BRB No. 12-0630 BLA

HERBERT W. PLUM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 09/23/2013
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.
William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-5135) of Administrative Law Judge Thomas M. Burke with respect to a subsequent claim filed on November 8, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the

Act).[1] The administrative law judge credited claimant with thirty years of underground coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that because claimant established fifteen years or more of underground coal mine employment and that he is suffering from a totally disabling respiratory or pulmonary impairment, claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer failed to rebut the presumption and that claimant established a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in denying its request that claimant be ordered to attend a post-hearing pulmonary evaluation by one of its physicians. In addition, employer asserts that the administrative law judge erred in finding that claimant established total disability at 20 C.F.R. §718.204(b)(2) and that employer did not rebut the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[3]

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[1] Claimant filed his initial claim for benefits on May 22, 1978, which was denied on January 20, 1988, by Administrative Law Judge Sheldon R. Lipson because claimant did not establish the existence of pneumoconiosis or that pneumoconiosis caused his total respiratory disability. Director's Exhibit 1. Claimant appealed the denial of benefits but the Board dismissed the appeal as untimely on August 22, 1988. *Plum v. Consolidation Coal Co.*, BRB No. 88-795 BLA (Aug. 22, 1988)(unpub. Order). Claimant filed a Motion for Reconsideration of the Board's dismissal, which was also denied on October 27, 1988. *Plum v. Consolidation Coal Co.*, BRB No. 88-795 BLA (Oct. 27, 1988)(unpub. Order). The record does not show that claimant took any other action prior to filing the current claim.

[2] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4).

[3] We affirm the administrative law judge's crediting of claimant with thirty years of underground coal mine employment and his finding that employer did not rebut the presumption by establishing the absence of clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

I. Employer's Request for a Post-Hearing Examination

While this case was before the district director, employer developed and submitted the report of Dr. Basheda. Director's Exhibit 32. After the case was transferred to the Office of Administrative Law Judges for a hearing, employer scheduled claimant for an examination by Dr. Renn on August 3, 2011, which was to be performed at Monongalia General Hospital. Claimant appeared at the hospital on that date, but was not examined. At the hearing, held on October 19, 2011, claimant's representative asked him to describe what had occurred on August 3, 2011. Claimant testified that approximately ten days prior to that date, he took a bus to the hospital and attempted to check in for an examination scheduled by employer, but was informed that there was no record of any appointment at the hospital and was told to go to the pulmonary clinic located in a different building. Hearing Transcript at 36. Claimant indicated that he could not get to the clinic, as "the buses I rode to General didn't go to that location." *Id*. Claimant also testified that he went to the pulmonary clinic the next day but was told by the receptionist that there was no appointment scheduled for him. *Id*. Claimant indicated that the receptionist then called employer's counsel and informed claimant that counsel would get in touch with him. *Id*. Claimant stated that counsel telephoned him on August 2, 2011, and told him that "they had called the cab company and that I could get a cab to bring me to the hospital the next morning." *Id*. The cab hired by employer transported claimant to the hospital on August 3, 2011 but, according to claimant, when he informed "the secretary" that he was there to be examined, she told him "we have nothing to show that he's here to be examined." *Id*. at 36-37. Claimant reported that he then returned home. *Id*. at 37.

At this point in the hearing, employer's counsel offered the administrative law judge a letter written by Dr. Renn, "which I think impeaches [claimant's] testimony, and the reason I'm doing it is to justify the examination." Employer's counsel and the administrative law judge then engaged in the following exchange:

[4] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

> Judge Burke: Justify what examination?
>
> Employer's Counsel: Dr. [Renn's] evaluation in November. Why I need to do a post-hearing examination.
>
> Judge Burke: I don't have any request before me to do a post-hearing exam.
>
> Employer's Counsel: You don't at this point, you will when I present my case. When you read Dr. [Renn's] letter, you'll see what he observed at the time. I mean, given [claimant's] conflicting testimony about the smoking history[,] that[,] with Dr. [Renn's] observations on that day[,] gives cause as to why the examination should be done after the hearing.

Id. at 37-38. The administrative law judge then read aloud the letter in which Dr. Renn stated that he had observed claimant on the day in question and that claimant did not approach the pre-admission desk, but "may" have approached the main lobby reception desk. *Id*. at 38-39; *see* Employer's Exhibit 3. Dr. Renn further reported that claimant sat across from him reading a newspaper for ten to fifteen minutes before calling a cab to pick him up. Hearing Transcript at 39-40. The administrative law judge remarked that claimant's testimony was not inconsistent with Dr. Renn's observations and that "it seems to be [claimant] . . . wouldn't have taken a cab to the hospital had he not intended to appear for the examination." *Id*. at 40.

When employer's counsel was given the opportunity to present employer's case, he submitted various exhibits for inclusion in the record, including, as Employer's Exhibit 5, a post-hearing medical report from Dr. Renn, based on an upcoming examination of claimant that employer had scheduled for November 9, 2011.[5] Hearing Transcript at 48. Counsel stated, "[w]hether it was because [claimant] didn't make connections with Dr. [Renn] on purpose or because of just mere miscommunication, and I have no way of knowing which it was, and it may have been miscommunication, I would like to have that evaluation rescheduled for November 9." *Id*. The administrative law judge replied, "why would you have [not] requested continuance of the hearing or request[ed] to hold the record open post-hearing?" *Id*. at 49. Employer's counsel responded: "I just didn't do that. That's my fault. I probably should have filed that

[5] Employer's counsel proffered, and the administrative law judge admitted, the medical report of Dr. Cohen. *See* Hearing Transcript at 44-45; Employer's Exhibit 1. Prior to the hearing, employer did not complete an Evidence Summary Form, designating its evidence in accordance with the regulations, nor did employer's counsel designate evidence at the hearing.

motion prior to today." *Id*. The administrative law judge denied employer's request, explaining:

> Well, because my Notice of Hearing states than any documentation that will be offered into evidence will be submitted [twenty] days prior to the hearing. [Section] 725.456 of the Department's regulations states any document to be admitted into evidence will be submitted to opposing Counsel within [twenty] days of hearing. *If you're not going to comply with either one of those, you should at least notify and request a waiver*[.]

Id. (emphasis added). Employer's counsel responded by reiterating his assertions that, because claimant was responsible for missing the August 3, 2011 examination, he was required to appear for a post-hearing examination. *Id*. at 50-51. The administrative law judge again denied employer's request, stating:

> There's a rule of procedure that requires you[,] if you're not going to offer a document and evidence prior to the hearing[,] that you show good cause why that's not offered.
>
> There's also a Notice of Hearing that you were required to comply with that asks you to submit any documentation within [twenty] days of the hearing. You wait until the date of the hearing and then [you] say . . . [you] don't even request, "I'm going to have the examination occur in November," a month from now.

Id. at 52. In the administrative law judge's subsequent Decision and Order, he noted that employer's request to submit the report of the post-hearing examination by Dr. Renn was denied because employer did not "abide by" the twenty-day rule found in 20 C.F.R. §725.456. Decision and Order at 2 n.4.

Employer contends on appeal that the administrative law judge erred in failing to determine whether good cause existed for Dr. Renn's post-hearing examination of claimant. Employer asserts that, given claimant's "propensity to tell different stories about his waiting in the registration area[,] . . . the [administrative law judge] abused his discretion in not ordering the miner to attend the pulmonary evaluation that the operator had scheduled for the miner." Employer's Brief at 21-22. Therefore, employer asks that the Board remand the case to a different administrative law judge for reconsideration of whether claimant should be compelled to appear at the requested pulmonary evaluation.

The administrative law judge is granted broad discretion in resolving procedural and evidentiary issues. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). Accordingly, the party seeking to overturn an administrative law

judge's resolution of an evidentiary issue must prove that his or her action represented an abuse of discretion. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). In denying employer's motion to obtain a post-hearing examination of claimant, the administrative law judge observed correctly that employer was required to show good cause for the admission of evidence in violation of the twenty-day rule pursuant to 20 C.F.R. §725.456(b)(3). Based on the facts of this case, we see no error in the administrative law judge's denial of employer's motion to obtain a post-hearing examination of claimant, as employer had the opportunity to raise the issue of the missed examination with Dr. Renn, prior to the hearing but failed to do so. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-151, 1-153 (1989); *Morgan v. Director, OWCP*, 8 BLR 1-491, 1-493 (1986); Hearing Transcript at 49, 52; Decision and Order at 2 n.4. We affirm, therefore, the administrative law judge's denial of employer's request that claimant be examined by Dr. Renn and that the report resulting from that examination be admitted into the record post-hearing.[6]

II. Invocation of the Amended Section 411(c)(4) Presumption – Total Disability

The administrative law judge initially considered the pulmonary function study evidence and found that, because all three of the studies produced qualifying results, both before and after the administration of a bronchodilator, under the standards for a miner over seventy-one years old, claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[7] Decision and Order at 11; *see* Director's Exhibits 13, 32; Employer's Exhibit 1. The administrative law judge determined that the evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii), as none of the blood gas studies was qualifying. Decision and Order at 12; *see* Director's Exhibits 13, 32.

[6] We need not address employer's argument that the administrative law judge should have found claimant responsible for missing the examination on August 3, 2011, based on Dr. Renn's more credible account of what happened that day. The administrative law judge was not required to determine which party's version of events was more accurate, as the basis for his reasonable denial of employer's request for a post-hearing examination was employer's failure to act in a timely fashion to preserve its entitlement to develop an additional medical report under 20 C.F.R. §725.414(a)(3), regardless of who was at fault for the missed examination.

[7] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

The administrative law judge then considered whether claimant established total disability based on the opinions of Drs. Basheda, Cohen, Celko and Rasmussen at 20 C.F.R. §718.204(b)(2)(iv).[8] The administrative law judge gave less weight to Dr. Basheda's opinion, that it was not possible to definitively assess the degree of claimant's impairment, as speculative, because he opined that "[d]ue to the absence of bronchodilator and anti-inflammatory therapy, it is not possible to ascertain whether his respiratory status would render him unable to perform his coal mining job or work of similar effort." Decision and Order at 12-13, quoting Director's Exhibit 32. The administrative law judge also gave less weight to Dr. Cohen's opinion, that claimant has an obstructive respiratory pattern that is not totally disabling, stating:

> Dr. Cohen relied upon his December 14, 2009 test in finding no total disability despite noting the results could be underestimated due to leaks during the test and poor inspiratory volume. Likewise, despite interpreting the December 22, 2008 test as evidencing a moderately severe obstruction, Dr. Cohen failed to adequately explain why such a defect would not render [c]laimant disabled from performing the job duties as he understood them.[9]

Decision and Order at 13; *see* Employer's Exhibit 1. In contrast, the administrative law judge found that the opinions in which Drs. Celko and Rasmussen diagnosed a totally disabling respiratory impairment were well-reasoned and well-documented, as they were supported by the qualifying pulmonary function studies and because the physicians explained why claimant's level of impairment would prevent him from performing his last coal mine employment. Decision and Order at 13; Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibit 2.

Employer argues that, in determining that claimant established total disability at 20 C.F.R. §718.204(b)(2), the administrative law judge mischaracterized Dr. Cohen's interpretation of the December 14, 2009 pulmonary function test, as he did not find poor effort or poor inspiratory volume on the pulmonary function study, but stated that the study was acceptable and had reproducible effort and tracings. Employer asserts that Dr.

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[8] Since the record does not contain evidence relevant to the issue of whether claimant has cor pulmonale with right-sided congestive heart failure, claimant is unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

[9] Dr. Cohen noted that claimant worked as a replacement operator where "he was required to carry heavy timbers, 8" thick [and] 12 foot steel beams which weighed 250 pounds. He shoveled coal, ran a loading machine, and carried bundles of roof bo[l]ts." Employer's Exhibit 1.

Cohen's statements about the underestimation of the results due to leaks during the test were related to the lung volume studies and that Dr. Cohen also was concerned about the diffusion study, which he thought underestimated claimant's true pulmonary capacity.[10] Employer also argues that the administrative law judge selectively analyzed the evidence, as he credited the opinion of Dr. Celko who, employer states, was "unaware of the better results" in the 2009 study. Employer's Brief at 18. Employer additionally asserts that the administrative law judge did not consider that the improvement in claimant's pulmonary capacity from 2008 to 2009 is inconsistent with the progressive and permanent nature of coal workers' pneumoconiosis. Further, employer contends that the administrative law judge's determination, that all of the pulmonary function studies were qualifying, ignores that "the regulations stop to adjust values at age [seventy-one] but ventilation testing needs to continue to be age adjusted to be an accurate reflection of the miner's capacity." Employer's Brief at 19.

Although employer is accurate that Dr. Cohen's comments related to the 2009 lung volume and diffusion studies, rather than the pulmonary function study, the administrative law judge rationally determined that Dr. Cohen's opinion on the issue of total disability was inadequately explained, "when considering that all three of the pulmonary function tests produced before and post bronchodilator values qualifying to establish total disability under the regulations." Decision and Order at 13; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In addition, the administrative law judge did not err in finding that the pulmonary function studies supported the diagnoses of total disability rendered by Drs. Celko and Rasmussen, as pulmonary function studies performed on a miner who is over the age of seventy-one are treated as qualifying if the values produced by the miner would be qualifying for a seventy-one year old. *K.L.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40 (2008). An opposing party may offer medical evidence to prove that pulmonary function studies that yield qualifying values for age seventy-one are actually normal, or otherwise do not

[10] In evaluating the December 14, 2009 pulmonary function study, Dr. Cohen remarked:

> Normal FVC and FEV1 with decreased FEV1/FVC ratio. There is no significant response to bronchodilator. The TLC and RV are normal, however its interpretation might be underestimated due to leaks during the test. The DLCO is low normal, but may be underestimated due to poor inspiratory volume.

Employer's Exhibit 1.

represent a totally disabling pulmonary impairment, but employer did not present any such evidence.[11] Consequently, the administrative law judge properly characterized claimant's pulmonary function studies as producing qualifying values both before and after the administration of a bronchodilator. *Id*. at 1-47.

We also reject employer's contention that the administrative law judge erred in crediting Dr. Celko's opinion because Dr. Celko was not aware of the December 4, 2009 pulmonary function study, which showed an improvement in claimant's respiratory function. The administrative law judge permissibly concluded that Dr. Celko's opinion was supported by all of the pulmonary function studies of record, including the 2009 study, as they produced qualifying results both before and after the administration of a bronchodilator. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-130; Decision and Order at 13. Therefore, we affirm the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2), based on the pulmonary function study evidence and the medical opinions of Drs. Celko and Rasmussen. In light of this finding and the administrative law judge's crediting of claimant with fifteen years or more of underground coal mine employment, we further affirm the administrative law judge's determination that claimant invoked the amended Section 411(c)(4) presumption.

III. Rebuttal of the Amended Section 411(c)(4) Presumption

Employer argues that the administrative law judge, in violation of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), did not resolve the conflict in claimant's smoking history reported in his previous claim and the current claim. Employer states that in claimant's prior claim, Administrative Law Judge Sheldon R. Lipson found that claimant smoked one pack of cigarettes daily for approximately thirty-five years, quitting before the hearing in the initial claim, but that in the subsequent claim, claimant indicated that he only had a fifteen to sixteen pack-year smoking history. Employer asserts that the length of claimant's smoking history is a fact that could not have changed since the prior denial, unless claimant resumed smoking. By analogy, employer relies on 20 C.F.R. §725.309(d)(2), which provides that "if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial." 20 C.F.R. §725.309(d)(2). Employer further indicates that the administrative law judge improperly

[11] Although Dr. Cohen noted that he used values from the NHANES/Hankinson Data Set, as recommended by the National Institute for Occupational Safety and Health, in order "to standardize the interpretations," Dr. Cohen did not discuss the significance of claimant's age in relation to these values, or to the values set forth in Appendix B to 20 C.F.R. Part 718. Employer's Exhibit 1.

speculated that Dr. Cohen's opinion supported a diagnosis of legal pneumoconiosis as he would have identified coal dust exposure as a significant contributing cause of claimant's impairment, even if he considered a greater smoking history. In addition, employer argues that the administrative law judge did not address what effect "the disproportionate smoking history as opposed to years of coal dust exposure" would have had on Dr. Celko's opinion. Employer's Brief at 15. Finally, employer requests that the award of benefits be vacated and the case assigned to a different administrative law judge.

Because the burden is on employer to establish the absence of legal pneumoconiosis, we need address only employer's argument that the administrative law judge erred in determining that Dr. Cohen's opinion did not assist employer in satisfying its burden. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980); *see also Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *aff'd sub nom. Mingo Logan Coal Co. v. Owens*, F.3d , 2013 WL 3929081 (4th Cir. July 31, 2013)(No. 11-2418)(Niemeyer, J. concurring). Dr. Cohen stated that claimant's "exposure to coal mine dust as well as his [sixteen] pack year history of tobacco smoke exposure is also significantly contributory to his pulmonary dysfunction including early obstructive impairment." Employer's Exhibit 1. The administrative law judge determined:

> Although [e]mployer is correct in [stating] that [c]laimant's smoking history varies, a greater smoking history would not affect Dr. Cohen's final diagnosis. Dr. Cohen considered [c]laimant's 33 years of heavy coal mine dust exposure and his 16 pack year tobacco consumption history to both be significant contributing factors in his impairment. As such, even if [c]laimant had a 30 pack year tobacco consumption history, he would still have 33 years of heavy coal mine dust exposure, which would still be considered a significant contributing factor. Accordingly, Dr. Cohen's opinion would still support a finding of legal coal worker[s'] pneumoconiosis.

Decision and Order at 20. Employer suggests that, contrary to the administrative law judge's finding, if Dr. Cohen was aware that claimant actually had a thirty pack-year history of smoking, he would have ruled out coal dust exposure as a significant causal factor. This contention is without merit, as the opinion before the administrative law judge did not contain this conclusion. Thus, the administrative law judge's determination that Dr. Cohen's opinion did not support a finding of rebuttal of the presumed existence of legal pneumoconiosis is supported by substantial evidence and is affirmed.[12] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

[12] We affirm, as unchallenged on appeal, the administrative law judge's discrediting of Dr. Basheda's opinion, that coal dust exposure did not contribute to

Finally, we reject employer's contention that the administrative law judge was required to address "whether a miner whose disability was found not due to pneumoconiosis in 1986 can now show disability due to pneumoconiosis in 2012. Such an adverse finding is an impermissible attack on the prior, and final, ruling." Employer's Brief at 2 n.3. The doctrine of res judicata generally has no application in the context of subsequent claims, "as the purpose of Section 725.309 is to provide relief from the principles of res judicata to a miner whose physical condition worsens over time." *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-79 (1993). Section 725.309 provides specifically that if claimant establishes a change in one of the applicable conditions of entitlement, "no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (*see* §725.463), shall be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(d)(4).

As employer has raised no other allegations of error concerning the administrative law judge's determination that employer did not rebut the presumption at amended Section 411(c)(4), we affirm this finding and deny employer's request that this case be remanded to a different administrative law judge for reconsideration. Therefore, we also affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and further affirm the award of benefits.

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claimant's impairment, as it is based on views contrary to the preamble to the 2001 regulations. *See Skrack*, 6 BLR at 1-711; Decision and Order at 19.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge