BRB No. 99-0621 BLA

JOHN W. SATIFKA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VESTA MINING 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 Awarding Benefits On Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Debra Henry (United Mine Workers of America, District 2, Compensation Department), Belle Vernon, Pennsylvania, for claimant.

W. William Prochot (Arter & Hadden), Washington, D.C., for employer.

Michelle Gerdano (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits On Remand (90-BLA-1204) of Administrative Law Judge Thomas M. Burke 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 is before the Board for the fourth time.[1] In a Decision and Order On Remand issued on April 9, 1997, the administrative law judge denied employer's request to reopen the record to submit new evidence in light of the new standard for establishing a material change in conditions pursuant to 20 C.F.R. §725.309(d) enunciated in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The administrative law judge found a material change in conditions was established pursuant to Section 725.309(d) and found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.202(a)(1), (4); *see also* 20 C.F.R. §718.203(b). The administrative law judge further found that total disability was not demonstrated by the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(c)(1), but was demonstrated by the blood gas study and medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(2) and (4). The administrative law judge further found

[1] Claimant originally filed a claim on June 27, 1973, which was ultimately denied by the Department of Labor on review on May 3, 1979, Director's Exhibit 23. No further action was taken on this claim. Claimant filed a second, duplicate claim on January 24, 1986, Director's Exhibit 24, which was denied on June 20, 1986, inasmuch as claimant failed to establish any element of entitlement, Director's Exhibit 34. No further action was taken on this claim.

Claimant filed the instant, duplicate claim on January 4, 1988, Director's Exhibit 1. Originally, in a Decision and Order issued on June 27, 1991, the administrative law judge found nineteen and one-quarter years of coal mine employment established, found that a material change in conditions was established pursuant to 20 C.F.R. §725.309(d) and awarded benefits pursuant to 20 C.F.R. Part 718. Employer appealed and the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1) and remanded the case for reconsideration and for consideration pursuant to 20 C.F.R. §718.204(b). *Satifka v. Vesta Mining Co.*, BRB No. 91-1819 BLA (Feb. 27, 1995)(unpub.).

In a Decision and Order On Remand issued on July 17, 1995, the administrative law judge again awarded benefits pursuant to Part 718. Employer appealed and the Board noted that subsequent to the issuance of the Board's original Decision and Order, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, redefined what constitutes a material change in conditions pursuant to Section 725.309(d) in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). *Satifka v. Vesta Mining Co.*, BRB No. 95-1959 BLA (Dec. 19, 1996)(unpub.). Thus, the Board vacated the award of benefits and remanded the case for the administrative law judge to determine whether a material change in conditions was established pursuant to Section 725.309(d) in accordance with the standard enunciated in *Swarrow* and for consideration of entitlement on the merits, if reached.

total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were awarded. Finally, the administrative law judge found that because the evidence supports a finding that claimant became totally disabled due to pneumoconiosis prior to the filing of the instant duplicate claim, the administrative law judge awarded benefits from January,1988, the month the duplicate claim was filed.

Employer appealed and the Board initially held that, while the administrative law judge erred in finding a material change in conditions established pursuant to Section 725.309(d), the error was harmless in light of the administrative law judge's weighing of all of the evidence of record on the merits and finding total disability established based on the relevant newly submitted evidence. *Satifka v. Vesta Mining Co.*, BRB No. 97-1104 BLA (Apr. 29, 1998)(unpub.). The Board also affirmed the administrative law judge's denial of employer's request to reopen the record to submit new evidence in light of the new standard under Section 725.309(d) enunciated in *Swarrow*. Next, the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a) and rejected employer's contentions regarding the administrative law judge's weighing of the medical evidence pursuant to Section 718.203 and 718.204(b) and (c) and, therefore, affirmed the administrative law judge's award of benefits. Finally, the Board affirmed the administrative law judge's awarding of benefits from the date the duplicate claim was filed.

However, on reconsideration, the Board vacated the administrative law judge's finding under Section 718.204(c) and remanded the case for the administrative law judge to weigh together all of the contrary probative evidence of disability, like and unlike, as required by *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). *Satifka v. Vesta Mining Co.*, BRB No. 97-1104 BLA *on recon.* (Oct. 29, 1998)(unpub.). Finally, the Board rejected employer's remaining assertions regarding the administrative law judge's findings pursuant to Section 725.309(d) and employer's contention that claimant is totally disabled due to a shoulder injury, as they had already been fully addressed and considered by the Board.

On remand, at issue herein, the administrative law judge found total disability established pursuant to Section 718.204(c). Accordingly, benefits were awarded. On appeal, employer reiterates its prior contention that the administrative law judge erred in not reopening the record to allow employer to submit new evidence in light of the new standard under Section 725.309(d) enunciated in *Swarrow*. Thus, employer contends that liability should shift to the Black Lung Disability Trust Fund (the Trust Fund) or the case should be remanded for consideration by another administrative law judge. Employer also contends that because the administrative law judge erred in finding total disability established pursuant to Section 718.204(c), he erred in failing to reconsider whether a material change in conditions was established pursuant to Section 725.309(d) and the date of onset of claimant's

disability. Finally, employer reiterates its prior contention that the administrative law judge did not consider evidence establishing that claimant is totally disabled due to a shoulder injury. Claimant responds, urging that the administrative law judge's award of benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, responds, urging the Board to reject employer's reiteration of its prior contentions pursuant to the "law of the case" doctrine and to reject employer's contention that liability should shift to the Trust Fund because the administrative law judge did not reopen the record to allow employer to submit new evidence in light of the new standard under Section 725.309(d) enunciated in *Swarrow*.

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).

In order to establish entitlement to benefits under Part 718 in the miner's claim, it must be established that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 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). Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock*, *supra*.

In addressing total disability, the administrative law judge found that the most recent evidence of record from 1990 outweighs the prior evidence because pneumoconiosis is a progressive and irreversible disease and the most recent evidence will reflect claimant's current condition. 1999 Decision and Order at 2. Although employer contends that the administrative law judge erred in considering only the most recent evidence of record, pneumoconiosis is generally considered to be a progressive and irreversible disease and, therefore, it is within the administrative law judge's discretion to give more weight to the most recent evidence, *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).[2]

[2] As the administrative law judge noted, courts have long acknowledged that pneumoconiosis is a progressive and irreversible disease, *see Mullins Coal Co. Of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Old Ben Coal Co. v. Scott*, F.3d , BLR , No. 96-3554 (7th Cir., May 13, 1998);

The administrative law judge noted that while the two pulmonary function studies administered by Drs. Levine and Wald from 1990 were non-qualifying,[3] Claimant's Exhibit 1; Employer's Exhibit 1, there was a single qualifying blood gas study administered by Dr. Wald from 1990, Employer's Exhibit 1, the significance of which was not diminished by the pulmonary function study evidence, as they measure different types of impairment. Employer contends that the administrative law judge impermissibly interpreted the results of the most recent blood gas study as demonstrating total disability because they showed a failure to adequately oxygenate blood at rest. *See* 1999 Decision and Order at 2. Employer contends that this interpretation of the blood gas study is unsupported in the record. However, any potential error by the administrative law judge in this regard would be harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), as the most recent blood gas study of record was qualifying as it yielded values equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix C and, therefore, was sufficient to demonstrate total disability, *see* 20 C.F.R. §718.204(c)(2); Employer's Exhibit 1.

Labelle Processing Co. v. Swarrow, 72 F. 3d 308, 315, 20 BLR 2-76, 2-89 (3d Cir. 1995); *Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990); *Back v. Director, OWCP*, 796 F. 2d 169, 172, 9 BLR 2-93, 2-97 (6th Cir. 1986); *see also Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990).

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

Next, although Dr. Wald found claimant was not totally disabled, Employer's Exhibit 1, the administrative law judge found his opinion unreasoned because it was based on the non-qualifying pulmonary function study administered without discussion of the qualifying blood gas study that was also administered, which measures a different type of respiratory impairment. The administrative law judge also considered the opinion of Dr. Levine, who found claimant was totally disabled based on examination, positive x-ray, pulmonary function study revealing mild impairment, and history of shortness of breath confirmed by observations of an exercise tolerance test indicating shortness of breath on much less than ordinary exertion, and indicating that claimant could not perform tasks requiring moderate to great effort without significant shortness of breath, Claimant's Exhibit 1. The administrative law judge found that the mild impairment revealed by Dr. Levine's pulmonary function study may be consistent with a finding of total disability in light of the fact that claimant performed heavy manual labor in his coal mine employment. 1999 Decision and Order at 3. The administrative law judge also found Dr. Levine's opinion well-documented, as it was based on examination, testing and claimant's history and symptoms. Finally, contrary to employer's contention that the administrative law judge disregarded Dr. Wald's criticism of Dr. Levine's exercise tolerance test, the administrative law judge found Dr. Levine's opinion documented by his observations of claimant's results on the exercise tolerance test, which the administrative law judge noted were consistent with Dr. Wald's qualifying blood gas study, despite Dr. Wald's description that the exercise tolerance test was a "crude" method of testing.[4]

The administrative law judge also rejected employer's contention that claimant was totally disabled due to his shoulder injuries, as no physician concluded such injuries rendered claimant totally disabled and because such injuries do not explain the totally disabling

[4] Employer contends that the administrative law judge also erred by failing to consider whether the results of the blood gas study and Dr. Levine's exercise tolerance test were connected to some other disease process, such as heart disease or old age, as opposed to respiratory disease. However, the administrative law judge properly noted that Dr. Levine found claimant totally disabled due to pneumoconiosis and both Dr. Levine and Dr. Wald noted that claimant had no history of heart disease, *see* Claimant's Exhibit 1; Employer's Exhibit 1.

respiratory impairment documented by Dr. Wald's qualifying blood gas study and Dr. Levine's examination and exercise tolerance test. Thus, based on a review of the like and unlike evidence under Section 718.204(c), the administrative law judge found total disability established.

Initially, employer reiterates the same contention that it advanced in its previous appeal that the administrative law judge erred and violated employer's due process rights by not reopening the record to allow employer to submit new evidence in light of the new standard under Section 725.309(d) enunciated in *Swarrow* and, therefore, contends that liability should shift to the Trust Fund or that the case should be remanded for consideration by another administrative law judge. However, the Board already addressed employer's contention in its previous Decision and Order, affirming the administrative law judge's denial of employer's request to reopen the record to submit new evidence in light of the new standard under Section 725.309(d) enunciated in *Swarrow*, *see Satifka*, BRB No. 97-1104 BLA at 3-4. In addition, the Board previously rejected employer's contention on reconsideration as it had already been fully addressed and considered by the Board, *see Satifka*, BRB No. 97-1104 BLA *on recon*. Moreover, employer does not cite to any relevant intervening case law issued since the Board's previous Decision and Order. Thus, inasmuch as the Board's previous holding stands as law of the case on this issue, and no exception to that doctrine has been demonstrated by employer herein, *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(2-1 opinion: with Brown, J., dissenting), we reject employer's contention in this regard.[5]

Similarly, employer reiterates the same contentions that it advanced in its previous appeal that the administrative law judge erred in failing to find claimant totally disabled due to a shoulder injury and, therefore, ineligible for Black Lung benefits and that the administrative law judge erred in awarding benefits from the date of filing. The Board already addressed employer's contentions in its previous Decision and Order, rejecting employer's contention that the administrative law judge erred in failing to find claimant totally disabled due to a shoulder injury and, therefore, ineligible for Black Lung benefits and affirming the administrative law judge's awarding of benefits from the date the duplicate claim was filed, *see Satifka*, BRB No. 97-1104 BLA at 5-6. In addition on reconsideration, the Board previously rejected employer's contention that claimant was totally disabled due to

[5] The law of the case doctrine is a discretionary rule of practice, based on the policy that when an issue is litigated and decided, that decision should be the end of the matter. Thus, it is the practice of courts generally to refuse to reopen in a later action what has been previously decided in the same case, *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(2-1 opinion: with Brown, J., dissenting).

a shoulder injury as it had already been fully addressed and considered by the Board, *see Satifka*, BRB No. 97-1104 BLA *on recon*. Moreover, employer does not cite to any relevant intervening case law issued since the Board's previous Decision and Order in this regard. Thus, inasmuch as the Board's previous holding stands as law of the case on these issues, and no exception to that doctrine has been demonstrated by employer herein, *see Brinkley, supra*; *Williams, supra*, we reject employer's contentions in this regard.

In regard to the administrative law judge's finding pursuant to Section 718.204(c) on remand, employer contends that the administrative law judge did not explain why he credited the qualifying blood gas study over the contrary pulmonary function study evidence and Dr. Wald's opinion. Employer also contends that the administrative law judge's consideration of the medical opinion evidence was inconsistent.

Contrary to employer's contentions, however, the most recent blood gas study of record was qualifying and, therefore, sufficient to demonstrate total disability, *see* 20 C.F.R. §718.204(c)(2); Employer's Exhibit 1, and the administrative law judge found the results of the qualifying blood gas study consistent with Dr. Levine's opinion. Moreover, the administrative law judge did not credit the qualifying blood gas study over the non-qualifying pulmonary function study evidence, but merely noted that the significance of the blood gas study was not diminished by the contrary pulmonary function study evidence, as it measures a different type of impairment. Similarly, the administrative law judge did not credit the qualifying blood gas study over Dr. Wald's opinion, but, within his discretion, permissibly found Dr. Wald's opinion unreasoned as Dr. Wald did not discuss the qualifying blood gas study he personally administered when opining that claimant was not totally disabled. As the administrative law judge found, blood gas studies and ventilatory studies measure different types of impairment and an administrative law judge may find a physician's opinion that does not address the conflicting results between a blood gas study and a pulmonary function study that the physician administered unreasoned and/or entitled to less weight, *see Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797 (1984)(medical opinion of no impairment based only on pulmonary function study does not necessarily rule out existence of pulmonary or respiratory impairment); *see also Whitaker v. Director, OWCP*, 6 BLR 1-983 (1984).

Ultimately, it is within the administrative law judge's discretion to determine whether an opinion is adequately documented and reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, as the administrative law judge weighed all the relevant evidence, like and unlike, we affirm the administrative law judge's finding that total disability was established pursuant to Section 718.204(c) as supported by substantial evidence, *see Budash, supra*;

Fields, *supra*; *Rafferty*, *supra*; *Shedlock*, *supra*.[6]

[6] Employer notes that, while the Board previously affirmed the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d) because the administrative law judge had weighed all of the evidence of record and found total disability established based on the newly submitted evidence, *Satifka*, BRB No. 97-1104 BLA at 3, the Board ultimately vacated the administrative law judge's finding under Section 718.204(c) on reconsideration, *see Satifka*, BRB No. 97-1104 BLA *on recon*. Thus, employer contends that the administrative law judge erred in not determining whether claimant established a material change in conditions pursuant to Section 725.309(d) on remand pursuant to the standard enunciated in *Swarrow*, contending that a finding of entitlement on the merits is not sufficient to established a material change in conditions pursuant to the standard enunciated in *Swarrow*.

However, we reject employer's contention as any error by the administrative law judge in this regard is harmless, *see Larioni*, *supra*, inasmuch as the administrative law judge's finding that total disability was established pursuant to Section 718.204(c) is affirmable and was based only on the most recent evidence of record, reflecting claimant's current condition, in light of the fact that pneumoconiosis is a progressive and irreversible disease, *see Wilt*, *supra*; *Casella*, *supra*; *see also Mullins*, *supra*; *Swarrow*, *supra*; *Kowalchick*, *supra*.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits On Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge