BRB No. 96-1154 BLA

DOUGLAS LEE ENGLAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	DATE ISSUED:
Employer-Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER
Party-in-Interest	)	on RECONSIDERATION

Appeal of the Decision and Order on Remand of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle), Pineville, West Virginia, for claimant.

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

PER CURIAM:

Claimant[1], without the assistance of counsel, has timely filed a Motion for Reconsideration of the Board's Decision and Order in *England v. Eastern Associated Coal Corp*, BRB No. 96-1154 BLA (Feb. 25, 1997)(unpub.) in which the Board affirmed the Decision and Order on Remand (87-BLA-1592) of Administrative Law Judge J. Michael O'Neill 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). *See* 20 C.F.R. §802.407(a). In *England*, the Board affirmed the administrative law judge's

[1]Claimant is Douglas Lee England, the miner, who filed a claim for benefits on July 18, 1996. Director's Exhibit 1.

finding that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) and the denial of benefits. *England, supra.*

On reconsideration, claimant generally argues that the Board erred in affirming the administrative law judge's Decision and Order on Remand. Employer and the Director, Office of Workers' Compensation Programs (the Director), are not participating on reconsideration.

After consideration of claimant's Motion for Reconsideration, we grant the motion but deny the relief requested. On remand, the administrative law judge was instructed to compare Dr. Daniel's opinion, that claimant was unable to perform heavy manual labor, to the exertional requirements of claimant's usual coal mine employment to determine whether the opinion is sufficient to support a finding of total respiratory disability pursuant to 20 C.F.R. §718.204(c) and to determine whether pneumoconiosis was at least a contributing cause of that totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *England v. Eastern Assoc. Coal Corp.*, BRB No. 94-2347 BLA (Mar. 30, 1995)(unpub.). Upon considering Dr. Daniel's opinion, the administrative law judge stated that Dr. Daniel's medical assessment appeared to be "the claimant's self-reported limitations rather than the physician's independent assessment". Decision and Order on Remand at 2. The administrative law judge then stated:

> Dr. Daniel's assessment of the claimant's work capacity is not reliable and does not establish the presence of a totally disabling respiratory or pulmonary impairment. Assuming that the claimant's job did involve heavy manual labor, for example when loading and unloading supplies, he continued to do that work for a year after Dr. Daniel's examination, with no change in the way he performed the job, until he sustained a rotator cuff injury to a shoulder. He has significant heart disease dating back to 1978 or 1979. His ventilatory function and arterial blood gas test results were not merely "non-qualifying" but were far above table values and noted to be normal. Subsequent thorough physical examinations by Drs. Rasmussen, Starr and Zaldivar in particular, revealed no significant pulmonary disease. The medical evidence does not establish that the claimant has a totally disabling respiratory or pulmonary impairment.
>
> Dr. Daniel's opinion is far outweighed by the claimant's own job performance between August 1986 and August 1987, and by the persuasive medical opinions of all other examining physicians (except Dr. Cardona). A preponderance of the evidence establishes that the claimant does not have a totally disabling respiratory or pulmonary impairment and from a pulmonary perspective, could continue to do his usual coal mine work.

Decision and Order on Remand at 2-3.

We first note that the United States Court of Appeals for the Fourth Circuit, within

whose jurisdiction this claim arises, held, in *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grds*, 14 BLR 1-37 (1990)(en banc), that an administrative law judge "may not reject physical limitations noted in a doctor's report as being nothing more than mere notations of the patient's descriptions unless there is specific evidence for doing so in the report." The Court further held that "unless there is explicit evidence contained in the physician's report that the report is not the physician's opinion, but merely lists without adopting the patient's description of the physical limitations, the limitations must be taken as the physician's opinion." *Scott, supra.*

In the instant claim, the administrative law judge erred in stating that Dr. Daniel's "Medical Assessment" appears to be a recitation of claimant's statements rather than the physician's independent assessment. *See* Decision and Order at 2-3; *Scott, supra*. However, because the administrative law judge permissibly questioned the reliability of Dr. Daniel's report based on claimant's continued job performance after the date of the report and the administrative law judge's finding that the preponderance of the medical opinion evidence establishes that claimant does not have total respiratory disability pursuant to Section 718.204(c)(4) is supported by substantial evidence, a remand is not required. Decision and Order on Remand at 2-3; Director's Exhibit 6; *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987); *Hutchens v. Director, OWCP,* 8 BLR 1-16 (1985); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Therefore, we reject claimant's contentions, deny the relief requested, and reaffirm the administrative law judge's denial of benefits.[2]

[2]We note that claimant included statements concerning his treatment by Dr. Zaldivar and regarding his coal mine employment in his Motion for Reconsideration. The Board cannot review new evidence, *i.e.*, evidence which is not a part of the record developed at the hearing before the administrative law judge, *see* 20 C.F.R. §802.301; *Burks v. Hawley Coal Mining Corp.*, 2 BLR 1-323 (1979); *see also Sparkman v. Director, OWCP*, 2 BLR 1-488 (1979); *Ellison v. Director, OWCP*, 2 BLR 1-317 (1979), but claimant may seek modification on the basis of new evidence below. *See* 20 C.F.R. §725.310; *Lee v. Consolidation Coal Co.*, 843 F.2d 159, 11 BLR 2-106 (4th Cir. 1988); *see also Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Accordingly, we grant claimant's motion for reconsideration, but deny the relief requested and reaffirm our prior Decision and Order.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge