BRB No. 00-0800 BLA

RICHARD CHARLES PINAMONTI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Mary Forrest-Doyle (Judith E. Kramer, 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: SMITH and McGRANERY Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-0686) of Administrative Law Judge Lawrence P. Donnelly 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).[1] The administrative

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless

law judge credited claimant with seven years of coal mine employment and noted that the instant case involves a duplicate claim.[2] The administrative law judge determined that claimant established a material change in conditions and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718(2000). The administrative law judge found the medical opinion evidence sufficient to establish the existence of pneumoconiosis, but found the evidence insufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c)(2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred by finding the evidence insufficient to establish that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c)(2000). Claimant also notes his disagreement with the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand. The Director concedes the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1)(2000), and concedes that claimant's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(c)(2000). However, the Director asserts that the administrative law judge erred in finding the newly submitted evidence sufficient to establish a material change in conditions based on total disability. Finally, the Director notes that if, on remand, the administrative law judge discredits the opinion of Dr. Kraynak, the case should be remanded to the district director for a complete credible pulmonary evaluation. Claimant has filed a Reply Brief. Claimant accepts the Director's concessions, but contends that the other issues raised by the Director are not properly before the Board because they go beyond the scope of the issues raised on appeal.

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otherwise noted, refer to the amended regulations.

[2] Claimant filed a prior claim for benefits on July 9, 1993. Benefits were denied by the claims examiner on November 22, 1993. Director's Exhibit 17. Claimant did not pursue this claim.

Claimant also objects to the Director's attempt to develop new evidence at this point in the case.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao,* No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by Order issued on March 9, 2001 to which both claimant and the Director have responded. The Director and claimant assert that disposition of this case is not impacted by the challenged regulations. Based on the briefs submitted by the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

As a preliminary matter, we accept the concessions made by the Director on appeal, that the existence of clinical pneumoconiosis is established and that claimant's pneumoconiosis arose, at least in part, out of his coal mine employment. In view of these concessions, we reverse the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1)(2000) and 20 C.F.R. §718.203(c)(2000) and hold that claimant has established the existence of pneumoconiosis at Section 718.202(a)(1), and that his pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203.

[3] We affirm the administrative law judge's length of coal mine employment finding and his finding that the existence of pneumoconiosis is established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4)(2000), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, which held in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, BLR (3d Cir. 1997), that all types of relevant evidence must be weighed together in determining whether claimant has established the existence of pneumoconiosis. In view of our acceptance of the Director's concession at Section 718.202(a)(1) and our affirmance of the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4), and in view of the fact that the record does not contain any biopsy evidence in this living miner's claim filed in 1998, we hold that the requirements of *Williams* are satisfied, and that claimant has established the existence of pneumoconiosis.

We next consider the assertions raised by the Director concerning the administrative law judge's evaluation of the newly submitted evidence and his finding that it establishes total respiratory disability and a material change in conditions. As a preliminary matter, we reject claimant's assertion that the Board should not consider the Director's arguments regarding total disability and a material change in conditions on the basis that these assertions are not responsive to the issues raised by claimant on appeal. Inasmuch as the administrative law judge denied benefits and the Director's challenges to the administrative law judge's material change in conditions finding are supportive of the administrative law judge's ultimate decision, it is appropriate for these issues to be raised in a response brief and for these issues to be addressed by the Board. *See King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983); *see also Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994).

The Director asserts that the administrative law judge erred in finding a material change in conditions established based on Dr. Kraynak's opinion of total disability without specifically addressing whether this opinion is well reasoned and without weighing this opinion with the newly submitted contrary probative evidence, like and unlike. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The newly submitted evidence regarding disability includes the results of three pulmonary function studies and a blood gas study. The June 9, 1998 pulmonary function study yielded non-qualifying results. Director's Exhibit 7. The April 5, 1999 and the May 3, 1999 pulmonary function studies yielded qualifying values. Claimant's Exhibits 5, 15. Both of these pulmonary function studies were invalidated by Dr. Sahillioglu, Director's Exhibits 20, 22, and Dr. Kraynak validated the May 3, 1999 pulmonary function study, Claimant's Exhibit 26.[4] The blood gas study yielded non-qualifying results. Director's Exhibit 9. The only new

[4] The record also contains a report invalidating a May 25, 1999 pulmonary function study, however, the record does not contain the results of a May 25, 1999 pulmonary function study. Director's Exhibit 27.

medical opinion is Dr. Kraynak's opinion that claimant is totally disabled due to pneumoconiosis. Claimant's Exhibit 6.

The Board has held that in order to find total disability established, the administrative law judge must weigh all of the contrary probative evidence, like and unlike, to determine whether total disability has been established. *See Fields, supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987). Inasmuch as the administrative law judge did not weigh together the contrary probative evidence relevant to disability, we vacate his weighing of the newly submitted evidence regarding total disability and his finding pursuant to Section 718.204(c)(2000). However, in view of our holding that claimant has established the existence of pneumoconiosis, a requisite element of entitlement previously adjudicated against claimant, we hold, as a matter of law, that claimant has established a material change in conditions. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

On remand, in considering all of the evidence to determine whether it establishes total disability, the administrative law judge must weigh the contrary probative evidence, like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory or pulmonary impairment. In addition the administrative law judge must specifically determine whether Dr. Kraynak's opinion constitutes a well reasoned opinion, *i.e.*, whether the documentation supports the physician's assessment of the miner's health. *See Fields, supra*.

The Director also requests the Board to instruct the administrative law judge, if he discredits Dr. Kraynak's opinion, to remand the case to the district director to allow the Department of Labor to satisfy its statutory obligation to provide claimant with a complete, credible pulmonary evaluation in connection with his duplicate claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 725.406; *Cline v. Director, OWCP*, 972 F.2d 234, 16 BLR 2-137 (8th Cir. 1992); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990). This argument is premature, inasmuch as the administrative law judge has not discredited Dr. Kraynak's opinion. The Director may raise this issue with the administrative law judge on remand, as necessary.

Accordingly, the administrative law judge's Decision and Order is affirmed in part, reversed in part, and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge