BRB No. 99-0940 BLA

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| ANDREW E. KUZLINSKI | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | DATE ISSUED: |
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| GATEWAY COAL COMPANY | ) | |
| | ) | |
| Employer-Petitioner | ) | |
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| 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 of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Raymond F. Keisling (Keisling, Schmitt, Coletta & Deitrick, P.C.), Carnegie, Pennsylvania, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-BLA-0125) of Administrative Law Judge Clement J. Kichuk awarding benefits 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] The Board most recently remanded this case for the administrative law judge to reconsider the medical opinions of Drs. Cho, Garson and Renn in determining whether the newly submitted evidence established a material

[1]The procedural history of this duplicate claim is set forth in detail in the Board's prior decision in *Kuzlinski v. Gateway Coal Co.*, BRB No. 97-1392 BLA (July 2, 1998)(unpublished).

change in conditions pursuant to 20 C.F.R. §725.309.[2] On remand, the administrative law judge found that the newly submitted medical opinion evidence was sufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), and thus, a material change in conditions pursuant to Section 725.309(d). The administrative law judge then found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) and total disability pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly benefits were awarded. On appeal, employer challenges the administrative law judge's finding of a material change in conditions under Section 725.309(d) and total disability under Section 718.204(b) and (c).[3] Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.

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 Third Circuit, within whose jurisdiction

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[2]The Board further affirmed, as unchallenged, Administrative Law Judge George P. Morin's finding that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(3). Because Judge Morin was no longer with the Office of Administrative Law Judges, the case was assigned to Administrative Law Judge Clement J. Kichuk (the administrative law judge) on remand.

[3]We affirm the administrative law judge's finding that the evidence of record is sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), as unchallenged on appeal. *Skrack v. Island Creek Coal Co.* 6 BLR 1-703 (1983).

this case arises, has held that in order to establish a material change in conditions pursuant to Section 725.309(d), claimant must establish by a preponderance of the newly submitted evidence, at least one of the elements of entitlement that formed the basis for the denial of the prior claim. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). Accordingly, in this case, in order to establish a material change in conditions under Section 725.309(d), claimant must establish by a preponderance of the newly submitted evidence the existence of a totally disabling pulmonary or respiratory impairment under Section 718.204(c)(1)-(4). *Id.*

On appeal, employer contends that there has been no change in claimant's condition since the prior denial, other than what would be expected in a ten year aging process. Employer argues that there is no clinical testing done by Drs. Garson, Cho, and Levine that "in any way can overcome the clear, objective data and, in particular, the excellent arterial blood gases that show" no disability. Employer's Exhibit 4. Employer contends that the administrative law judge did not explain why the opinions of Drs. Garson, Cho and Levine are well reasoned "in the face of the obvious nondisability that was established by the objective data, pulmonary function studies and arterial blood studies, as well as the more extensive testing that was done by Dr. Renn that showed no objective disability." Employer's Brief at 8.

Although the administrative law judge mentioned the newly submitted pulmonary function studies[4] and listed the newly submitted blood gas study evidence in his Decision and Order on Remand, he solely referred to the pulmonary function study evidence and analyzed only the medical opinion evidence in his material change in conditions analysis under Section 725.309(d). Decision and Order on Remand at 11, 17. We, therefore, vacate the administrative law judge finding of a material change in conditions under Section 718.309(d) and remand this case for the administrative law judge to consider all the newly submitted evidence, favorable and unfavorable, under Section 718.204(c), including the newly submitted pulmonary function studies and blood gas studies of record. *See Swarrow, supra.*[5]

[4]The administrative law judge's consideration of the pulmonary function studies was limited to a comment that "while the pulmonary function studies of record were non-qualifying, it is error to discredit a physician's report solely because of his or her reliance upon non-qualifying testing where the physician also relied upon physical examination, work and medical histories, and symptomatology of the miner." Decision and Order at 17.

[5]Employer also alleges that claimant has not established a material change in conditions because there is no "change or increase in any of the x-rays." Employer's Brief at 3. We reject employer's argument as x-rays are not diagnostic of the degree of disability, unless complicated pneumoconiosis is revealed. *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987); *York v. Director, OWCP*, 7 BLR 1-641 (1985). Further, employer suggests that there

has been no change in claimant's condition other than "what would be expected in a ten year aging process" and that claimant was fully capable of performing his job, which had no time requirement, in 1983. Employer's Brief at 6. Claimant correctly responds that none of the physicians of record stated that claimant was not able to do his coal mine work only because of his age and that the record reflects, contrary to employer's argument, that claimant's supervisor, Porter Remington, stated that claimant had to finish his job before the next shift went into the mine. Claimant's Exhibit 4 at 10.

Employer further argues that, in considering the newly submitted medical reports of record, the administrative law judge erred in relying on Dr. Garson's opinion that claimant has chronic obstructive pulmonary disease because he provided no basis for that diagnosis. Employer refers to the 1995 pulmonary function study that Dr. Garson evaluated, concluding that claimant did not have an obstructive lung defect. Director's Exhibit 10. Contrary to employer's contention, we hold that the administrative law judge acted within his discretion in finding that Dr. Garson's opinion supports a finding that pneumoconiosis was a substantial contributor to claimant's disability inasmuch as Dr. Garson found pneumoconiosis by x-ray and that the restriction identified by pulmonary function studies and his symptomative "evidence of breathlessness on very limited exertion" contributed, *inter alia*, to claimant's total disability. Decision and Order on Remand at 9; Claimant's Exhibit 2.

Employer also argues that Dr. Cho's statement that claimant is "probably" unable to perform for eight hours a day or that claimant "would have difficulty performing the job," is not equivalent to a finding that claimant is "unable to perform" his job as a fire boss. In characterizing Dr. Cho's opinion, employer fails to state that Dr. Cho specifically opined that pneumoconiosis was a contributing factor to claimant's disability. Claimant's Exhibit 2 at 14. The Board, in its previous decision, stated that "[a]fter becoming apprised of claimant's physical requirements, Dr. Cho concluded that claimant could not perform them." *Kuzlinski* at 3. In light of the foregoing, on remand, the administrative law judge must consider Dr. Cho's deposition and medical report as a whole and determine whether, in fact, it establishes total disability.

Employer also argues that the administrative law judge's rejection of Dr. Renn's opinion that claimant was not totally disabled, is "hard to understand" because he is the most qualified examining physician and his opinion is based on employment, social and medical histories, physical examination, x-rays, and non-qualifying pulmonary function study and blood gas study evidence. The administrative law judge was not required to give more weight to Dr. Renn's opinion based solely on his superior qualifications. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge acknowledged Dr. Renn's qualifications and the bases of his opinion. Decision and Order on Remand at 7, 8. However, the administrative law judge, citing *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989), properly rejected Dr. Renn's opinion, finding his premise, that a ventilatory impairment would not exist unless a profusion of 2/2 or higher is diagnosed, hostile to the Act. *See also Stephens v. Bethlehem Mines Corp.*, 8 BLR 1-3-50 (1985); *Hoffman v. B& G. Construction Co.*, 8 BLR 1-65 (1985).

In his consideration of the evidence under Section 718.204(b) and (c) on the merits, the administrative law judge summarized the medical opinion evidence previously submitted with claimant's first claim, but failed to specifically weigh this evidence in his analysis. Decision and Order at 16-18. Further the administrative law judge did not consider the

previously submitted pulmonary function studies or blood gas studies. If, on remand, therefore, the administrative law judge finds that claimant has established a material change in conditions under Section 725.309, he must consider all of the evidence of record to determine whether it supports a finding of entitlement to benefits on the merits under 20 C.F.R. Part 718. *See Swarrow*, *supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge