BRB No. 98-1110 BLA

FRANCIS W. GRAHAM	)	
	)	
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 Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Ralph P. Carey, Scranton, Pennsylvania, for claimant.

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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (97-BLA-1577) of Administrative Law Judge Ainsworth H. Brown on a duplicate claim[1] filed pursuant to

[1] Claimant, Francis W. Graham, filed his first application for benefits on December 26, 1973, and the district director denied benefits on December 17, 1980. Director's Exhibit 21. Claimant did not pursue this denial. Subsequently, claimant filed a duplicate for benefits on April 17, 1989. Director's Exhibit 21. Administrative Law Judge Robert D. Kaplan adjudicated this duplicate claim and denied benefits in a Decision and Order
issued on August 28, 1991. Claimant appealed and the Board remanded the case 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge noted that this is claimant's third claim for benefits and that claimant had previously established nine and one-quarter years of qualifying coal mine employment. Next, the administrative law judge found that because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), claimant failed to establish a material change in conditions under 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred by failing to find total disability pursuant to 20 C.F.R. §718.204(c)(4). The Director, Office of Workers' Compensation Programs (the Director), filed a response brief, arguing that the administrative law judge erroneously failed to find a material change in conditions established under 20 C.F.R. §725.309. Nevertheless, the Director avers

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Administrative Law Judge Kaplan because he erred under 20 C.F.R. §718.204(c)(4). *Graham v. Director, OWCP*, BRB No. 91-2187 BLA (Apr. 13, 1993)(unpub.); Director's Exhibit 21. On remand, Administrative Law Judge Kaplan remanded the case to the district director for claimant to undergo a complete pulmonary evaluation. Subsequently, Administrative Law Judge Kaplan reviewed the additional medical evidence, again found that claimant failed to demonstrate total disability under 20 C.F.R. §718.204(c), and, accordingly denied benefits. Director's Exhibit 21. Claimant appealed and the Board affirmed the denial of benefits. *Graham v. Director, OWCP*, BRB No. 94-2708 BLA (Jan. 19, 1995)(unpub.); Director's Exhibit 21.

Subsequently, claimant filed his third application for benefits on September 6, 1996, which is the subject of the case *sub judice.* Director's Exhibit 1.

that the administrative law judge's error is not dispositive in this case, and therefore, constitutes harmless error. Consequently, the Director urges affirmance of the administrative law judge's denial of benefits.

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 the applicable law, they are binding upon this Board and may not be disturbed. 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).

The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises,[2] adopted the "one element" standard, which requires the miner to prove at least one of the elements of entitlement previously adjudicated against him to establish a material change in conditions pursuant to Section 725.309. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 317, 20 BLR 2-76, 2-94 (3d Cir. 1995); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

With respect to the issue of total disability, claimant argues that the administrative law judge properly found that the newly submitted x-ray interpretations were positive for the existence of pneumoconiosis, but improperly concluded that this evidence was of little probative value in determining disability. We disagree. The regulations provide that "a chest x-ray conducted and classified in accordance with [20 C.F.R.] §718.102 may form the basis for a finding of *the existence of pneumoconiosis*." 20 C.F.R. §718.202(a)(1) (emphasis added). Inasmuch as x-ray evidence is demonstrative of whether a miner suffers from the existence of clinical pneumoconiosis and not total disability, *see* 20 C.F.R. §718.204(c), we reject claimant's argument. *See* 20 C.F.R. §718.202(a)(1); Decision and Order at 3; Director's Exhibits 8, 9.

[2] Inasmuch as claimant's most recent coal mine employment occurred in the state of Pennsylvania, the United States Court of Appeals for the Third Circuit has jurisdiction over the instant claim. *See Broyles v. Director, OWCP*, 143 F.3d 1348, 21 BLR 2-369 (10th Cir. 1998); *Danko v. Director, OWCP*, 846 F.2d 366, 11 BLR 2-157 (6th Cir. 1988); *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

Claimant additionally argues that the administrative law judge impermissibly discounted Dr. Aquilina's opinion that claimant's respiratory impairment would preclude him from performing his usual coal mine work. *See* Director's Exhibits 5, 6. Claimant asserts specifically that the administrative law judge improperly failed to consider Dr. Aquilina's treating physician status, impermissibly undermined his Board-certification and medical expertise in anesthesiology, and incorrectly found that this opinion lacks supporting documentation and objective studies. Claimant's arguments lack merit. Although a miner's treating physician's opinion merits consideration, the administrative law judge is not required to accord a treating physician's opinion greater weight. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Furthermore, the administrative law judge properly found the opinions of Drs. Levinson and Sahillioglu more persuasive inasmuch as Dr. Levinson is Board-certified in internal medicine and the subspecialty of pulmonary disease and Dr. Sahillioglu is Board-eligible in internal medicine and the subspecialty of pulmonary disease, and consequently, these physicians have superior, demonstrated, pulmonary expertise.[3] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Burns, supra*; Decision and Order at 6; Director's Exhibits 23, 24. Finally, the administrative law judge permissibly found that Dr. Aquilina's opinion lacked supporting objective data because the underlying documentation failed to support Dr. Aquilina's conclusion that claimant is totally disabled. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985).

We next address the Director's contentions. The Director argues that the administrative law judge erred by failing to find that claimant demonstrated a material change in conditions because the newly submitted evidence establishes both the existence of pneumoconiosis and that it arose out of coal mine employment, elements previously adjudicated against claimant. Hence, the Director contends that the administrative law judge "should have found that [claimant] has established a material change in conditions, and should have reviewed the totality of the medical evidence of record, including that developed in connection with the two prior claims," in considering whether claimant is entitled to benefits. Director's Brief at 5. However, the Director asserts that the administrative law judge's error is harmless and "absolutely irrelevant to the ultimate resolution of this claim" inasmuch as the previous administrative law judge determined that the prior evidence was insufficient to establish total disability at Section 718.204(c), a finding which was affirmed by the

[3] Both Drs. Levinson and Sahillioglu opined that claimant mild pulmonary impairment would not preclude him from performing his prior coal mine employment. Director's Exhibits 15-17.

Board, and the present administrative law judge determined that the newly submitted evidence does not establish total disability. Director's Exhibit 21; Director's Brief at 6.

A review of the record reveals that when claimant filed the first two claims for benefits, December 26, 1973 and April 17, 1989, the Director repeatedly contested the issues of the existence of pneumoconiosis and whether it arose out of coal mine employment. *See* 20 C.F.R. §725.463(a); *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Simpson v. Director, OWCP*, 6 BLR 1-49, 1-51 (1983). The district director found that claimant failed to establish these elements, thereby adjudicating these issues against claimant. Director's Exhibit 21. Notwithstanding the fact that the existence of pneumoconiosis was a contested issue, Administrative Law Judge Kaplan (the previous administrative law judge) declined to render a finding under Section 718.202(a), and limited his material change in conditions discussion to the issue of total disability in his Decision and Order dated August 28, 1991. Director's Exhibit 21; *see* n.1, *supra*. After reviewing the case again on remand, Administrative Law Judge Kaplan again declined to address the issue of pneumoconiosis in his Decision and Order dated June 20,1994, because the denial of benefits was based on claimant's failure to establish total disability. *Id.* With respect to claimant's third application, however, the record indicates that the Director stipulated to the existence of pneumoconiosis arising out of coal mine employment, as corroborated by the newly submitted evidence.[4] Director's Exhibit 19. Because the Director stipulated to the existence of pneumoconiosis arising out of coal mine employment, claimant has established elements that were previously adjudicated against him. We, therefore, hold that claimant has established a material change in conditions, as a matter of law, and vacate the administrative law judge's determination pursuant to Section 725.309. Furthermore, we reject the Director's contention that the administrative law judge's error is harmless. Once a material change in conditions is established, the administrative law judge must conduct a *de novo* review of the evidence of record in its entirety, including that evidence submitted with any prior claims. Moreover, the fact that the Director stipulated to pneumoconiosis arising out of coal mine employment may have an impact upon the administrative law judge's weighing of the medical evidence on remand. Inasmuch as claimant has established, as a matter of law, a material change in conditions, we remand this case for the administrative law judge to consider *de novo* the administrative record as a whole in order to determine whether claimant is entitled to benefits. *See*

[4] Relevant to the existence of pneumoconiosis, the newly submitted evidence consists of two positive x-ray readings and the opinions of Drs. Aquilina, Sahillioglu, and Levinson diagnosing coal worker's pneumoconiosis. Director's Exhibits 5, 6, 8, 9, 15-17.

Swarrow, *supra*; *Ross*, *supra*.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge