BRB No. 05-0803 BLA

MYRTLE BETTS (on behalf of RAY DONALD BETTS, deceased)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED: 07/10/2006
BELLAIRE CORPORATION	)	
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 – Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson and Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

John C. Artz (Polito & Smock, P.C.), Pittsburgh, Pennsylvania, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denial of Benefits (04-BLA-5802) of Administrative Law Judge Joseph E. Kane on a subsequent miner's 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). The miner's subsequent claim, filed on September 24, 2002,[2] was denied by the district director on July 7, 2003. Director's Exhibit 25. Subsequently, the miner timely requested modification of the district director's denial, which the district director denied, and the miner requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibits 27, 31, 32.

The administrative law judge noted that this case involves a request for modification of a subsequent claim. Decision and Order at 4-5. The administrative law judge found that the issue before him was whether the evidence was sufficient to establish modification pursuant to 20 C.F.R. §725.310 by demonstrating that there has been a change in conditions or a mistake in a determination of fact. Initially, the administrative law judge credited the miner with twenty-six and one-half years of coal mine employment. The administrative law judge next "thoroughly reviewed the decision of evidence considered by the District Director in the previous denial of benefits," and found no mistake in a determination of fact. Decision and Order at 5. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that the newly submitted evidence, namely, the evidence submitted after the district director's July 7, 2003 decision denying benefits on the 2002 claim, was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge also found that the newly submitted evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, found that claimant failed to establish a change

[1]Claimant is Myrtle Betts, widow of Ray Donald Betts, the miner, whose present claim for benefits was pending at the time of his death on April 29, 2004. Director's Exhibit 3; Claimant's Exhibit 2. A decision was rendered on the record pursuant to the parties' request.

[2]The miner's first claim for benefits, filed on January 6, 1982, was finally denied by a Department of Labor claims examiner on March 1, 1982. Director's Exhibit 1. No further action was taken on this claim.

in conditions[3] pursuant to Section 725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in adjudicating this subsequent claim by considering only the evidence submitted after the district director's July 7, 2003 decision denying benefits. Claimant also contends that the administrative law judge mischaracterized Dr. Grant's opinion. Claimant asserts that the administrative law judge erred in not admitting Dr. Lenkey's October 16, 2003 "Occupational Lung Disease Evaluation" into the record. Employer responds, urging affirmance of the administrative law judge's denial of benefits. Claimant has filed a reply brief, reiterating the arguments set forth in her Petition for Review and brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief. The Director argues that the administrative law judge should have determined whether the evidence submitted in conjunction with the subsequent claim is sufficient to establish a material change in conditions at 20 C.F.R. §725.309, rather than whether claimant established a basis for modification of the district director's denial of the subsequent claim. The Director additionally asserts that if the Board remands this case, the administrative law judge should be instructed to reconsider his decision not to admit Dr. Lenkey's 2003 evaluation into the record.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

Claimant and the Director assert that, in considering the instant claim, the administrative law judge should have considered whether the evidence submitted since the denial of claimant's 1982 claim was sufficient to establish "a material change in conditions" pursuant to Section 725.309, rather than determining whether claimant established a basis for modification of the district director's denial of the miner's 2002 subsequent claim. The assertion of claimant and the Director has merit. In *Hess v. Director, OWCP*, 21 BLR 1-141 (1999), the Board determined that an administrative law judge may properly review, *de novo*, the issue of whether claimant has demonstrated a

---

[3]The administrative law judge used the terms "change in conditions" and "material change in conditions" interchangeably throughout his Decision and Order. However, from the discussion at the beginning of his Decision and Order, it is clear that he was considering whether claimant could establish a change in conditions pursuant to 20 C.F.R. §725.310. Decision and Order at 4-5.

material change in conditions.[4] Consequently, the Board stated that where the district director denied modification of a duplicate claim, on a case that has not progressed beyond the district director level, the administrative law judge should have considered whether claimant established a material change in conditions pursuant to Section 725.309(d) (2000).[5] *See Hess*, 21 BLR at 1-143. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises,[6] 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. 20 C.F.R. §725.309; *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994).[7] The miner's 1982 claim was denied because claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 1. Consequently, in order to demonstrate that at least one of the elements of entitlement previously adjudicated against the miner has changed since the date upon which the order denying the prior claim became final pursuant to Section 725.309, claimant must show that the newly submitted evidence,

---

[4]The Department of Labor made substantive revisions to 20 C.F.R. §725.309 in the amended regulations. In the amended Section 725.309, additional claims filed more than a year after the previous denial are termed "subsequent claims," rather than "duplicate claims." Moreover, in the earlier regulation, a duplicate claim would be denied unless a claimant was able to establish "a material change in conditions," whereas in the amended regulation, a subsequent claim would be denied unless claimant has proven at least one of the elements of entitlement previously adjudicated against claimant.

[5]Because the miner filed his subsequent claim after January 19, 2001, the amended Section 725.309 is applicable. We note, however, that the Board's holding regarding the effect of a claimant's request for modification of a district director's denial of benefits in a subsequent claim, set out in *Hess v. Director, OWCP*, 21 BLR 1-141 (1999), is not affected by the revisions to Section 725.309.

[6]The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Ohio. Director's Exhibits 1, 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[7]Moreover if a material change is established, an administrative law judge must consider whether all of the record evidence, including that submitted in the previous claim, supports a finding of entitlement. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-18-19 (6th Cir. 1994).

which is the evidence submitted since the denial of claimant's 1982 claim, supports a finding of pneumoconiosis pursuant to Section 718.202(a) or a finding of total respiratory disability pursuant to Section 718.204(b).[8] Therefore, we vacate the administrative law judge's Decision and Order denying benefits and remand this case for the administrative law judge to determine whether the newly submitted evidence is sufficient to establish at least one of the elements of entitlement previously adjudicated against the miner, in accordance with the discussion above.[9]

Claimant next asserts that the administrative law judge erred in "mischaracterizing" Dr. Grant's opinion in considering it pursuant to Section 718.202(a)(4). In considering the opinions of Drs. Grant and Fino, the administrative law judge stated:

> The Board has held that resubmission of evidence that was in the record prior to the issuance of the original decision is insufficient to demonstrate a "change in conditions." Both Drs. Grant's and Fino's medical reports review evidence submitted in the [miner's] original decision as well as new evidence in the record. The Board has also held that when the basis for a physician's opinion cannot be determined then that report may be rejected. As it cannot be determined if Drs. Grant and Fino relied upon the newly submitted evidence or evidence already in the record, I afford both of their opinions little weight. [Citations omitted].

---

[8]As claimant contends, in considering whether she has demonstrated total respiratory disability pursuant to 20 C.F.R. 718.204(b)(2)(i) on remand, the administrative law judge should resolve the conflict in the evidence concerning the validity of the January 7, 2003 pulmonary function study.

[9]In her brief, claimant asserts that "she may submit new evidence showing that the denial of the duplicate claim was mistaken." Claimant's Brief at 10. However, because of the Board's holding in *Hess*, that an administrative law judge may properly review, *de novo*, the issue of whether claimant has demonstrated a material change in conditions, there is no inquiry, in the instant case, into whether there was a mistake in fact in the previous determination. Rather, claimant must demonstrate that at least one of the elements of entitlement previously adjudicated against the miner has changed since the date upon which the order denying the prior claim became final pursuant to Section 725.309. *See* discussion, *supra*.

Decision and Order at 8. The administrative law judge erred in according little weight to the opinions of Drs. Grant and Fino on this basis. As previously discussed, the administrative law judge should have applied Section 725.309 to this case, rather than Section 725.310. As a consequence, a material change must be judged in terms of a change occurring after March 1, 1982. Because Drs. Grant and Fino gave their opinions as to the miner's condition as of 2003, and the bulk of the evidence they discussed and considered was developed after the denial of the miner's previous claim, substantial evidence does not support the administrative law judge's determination. Accordingly, we instruct the administrative law judge to reconsider the weight to be accorded to the opinions of Drs. Grant and Fino on remand.

Lastly, claimant contends that the administrative law judge erred in refusing to admit Dr. Lenkey's October 16, 2003 evaluation into the record. With regard to Dr. Lenkey's 2003 evaluation, claimant asserts that she produced Dr. Lenkey's report to employer in response to its discovery requests. Claimant notes that employer then gave Dr. Lenkey's evaluation to Dr. Fino, who reviewed it as part of his consulting opinion. Claimant further notes that, thereafter, employer identified the evaluation as Employer's Exhibit 3 in its Evidence Summary Form. Claimant, therefore, maintains that she, who was unrepresented at that time, reasonably believed "that this evaluation had already been presented to the ALJ as evidence and that she did not have to submit it independently." Claimant's Brief at 13. In his response brief, the Director argues that "[a]lthough [Dr. Lenkey's] report was submitted by the employer, it appears that employer was merely forwarding this evidence, submitted by a *pro se* claimant, to the ALJ. The ALJ should have addressed whether this report was admissible as claimant's evidence under section 725.414(a)."[10] Director's Brief at 3. The Director notes that, contrary to the administrative law judge's observation, Dr. Lenkey's evaluation was listed on employer's

[10]In a December 30, 2004 letter from employer to the administrative law judge, employer stated that claimant "has sent me a number of medical records, but there was no cover letter, so I do not know whether they were sent to you as well. They should be included in the record of this case, as they include an occupational lung disease evaluation in October of 2003. . . ." In an Order issued on January 5, 2005, the administrative law judge stated that "the record will be held open until February 11, 2005, for the parties to submit additional medical records, to include any records that the claimant deems relevant in this case concerning the miner's last treatment and hospitalization, as well as the records which [employer] refers to in his December 30, 2004, [sic] letter which was sent to him by [claimant] and which the court was never provided." Thereafter, employer submitted its Evidence Summary Form, listing Dr. Lenkey's report as Employer's Exhibit 3 under the section for hospitalization records and treatment notes.

Evidence Summary Form under the category of hospitalization records or treatment notes. However, the Director maintains that "Dr. Lenkey's report pertains to a one-time examination of the miner and does not appear to be a hospitalization record or treatment note." Director's Brief at 4 n.4. The Director, therefore, states that the administrative law judge should decide whether Dr. Lenkey's evaluation falls under the category of hospitalization records or treatment notes on remand. In her Reply Brief, in regard to the Director's assertion that Dr. Lenkey's evaluation does not fall under the category of hospitalization records or treatment notes, claimant argues that the Board should direct the administrative law judge, on remand, to determine whether Dr. Lenkey's report is a hospitalization record or treatment note admissible pursuant to 20 C.F.R. §725.414(a)(4). If the administrative law judge finds that Dr. Lenkey's report is not a hospitalization record or treatment note on remand, then claimant asserts that he should allow her to redesignate her medical opinion evidence pursuant to 20 C.F.R. §725.414(a).

In his Decision and Order, the administrative law judge noted that employer "also submitted into evidence the medical report of Dr. Lenkey performed at East Ohio Regional Hospital on October 16, 2003." Decision and Order at 7 n.5. The administrative law judge stated that Dr. Lenkey's opinion would not be considered because "the Employer did not list the report on its Black Lung Evidence Summary Form." *Id.* However, as discussed above, in its Evidence Summary Form dated February 10, 2005, employer listed Dr. Lenkey's report as Employer's Exhibit 3 under the section for hospitalization records and treatment notes. Therefore, it was irrational for the administrative law judge to exclude Dr. Lenkey's report from the record on the basis that it was not listed in employer's Evidence Summary Form. Thus, we instruct the administrative law judge to reconsider his exclusion of this report on remand. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). In doing so, the administrative law judge must consider whether Dr. Lenkey's evaluation is properly categorized as hospital records or treatment notes in employer's Evidence Summary Form in accordance with Section 725.414(a)(4). If the administrative law judge determines, on remand, that Dr. Lenkey's evaluation is not a hospital record or treatment note, then the administrative law judge must consider if this physician's evaluation can be admitted into the record taking into account the evidentiary limitations outlined at 20 C.F.R. §§725.414 and 725.456(b)(1).[11]

---

[11]In addition to the arguments noted above as to claimant's belief, in her Reply Brief, claimant asserts that she should be able to redesignate Dr. Lenkey's evaluation, if the administrative law judge determines that it is not a hospitalization record or treatment note on remand. Specifically, claimant urges that, on remand, she should be able to submit (1) both of Dr. Grant's opinions as one opinion and Dr. Lenkey's evaluation as the second opinion pursuant to 20 C.F.R. §725.414(a)(2)(i); or (2) that she should be able to withdraw one of Dr. Grant's opinions and add Dr. Lenkey's evaluation as her second

In sum, we instruct the administrative law judge to first consider the evidence submitted by the parties in conjunction with the evidentiary limitations outlined in Section 725.414. The administrative law judge must next determine whether claimant has demonstrated that at least one of the elements of entitlement previously adjudicated against the miner has changed since the date upon which the order denying the prior claim became final pursuant to Section 725.309. If the administrative law judge finds, on remand, that claimant has demonstrated that at least one of the elements of entitlement previously adjudicated against the miner has changed, then he must consider the entire record to determine whether claimant is entitled to benefits on the merits of her case.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

---

opinion pursuant to Section 725.414(a)(2)(i). We note that these are issues for the administrative law judge to decide, if they are reached on remand. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).