BRB No. 98-1511 BLA

RUSSELL GASSERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Barry H. Joyner (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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (97-BLA-1288) of Administrative Law Judge Ralph A. Romano 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). The administrative law judge credited the miner with twenty-three years of qualifying coal mine employment based on the parties' stipulation, and determined that the instant claim, filed on December 20, 1996, was subject to the duplicate claim provisions at 20 C.F.R. §725.309, as it was filed more than one year after the final denial of claimant's initial claim.[1] Based on

[1]Claimant filed his original claim on July 2, 1980. Director's Exhibit 23. In a

the date of filing, the administrative law judge adjudicated this duplicate claim pursuant to the provisions at 20 C.F.R. Part 718, and found that the new evidence submitted in support thereof was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), the element of entitlement previously adjudicated against claimant, thus a material change in conditions was not established at Section 725.309. Accordingly, benefits were denied.

Claimant appeals, challenging the administrative law judge's findings at

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Decision and Order issued on May 27, 1987, Administrative Law Judge Ainsworth H. Brown found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), but insufficient to establish total respiratory disability at 20 C.F.R. §718.204(c)(1)-(4). Director's Exhibit 23. Upon claimant's *pro se* appeal, the Board affirmed the administrative law judge's finding of occupational pneumoconiosis and his finding that total respiratory disability was not established at Section 718.204(c)(1)-(3), but vacated his findings at Section 718.204(c)(4) and remanded the case for reconsideration of the evidence. *Gassert v. Director, OWCP*, BRB No. 87-1629 BLA (Jan. 24, 1989) (unpublished). In a Decision and Order on Remand issued on May 23, 1989, Judge Brown found the evidence insufficient to establish total respiratory disability at Section 718.204(c)(4), thus invocation of the presumption at 20 C.F.R. §718.305 was precluded and benefits were denied. Director's Exhibit 23. Claimant took no further action until the filing of his duplicate claim on December 20, 1996. Director's Exhibit 1.

Section 718.204(c)(1), (4), and his admission into evidence of Dr. Spagnolo's opinion, which was submitted for the first time at the hearing in violation of 20 C.F.R. §725.456(b). The Director, Office of Workers' Compensation Programs (the Director), has filed a motion for remand, which the Board accepts as his response brief, challenging the administrative law judge's findings at Section 718.204(c)(1), (4), and arguing that the administrative law judge must adjudicate the contested issues of the existence of pneumoconiosis and disease causation pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b), and allow the Director the opportunity to obtain validation reports in response to the March 11, 1998 and March 16, 1998 pulmonary function studies submitted by claimant twenty days prior to the hearing. Claimant replies, contending that the Director was required to file a cross-appeal in order to raise the issues presented in his motion to remand.[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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Turning first to the procedural issues, claimant maintains that by failing to file a cross-appeal, the Director has waived any objection to the administrative law judge's findings and omissions. We disagree. The applicable regulation provides that arguments in response briefs are limited to those which respond to arguments raised in petitioner's brief and to those in support of the decision below. 20 C.F.R. §802.212(b). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that any contention which provides an alternate avenue to a prior favorable judgment may be raised in a response brief. *See Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987); *see also Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Garcia v. Director, OWCP*, 869 F.2d 1413, 12 BLR 2-231 (10th Cir. 1989). In the instant case, the administrative law judge's denial of benefits resulted in a judgment favorable to the Director. Consequently, in a response brief in support of that denial, the Director can challenge any matter appearing in the record, although his

[2]The administrative law judge's finding that the evidence was insufficient to establish total respiratory disability at Section 718.204(c)(2), (3), is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

arguments may involve an attack upon the reasoning of the administrative law judge or an insistence upon matters overlooked or ignored by him, as long as that challenge provides an alternate avenue to the prior favorable judgment. *See Dalle Tezze, supra.*

Claimant next contends that the administrative law judge erred in admitting Dr. Spagnolo's report, dated March 21, 1998, into the record, because good cause was not shown for the Director's submission of this evidence at the hearing on April 7, 1998, in violation of the 20-day rule pursuant to Section 725.456. Claimant argues that the Director made no effort to develop this evidence until March 11, 1998, and did not provide claimant with a copy of the report prior to the hearing, thereby causing irreparable harm to claimant. Claimant asserts that he timely developed and submitted his evidence, and maintains that the Director should be held to the same standard. Claimant's arguments are without merit.

The administrative law judge is granted broad discretion in resolving procedural issues. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). In the present case, the Director explained at the hearing and in his motion for enlargement of time filed on March 18, 1998, that a full evidentiary packet could not be assembled and made available for submission to Dr. Spagnolo for his review until March 9, 1998, due to the fact that despite repeated requests, the Director did not obtain the original tracings of claimant's August 4, 1997 pulmonary function studies until February 2, 1998, whereupon the Director sent them for validation and received the validation report on March 9, 1998. Director's Exhibit 29. The Director then forwarded the complete evidentiary packet to Dr. Spagnolo on March 11, 1998, but did not receive the physician's consultative report within the 20-day deadline. The administrative law judge acted within his discretion in admitting Dr. Spagnolo's report into the record, based on a showing of good cause for its late submission pursuant to Section 725.456(b), and properly held the record open in order to permit claimant to obtain and submit responsive evidence. *See Baggett v. Island Creek Coal Co.*, 6 BLR 1-1311 (1984).

Turning to the merits, claimant and the Director contend that the administrative law judge erred in his evaluation of the evidence at Section 718.204(c)(1). Specifically, claimant asserts that the overwhelming preponderance of pulmonary function studies produced qualifying results, and that Dr. Kraynak's validations of his own tests were entitled to determinative weight over the invalidations of Drs. Levinson, Sahillioglu and Ranavaya. Claimant also contends that the administrative law judge erred in relying on the unpublished opinion of the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22, 1994), to support

his finding that the most recent test, which produced non-qualifying values,[3] was the most reliable indicator of claimant's pulmonary capacity, because claimant maintains that all of the tests produced comparable abnormal results, thus there were no spurious, disparately lower values. The Director urges remand on different grounds, arguing that because all of the pulmonary function studies were conducted when claimant was over 71 years of age, and the regulatory tables do not contain values for individuals beyond that age, the administrative law judge's basis for determining which studies produced qualifying values is not apparent. The Director further maintains that while the administrative law judge properly credited, on the basis of their superior qualifications, the invalidations by Drs. Levinson and Sahillioglu of the February 1997 and July 1997 pulmonary functions studies over Dr. Kraynak's validations of those tests, the administrative law judge did not address the invalidations by Dr. Spagnolo of the February 1997, July 1997, and August 1997 pulmonary functions studies, *see* Director's Exhibit 30, or provide a reason for discounting Dr. Ranavaya's invalidation of the August 1997 test. Lastly, the Director contends that because the March 11, 1998 and March 16, 1998 pulmonary function studies were submitted on March 18, 1998, precisely 20 days prior to the hearing, the administrative law judge abused his discretion in refusing to allow the Director a reasonable opportunity to obtain validation reports in response to this evidence. The Director's arguments have merit.

The Administrative Procedure Act (APA), 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), explicitly mandates an opportunity for rebuttal where it is necessary to the full presentation of a case. "A party is entitled to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. §556(d). Where a party would be denied the full presentation of its case if unable to respond to evidence submitted just prior to or upon the twenty-day deadline pursuant to Section 725.456(b)(1), due process as incorporated into the APA requires that such party be given an opportunity to respond. *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In the present case, since claimant submitted the two March

[3]Although claimant argues that this test produced qualifying values for the height it recorded, the administrative law judge properly made a factual finding that claimant's height was 61.33 inches, based on the average of the various heights listed in the pulmonary function studies of record. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983).

1998 pulmonary function studies on the 20-day deadline, the Director could not comply with the provisions at Section 725.456(b)(1), and inasmuch as a determination as to the validity of the studies is necessary for the administrative law judge to properly evaluate the reliability of the evidence at Section 718.204(c)(1), (4), the administrative law judge's refusal to allow the Director a reasonable opportunity to submit rebuttal evidence constitutes an abuse of discretion. *See Miller, supra*. Consequently, we vacate the administrative law judge's findings pursuant to Section 718.204(c)(1), and remand this case for the administrative law judge to reevaluate the evidence thereunder after reopening the record and allowing the parties sufficient opportunity to develop and submit responsive evidence. On remand, the administrative law judge must address and weigh all of the validation reports of record, provide a rationale for each credibility determination, and determine whether the pulmonary function studies which are ultimately found to be valid are sufficient to establish total respiratory disability at Section 718.204(c)(1) in a miner whose age is not listed within the regulatory tables.

Claimant and the Director also challenge the administrative law judge's evaluation of the medical opinions at Section 718.204(c)(4).[4] Inasmuch as the validity of the objective tests upon which a physician relies in formulating his conclusions impacts upon the reliability of the physician's opinion, *see Director, OWCP v. Siwiec,* 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990), we vacate the administrative law judge's findings at Section 718.204(c)(4) for reconsideration of the evidence thereunder on remand.

Lastly, the Director contends that the administrative law judge erred in striking the contested issues of the existence of pneumoconiosis at Section 718.202(a)(1)-(4) and disease causation at Section 718.203(b) from further consideration upon

[4]We reject claimant's argument that Dr. Kraynak's opinion is entitled to greater weight based on his status as claimant's treating physician. The administrative law judge acted within his discretion in finding that because Dr. Kraynak had treated claimant for little more than one year, he did not have the benefit of observing claimant's condition over an extended period of time and thus his opinion was not entitled to additional weight. Decision and Order at 8; *see generally Tedesco v. Director,* OWCP, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Claimant correctly maintains, however, that on remand, the administrative law judge should determine the probative worth of Dr. Spagnolo's opinion as a non-examining physician in light of *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986).

claimant's motion alleging that these issues were *res judicata*, and in summarily denying the Director's request for reconsideration. *See* Administrative Law Judge's Exhibits 4, 5. The Director argues that while claimant prevailed on these issues in his original claim, that claim was finally denied, thus the Director is not collaterally estopped from relitigating the issues in this duplicate claim. We agree.

The doctrine of *res judicata,* or claim preclusion, generally has no application in the context of a duplicate claim. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993). Collateral estoppel, or issue preclusion, refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in the initial action. For a party to be estopped from relitigating an issue, the following elements must be present:

(1) the issue sought to be precluded must be the same as the one involved in the prior action;
(2) the issue must have been actually litigated;
(3) the issue must have been determined by a valid and final judgment; and
(4) the determination must have been essential to the prior judgment.

In re Docteroff, 133 F.3d 210 (3d Cir. 1997); *see Witkowski v. Welch*, 173 F.3d 192 (3d Cir. 1999); *Haize v. Hanover Ins. Co.*, 536 F.2d 576 (3d Cir. 1976). In the present case, inasmuch as benefits were denied in claimant's original claim for failure to establish total respiratory disability pursuant to Section 718.204(c), Judge Brown's finding of the existence of occupational pneumoconiosis was not necessary to the adverse judgment. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*); *Haize, supra*. Consequently, if on remand the administrative law judge finds that the new evidence submitted in support of this duplicate claim establishes a material change in conditions pursuant to Section 725.309, he must readjudicate the issues of pneumoconiosis and disease causation at Sections 718.202(a)(1)-(4), 718.203(b), in determining whether the totality of the evidence of record establishes entitlement to benefits.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge