BRB No. 00-1158 BLA

SYLVESTER E. FRISCH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
PEABODY COAL COMPANY	)	
	)	
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 - Awarding Benefits of Thomas M. Burke, Associate Chief Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Dorothy L. Page (Howard M. Radzely, Acting 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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-2441) of Associate Chief Judge Thomas M. Burke (the administrative law judge) 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).[1] This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with fifteen years of coal mine employment and found that the instant claim was a duplicate claim pursuant to 20 C.F.R. §725.309(d) (2000) because it was filed more than one year after the denial of claimant's prior claim.[2] Thus, the administrative law judge considered whether the new evidence, submitted since the denial of claimant's prior claim, established a material change in conditions pursuant to Section 725.309(d) (2000) in accordance with the standard enunciated by the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises. *See Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1010, 21 BLR 2-113, 2-129 (7th Cir. 1997)(*en banc rehearing*), *modifying* 94 F.3d 369 (7th Cir. 1996), *and affirming* 19 BLR 1-45 (1995). The administrative law judge initially considered the relevant, newly submitted evidence pursuant to 20 C.F.R. Part 718 and found that it was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). Thus, the administrative law judge found that claimant established a material change in conditions pursuant to Section 725.309(d) (2000).[3] The

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2] Claimant filed his initial claim for benefits on January 28, 1992. Director's Exhibit 27. This claim was denied by the district director on August 6, 1992. *Id*. No further action was taken on this claim and the denial became final. The instant claim was filed on September 10, 1994. Director's Exhibit 1.

[3] The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as this, which were pending on January 19, 2001.

administrative law judge further found, based on his review of all of the evidence in the record, the existence of pneumoconiosis arising out coal mine employment established pursuant to 20 C.F.R. §718.203(b) (2000) and total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204(b), (c) (2000). Accordingly, benefits were awarded.

Employer appealed the award of benefits to the Board and in *Frisch v. Peabody Coal Co.*, BRB No. 98-1037 BLA (Sept. 30, 1999) (unpub.), the Board vacated the administrative law judge's finding that the newly submitted evidence was sufficient to establish a material change in conditions pursuant to Section 725.309 (2000) because the existence of pneumoconiosis was not an element of entitlement which was previously defeated. The Board thus remanded the case to the administrative law judge to determine whether the newly submitted evidence was sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c) (2000) and thereby establish a material change in conditions under Section 725.309 (2000). If so, the Board further instructed the administrative law judge to consider whether the evidence was sufficient to establish the existence of pneumoconiosis on the merits at Section 718.202(a) (2000) and, if reached, whether the evidence was sufficient to establish that pneumoconiosis arose out of coal mine employment on the merits at Section 718.203 (2000). The Board also considered and rejected employer's specific arguments with regard to the administrative law judge's finding of total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000), but was nonetheless compelled to vacate the administrative law judge's finding at Section 718.204(b) (2000) based on the administrative law judge's flawed analysis of the material change in conditions issue and in light of its decision to remand the case for the administrative law judge to render findings on the merits with respect to the issue of the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). The Board, however, instructed the administrative law judge that if he were to find that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment on the merits at Sections 718.202(a) and 718.203 (2000) on remand, the administrative law judge could reinstate his finding that the evidence was sufficient to establish total disability due to pneumoconiosis at Section 718.204(b) (2000).

On remand, the administrative law judge found that the evidence was sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(2), (4) (2000) and, thus, that claimant established a material change in conditions pursuant to Section 725.309 (2000). On the merits, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4) and 718.203 (2000). The administrative law judge further found that total disability due to pneumoconiosis was established pursuant to Section 718.204(b) (2000). Accordingly, benefits were awarded as of September 1994, the month in which the current claim was filed.

On appeal, employer argues that the administrative law judge erred in refusing to reopen the record on remand in order to provide employer an opportunity to submit evidence regarding whether pneumoconiosis is a progressive disease. Employer also contends that the administrative law judge erred in concluding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), erred in finding that total disability was established pursuant to Section 718.204(c) (2000) and thereby finding a material change in conditions established pursuant to Section 725.309 (2000), erred in finding that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(b) (2000), and erred in analyzing the evidence regarding the date of the onset of disability. Claimant, in response, urges affirmance of the administrative law judge Decision and Order on Remand awarding benefits.[4] The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief on the merits in this appeal.[5]

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 the 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 (2000). Failure of claimant to

[4] Employer subsequently filed a Reply Brief in which it reiterates its earlier contentions.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant was entitled to the presumption found at 20 C.F.R. §718.203(b) (2000) and the findings that claimant was unable to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(1) and (3) (2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

establish any of these requisite elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Initially, employer contends that the administrative law judge erred in refusing employer's request to reopen the record on remand to allow employer to submit evidence as to whether pneumoconiosis is a progressive disease in light of an alleged change in the law by the United States Court of Appeals for the Seventh Circuit court in *Spese*. In a preliminary order issued on March 24, 2000, on remand, the administrative law judge determined that employer had not established good cause for reopening the record since the law in the Seventh Circuit on the issue of whether pneumoconiosis is a progressive disease had not undergone a significant change since the formal hearing. Thus, the administrative law judge refused employer's request to submit new evidence in support of its prior challenge of whether claimant had established the existence of pneumoconiosis.

Employer contends that the Seventh Circuit's holding in *Spese*, issued after the close of the record in this case, constitutes a significant change in the law because, employer asserts, it now holds that employer bears the burden of refuting the regulatory presumption that pneumoconiosis is progressive, thereby entitling employer to the opportunity to respond with new evidence. Employer further contends that the administrative law judge's denial of employer's right to respond violated employer's due process rights and, therefore, requires that the case must be remanded to the administrative law judge with instructions to reopen the record.

Contrary to employer's contentions, the burden of proof with respect to establishing a material change in conditions pursuant to the standard enunciated by the Seventh Circuit in *Spese* continues to be on claimant and does not change employer's evidentiary burden or the type of evidence relevant to the issue and, therefore, does not compel the reopening of the record. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-20-21 (1999). Thus, we reject employer's contentions.

Employer next contends that the administrative law judge erred in finding a material change in conditions established pursuant to Section 725.309(d) (2000) on the basis that the administrative law judge erroneously found that claimant established a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(4) (2000). Employer asserts that the Board's decision *Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000)(*en banc*, with Hall, J. and Nelson, J., concurring and dissenting), constitutes intervening case law which requires the Board to vacate the administrative law judge's finding of a material change in conditions based on his finding of total respiratory disability pursuant to Section 718.204(c) (2000). Employer's Brief at 11-18. In *Stewart*, the Board held, in accordance with the standard enunciated by the United States Court of Appeals for the Sixth Circuit in *Ross*, that in determining whether the new evidence establishes a material

change in conditions, an administrative law judge must analyze whether the new evidence submitted differs qualitatively from evidence submitted with the previously denied claim, or whether it is merely cumulative of, or similar to, the earlier evidence. The Board further held that "[i]f the trier-of-fact finds this qualitative difference, it follows that claimant's condition has worsened in accordance with the [Sixth Circuit] court's requirement." *Stewart*, 22 BLR at 1-86.

Employer's argument is misplaced. In finding a material change in conditions established, the administrative law judge properly considered the newly submitted evidence of record and found the existence of a totally disabling respiratory or pulmonary impairment, an element of entitlement which defeated entitlement in the prior case. Decision and Order on Remand at 5. The administrative law judge initially noted that the evidence submitted in the previous denial upon which claimant failed to establish total disability consisted of an invalid pulmonary function study and a nonqualifying blood gas study. Decision and Order on Remand at 5; Director's Exhibit 27. In his consideration of the newly submitted evidence, the administrative law judge acknowledged that the qualifying pulmonary function study evidence was invalid, but that the blood gas studies supported a finding of total disability at Section 718.204(c)(2) (2000). Decision and Order on Remand at 5. In addition, the administrative law judge stated that "virtually all of the physicians who addressed the issue concluded that the Claimant suffers from a totally disabling respiratory or pulmonary impairment." Decision and Order on Remand at 5. Accordingly, in assessing the evidence in accordance with the Board's remand instructions under the standard articulated by the Seventh Circuit in *Spese*, the administrative law judge permissibly concluded that the evidence was sufficient to establish total respiratory disability and, thus, that claimant established a material change in conditions pursuant to Section 725.309(d) (2000). We, therefore, affirm the administrative law judge's finding that the newly submitted medical evidence is sufficient to establish a material change in conditions pursuant to Sections 718.204(c) (2000) and 725.309(d) (2000). *Spese*, *supra*.

Employer next contends that the administrative law judge erred in finding that claimant established the existence of "legal" pneumoconiosis pursuant to Section 718.202(a)(4) (2000). Specifically, employer asserts that the administrative law judge erroneously accorded greater weight to the opinion of Dr. Cohen, who concluded that claimant suffered from pneumoconiosis, Claimant's Exhibit 7, and asserts that the administrative law judge improperly discredited the opinions of Drs. Renn, Dahhan and Tuteur, who concluded that the claimant did not suffer from pneumoconiosis, Employer's Exhibits 1, 36-38. In addressing the issue of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), the administrative law judge noted that Dr. Renn had not diagnosed a ventilatory defect and that Drs. Dahhan and Tuteur diagnosed a disabling impairment due to smoking and not coal dust exposure. Decision and Order on Remand at 7. The administrative law

judge properly accorded greater weight to the opinion of Dr. Cohen than to the contrary opinions of Drs. Renn, Dahhan and Tuteur because he found Dr. Cohen's opinion more persuasive in light of the documentation and reasoning contained in the report.[6] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge also properly accorded greater weight to Dr. Cohen's opinion because he found it to be supported by the opinions of Drs. Sandoval and Nelson who diagnosed pneumoconiosis and/or found that claimant's severe respiratory impairment was related, at least in part, to pneumoconiosis and

[6] We reject employer's assertion that the administrative law judge's reliance on Dr. Cohen's opinion is not rational. Dr. Cohen's opinion is based on a physical examination, a smoking history, a coal mine employment history, a pulmonary function study, an arterial blood gas study and an x-ray. *See* Claimant's Exhibit 7. The administrative law judge findings that Dr. Cohen's opinion is consistent with claimant's significant histories of coal mine employment (15 years) and cigarette smoking (30 years), various abnormalities on physical examination of the lungs showing chronic lung disease with rhonchi and decreased breath sounds, subjective complaints of worsening dyspnea, as well as the objective medical evidence, such as the arterial blood gas studies, which reveal a deterioration in claimant's respiratory and pulmonary function test results showing severe obstructive lung disease with a restrictive component, all of which were found by Dr. Cohen to be consistent with pneumoconiosis, is supported by substantial evidence. Decision and Order at 8; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Ogozalek v. Director, OWCP*, 5 BLR 1-309 (1982).

coal mine employment. Decision and Order at 7; *see Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). The administrative law judge reasonably concluded that Dr. Renn's opinion did not address the question of whether claimant's respiratory impairment was due to coal mine employment as Dr. Renn, unlike the other physicians, determined that the evidence did not support a finding that claimant had a ventilatory defect. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision and Order on Remand at 7.

In addition, contrary to employer's assertions, the administrative law judge extensively compared and contrasted Dr. Cohen's review of the medical literature with the opposing viewpoints by Drs. Dahhan and Tuteur and reasonably accepted Dr. Cohen's representations because of his expertise as a board certified pulmonologist and in light of his duties as a senior attending physician of Pulmonary Medicine at Cook County Hospital, an instructor of Clinical Medicine at the University of Illinois College of Medicine and the Director of the Black Lung Clinics Program at Cook County Hospital, in spite of the similar qualifications of Drs. Dahhan and Tuteur. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Clark, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); Decision and Order on Remand at 7-9. Furthermore, the Board previously rejected employer's assertion that the administrative law judge abused his discretion by subsequently admitting the post-hearing report of Dr. Cohen into the record. *See Frisch*, 98-1037 BLA at 6. Consequently, the Board's previous holding stands as the law of the case on this issue, and no exception to that doctrine has been demonstrated by employer, *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).[7] Thus, we reject employer's assertion that the administrative law judge erred in finding Dr. Cohen's opinion more persuasive that the opinions of Drs. Renn, Dahhan and Tuteur.

Regarding Section 718.204(b) (2000), employer specifically asserts that based upon the recent holding of the United States Court of Appeals for the Fourth Circuit in *U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); as well as the holdings of the Seventh Circuit in *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995) and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), the administrative law judge's previous finding of disability causation cannot be reinstated. Employer contends that the medical opinions of Drs. Tuteur and Dahhan concluded that claimant's disability was not due to coal dust exposure, and that the administrative law judge erroneously

[7] 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, such that 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, supra*; *Williams, supra*.

discredited their opinions based on a flawed determination that claimant established the existence of pneumoconiosis. Employer further argues that the administrative law judge improperly relied upon the opinion of Dr. Cohen, that claimant's totally disabling respiratory impairment was due to pneumoconiosis and smoking, as Dr. Cohen did not state the degree to which coal dust exposure was responsible.

In his earlier decision, the administrative law judge relied on the Seventh Circuit's articulation that in order to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000), claimant must prove by a preponderance of the evidence that his pneumoconiosis is a contributing cause of his total disability, such that his pneumoconiosis must be a necessary, but need not be a sufficient condition of his total disability. *See Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990); *Hawkins v. Director, OWCP*, 907 F.2d 697, 14 BLR 2-17 (7th Cir. 1990). The Board held that the administrative law judge rationally found that, based on Dr. Cohen's opinion, pneumoconiosis was a contributing cause of claimant's disability. On remand, the administrative law judge relied on the Board's holding in reinstating his finding that the evidence establishes that pneumoconiosis is a contributing cause of claimant's total disability.

Subsequent to the issuance of the administrative law judge's Decision and Order on Remand, however, the regulations concerning total disability causation were amended and became applicable to all pending claims. *See* note 1, *supra*. Pursuant to 20 C.F.R. §718.204(c)(2001):

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in 20 C.F.R. §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which was caused by a disease or exposure that is unrelated to coal mine employment.

In light of the substantive changes in the amended regulations, we are compelled to vacate the administrative law judge's findings on disability causation and remand this case to the administrative law judge to reconsider the evidence in accordance with the amended standard pursuant to Section 718.204(c) (2001) under the circumstances of this case.

Lastly, employer asserts that the administrative law judge erred in determining the date from which benefits commence. Decision and Order on Remand at 10. In light of our determination that the administrative law judge must reconsider the evidence pursuant to Section 718.204(c) (2001), we instruct the administrative law judge on remand that if he awards benefits, he must redetermine this issue under the revised regulation at 20 C.F.R. §725.503 (2001). We note that these revisions do not alter the principle that benefits must commence with the month in which the claim was filed where the evidence fails to establish when claimant became totally disabled due to pneumoconiosis. *Ziegler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge