BRB No. 96-0792 BLA

LEONARD M. LUSK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (94-BLA-0128) of Administrative Law Judge Samuel J. Smith awarding benefits on a claim[1] 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 accepted the parties' stipulation to twenty-two years of coal mine employment. The administrative law judge found the existence of totally disabling pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and 718.204 and, accordingly, awarded benefits.

[1] Claimant is Leonard M. Lusk, the miner, whose initial application for benefits filed on December 19, 1983 was finally denied on October 3, 1984. Director's Exhibit 31. Claimant filed this application for benefits on January 22, 1993. Director's Exhibit 1.

On appeal, employer contends that the administrative law judge failed to determine whether the evidence developed since the denial of claimant's prior claim establishes a material change in conditions pursuant to 20 C.F.R. §725.309(d). Employer further asserts that the administrative law judge failed to consider all of the relevant evidence pursuant to Section 718.202(a)(4) and failed to make proper findings regarding respiratory disability or causation at Section 718.204. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, urging 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 into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 725.309(d), employer contends and the Director agrees that the administrative law judge failed to determine whether a material change in conditions was established. Subsequent to the issuance of the administrative law judge's decision, the United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, held that when a claim for benefits is filed more than one year after the denial of a prior claim, before proceeding to the merits of entitlement the administrative law judge must first determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Lisa Lee Mines v. Director [Rutter], OWCP*, 20 BLR 2-227 (4th Cir. 1996). Because we must apply the law now in effect, *see Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989), we remand this case for the administrative law judge to apply *Rutter*.[3]

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[2] We affirm as unchallenged on appeal the administrative law judge's finding regarding length of coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Because the record contains contrary probative evidence regarding the existence of a totally disabling respiratory impairment, Director's Exhibits 11-14, 29, 30; Claimant's Exhibits 1, 3; Employer's Exhibits 1, 7, 9, 11, 12; *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), we disagree with the Director's assertion that total respiratory disability, and hence, a material change in conditions, has been established as a matter of law. Director's Brief at 1-3.

Pursuant to Section 718.202(a)(4), employer and Director correctly contend that the administrative law judge failed to consider the opinions of Drs. Vasudevan, Dahhan, Zaldivar, and Fino, all of whom concluded that claimant does not suffer from pneumoconiosis. Director's Exhibit 15; Employer's Exhibits 7, 9, 11, 12. Because the administrative law judge did not consider all of the relevant evidence regarding the existence of pneumoconiosis, as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Director, OWCP v. Congleton*, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984), we vacate his finding pursuant to Section 718.204(a)(4). In addition, as both employer and the Director contend, the administrative law judge did not consider the computed tomography (CT) scan evidence, or Dr. Pathak's testimony regarding the probative value of the CT scan obtained in this case. Director's Exhibit 29; Claimant's Exhibit 4; Employer's Exhibits 1-3. Accordingly, we instruct the administrative law judge on remand to weigh all of the medical opinion and CT scan evidence regarding the existence of pneumoconiosis.

Pursuant to Section 718.204, employer and Director correctly note that the administrative law judge failed to consider all of the relevant evidence and conflated his findings at Sections 718.204(c), 718.204(b), and 718.203(b). Employer's Brief at 13-14; Director's Brief at 5; Decision and Order at 13. Accordingly, we instruct the administrative law judge on remand to consider and weigh all of the relevant evidence to determine whether it establishes total respiratory disability pursuant to Section 718.204(c). *See Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). If total respiratory disability is found established, the administrative law judge must then determine whether all of the relevant evidence establishes that claimant's pneumoconiosis is a contributing cause of his total disability.[4] *See Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990). If so, the adminstrative law judge must then determine the date of onset of total disability due to pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).[5]

[4] In so doing, the administrative law judge must not apply the presumption that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b) to the disability causation issue, as he appears to have done below. Decision and Order at 13.

[5] If deemed necessary on remand, the Director may wish to renew its motion before the administrative law judge requesting a remand to the district director for a complete pulmonary examination. Director's Brief at 5.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and 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

NANCY S. DOLDER
Administrative Appeals Judge