BRB No. 05-0398 BLA

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| SHERMAN F. LESTER | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| PEABODY COAL COMPANY | ) | |
| | ) | DATE ISSUED: 10/28/2005 |
| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order on Modification Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C. for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification Denying Benefits (01-BLA-0731) of Administrative Law Judge Richard A. Morgan rendered on a duplicate 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

[1] Claimant's initial application for benefits, filed on May 15, 1995, was denied by the district director on February 28, 1996 because claimant did not establish that his totally disabling respiratory impairment was due to pneumoconiosis. Director's Exhibit 26. Claimant filed his current application for benefits on March 24, 1998. Director's Exhibit 1. Administrative Law Judge Richard A. Morgan denied benefits on October 11,

the Board for the second time. The full procedural history of this claim was summarized in our prior decision in this case. *Lester v. Peabody Coal Co.*, 22 BLR 1-183 (2002)(*en banc*). In *Lester*, the Board reversed the administrative law judge's order granting claimant's request to withdraw his duplicate claim, and remanded the case for the administrative law judge to consider claimant's request to modify the denial of his duplicate claim. *Lester*, 22 BLR at 1-191.

On remand, the administrative law judge credited claimant with at least twelve years of coal mine employment pursuant to the parties' stipulation and found that claimant smoked approximately one pack of cigarettes per day for at least forty-five years. Considering all the medical evidence developed since the 1996 denial of claimant's prior claim, the administrative law judge found that claimant did not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found that claimant did not demonstrate a material change in conditions as required by 20 C.F.R. §725.309(d)(2000). Accordingly, the administrative law judge found no mistake in a determination of fact in the denial of claimant's duplicate claim pursuant to 20 C.F.R. §725.310(2000), and again denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical evidence when he found that claimant did not establish a material change in conditions. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs has indicated that he will not file a substantive response 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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2000 because claimant did not establish a material change in conditions as required by 20 C.F.R. §725.309(d)(2000). Director's Exhibit 58. Claimant timely requested modification of that determination. Director's Exhibits 60, 61.

[2] The administrative law judge's findings regarding the length of claimant's coal mine employment and smoking histories, and his determination that Dr. Thavaradhara's medical opinion did not support a finding that claimant is totally disabled due to pneumoconiosis, are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the duplicate claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000).[3] The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant 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)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id*. Where a claimant requests modification of a finding that he did not establish a material change in conditions, the administrative law judge should consider whether the evidence submitted with the duplicate claim, plus any evidence submitted on modification, establishes a material change in conditions pursuant to Section 725.309(d). *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998).

Because the miner's previous claim was denied for failure to establish that his total disability was due to pneumoconiosis, Director's Exhibit 26, the issue before the administrative law judge was whether all the evidence developed in the subsequent claim, including that which was submitted with the request for modification, established a material change in conditions with respect to the issue of disability causation since the 1996 denial of claimant's first (*i.e.*, prior) claim. *See* 20 C.F.R. §725.309(d)(2000); *Rutter* 86 F.3d at 1362, 20 BLR at 2-235; *Hess*, 21 BLR at 1-143. The administrative law judge followed this procedure on remand. Decision and Order at 17-18, 20, 22. Consequently, claimant's assertion that the administrative law judge did not properly consider his request for modification of the denial of his duplicate claim lacks merit.

Pursuant to Section 718.204(c)(1), the administrative law judge discounted Dr. Gaziano's opinion that claimant is totally disabled due to pneumoconiosis because Dr.

[3] The Department of Labor's recent revisions to 20 C.F.R. §725.309(d) do not apply to this claim, because this claim was pending on January 19, 2001, the effective date of the revised regulations. 20 C.F.R. §725.2(c).

Gaziano noted a forty-year smoking history, but "did not discuss what effect, if any, such smoking history has on Claimant's pulmonary impairment." Decision and Order at 21. The administrative law judge is authorized to consider the quality of a physician's explanation and reasoning, *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*), and claimant has alleged no error in this particular finding by the administrative law judge regarding Dr. Gaziano's opinion. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). We therefore affirm the administrative law judge's discounting of Dr. Gaziano's opinion on this ground, and we need not address claimant's allegation that the administrative law judge did not properly analyze Dr. Gaziano's opinion as to the extent of claimant's respiratory impairment. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). Since the administrative law judge validly discounted the only medical evidence supportive of claimant's burden at Sections 718.204(c)(1) and 725.309(d)(2000), we affirm the administrative law judge's findings thereunder. Accordingly, we need not address claimant's additional arguments alleging error in the administrative law judge's consideration of other medical evidence of record.

Based on the foregoing, we affirm the administrative law judge's finding that the duplicate claim evidence plus that submitted on modification did not establish the material change in conditions required by Section 725.309(d)(2000) in this case. *See Rutter*, 86 F.3d at 1362, 20 BLR at 2-235; *Hess*, 21 BLR at 1-143. Therefore, we affirm the administrative law judge's denial of claimant's request for modification of the denial of his duplicate claim.

Accordingly, the administrative law judge's Decision and Order on Modification Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge