiosis post-1998 could not establish a material change in conditions within the meaning of Section 725.309(d).

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 applicable 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).

In order to establish entitlement to benefits under the duplicate claim provision of the Black Lung regulations, claimant must establish that Athere has been a material change in conditions or the later claim is a request for modification and the requirements of 725.310 are met.@ 20 C.F.R. ' 725.309(d) (1999). As claimant=s duplicate claim was filed more than one year after his previous claim, it may not be treated as a request for modification. 20 C.F.R. ' 725.310. Therefore, in order to prevail claimant must establish a material change in conditions. The United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, has held that in order to establish a material change in conditions pursuant to Section 725.309(d), claimant must establish by a preponderance of the newly submitted evidence at least one of the elements of entitlement that formed the basis for the denial of the prior claim. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2- 227 (4th Cir.1996) (*en banc*), *cert. denied*, 519 U.S. 1090 (1997). Accordingly, in order to establish a material change in conditions under Section 725.309(d) in this case, claimant must establish by a preponderance of the newly submitted evidence the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202 or the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. ' 718 204(b). If claimant establishes a material change in conditions regarding one of these elements, he is entitled review of all of the evidence in the record to determine whether he qualifies for benefits. *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997).

Employer argues on appeal that the administrative law judge erred in finding a material change in conditions with regard to the existence of pneumoconiosis and total disability. Regarding the existence of pneumoconiosis, employer argues that: 1) Because the 1997 pathology report diagnosed pneumoconiosis **before** the 1998 final denial of benefits, the subsequent diagnoses of pneumoconiosis could not, as a matter of law, constitute a material change in conditions; 2) Although employer conceded the existence of pneumoconiosis, it did **not** concede that the pneumoconiosis constituted a material change in conditions subsequent to the 1998 denial of benefits; and 3) The administrative law judge erroneously relied upon the pathology report, and recent medical opinions that were based largely on the pathology report, to find a material change in conditions under Section 725.309(d). We concur. The administrative law judge relied on employer=s concession that claimant had pneumoconiosis, the 1997 pathology report, and recent medical reports to find a material change in conditions regarding the existence of pneumoconiosis. Decision and Order at 13-14. However, the employer did not concede that the existence of pneumoconiosis constituted a material change in conditions. Given that claimant was diagnosed with pneumoconiosis in 1997 - prior to the 1998 denial of benefits - employer=s Aconcession@ of pneumoconiosis does not support a finding of a material change.

In addition, the administrative law judge relied upon the pre-1998 pathology report in finding a material change in conditions without addressing the issue whether it is permissible under Section 725.309(d) to rely upon evidence in existence prior to the last denial to establish a material change.[3] This reliance is contrary to Board and Fourth Circuit case law applicable to duplicate claims filed before January 20, 2001. In *Rutter*, the

[3] The administrative law judge found the x-ray evidence was in conflict, but the Abiopsy evidence establishes@ the presence of pneumoconiosis. Decision and Order at 13.

Fourth Circuit adopted the Aone-element@ standard, Awhich requires the claimant to *prove*, under all of the probative medical evidence of his condition *after* the prior denial, at least one of the elements previously adjudicated against him.@ *Rutter*, *supra*, 86 F.3d at 1362 (emphasis in original); *see Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997) (same). Finally, the administrative law judge relied on recent medical opinions that found the existence of pneumoconiosis, but she failed to evaluate the extent to which the physicians rendering those opinions relied upon the pre-1998 pathology report to reach their conclusions. Therefore, the administrative law judge=s finding of material change regarding the existence of pneumoconiosis is erroneous as a matter of law. *Rutter*, *supra*.

The administrative law judge=s finding that subsequent to the last denial of benefits there had been a material change in conditions with regard to total disability also cannot be affirmed. As employer points out, Dr. Iosif issued a report finding claimant totally disabled prior to the 1998 denial of benefits. Moreover, although the Office of Workers= Compensation Programs checked a provision in the 1998 denial letter indicating that claimant was not totally disabled due to pneumoconiosis,[4] the explicit notation on the attached description of the medical evidence makes it clear that the Office of Workers= Compensation Programs found that claimant **was** totally disabled - but not as a result of pneumoconiosis.[5] Director=s Exhibit 27-14. The administrative law judge failed to grapple with the issue whether this 1998 Office of Workers= Compensation Programs finding precludes a determination under Section 718.309(d) of a material change in conditions with regard to total disability since the 1998 denial. For these reasons the administrative law judge=s material change in conditions finding regarding total disability is also erroneous as a matter of law. *Rutter*, *supra*.

Accordingly, the administrative law judge=s Decision and Order granting benefits is vacated and the case remanded for reconsideration of the issue whether claimant established a material change in conditions with regard to pneumoconiosis or total disability.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY

[4] The denial letter did not make a separate finding regarding total disability, but instead stated that the evidence did Anot show that you are totally disabled by the disease.@ Director=s Exhibit 27-14.

[5] The explanation noted, A[a]lthough the arterial blood-gas studies meet the disability standards, the evidence in file does not indicate that this is caused by pneumoconiosis (black lung).@ Director=s Exhibit 27-14.

Administrative Appeals Judge