BRB No. 98-0651 BLA

ROBERT S. BAILEY, JR.	)	
	)	
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 Second Decision and Order On Remand and Order Denying Employer's Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Douglas E. Hayes (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

Jennifer U. Toth (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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Second Decision and Order On Remand and Order Denying Employer's Motion for Reconsideration (85-BLA-6631) of Administrative Law Judge Daniel

A. Sarno, Jr., 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). This case is before the Board for the third time. Originally, in a Decision and Order issued on October 16, 1987, Administrative Law Judge Richard H. Beddow, Jr., noted that the district director found a material change in conditions established in this duplicate claim, *see* 20 C.F.R. §725.309, and adjudicated the instant claim on the merits pursuant to 20 C.F.R. Part 718.[1] Judge Beddow stated that the parties stipulated that claimant had in excess of thirty years of coal mine employment and had simple pneumoconiosis. The administrative law judge found pneumoconiosis arising out of coal mine employment established, *see* 20 C.F.R. §718.203(b), and, after considering the newly submitted evidence of record, found total disability due to pneumoconiosis established, *see* 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded. Employer appealed, and the Board initially held that the evidence of record was sufficient to establish a material change in conditions pursuant to Section 725.309 in accordance with the standard enunciated by the Board in *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988), *dismissed with prejudice*, No. 88-3309 (7th Cir., Feb. 6, 1989)(unpub.); *see also Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). *Bailey v. Eastern Associated Coal Corp.*, BRB No. 87-3331 BLA (Oct. 31, 1989)(unpub.). The Board also affirmed Judge Beddow's finding under Section 718.203(b) as unchallenged on appeal and stated that employer did not challenge the administrative law judge's finding that total disability was demonstrated by the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(c)(1). Ultimately, the Board affirmed the administrative law judge's finding that total disability due to pneumoconiosis was established pursuant to Section 718.204(b), (c), but vacated the administrative law judge's determination as to the date from which benefits should be awarded and, therefore, remanded the case for reconsideration.

[1] Claimant originally filed a Part B claim with the Social Security Administration on November 13, 1972, which was ultimately denied on review by the Department of Labor on July 8, 1980, with the notation that while claimant met the "medical standards for disability," he was still engaged in his usual coal mine employment, Director's Exhibit 19. Claimant took no further action with regard to that claim. Claimant filed a second, duplicate claim with the Department of Labor on July 8, 1983, Director's Exhibit 1, which is at issue herein.

On remand, inasmuch as Judge Beddow was no longer with the Office of Administrative Law Judges, the case was transferred to Judge Sarno, hereinafter, the administrative law judge.[2] In a Decision and Order Upon Remand issued on February 24, 1994, the administrative law judge determined the date of onset of claimant's total disability to be October 5, 1982, and ordered benefits to commence from that date. Employer appealed and again raised contentions pertaining to issues already addressed by the Board in its prior Decision and Order regarding whether a material change in conditions was established pursuant to Section 725.309 and claimant's entitlement to benefits under Part 718. Because those issues had already been addressed by the Board and employer did not demonstrate any exception to the law of the case doctrine, the Board held that the law of the case doctrine was controlling and reaffirmed Judge Beddow's determination that claimant is entitled to benefits under Part 718. *Bailey v. Eastern Associated Coal Corp.*, BRB No. 94-1415 BLA (Jan. 30, 1995)(unpub.). The Board further affirmed the administrative law judge's determination of the date of onset of claimant's total disability and, therefore, affirmed the administrative law judge's Decision and Order Upon Remand awarding benefits. On reconsideration, however, the Board noted that, subsequent to the issuance of its previous Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, overruled the Board's standard for establishing a material change in conditions under Section 725.309(d) enunciated in *Spese* and *Shupink*, *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997). *Bailey v. Eastern Associated Coal Corp.*, BRB No. 94-1415 BLA (July 28, 1997)(unpub. on recon.). Thus, the Board vacated its prior affirmance that a material change in conditions was established pursuant to Section 725.309 and remanded the case for reconsideration in accordance with the standard enunciated in *Rutter*. The Board again declined to address employer's other contentions on reconsideration regarding Judge Beddow's weighing of the evidence pursuant to Section 718.204(c)(4) and the onset date of total disability, as they were essentially the same contentions advanced in employer's prior appeal. Thus, the Board again reaffirmed the findings regarding claimant's entitlement to benefits and onset and, therefore, instructed the

[2] The case was transferred to Judge Sarno pursuant to an order giving the parties notice of the transfer and an opportunity to object, in compliance with the procedural due process rights of the parties, *see McRoy v. Peabody Coal Co.*, 10 BLR 1-33 (1987)(order), *vacated on reh'g*, 11 BLR 1-107 (1987)(*en banc* with McGranery, J., dissenting); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

administrative law judge that if on remand he found a material change in conditions established pursuant to *Rutter* and he did not disturb any of his previous findings on the issue of entitlement, he should award benefits. However, the Board noted that its holding did not prohibit the administrative law judge from exercising his discretion to reopen the record on remand for the purpose of admitting evidence regarding Dr. Modi or for any other reason.

On remand, in the Decision and Order at issue herein, the administrative law judge noted that the newly submitted evidence from claimant included two qualifying pulmonary function studies and the opinions of Drs. Piracha and Modi, both of which found claimant totally disabled due to pneumoconiosis, which the administrative law judge found were sufficient to establish total disability, *see* 20 C.F.R. §718.204, and, therefore, the administrative law judge found a material change in conditions pursuant to Section 725.309(d) in accordance with the standard enunciated in *Rutter*, *supra*. The administrative law judge also declined to reopen the record and did not disturb any of the previous findings on the issue of entitlement. Accordingly, in light of the Board's previous remand instructions, benefits were awarded. Subsequently, on reconsideration, the administrative law judge reiterated that he found, within his discretion, that it was unnecessary, in the interest of justice, to reopen the record. In addition, the administrative law judge noted that employer conceded in its brief on reconsideration that claimant should have been awarded benefits in his original claim based on the medical evidence of record. On appeal, employer contends that the administrative law judge erred in finding a material change in conditions established pursuant to Section 725.309(d) and abused his discretion by not reopening the record for the submission of evidence responsive to the new standard under Section 725.309(d) enunciated in *Rutter*, *supra*. 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 contention that the administrative law judge erred in failing to reopen the record on remand. Employer has filed a reply brief, reiterating its contentions.

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).

The United States Court of Appeals for the Fourth Circuit adopted the Director's standard for establishing a material change in conditions in a duplicate claim pursuant to Section 725.309(d), in requiring a claimant to prove at least one of the elements previously adjudicated against him, *see Rutter*, *supra*. A review of the record indicates that claimant's original claim filed on November 13, 1972, was ultimately denied by the district director on July 8, 1980, because claimant was still "engaging" in his "usual coal mine employment,"

even though the district director found that claimant met the "medical standards for disability," *see* Director's Exhibit 19. Subsequently, claimant retired from coal mine employment in October, 1982, *see* Director's Exhibits 1, 6, and filed the instant duplicate claim in July, 1983, Director's Exhibit 1.

The Act's relevant regulations at 20 C.F.R. §725.503A, implementing 30 U.S.C. §923(d), state:

> (a) In the case of a claimant who is employed as a miner at the time of a final determination of such miner's eligibility for benefits, no benefits shall be payable unless: (1) the miner's eligibility is established under Section 411(c)(3) of the act; or (2) the miner terminates his coal mine employment within 1 year from the date of the final determination of the claim.
>
> (b) ... If the miner's employment continues for more than 1 year after a final determination of eligibility, such determination shall be considered a denial of benefits on the basis of the miner's continued employment, and the miner may seek benefits only as provided in §725.310, if applicable, or by filing a new claim under this part.[3]

20 C.F.R. §725.503A, implementing 30 U.S.C. §923(d). *See also* 20 C.F.R. §§718.204(f), 727.205(c)(No miner who is engaged in coal mine employment shall...be entitled to any benefit[s] under this part while so employed). In addition, 20 C.F.R. §725.202(b), Conditions of entitlement; miner, states:

> An individual is eligible for benefits under this subchapter if the individual:
>
> (1) Is a miner as defined in this section; and
> (2) Is totally disabled due to pneumoconiosis (see part 718 of this subchapter; also § 725.503A); and
> (3) Has filed a claim for benefits in accordance with the provisions of this part.

20 C.F.R. §725.202(b). Finally, 20 C.F.R. §725.203, "Duration of entitlement, miner," states:

> (a) An individual is entitled to benefits ... beginning with the first month in which all of the conditions for entitlement prescribed in § 725.202 are satisfied.

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[3] The instant claim cannot be considered a request for modification under 20 C.F.R. §725.310, inasmuch as it was filed more than a year after the denial of claimant's prior claim. *See* 20 C.F.R. §725.310; Director's Exhibits 1, 19.

> (b) The last month for which such individual is entitled to benefits is the month before the month during which either of the following events occurs:
> (1) the miner dies; or (2) The miner's total disability ceases (see § 725.503A).

20 C.F.R. §725.203. Thus, cessation of coal mine employment either prior to or within a year of a final determination of eligibility pursuant to Section 725.503A(b) is a condition of entitlement, as referenced by Section 725.202(b), *see also* 20 C.F.R. §725.203(a).

Moreover, pursuant to Section 725.203(b)(2), referencing Section 725.503A, a miner no longer is considered totally disabled if he continues to work in coal mine employment more than one year after a final determination of eligibility or he returns to coal mine employment after receiving benefit payments.[4] *See* 20 C.F.R. §§725.203(b)(2); 725.503A(b); *see also* 20 C.F.R. §718.404. Thus, the miner subsequently is required to establish that he is totally disabled either by a petition for modification pursuant to Section 725.310 or a new, duplicate claim, *see* 20 C.F.R. §725.503A(b).

[4] Pursuant to 20 C.F.R. §725.503A(c), a miner in payment status who returns to coal mine employment shall have his payments suspended and if the miner again terminates his employment, the district director may require further medical examination before authorizing the payment of benefits again, *i.e.*, the miner may be required to again establish that he is totally disabled. 20 C.F.R. §725.503A(c); *see also* 20 C.F.R. §718.404.

In the instant case, to establish a material change in conditions pursuant to Section 725.309(d) in accordance with the standard enunciated in *Rutter*, one must first determine the basis of the prior denial: that claimant continued to work for more than a year after a final determination of eligibility pursuant to Section 725.503A(b), and, therefore, was not considered totally disabled, even though claimant met the "medical standards for disability," *see* 20 C.F.R. §§725.203(b)(2); 725.503A(b). However, evidence of claimant's subsequent retirement from coal mine employment in October, 1982, enabled him to establish that he had become totally disabled within the meaning of the Act; thus, he established the element of entitlement previously adjudicated against claimant, and, therefore, a material change in conditions pursuant to Section 725.309(d) in accordance with the standard enunciated in *Rutter*.[5] Consequently, any error by the administrative law judge in finding a material change in conditions established pursuant to Section 725.309(d) without, as employer contends, weighing the new contrary evidence of record is harmless, since employer does not dispute that claimant ceased working in 1982. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer further contends, however, that the Board erred in its previous Decision and Order On Reconsideration in declining to send this case back for consideration of evidence regarding Dr. Modi and that the administrative law judge abused his discretion by not reopening the record for the submission of evidence responsive to the Section 725.309(d) standard enunciated in *Rutter*. Contrary to employer's initial contention, the Board previously held that it was within the administrative law judge's discretion to reopen the record on remand for the purpose of admitting evidence regarding Dr. Modi or for any other reason. It is within the administrative law judge's discretion to reopen the record if he finds that further development of the evidence is warranted, *see Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992)(Brown, J., concurring; Smith, J., dissenting); *Lynn v. Island Creek Coal Co.*, 11 BLR 1-146 (1989); *see also Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986). In this case, the administrative law judge, within his discretion, found it would not serve the interest of justice to reopen the record, *see Cochran*

[5] The administrative law judge also found that employer conceded in its brief on reconsideration before the administrative law judge that claimant should have been awarded benefits in his original claim, *see* Order Denying Employer's Motion for Reconsideration at 2, which also supports the fact that claimant's retirement from coal mine employment is sufficient to establish a material change in conditions pursuant to Section 725.309(d) in accordance with the standard enunciated in *Rutter*. Moreover, employer's contention that the newly submitted evidence is insufficient to establish total disability is illogical in light of the Board's prior affirmance of Judge Beddow's finding that total disability was established on the merits pursuant to Section 718.204(c) based, in part, on his proper weighing of all of the newly submitted evidence.

v. Consolidation Coal Co., 16 BLR 1-101 (1992). In addition, we reject employer's contention that it should be allowed the opportunity to present evidence addressing the standard enunciated in *Rutter*. As the standard enunciated by the Fourth Circuit in *Rutter* did not change employer's evidentiary burden or the type of evidence relevant to meeting the burden of proof for establishing a material change in conditions pursuant to Section 725.309(d), *Rutter* does not compel the reopening of the record, *see Troup v. Reading Anthracite Co.*, BLR , BRB No. 98-0143 BLA (Nov. 15, 1999)(*en banc*).

Finally, employer again raises the same contentions that it advanced in its previous appeals and which were already addressed by the Board in its prior Decisions and Orders regarding the administrative law judge's weighing of the evidence at Section 718.204(c)(4) and his determination as to the onset date of claimant's disability. Inasmuch as the Board's previous holdings stand as law of the case on these issues, 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 contentions in this regard.[6]

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[6] 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 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).

Specifically, contrary to employer's contention that the administrative law judge made no findings on the exertional requirements of claimant's coal mine employment, Judge Beddow noted in his original 1987 opinion that claimant's last job "required him to lift heavy electrical and water hoses" and "shoveling coal," 1987 Decision and Order at 3. Employer also contends that two recent opinions of the Fourth Circuit Court are intervening case law issued since the findings were made pursuant to Section 718.204(c) on the merits and therefore require remand. We reject employer's contentions.

Employer notes that in *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), the Court held that an administrative law judge may not rely merely on the numerical weight of the evidence or the most recent evidence or the opinion of a treating physician without any further explanation. However, Judge Beddow did not rely on any of these factors when rendering his finding pursuant to Section 718.204(b), (c).

In addition, in *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997), the Court held that if a physician finds no impairment, the physician need not address the exertional requirements of the miner's usual coal mine employment. Employer contends,

therefore, that, conversely, a physician finding total respiratory or pulmonary disability must demonstrate knowledge of the exertional requirements of the miner's usual coal mine employment. However, as the Board noted in its prior Decision and Order, Drs. Piracha and Modi found claimant to be totally disabled from *any* coal mine employment. Moreover, a medical opinion only needs to describe either the severity of the impairment or the physical effects imposed by a miner's respiratory impairment in such a way that the administrative law judge can infer that the miner is totally disabled under Section 718.204(c)(4), *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*), and, again, the ultimate finding regarding total disability as required by the regulations is a legal determination to be made by the administrative law judge, not the physician, *see Hvizdzak, supra*; *see also Aleshire, supra*.

Finally, intervening law, by itself, does not mandate remand. Rather, to necessitate remand, the application of intervening law must have the effect of materially altering the result below; or, stated differently, a remand must be had when the application of intervening case law is necessary to correct a "manifest injustice." *See Riley v. Director, OWCP*, 7 BLR 1-139 (1984), *citing Hormel v. Helvering*, 312 U.S. 552 (1941); *see also Tackett, supra; Lynn, supra*. Thus, the application of *Akers* and *Lane* to the instant case would not alter the decision below and remand is not required.

Accordingly, the administrative law judge's Second Decision and Order On Remand and Order Denying Employer's Motion for Reconsideration awarding benefits are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge