BRB No. 99-0474 BLA

BRAXTON ALLEN Claimant-Petitioner v. MEAD CORPORATION Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: DECISION and ORDER *EN BANC*

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

William Z. Cullen (Sexton, Cullen & Jones, P.C.), Birmingham, Alabama, for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Jill M. Otte (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, BROWN, McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0397) of Administrative Law Judge Gerald M. Tierney 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 found that employer was not the responsible operator and that claimant established at least one, but not more than three, years of qualifying coal mine employment. Decision and Order at 4-6. Considering entitlement pursuant to the regulations contained in 20 C.F.R. Part 718, the administrative law judge determined that the instant claim was a duplicate claim[1] and concluded that the weight of the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 2-3, 9-10. Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Decision and Order at 10. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find a material change in conditions established. Employer responds urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that remand is required as the administrative law judge erred in his consideration of the evidence and further urges the Board to reconsider the standard to be applied in determining whether a material change in

[1] Claimant filed his initial claim for benefits on August 27, 1982, which was denied by reason of abandonment on March 31, 1983. Director's Exhibit 33. Claimant subsequently filed a second claim on July 2, 1984, which was finally denied by the Department of Labor on November 28, 1984, because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Director's Exhibit 34. Claimant filed a third claim on February 26, 1990, which was denied on July 17, 1990, for failure to establish a material change in conditions and failure to establish any element of entitlement. Director's Exhibit 35. Claimant filed his most recent claim on June 17, 1996. Director's Exhibit 1.

conditions has been established.[2]

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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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[2] The administrative law judge's responsible operator and length of coal mine employment determinations, as well as his findings pursuant to 20 C.F.R. §718.202(a)(1)-(3), are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, we hold that claimant's contention that the administrative law judge's Decision and Order fails to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), is without merit.[3] The administrative law judge fully set forth the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

Claimant further challenges the administrative law judge's material change in conditions finding, asserting that the administrative law judge should not have weighed the newly submitted evidence in adjudicating this duplicate claim. Rather, claimant maintains that the administrative law judge must consider the newly developed evidence in light of the prior denial and merely determine if there is a reasonable possibility that such evidence, if credited on the merits, could alter the previous result. *See Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). The Director also challenges the administrative law judge's material change in conditions finding, and requests that the Board abandon the *Shupink* standard.

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[3] The Administrative Procedure Act requires that each adjudicatory decision within its purview include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

A claimant filing a duplicate claim more than one year after the final denial of a previous claim must demonstrate a material change in conditions pursuant to Section 725.309. *See Dotson v. Director, OWCP*, 14 BLR 1-10 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-1 (1990)(*en banc*). This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, which has not declared the standard to apply in determining if a claimant has established a material change in conditions.[4] The Director urges the Board to adopt the standard under which a material change in conditions is established where a preponderance of the evidence developed subsequent to the denial of the prior claim establishes at least one of the elements of entitlement previously adjudicated against claimant. *See Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997); *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). Inasmuch as all of the United States Courts of Appeals which have addressed the *Shupink* standard have rejected it, we overrule our previous holding in *Shupink*, that in adjudicating a duplicate claim, an administrative law judge must consider the newly developed evidence in light of the prior denial and determine if there is a reasonable possibility that such evidence, if credited on the merits, could alter the previous result.[5] Furthermore, in cases arising in circuits where the United States Courts of Appeals have not yet addressed the standard applicable under Section 725.309, we adopt the

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit as the miner was employed in the coal mine industry in the State of Alabama. *See* Director's Exhibits 2, 35; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5] In addition to the United States Courts of Appeals for the Third, Fourth, Seventh and Eighth Circuits, both the United States Courts of Appeals for the Sixth and Tenth Circuits have also rejected *Shupink v. LTV Steel Co.,* 17 BLR1-24 (1992). *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) and *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996).

Director's position and hold that in order to establish a material change in conditions, claimant must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim at least one of the elements of entitlement previously adjudicated against him. *See Spese*, *supra*; *Harvey*, *supra*; *Rutter*, *supra*; *Swarrow*, *supra*.

With respect to the instant claim, the administrative law judge addressed whether claimant had established a material change in conditions. He weighed the newly submitted evidence pursuant to Section 718.202(a) and concluded that it was insufficient to establish the existence of pneumoconiosis and therefore insufficient to establish a material change in conditions.[6] Decision and Order at 10. As claimant's prior claim was also denied for failing

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[6] Contrary to claimant's contention, the administrative law judge reasonably determined that the opinion of Dr. Vines, diagnosing pneumoconiosis, was insufficient to meet claimant's burden of proof pursuant to 20 C.F.R. §718.202(a)(4) as the administrative law judge found the opinion was not reasoned and documented since the physician offered no explanation for his finding of pneumoconiosis. Furthermore the administrative law judge rationally determined that the contrary opinions of Drs. Goldstein and Fino, that claimant's moderate respiratory impairment was due to smoking, were supported by the majority of the objective evidence of record, "indicat[ing] that claimant does not have pneumoconiosis," and were documented and reasoned. Decision and Order at 10; Director's Exhibits 10, 28; Claimant's Exhibits 1, 3; Employer's Exhibits 1, 2; *Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Piccin v.*

to prove total disability, Director's Exhibit 35, however, claimant still has the opportunity to establish a material change in conditions with respect to this requisite element of entitlement based on the newly submitted evidence. Therefore, we vacate the administrative law judge's denial of benefits and remand the case to the administrative law judge to determine if the newly submitted evidence is sufficient to establish that claimant is totally disabled.[7] If the newly submitted evidence establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(c), and thus establishes a material change in conditions, then the administrative law judge must address all the evidence of record and determine if claimant has established entitlement to benefits. *See Spese*, *supra*; *Harvey*, *supra*; *Rutter*, *supra*; *Swarrow*, *supra*; *Ross*, *supra*.

Director, OWCP, 6 BLR 1-616 (1983).

[7] The administrative law judge indicated that Dr. Fino invalidated the qualifying pulmonary function study obtained by Dr. Green on June 30, 1995. Decision and Order at 7; Director's Exhibit 24; Employer's Exhibit 1. On remand, the administrative law judge should also consider that the record indicates that the qualifying results of this study were validated by Dr. Burki. Director's Exhibit 25.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

CASE NAME: ***Allen v. Meade Corp.***, 22 BLR 1- (2000)

DATE ISSUED: May 31, 2000

DESK BOOK SECTIONS

III.F.2 - In the "Introductory Section" (before the CASE LISTINGS section)
& the section labeled "CASE LISTINGS"

CIRCUIT COURT OUTLINE SECTIONS

II.E.2.b. - In the "Introductory Section" (before the DIGESTS section)
& the section labeled "DIGESTS"

In cases arising in circuits in which the United States Courts of Appeals have not yet addressed the standard applicable to a duplicate claim pursuant to 20 C.F.R. §725.309, the Board overruled its previous holding in ***Shupink v. LTV Steel Co.***, 17 BLR 1-24 (1992), and adopted the Director's position in ***Peabody Coal Co. v. Spese***, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*); ***Lovilia Coal Co. v. Harvey***, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997); ***Lisa Lee Mines v. Director, OWCP [Rutter]***, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), that in order to establish a material change in conditions, claimant must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim at least one of the elements of entitlement previously adjudicated against him. ***Allen v. Mead Corp.***, 22 BLR 1- (2000).