BRB No. 90-1436 BLA

ELMER PATTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Bernard J. Gilday, Jr., Administrative Law Judge, United States Department of Labor.

Albert A. Burchett, Prestonsburg, Kentucky, for claimant.

Rodger Pitcairn (David S. Fortney, Deputy Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Jeffrey J. Bernstein, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and FEIRTAG, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (88-BLA-1312) of Administrative Law Judge Bernard J. Gilday, Jr., 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). The administrative law judge credited

claimant with twelve and three-quarter years of qualifying

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

coal mine employment, and found that claimant's original claim, which was filed on April 14, 1978, had been finally denied on November 19, 1980, and had not been pursued within the one-year period for modification pursuant to 20 C.F.R. §725.310(a).[1] Consequently, the administrative law judge determined that claimant's second claim, which was filed on January 3, 1983, was a duplicate claim which must be denied on the basis of the prior denial pursuant to 20 C.F.R. §725.309(d), inasmuch as the weight of the new medical evidence, submitted in support of claimant's second claim, failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, and thus failed to establish a material change in conditions. Accordingly, benefits were denied. Claimant appeals, contending that the evidence is sufficient to establish both a material change in conditions pursuant to Section 725.309(d), and entitlement to benefits pursuant to 20 C.F.R. Part 718. The Director, Office of Workers' Compensation

[1] The deputy commissioner denied the initial claim because the evidence did not establish either the existence of pneumoconiosis or that the disease arose out of coal mine employment. Director's Exhibit 26.

Programs (the Director), responds, urging affirmance.[2]

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, 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 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).

Turning first to the procedural issue, claimant asserts that the positive x-ray interpretation by Dr. Sargent and the medical report of Dr. Mettu constitute new medical evidence, developed subsequent to the denial of the first claim, which is sufficient to establish a material change in conditions pursuant to Section

[2] The administrative law judge's findings pursuant to Section 725.310, and with regard to the length of coal mine employment, are affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

725.309(d). See Director's Exhibit 37. In order to establish a material change in conditions, claimant must submit evidence which is relevant and probative, demonstrating that there is a reasonable possibility that it would, if fully credited, change the prior administrative result. Rice v. Sahara Coal Co., Inc., BLR , BRB No. 88-1347 BLA (Aug. 31, 1990)(en banc); Spese v. Peabody Coal Co., 11 BLR 1-178 (1988), dismissed with prejudice, No. 88-3309 (7th Cir., Feb. 6, 1989)(unpub.). The administrative law judge must determine whether a material change in conditions has been established without weighing the evidence supportive of a finding of material change against the contrary evidence. In the instant case, the administrative law judge did not apply the proper method, inasmuch as he weighed the new evidence, determined that it was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202, and then found that a material change in conditions had not been established. Consequently, we must vacate the administrative law judge's findings pursuant to Section 725.309(d), and remand this case for the administrative law judge to determine whether claimant has established a material change in conditions thereunder pursuant to the standard set forth in Rice, supra. If, on remand, the administrative law judge concludes that claimant has established a material change in conditions, he must then weigh not only the new evidence, but all of the relevant evidence of record, and determine whether claimant has established the elements of entitlement pursuant to Part 718. Accordingly, we must also vacate the administrative law judge's findings pursuant to Section

718.202.

Claimant additionally maintains that, in finding that the new x-ray evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge erred in his evaluation of the conflicting interpretations of a film taken on November 9, 1987. We agree. The administrative law judge found that both of the physicians who interpreted the film were B-readers, and that the interpretation of Dr. Poulos was negative for pneumoconiosis, whereas the interpretation of Dr. Sargent was positive. See Director's Exhibit 37. The administrative law judge could not discern any explanation for the difference in opinion between equally qualified physicians, and therefore found that this "equivocal" evidence was negative for pneumoconiosis. Decision and Order at 7. An administrative law judge, however, is required to apply the "true doubt" rule when the evidence, upon weighing, is found to be equally probative but contradictory. Kozele v. Rochester & Pittsburgh Coal Co., 6 BLR 1-378 (1983). In this situation, the administrative law judge must resolve the issue in favor of the claimant. Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989); Conley v. Roberts and Schaefer Co., 7 BLR 1-309 (1984). Consequently, in reviewing the merits of this claim on remand, the administrative law judge must re-assess the interpretations of Drs. Sargent and Poulos, and reconsider the x-ray evidence taken as a whole pursuant to Section 718.202(a)(1). See generally Cooley v. Island Creek Coal Co., 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); Clark, supra.

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.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ERIC FEIRTAG
Administrative Law Judge