BRB No. 98-1315 BLA

WILLIAM ARNOLDI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WYOMING FUEL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Alexander Karst, Administrative Law Judge, United States Department of Labor.

James R. Collins, Denver, Colorado, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (86-BLA-4850) of Administrative Law Judge Alexander Karst awarding 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 involving a duplicate claim is before the Board for the third time. We discussed fully this claim's procedural history in our previous decision on appeal. *Arnoldi v. Wyoming Fuel Co.*, BRB No. 92-0273 BLA (Jun. 27, 1995)(unpub.). We now focus only on those procedural aspects relevant to the issues raised in this appeal.

In a Decision and Order on Remand issued on September 27, 1991, Administrative Law Judge Alexander Karst found that the most recent credible x-ray readings established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and concluded that the

medical opinions of Drs. VanAs and Villalon, when considered along with two qualifying blood gas studies and the lay testimony of record, outweighed the contrary probative evidence to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204. On appeal, the Board rejected employer's allegations of error and affirmed the administrative law judge's decision as based upon permissible credibility determinations and supported by substantial evidence. [1995] *Arnoldi, supra*.

Subsequent to the issuance of the Board's decision affirming the award, the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, issued its decision in *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), which set forth a standard for determining whether a material change in conditions is established in a duplicate claim under Section 725.309(d). Because the Board had previously held that a material change in conditions was established in this claim under the Board's standard set forth in *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988), *Arnoldi v. Wyoming Fuel Co.*, BRB No. 87-2362 BLA (Aug. 31, 1990)(unpub.), a standard different from that issued by the Tenth Circuit court, employer moved for reconsideration of the Board's decision affirming the award. Employer also argued on reconsideration that the administrative law judge erred by applying the true doubt rule, and that the Board erred by affirming the administrative law judge's weighing of the medical evidence pursuant to Sections 718.202(a)(1) and 718.204(c), (b).

On reconsideration, the Board vacated its prior determination at Section 725.309(d) and remanded the case for the administrative law judge to determine whether the medical evidence submitted in the duplicate claim established a material change in conditions under the *Brandolino* standard. *Arnoldi v. Wyoming Fuel Co.*, BRB No. 92-0273 BLA at 2 (Sep. 24, 1997)(unpub.). Additionally, because it was unclear whether or not the administrative law judge had relied upon the true doubt rule in finding entitlement established,[1] the Board instructed the administrative law judge on remand to clarify this issue. [1997] *Arnoldi*, slip op. at 2-3. Finally, the Board declined to consider employer's challenges to the administrative law judge's weighing of the medical evidence because they were the same arguments raised in employer's prior appeals and already considered and rejected by the Board. [1997] *Arnoldi*, slip op. at 3. Accordingly, the Board left intact its affirmance of the

[1] In his prior decision, the administrative law judge weighed the medical evidence and appeared to find that claimant met his burden to prove entitlement. [1991] Decision and Order on Remand at 1-2. Subsequently, in a brief statement at the end of his Decision and Order, the administrative law judge remarked that "[a]t the very least" the evidence was contrary but equally probative and he would have to resolve the doubt in claimant's favor. [1991] Decision and Order on Remand at 3. Employer did not raise the true doubt issue on appeal but did so on reconsideration.

administrative law judge's weighing of the medical evidence on the merits, but instructed the administrative law judge that if he found a material change in conditions established on remand and if he had in fact applied the true doubt rule in his prior decision, then he was to reweigh the medical evidence pursuant to Sections 718.202(a)(1) and 718.204. *Id*.

On remand, the administrative law judge found that the new medical opinions, blood gas studies, and pulmonary function studies established a material change in conditions pursuant to Section 725.309(d) by demonstrating that claimant's respiratory condition worsened materially since the prior denial. Additionally, the administrative law judge explained that he based the award of benefits on his conclusion that claimant established entitlement by a preponderance of the evidence, not upon the true doubt rule. Finally, the administrative law judge added that although claimant "has already met his burden for the reasons given" in the administrative law judge's prior decision, the administrative law judge accorded additional weight to the opinion of claimant's treating physician, Dr. Villalon. [1998] Decision and Order on Remand at 5. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding a material change in conditions established pursuant to Section 725.309(d). Employer further asserts that the administrative law judge erred in his weighing of the medical evidence pursuant to Sections 718.202(a)(1), 718.204(c), and 718.204(b). In addition, employer contends that the administrative law judge erred by declining to address employer's argument that claimant unreasonably refused to submit to a medical examination. Claimant has not responded to employer's appeal and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in the appeal.

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 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). Under the

law of the Tenth Circuit, to establish a material change in conditions, "a claimant must prove for each element that was actually decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied." *Brandolino*, 90 F.3d at 1511, 20 BLR at 2-320-21. The administrative law judge must "compar[e] [the] evidence obtained after [the] prior denial to [the] evidence considered in or available at the time of [the] prior claim" to determine whether claimant has "demonstrated that each of these elements previously found against him [has] worsened materially since the previous denial." *Brandolino*, 90 F.3d at 1512, 20 BLR at 2-321.

The district director denied claimant's prior claim because the evidence then in the file did not establish total respiratory disability pursuant to Section 718.204(c). Director's Exhibit 30. Therefore, the inquiry on remand was whether the medical evidence developed since the prior claim demonstrated material worsening with respect to the element of total respiratory disability. *See Brandolino, supra*.

The administrative law judge found that claimant demonstrated a material change in his condition because the previous denial order indicated that claimant did not establish total respiratory disability, whereas in the current claim the administrative law judge concluded that claimant established the total disability element. [1998] Decision and Order on Remand at 5. The administrative law judge additionally found that claimant submitted medical evidence that his condition worsened since the previous denial. Specifically, the administrative law judge contrasted the qualifying[2] blood gas studies submitted in the current claim with the non-qualifying study submitted previously, and observed that the weight of the new medical opinions established the existence of a totally disabling respiratory impairment, whereas the single medical opinion submitted previously indicated that there was then no evidence of a pulmonary impairment. *Id*. The administrative law judge also noted that the new pulmonary function studies, although non-qualifying, yielded lower values than the non-qualifying study submitted in the prior claim. Therefore, the administrative law judge concluded that claimant established a material change in conditions.

[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Employer contends that the administrative law judge's material change in conditions finding does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer's Brief at 9-10. Based on our review of the administrative law judge's decision, we believe that the administrative law judge sufficiently referred to the evidence and adequately explained his reasoning. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803-04, 21 BLR 2-302, 2-310-12 (4th Cir. 1998); *Mangus v. Director, OWCP*, 882 F.2d 1527, 1528 n.2, 13 BLR 2-9, 2-11 n.2 (10th Cir. 1989). Therefore, we reject employer's contention.[3]

Employer next asserts that, in finding that the new, qualifying blood gas studies demonstrated material worsening, the administrative law judge ignored two medical opinions stating that the blood gas studies are normal if altitude and claimant's age are considered. Employer's Brief at 16. Drs. Repsher and Neff so testified, Hearing Transcript at 65-66, 76, but neither physician offered a method for adjusting for either of these factors. Therefore, as to altitude, their unexplained testimony conflicts with the altitude-adjusted table under which the tests in question are qualifying. Director's Exhibit 11; Employer's Exhibit 1; *see Big Horn v. OWCP [Alley]*, 897 F.2d 1052, 1055, 13 BLR 2-372, 2-379 (10th Cir. 1990) ("These tables reflect the Department of Labor's best estimate of the extent to which altitude may affect blood-gas tests in the black lung context."). As to the effect of age on blood gas studies, neither the regulations nor the medical opinions of record offer any guidance. *See Alley*, 897 F.2d at 1056 n.4, 13 BLR at 2-379-80 n.4. Under these circumstances, we find no error in the administrative law judge's analysis.

Employer additionally alleges that the administrative law judge erred by failing to analyze the medical opinions for a material change. Employer's Brief at 17-20. Instead of performing a *de novo* analysis of the medical opinions on remand, the administrative law judge referred to his prior finding, affirmed by the Board, that the medical opinions of Drs. VanAs and Villalon, as supported by the qualifying blood gas studies and the lay testimony,

[3] Employer also contends that the administrative law judge failed to analyze the x-ray readings for a material change in conditions. Employer's Brief at 11-13. The adjudicator of the first claim did not actually decide the pneumoconiosis element. Director's Exhibit 30. Therefore, claimant need not prove a material change in that element. *Brandolino*, 90 F.3d at 1511 n. 13, 20 BLR at 2-320 n.13.

established total disability pursuant to Section 718.204(c). [1998] Decision and Order on Remand at 5; [1991] Decision and Order on Remand at 2; [1995] *Arnoldi*, slip op. at 4-5. This contrasted with the situation in claim one, in which Dr. Keil found no evidence of pulmonary impairment. Director's Exhibit 30. Because the administrative law judge who has handled this claim from its inception has explained why he found that the new medical opinions support a material change in conditions based upon his previous discretionary weighing of those opinions, *see Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 873, 20 BLR 2-334, 2-338-339 (10th Cir. 1996), we find no error in his analysis and we therefore reject employer's argument.

Employer contends that the administrative law judge failed to determine whether the medical evidence of a worsening condition outweighed the evidence that employer alleges shows no change. Employer's Brief at 21-23. As discussed above, the administrative law judge incorporated his prior weighing of the evidence at Section 718.204(c) into his material change in conditions analysis on remand instead of weighing the contrary probative disability evidence over again. [1998] Decision and Order on Remand at 5; [1991] Decision and Order on Remand at 2; [1995] *Arnoldi*, slip op. at 4-5. This was reasonable under the circumstances. Bearing in mind that a claimant need only make a threshold showing of material worsening, *Brandolino*, 90 F.3d at 1511, 20 BLR at 2-317, we conclude that the administrative law judge properly found that claimant presented sufficient new evidence in the form of qualifying blood gas studies and medical opinions to demonstrate material worsening.[4] We therefore affirm the administrative law judge's finding that a material

[4] We agree with employer that the administrative law judge could have better explained his apparent conclusion that the reduced values of claimant's new, non-qualifying pulmonary

change in conditions was established pursuant to Section 725.309(d).

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function tests indicated material worsening when compared with a non-qualifying test taken five-and-a-half years earlier. Employer's Brief at 14. The regulations recognize that one's pulmonary function decreases with age, 20 C.F.R. Part 718, App. B, and thus some decrease is expected over time. However, the qualifying blood gas studies and medical opinions remain to support the administrative law judge's finding that claimant made the threshold showing of a material change in conditions. *See Brandolino, supra*; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Additionally, we have considered employer's argument that the administrative law judge failed to address the disability causation element for material worsening. Employer's Brief at 20. It is not clear to us that the causation element was actually decided in the first claim; the gist of the brief form letter sent to claimant was that he did not establish total disability. Director's Exhibit 30. Furthermore, employer does not explain how the causation element is relevant in a context where claimant was previously found not to have established total disability. *See Brandolino*, 90 F.3d at 1512 n.17, 20 BLR at 2-321 n.17.

On the merits, employer again raises the same contentions that it advanced in its previous appeals and which were already addressed by the Board in its prior decisions regarding the administrative law judge's weighing of the evidence at Sections 718.202(a)(1) and 718.204(c), (b). Employer's Brief at 24-35. The Board's previous holdings stand as the law of the case on these issues, and employer demonstrates no exception to that doctrine. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991)(Stage, J., dissenting); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting). Therefore, we reject employer's contentions.[5]

Finally, employer contends that the administrative law judge erred by failing to address its argument that claimant unreasonably refused to submit to a medical examination in 1986. Employer's Brief at 3 n.1. The administrative law judge declined to address this issue on the grounds that employer failed to raise it at the appropriate stage of the proceedings. [1998] Decision and Order on Remand at 4. Review of the record indicates that employer's counsel placed copies of correspondence regarding this issue into the record in 1986, as if preparing to make a motion to the district director or the administrative law judge, but never did so. The issue was not listed on the CM-1025 form indicating the issues to be resolved at the hearing, Director's Exhibit 31, and employer's counsel did not raise the issue at the 1987 hearing. We hold that employer waived this issue by waiting for so long to raise it with the administrative law judge. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995); *Gillen*, *supra*. Therefore, the administrative law judge did not err in declining to consider it.[6]

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[5] One seemingly new argument raised is that the administrative law judge on remand erred by citing Dr. Villalon's status as claimant's treating physician as an additional reason for relying upon his opinion. Employer's Brief at 30-31. However, the specific deficiencies employer alleges in Dr. Villalon's opinion are the same ones the Board considered previously. [1990] *Arnoldi,* slip op. at 4 n.3; [1995] *Arnoldi*, slip op. at 4-5; [1997] *Arnoldi*, slip op. at 3.

[6] Employer was not defenseless. It submitted the examination report of Dr. Repsher and a consultation report by Dr. Neff. Both doctors testified at the hearing.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge