BRB No. 99-0386 BLA

DOUGLAS W. FLYNN	)	
	)	
Claimant-	)	
Respondent	)	
	)	DATE ISSUED:
v.	)	
	)	
GRUNDY MINING COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF	)	
WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order on Remand of Fletcher E. Campbell, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (85-BLA-7915) of Administrative Law Judge Fletcher E. Campbell with respect to 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 a fifth time.[1] In a Decision and Order issued on July 27, 1995, the Board indicated that in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit adopted a new standard for determining whether a material change in conditions was demonstrated pursuant to 20 C.F.R. §725.309. *Flynn v. Grundy Mining Co.[Flynn IV]*, BRB No. 95-1111 BLA (July 27, 1995)(unpub.). The Board held that inasmuch as the administrative law judge permissibly determined that Dr. Fritzhand's 1984 report was sufficient to establish that claimant is totally disabled due to pneumoconiosis, a material change in conditions was established as a matter of law. *Id*. The Board also rejected employer's argument that Dr. Fritzhand's 1984 opinion did not support a finding of pneumoconiosis under 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis under 20 C.F.R. §718.204(b). The Board affirmed, therefore, the award of benefits. *Id*.

Employer requested reconsideration of the Board's Decision and Order, arguing that the Board erred in rendering a *de novo* finding that the evidence is sufficient to establish a material change in conditions. The Board held that under the standard adopted by the Sixth Circuit in *Ross*, the administrative law judge was required to consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the existence of such an element is established, a material change in conditions has been demonstrated as a matter of law. *Flynn v. Grundy Mining Co. [Flynn V]*, 21 BLR 1-40, 1-42 (1997). The Board further indicated that under the *Ross* standard, the administrative law judge is required to identify how the newly submitted evidence

[1]A complete recitation of the procedural history of this case prior to the Board's Decision and Order on Reconsideration is set forth in *Flynn v. Grundy Mining Co.[Flynn IV]*, BRB No. 95-1111 BLA (July 27, 1995)(unpub.), slip op. at 1 n.1.

differs qualitatively from the evidence previously submitted which had been deemed insufficient to establish the requisite element of entitlement in the first claim. *Id*. at 1-43. The Board concluded, therefore, that the Sixth Circuit required that a miner show that there has been a worsening in his physical condition in order to have his claim reconsidered on the merits if more than one year has passed since the final denial of a prior claim. *Id*. Inasmuch as the administrative law judge did not make findings relevant to the latter aspect of the *Ross* standard, the Board remanded the case to the administrative law judge with instructions to reconsider Dr. Fritzhand's 1980 and 1984 reports and explicitly determine whether the conclusions set forth in the 1984 report differ qualitatively from those set forth in the 1980 report. *Id*. at 1-44-1-45. The Board affirmed, however, the administrative law judge's finding that claimant is entitled to benefits on the merits. *Id*. at 1-45.

In a brief submitted to the administrative law judge on remand, employer referred to a new medical report prepared by Dr. Branscomb at employer's request and attached a copy to the brief. In his Decision and Order on Remand, the administrative law judge refused to admit or consider Dr. Branscomb's report. In addition, the administrative law judge concluded that Dr. Fritzhand's 1984 report contained a finding that claimant is totally disabled due to pneumoconiosis and that his condition had become worse since 1980. The administrative law judge determined, therefore, that claimant established a material change in conditions pursuant to Section 725.309 and awarded benefits. Employer subsequently filed the present appeal in which it contends that the administrative law judge erred in failing to address the medical report of Dr. Branscomb and in finding that claimant demonstrated a material change in conditions. The Director, Office of Workers' Compensation Programs (the Director) has responded and although he takes issue with the Board's interpretation of the *Ross* standard, the Director urges affirmance of the award of benefits. Employer has replied, reasserting its allegations of error.

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 applicable 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).

Employer argues initially that the administrative law judge erred in declining to admit and consider the record review in which Dr. Branscomb stated that claimant is not totally disabled due to pneumoconiosis. We disagree. The administrative law judge is afforded broad discretion in determining whether to

reopen the record on remand from the Board in order to avoid manifest injustice to the parties. *See* 20 C.F.R. §725.456(e); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989). In the present case, the administrative law judge did not abuse his discretion inasmuch as he rationally based his determination upon counsel's failure to move for the inclusion of the report in the record and the fact that Dr. Branscomb's record review did not address the specific issue to be determined on remand concerning the significance of Dr. Fritzhand's medical reports. Decision and Order on Remand at 5-6 n.4; *see Cochran*, *supra*; *Lynn*, *supra*. In addition, there is no merit in employer's assertion that there has been a change in the legal standard concerning duplicate claims that mandates the reopening of the record to receive new evidence. The United States Court of Appeals for the Sixth Circuit issued *Ross* in 1994. Thereafter, employer had the opportunity to move for the admission of additional evidence in the record prior to its submission of Dr. Branscomb's 1997 opinion with its brief on remand, but did not do so. Thus, the administrative law judge did not err in declining to reopen the record for the admission of Dr. Branscomb's report.[2] *See Lynn*, *supra*.

Turning to the administrative law judge's consideration of Dr. Fritzhand's opinions on remand, employer attempts to reargue whether the administrative law judge acted properly in crediting Dr. Fritzhand's 1984 opinion as a reasoned and documented diagnosis of total disability due to pneumoconiosis. Inasmuch as the Board previously affirmed the administrative law judge's finding in this regard and employer has not identified any grounds upon which the Board's holding should be altered, our affirmance of the administrative law judge's finding constitutes the

[2]Employer's contention that the Board adopted a new standard in *Rowe v. Johnson Coal Co.*, BRB No. 97-1140 BLA (May 15, 1998)(unpub.), which requires the administrative law judge to reopen the record on remand when relevant evidence is developed subsequent to the hearing is also without merit. In *Rowe*, the Board merely recognized the administrative law judge's appropriate exercise of his discretion in reopening the record and admitting a medical report submitted on remand.

law of the case and will not be disturbed. *See Flynn V*, *supra*; *Flynn IV*, *supra*; *Brinkley v. Peabody Coal Co.,* 14 BLR 1-147 (1990).

Regarding the administrative law judge's determination that Dr. Fritzhand's 1984 opinion is sufficient to establish a material change in conditions in accordance with the standard set forth in *Ross*, employer alleges that the administrative law judge erred in applying *Lisa Lee Mines v. Director, OWCP* [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), in a case arising within the jurisdiction of the Sixth Circuit and in determining that Dr. Fritzhand's 1984 report was qualitatively different from his earlier report.[3] Upon review of the administrative law judge's findings, we hold that the administrative law judge's determination that Dr. Fritzhand's 1984 report is sufficient to establish a material change in conditions is rational and supported by substantial evidence and accords with the standard enunciated in *Ross*.

[3]In *Lisa Lee Mines v. Director, OWCP* [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit held that a prior denial is treated as correct such that any medical opinions previously addressed are deemed to be insufficient to establish the elements of entitlement adjudicated against claimant.

The central issue before the administrative law judge on remand was whether Dr. Fritzhand's 1984 report differed qualitatively from his 1980 report, which by virtue of the denial of claimant's initial claim had been deemed insufficient to establish total disability due to pneumoconiosis, such that it logically followed that claimant's condition had worsened since 1980. *See Ross*, *supra*. The administrative law judge determined correctly that in 1984, Dr. Fritzhand conducted a new physical examination of claimant during which he obtained pulmonary function studies and blood gas studies which reflected a decline in values since 1980 and that Dr. Fritzhand "downgraded" claimant's physical limitations from mild to sedentary activity. Decision and Order on Remand at 8; Director's Exhibit 5. The administrative law judge reasonably concluded, therefore, that Dr. Fritzhand's 1984 report was qualitatively different from his 1980 report, as "Dr. Forehand used new objective medical evidence to determine that claimant's condition has worsened since the prior examination" and was sufficient to establish a material change in conditions under Section 725.309 inasmuch as claimant established an element of entitlement adjudicated against him in the disposition of his first claim.[4] *Id*.; *see Ross*, *supra*; *Flynn V*, *supra*. Thus, we affirm the administrative law judge's finding pursuant to Section 725.309 and in light of our prior affirmance of the administrative law judge's finding that claimant established entitlement to benefits on the merits, we also affirm the award of benefits under 20 C.F.R. Part 718.

[4]As employer asserts, the administrative law judge did not reconcile the inconsistency between Dr. Fritzhand's estimation in 1980 that claimant could walk 200 feet on level ground in 1980 and his statement in 1984 that claimant was able to ambulate 300 feet on level ground. Director's Exhibits 5, 18. In light of the administrative law judge's reference to Dr. Fritzhand's reliance upon a new examination and lower objective test results, however, we hold that the administrative law judge's findings with respect to Dr. Fritzhand's 1984 report are supported by substantial evidence. Moreover, the administrative law judge was not required to discredit Dr. Fritzhand's report on the ground identified by employer. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). In addition, although the administrative law judge stated incorrectly that Dr. Fritzhand determined that claimant could perform mild activity without assistance and heavier activity with assistance in 1980, this error does not require remand, as the administrative law judge's overall understanding that Dr. Fritzhand altered his assessment of claimant's activity level from mild to sedentary is accurate. Decision and Order on Remand at 8; Director's Exhibits 5, 18; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge