BRB No. 97-1498 BLA

HERMAN M. WAGNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Kathy L. Snyder (Jackson & Kelly), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and MCGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (90-BLA-2446) of

[1] Claimant is the miner, Herman M. Wagner, who filed his initial application for

Administrative Law Judge Clement J. Kichuk 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). The administrative law judge[2] found that claimant's first application for benefits had been finally denied, and

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benefits on December 18, 1973, which claim was denied on March 19, 1980. Director's Exhibits 1, 49. Claimant filed the present duplicate claim on May 23, 1985. Director's Exhibit 2.

[2] This claim was initially assigned to Administrative Law Judge Charles P. Rippey who denied benefits finding that the first claim had been finally denied, thereby requiring application of the 20 C.F.R. Part 718 regulations. Judge Rippey also found that the x-ray evidence of record was insufficient to establish the presence of pneumoconiosis, and that there was no other evidence relevant to the existence of pneumoconiosis or total disability. Claimant appealed the denial to the Board who affirmed the findings that the initial claim was not viable, that the duplicate claim was subject to the Part 718 regulations, and the administrative law judge's findings

consequently, that the present duplicate claim was subject to the provisions of 20 C.F.R. Part 718. The administrative law judge further found that claimant had failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), or a material change in condition pursuant to 20 C.F.R. §725.309. The administrative law judge further denied claimant's Motion for Reconsideration regarding the viability of claimant's initial claim. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that claimant's initial claim had been finally denied, and that the present duplicate claim is subject to the provisions of 20 C.F.R. Part 718, and that remand is required to afford claimant the opportunity to receive a complete pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits. The Director, Office

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regarding the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and that total disability had not been established at 20 C.F.R. §718.204(c)(1)-(3). The Board remanded the case for consideration of medical evidence in the record not considered previously by the administrative law judge, for a finding regarding the number of years that claimant worked as a miner, and for the administrative law judge to consider the issue of causation, if that issue was reached on remand. The Board also held that claimant had established a material change in condition based on the Board's holding in *Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992). In response to employer's Motion for Reconsideration, the Board vacated the material change in condition finding in light of the holding in *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 19 BLR 2-223 (4th Cir. 1996), issued subsequent to the Board's original Decision and Order herein. On remand, the claim was assigned to Administrative Law Judge Kichuk.

of Workers' Compensation Programs, as party-in-interest, responds that the administrative law judge properly determined that the present duplicate claim is subject to the provisions of Part 718, and that there is no objection to a remand for the purpose of allowing claimant to receive a complete pulmonary evaluation, but does not address the merits of the claim.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement. *Trent, supra; Perry, supra*.

Initially, we reject claimant's argument that his first claim for benefits is still viable, thus requiring the application of the provisions of 20 C.F.R. Part 727, rather than the regulations contained at Part 718. We have previously considered and rejected claimant's contention regarding this issue. We also note that no exception to the law of the case doctrine is controlling on this issue. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989). Accordingly, we affirm the administrative law judge's application of the provisions of Part 718 to the present duplicate claim.

Notwithstanding claimant's burden of proving entitlement to benefits, the Department of Labor has a statutory duty to provide claimant with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990). In the instant case, we note that the opinion of Dr. Manchin, who examined claimant on behalf of the Department of Labor, diagnosed the existence of occupational pneumoconiosis, and indicated that claimant suffered from a mild loss of respiratory capacity. Dr. Manchin did not however, address the issue of causation. Since this opinion fails to address every required element necessaary to establish entitlement, we vacate the administrative law judge's denial of benefits and remand this case to the district director to furnish

claimant with a complete, credible pulmonary evaluation.[3] *Id*.

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed in part, vacated in part and the case is remanded to the district director to provide for a complete pulmonary examination and for further consideration of the merits of this claim in light of the new evidence.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3] We note that the Department of Labor's statutory duty to provide claimant with a complete pulmonary examination requires the physician to address every element of entitlement, but does not require that the physician's findings support claimant's burden of proof on each necessary element.