BRB No. 98-0602 BLA

WILLIAM H. BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	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 and Supplemental Decision and Order Awarding Attorney Fees and Denying Motion for Reconsideration of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Lawrence C. Renbaum (Arter & Hadden, LLP), 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 (91-BLA-1389) and the Supplemental Decision and Order Awarding Attorney Fees and Denying Motion for Reconsideration (91-BLA-1389) of Administrative Law Judge Ainsworth H. Brown 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). The instant case involves a duplicate claim filed on March 6, 1984.[1] In the initial decision, Administrative Law Judge Glenn Robert Lawrence applied the material change standard set out in *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988) and found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Judge Lawrence, therefore, considered the merits of claimant's 1984 claim. After crediting claimant with thirty-seven years of coal mine employment, Judge Lawrence found the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Judge Lawrence also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Judge Lawrence further found that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, Judge Lawrence awarded benefits. By Decision and Order dated April 19, 1994, the Board affirmed Judge Lawrence's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§725.309, 718.202(a)(1)-(3) and 718.204(c)(1) and (c)(2) as unchallenged on appeal. *Brown v. Eastern Associated Coal Co.*, BRB No. 92-1844 BLA (Apr. 19,

[1]The relevant procedural history of the instant case is as follows: Claimant filed a claim for benefits on February 13, 1980. Director's Exhibit 19. The district director denied the claim on September 16, 1980. *Id.* By letter dated December 5, 1980, an attorney informed the Department of Labor that claimant had asked him to represent him in connection with his claim for benefits. *Id.* The attorney submitted an appointment of representation form. *Id.* The attorney also requested that the Department of Labor provide him with a copy of its file on claimant's claim so that he could determine how he could assist claimant in obtaining benefits. *Id.* There is no indication that claimant took any further action in regard to his 1980 claim.

Claimant filed a second claim on March 6, 1984. Director's Exhibit 1.

1994) (unpublished). The Board also affirmed Judge Lawrence's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204(b) and (c). *Id.* The Board, therefore, affirmed Judge Lawrence's award of benefits. *Id.* Employer sought reconsideration, which the Board summarily denied. *Brown v. Eastern Associated Coal Co.*, BRB No. 92-1844 BLA (Apr. 11, 1996) (Order) (unpublished). Thereafter, employer filed an appeal with the United States Court of Appeals for the Fourth Circuit.

Subsequent to the issuance of Judge Lawrence's May 29, 1992 Decision and Order and the Board's April 19, 1994 Decision and Order, the Fourth Circuit adopted a new standard for establishing a material change in conditions. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 763 (1997). Consequently, by Order dated September 6, 1996, the Fourth Circuit granted employer's motion to remand the case to the Office of Administrative Law Judges for reconsideration in light of *Rutter*.[2] *Eastern Associated Coal Corp. v. Director, OWCP [Brown]*, No. 96-1788 (4th Cir. Sept. 6, 1996) (Order) (unpublished).

Due to Judge Lawrence's unavailability, Administrative Law Judge Ainsworth H. Brown (the administrative law judge) reconsidered the claim on remand. The administrative law judge found that Judge Lawrence's evaluation of the evidence, as affirmed by the Board, satisfied the material change standard set out in *Rutter*. The administrative law judge, noting that the Board's May 19, 1997 Order did not vacate Judge Lawrence's award of benefits, concluded that the award remained in effect. The administrative law judge subsequently denied employer's motion for reconsideration. On appeal, employer argues, *inter alia,* that the administrative law judge erred in not addressing whether the evidence was sufficient to establish a material change in condition pursuant to the standard set out in *Rutter*. Claimant responds in support of the award of benefits. In a reply brief, employer reiterates its previous contentions. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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[2]By Order dated May 29, 1997, the Board remanded the case to the Office of Administrative Law Judges for further proceedings consistent with the order of the United States Court of Appeals for the Fourth Circuit. *Brown v. Eastern Associated Coal Corp.*, BRB No. 92-1844 BLA (May 29, 1997) (unpublished).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Employer argues that the administrative law judge erred in concluding that Judge Lawrence's award of benefits was never vacated and, therefore, remained in effect. In the instant case, the United States Court of Appeals for the Fourth Circuit granted employer's motion to remand the case for reconsideration in light of *Rutter*. By Order dated May 29, 1997, the Board, following the directive of the Fourth Circuit, remanded the case to the Office of Administrative Law Judges for further proceedings consistent with the Fourth Circuit's order. Although the Board did not explicitly vacate Judge Lawrence's Decision and Order, the Board implicitly did so by remanding the case for further consideration. When the Board vacates an administrative law judge's decision, it annuls or sets aside that decision rendering it of no force and effect. *Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985). The effect of the action is to return the parties to the status quo of the administrative law judge's decision, *i.e.*, the parties resume the position that they had prior to the issuance of the administrative law judge's decision. *Id.* Consequently, contrary to the administrative law judge's conclusion, Judge Lawrence's Decision and Order was vacated, rendering it of no force and effect.

Employer also contends that the administrative law judge erred in refusing to follow the Fourth Circuit's directive to reconsider whether the evidence was sufficient to establish a material change in conditions pursuant to the standard set out in *Rutter*. An inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Muscar v. Director, OWCP*, 18 BLR 1-7, 1-8 (1993). This principle has been held to be equally applicable to the duty of an administrative agency to comply with the mandate issued by a reviewing court. *Id.* We, therefore, remand the case to the administrative law judge with instructions to address whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 in accordance with the standard set out in *Rutter.*[3]

[3]The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 763 (1997). Claimant's 1980 claim was denied

Should the administrative law judge, on remand, find the newly submitted evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, he must consider claimant's 1984 claim on the merits, based on a weighing of all the evidence of record. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

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because he failed to establish either the existence of pneumoconiosis or total disability. Director's Exhibit 19. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support either a finding of the existence of pneumoconiosis or a finding of total disability.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated. The administrative law judge's Supplemental Decision and Order Awarding Attorney Fees and Denying Motion for Reconsideration is vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge