BRB Nos. 99-0218 BLA
and 99-0218 BLA-A

DUANE R. WRIGHT	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
LABELLE PROCESSING COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Christopher Pierson (Davies, McFarland & Carroll), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0098) of Administrative Law Judge Michael P. Lesniak 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 credited claimant with at least twenty years of qualifying coal mine employment as stipulated by the parties, and determined that the claim, filed on December 16, 1996, was subject to the duplicate claim provisions at 20 C.F.R. §725.309, as it was filed more

than one year after the final denial of claimant's original claim.[1] The administrative law judge found that the new evidence submitted in support of this duplicate claim was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), the element of entitlement previously adjudicated against claimant, thus claimant failed to establish a material change in conditions pursuant to Section 725.309. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings

[1]Claimant filed his original claim for benefits on October 1, 1987. Director's Exhibit 35. In a Decision and Order issued on July 16, 1990, Administrative Law Judge Richard K. Malamphy awarded benefits. Director's Exhibit 35. On appeal, the Board affirmed Judge Malamphy's finding that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(3), as unchallenged on appeal, but vacated his findings pursuant to Section 718.204(c)(4) and remanded for a reevaluation of the medical opinions. *Wright v. LaBelle Processing Co.*, BRB No. 91-0143 BLA (July 21, 1992) (unpub.). In a Decision and Order on Remand issued on November 13, 1992, Judge Malamphy found the evidence insufficient to establish total respiratory disability at Section 718.204(c)(4), and denied benefits. Director's Exhibit 35. Claimant's appeal to the Board was dismissed at claimant's request by Order dated October 29, 1993. Director's Exhibit 35.

pursuant to Section 718.204(c)(4). Employer responds, urging affirmance of the denial of benefits, and cross-appeals, contending that the administrative law judge erred in failing to relitigate the issue of the existence of pneumoconiosis. Claimant responds in opposition to the arguments raised in employer's cross-appeal. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

[2]We affirm, as unchallenged on appeal, the administrative law judge's finding that the new evidence submitted in support of this duplicate claim was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Turning first to employer's cross-appeal, employer contends that the administrative law judge erred in finding that employer was precluded from relitigating the issue of the existence of pneumoconiosis. From the arguments raised in employer's brief, it appears that employer has misconstrued the administrative law judge's analysis at Section 725.309 to reflect a refusal to adjudicate the issue of pneumoconiosis in the event the administrative law judge reached the merits of this duplicate claim. Contrary to employer's arguments, however, the administrative law judge acted in accordance with law in determining that, inasmuch as the judgment was final in the prior claim, Judge Malamphy's findings could no longer be attacked, and that because claimant previously established the existence of pneumoconiosis arising out of coal mine employment, the weight of the new evidence submitted in support of the present claim had to establish total respiratory disability pursuant to Section 718.204(c)(1)-(4) in order to satisfy claimant's burden of establishing a material change in conditions at Section 725.309. Decision and Order at 8; *see LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The administrative law judge properly indicated that "[i]n the event that a material change is shown, all record evidence will then be reviewed, including the evidence relating to pneumoconiosis," in determining whether claimant is entitled to benefits under the Act.[3] Decision and Order at 8; *see*

[3]Contrary to the arguments raised in claimant's response brief, however, once a material change in conditions has been established at Section 725.309, claimant cannot successfully invoke the doctrine of collateral estoppel to preclude relitigation of the issue of the existence of occupational pneumoconiosis based on the administrative law judge's evaluation of both the old and new evidence of record. For a party to be estopped from relitigating an issue, the following elements must be present: (1) the issue sought to be precluded must be the same as the one involved in the prior action; (2) the issue must have

Swarrow, supra. Consequently, we reject employer's arguments on cross-appeal.

Turning to claimant's appeal, claimant challenges the administrative law judge's finding that the new evidence was insufficient to establish total respiratory disability at Section 718.204(c)(4) and a material change in conditions at Section 725.309. In assessing the new medical opinions at Section 718.204(c)(4), the administrative law judge determined that only Dr. Levine concluded that claimant suffered a totally disabling respiratory impairment. The administrative law judge found that the contrary opinions of Drs. Fino and Cho were entitled to greater weight because they were better supported by the non-qualifying blood gas studies and ventilatory studies of record, and that Dr. Fino's opinion was entitled to determinative weight based on his superior qualifications. Decision and Order at 9. Given the fact that claimant exhibited no shortness of breath after undergoing Dr. Levine's step stool test, the administrative law judge found that Dr. Levine failed to provide adequate reasoning and support for his conclusion that claimant was totally disabled, and thus the administrative law judge gave less weight to Dr. Levine's opinion on the ground that it was not well reasoned. Decision and Order at 9. Claimant accurately notes, however, that Dr. Levine explained in his deposition that the step stool test was conducted merely to determine whether claimant could perform mild physical activity without shortness of breath, and the results showed that claimant could do so. *See* Director's Exhibit 32 at 8. Claimant asserts, however, that his usual coal mine employment involved heavy labor, and that Dr.

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been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment. *In re Docteroff*, 133 F.3d 210 (3d Cir. 1997); *see Witkowski v. Welch*, 173 F.3d 192 (3d Cir. 1999); *Haize v. Hanover Ins. Co.*, 536 F.2d 576 (3d Cir. 1976). In the present case, inasmuch as benefits were denied in claimant's original claim for failure to establish total respiratory disability pursuant to Section 718.204(c), Judge Malamphy's finding of the existence of occupational pneumoconiosis was not necessary to support the adverse judgment. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*); *Haize, supra.*

Levine testified that the reduced values on claimant's pulmonary function studies demonstrated an impairment which was sufficient to disable him from his job duties as a sample preparer. *See* Director's Exhibit 32 at 8-10, 32. Claimant additionally argues that the administrative law judge should not have credited Dr. Cho's opinion without first determining whether it was well reasoned, and should not have accepted Dr. Fino's opinion, that claimant was not disabled from performing his job as a sample preparer, without first determining whether Dr. Fino's understanding of claimant's duties was accurate. Claimant's arguments have merit. The ultimate finding of disability is a legal determination to be made by the administrative law judge through consideration of the exertional requirements of claimant's usual coal mine work in conjunction with medical opinions as to the miner's work capability. *See Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). Inasmuch as Dr. Fino testified that claimant's moderate obstructive impairment did not prevent him from performing sedentary to moderate labor, but did prevent him from performing heavy labor, *see* Claimant's Exhibit 4 at 18; Employer's Exhibit 14 at 28, Dr. Fino's opinion is not necessarily inconsistent with Dr. Levine's opinion, thus the administrative law judge should have determined the exertional requirements of claimant's usual coal mine employment and compared them with Dr. Fino's assessment. *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc* recon.); *Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48 and 13 BLR 1-46 (1986)(*en banc), aff'd on recon.* 9 BLR 1-104 (1986); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). We therefore vacate the administrative law judge's findings pursuant to Section 718.204(c)(4), and remand this case for the administrative law judge to reevaluate the new medical opinions thereunder, assign them appropriate weight, and determine whether they demonstrate a totally disabling respiratory impairment. *See Budash, supra*. If so, the administrative law judge must determine whether the new medical opinions outweigh the contrary probative new evidence under Section 718.204(c), *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and establish a material change in conditions at Section 725.309, in which event the administrative law judge must adjudicate the merits of this duplicate claim based on his assessment of both the old and new evidence of record. *See Swarrow, supra*.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part, vacated in part, and this 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

REGINA C. McGRANERY
Administrative Appeals Judge