BRB No. 97-1395 BLA

VIRGINIA QUARTIERI (Widow of LINO B. QUARTIERI) Claimant-Petitioner v. PITTSBURG & MIDWAY COAL MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

William C. Erwin, Raton, New Mexico, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (93-BLA-1810) of Administrative Law Judge Robert L. Hillyard 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). This case is before the Board for the second time. Previously, we affirmed the administrative law judge's

denial of claimant's survivor's claim, but vacated the denial of the miner's duplicate claim and remanded the case for the administrative law judge to reconsider the miner's claim pursuant to 20 C.F.R. §725.309(d) under the standard set forth in *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996). *Quartieri v. Pittsburg & Midway Coal Co.*, BRB No. 96-1106 BLA (Jan. 29, 1997).

On remand, the administrative law judge found that the new evidence failed to establish a material change in conditions pursuant to Section 725.309(d). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in concluding that the new x-rays and medical opinions did not establish a material change in conditions with respect to the element of pneumoconiosis pursuant to Section 718.202(a)(1), (4). Claimant further asserts that the administrative law judge failed to properly consider the blood gas studies pursuant to Section 718.204(c)(2). Claimant also challenges as unsupported by the record the administrative law judge's finding that the new medical opinions at Section 718.204(c)(4) did not establish a material change in conditions. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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).

To be entitled to benefits under 20 C.F.R. Part 718, a miner must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent 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). The United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, has held that to establish a material change in conditions, "a claimant must prove for each element that was actually decided adversely to the claimant in the prior denial that there has been a material

change in that condition since the prior claim was denied." *Brandolino*, 90 F.3d at 1511, 20 BLR at 2-320-21. The administrative law judge must "compar[e] [the] evidence obtained after [the] prior denial to [the] evidence considered in or available at the time of [the] prior claim" to determine whether claimant has "demonstrated that each of these elements previously found against him [has] worsened materially since the previous denial." *Brandolino*, 90 F.3d at 1512, 20 BLR at 2-321.

The administrative law judge who denied the miner's prior claim, filed on June 1, 1978, found that although invocation of the interim presumption of total disability due to pneumoconiosis was established pursuant to 20 C.F.R. §727.203(a)(1) and (3), employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(4) by proving that "[c]laimant does not have pneumoconiosis." [1979] Decision and Order at 4. Thus, the inquiry on remand was whether claimant established a material worsening with respect to the element of pneumoconiosis in his Part 718 duplicate claim.

In support of his duplicate claim, the miner submitted a medical examination report by Dr. Schmidt-Nowara, who diagnosed pneumoconiosis. Director's Exhibit 14. Employer submitted the report of Dr. Repsher, who the record indicates is Board-certified in Internal Medicine and Pulmonary Diseases. Director's Exhibit 33. Dr. Repsher reviewed the medical evidence of record and diagnosed "very mild coal workers' pneumoconiosis" which he opined was not clinically significant. Director's Exhibit 33 at 4. The administrative law judge did not compare the new medical opinions with the old medical opinions regarding the existence of pneumoconiosis or make a material worsening finding at Section 718.202(a)(4). Claimant contends that the new medical opinions demonstrate material worsening because both opinions diagnose pneumoconiosis. Claimant's Brief at 3-4. Because we are not empowered to weigh the evidence, we must remand this case for the administrative law judge to compare the new medical opinions regarding the existence of pneumoconiosis with the old medical opinions pursuant to Section 725.309(d) under *Brandolino*.[1]

[1] In the prior claim, Dr. Keil examined and tested the miner and initially diagnosed restrictive lung disease due to coal dust exposure resulting in a moderate impairment. Director's Exhibit 37. By contrast, Dr. Petty on examination detected "no pulmonary disease of any significance." Director's Exhibit 37. At the 1979 hearing, Dr. Keil testified that after reviewing Dr. Petty's objective test data, he concluded that his own pulmonary function study data was invalid and changed his diagnosis to no physiological impairment of any significance. [1979] Hearing Transcript at 14-21. He testified that any impairment the miner may have had was due to mild emphysema unrelated to coal mine employment. *Id*. Along with certain x-ray readings, the 1979 Hearing Transcript was missing from the record on appeal. In response to the Board's June 29, 1998 order requesting exhibits, the parties

submitted the transcript, which the administrative law judge should consider on remand when comparing the old and new medical opinions.

Pursuant to Section 718.202(a)(1), the administrative law judge noted that all of the old x-rays were read positive for pneumoconiosis, but found the weight of the new x-rays viewed in light of the readers' radiological qualifications to be negative for pneumoconiosis. He concluded therefore that claimant "has not established a material worsening . . . by the x-ray evidence." Decision and Order at 4. Claimant contends that the administrative law judge erred because the x-ray readings submitted with the miner's duplicate claim indicate material worsening. Claimant's Brief at 3. An administrative law judge exercises broad discretion in weighing the medical evidence and may accord greater weight to the interpretations of B-readers. *See Brandolino*, 90 F.3d at 1513, 20 BLR at 2-323. However, the three negative x-ray readings credited by the administrative law judge in making his finding are not in the record on appeal and were not submitted to the Board despite the Board's June 29, 1998 order requesting them from the parties.[2] Because we are unable to determine whether substantial evidence supports the administrative law judge's finding pursuant to Section 718.202(a)(1), we do not affirm it. Since we must remand this case for the administrative law judge to consider the new medical opinions at Section 718.202(a)(4), the parties may choose to take such steps as they deem advisable on remand to place the missing readings into the record.[3] *See* 20

[2] The administrative law judge indicated that he relied upon three negative readings by Dr. Sargent of x-rays taken on November 6, 11, and December 15, 1989. The administrative law judge further indicated that these readings were found at Director's Exhibits 27-29. Decision and Order on Remand at 3-4.

[3] Should the administrative law judge on remand revisit Section 718.202(a)(1), we note that "[a]s an example of how a claimant might show a condition has worsened materially, the claimant might offer to compare past and present x-rays reflecting that any conditions suggesting that claimant has pneumoconiosis have become materially more severe since the last claim was rejected." *Brandolino*, 90 F.3d at 1511, 20 BLR at 2-320; *see* 20 C.F.R. §718.102(b).

C.F.R. §725.456(e).

If on remand, the administrative law judge finds a material change in conditions with respect to the existence of pneumoconiosis, he must then address the merits of entitlement. Consequently, we will review the other arguments raised by claimant. Pursuant to Section 718.204(c)(2), claimant contends that the administrative law judge impermissibly engaged in his own medical reasoning when he concluded that the reduction in the miner's blood gas study values since the prior claim was "only slightly less," and therefore did not show material worsening. Decision and Order at 6; Claimant's Brief at 2. The new blood gas study taken on July 15, 1991 was non-qualifying at rest but qualifying on exercise.[4] Director's Exhibit 15. Its values were below those obtained on the two blood gas studies submitted with the prior claim. Director's Exhibit 37. Dr. Schmidt-Nowara, who administered the 1991 test, interpreted it as showing "hypoxemia at rest, worse with exercise." Director's Exhibit 14. He diagnosed a moderate impairment of lung function on modest exertion. *Id*. Dr. Repsher concluded on review that the 1991 blood gas study was normal for the miner's age and for the altitude at which the test was taken. Director's Exhibit 33. Without discussing and resolving the physicians' interpretation of the study, the administrative law judge found the blood gas study values to be "only slightly less" than the old values, and therefore not indicative of material worsening. Decision and Order on Remand at 6. The new objective study evidence will be relevant to considering the medical opinions on remand pursuant to Section 718.202(a)(4) for material worsening as well as to addressing the merits of entitlement, if reached. *See Brandolino, supra*. Because the administrative law judge's finding is unexplained with respect to the expert medical interpretations of the new blood gas study, *see Marcum v. Director, OWCP*, 11 BLR 1-23 (1987), we must vacate his finding pursuant to Section 718.204(c)(2).

Although we vacate the administrative law judge's finding at Section 718.204(c)(2), we reject claimant's contention that the administrative law judge erred in finding the multiple blood gas studies from the miner's final hospitalization to be unreliable. Claimant's Brief at 2. The administrative law judge complied with the Board's instructions to consider this evidence on remand, and substantial evidence supports his finding that these blood gas studies are unreliable as a measure of the miner's chronic respiratory or pulmonary condition because Dr. Repsher's expert review and explanation of the miner's hospital treatment records indicated that the miner was acutely ill with severe pulmonary disease due to renal failure and

[4] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

pneumonia due in turn to Wegener's granulomatosis[5] at the time the studies were done. Decision and Order on Remand at 6; Director's Exhibits 11, 33; *see Casella v. Kaiser Steel Corp*., 9 BLR 1-131, 1-133-34 (1986).

[5] Wegener's granulomatosis is "a progressive disease, characterized by granulomatous lesions of the respiratory tract, focal necrotizing arteriolitis, and, finally, widespread inflammation of all the organs of the body." *Dorland's Illustrated Medical Dictionary* 666 (25th ed. 1974). Dr. Repsher indicated that this disease has never been related to coal mine employment and its cause is unknown. Director's Exhibit 33 at 4.

Pursuant to Section 718.204(c)(4), claimant contends that the administrative law judge's conclusion that the new medical opinions are identical to the opinions rejected in the prior claim ignores the fact that Dr. Schmidt-Nowara diagnosed a moderate impairment based on the new, partially qualifying blood gas study that he interpreted as abnormal. Claimant's Brief at 3. Because we have vacated the administrative law judge's finding pursuant to Section 718.204(c)(2) so that he may reweigh the new blood gas study, we also vacate the administrative law judge's finding pursuant to Section 718.204(c)(4) and instruct him to reweigh the new medical opinions on the merits of total respiratory disability, if reached.[6] *See Brandolino, supra*.

Therefore, on remand the administrative law judge must compare the new medical opinions with those submitted with the prior claim to determine whether they demonstrate material worsening with respect to the element of pneumoconiosis pursuant to Section 718.202(a)(4). If the administrative law judge finds that material worsening and hence a material change in conditions is established, he must determine whether the evidence establishes the remaining elements of entitlement. *See* 20 C.F.R. §718.204; *Brandolino, supra*.

[6] Claimant does not challenge on appeal the administrative law judge's finding that the new pulmonary function study was non-qualifying pursuant to Section 718.204(c)(1). Director's Exhibit 10.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is vacated in part and the 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge