

BRB No. 97-0373 BLA

JESSE H. HIGGINS)	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:
OLD BEN COAL COMPANY)	
)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	

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

Harold B. Culley, Jr., Raleigh, Illinois, for claimant.

Karen Rapaport Esser (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (91-BLA-2515) of Administrative Law Judge Robert Kaplan awarding 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 involving a duplicate claim is before the Board for the third time. Initially, Administrative Law Judge Peter McC. Giesey awarded benefits on claimant's second application for benefits, but without first determining whether the new evidence established a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, on appeal, the Board vacated the administrative law judge's findings and remanded the case for him to consider the duplicate claim pursuant to Section 725.309(d) under *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 556, 15 BLR 2-227, 2-229. (7th Cir. 1991), and to make findings pursuant to 20 C.F.R. §§718.202(a) and 718.204, if reached. *Higgins v. Old Ben Coal Co.*, BRB No. 93-0201 BLA (May 11,

1994)(unpub.).

On remand, the case was re-assigned to Judge Kaplan, who found that the new evidence established the existence of a totally disabling respiratory impairment and concluded therefore that a material change in conditions was established. On the merits, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and determined that claimant was totally disabled due to pneumoconiosis pursuant to Section 718.204. Accordingly, he awarded benefits.

On appeal, the Board vacated the administrative law judge's material change in conditions finding because the administrative law judge failed to determine, pursuant to *McNew*, whether the new evidence established that claimant's total respiratory disability was due to pneumoconiosis. *Higgins v. Old Ben Coal Co.*, BRB No. 95-1370 BLA (Apr. 29, 1996)(unpub). The Board also vacated the administrative law judge's weighing of the new total disability evidence pursuant to Section 718.204(c)(4), holding that the administrative law judge mischaracterized Dr. Tuteur's opinion. [1996] *Higgins*, slip op. at 4. Specifically, the Board indicated that the administrative law judge erred when he found that Dr. Tuteur did not state whether claimant was totally disabled because, in the Board's view, "Dr. Tuteur specifically diagnosed no respiratory impairment."¹ *Id.* The Board instructed the administrative law judge that in reconsidering the material change in conditions issue on remand, he was to reweigh Dr. Tuteur's opinion at Section 718.204(c)(4), reweigh all of the contrary probative new evidence pursuant to Section 718.204(c), and then determine whether the new evidence established that claimant's total respiratory disability was due to pneumoconiosis. [1996] *Higgins*, slip op. at 3-4. On the merits, the Board affirmed the administrative law judge's finding that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), but vacated the administrative law judge's findings pursuant to Section 718.204 and instructed him to consider all of the relevant evidence. [1996] *Higgins*, slip op. at 5-6.

On remand, the administrative law judge found that "the opinion attributed to Dr. Tuteur by the Board," was unreasoned at Section 718.204(c) and irrelevant to disability causation at Section 718.204(b). Decision and Order on Remand 4. In reliance on these findings, the administrative law judge found that the new evidence established total disability due to pneumoconiosis and a material change in conditions pursuant to Section 725.309(d). On the merits, the administrative law judge weighed some but not all of the

¹ However, further review of the record indicates that Dr. Tuteur actually diagnosed a moderate obstructive impairment, which he opined was unrelated to claimant's simple pneumoconiosis but was due instead to smoking. Director's Exhibit 20.

evidence regarding the existence of total respiratory disability at Section 718.204(c), and again rejected Dr. Tuteur's opinion as irrelevant in finding disability causation established at Section 718.204(b). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge misapplied the material change in conditions test of *McNew*. Employer further asserts that the administrative law judge mischaracterized Dr. Tuteur's opinion and failed to consider all relevant evidence regarding total disability. Claimant 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As a result of the Board's statement that Dr. Tuteur diagnosed no respiratory impairment, the administrative law judge refused to consider at Section 718.204(b)--both on the material change in conditions issue and on the merits--Dr. Tuteur's opinion that no part of claimant's respiratory impairment was related to pneumoconiosis. Decision and Order on Remand at 4-5, 8; Director's Exhibit 20. In addition, as employer contends, Employer's Brief at 28, the administrative law judge failed to weigh all of the contrary probative evidence pursuant to Section 718.204(c).² Therefore, we must vacate the administrative

² The administrative law judge did not weigh Dr. Selby's opinion that claimant "has the respiratory pulmonary capacity to perform his coal mine employment duties as a gob truck driver. . . .," Director's Exhibit 24, or the opinions of Drs. Sanjabi, Rao, Rosecan, and Kelly, all of whom diagnosed varying degrees of respiratory impairment. Director's Exhibits 6, 7, 20, 24; Claimant's Exhibit 1.

law judge's findings and remand this case for further consideration.³

On remand, the administrative law judge must weigh the new evidence to determine whether claimant's physical condition has changed materially since the time of the previous denial *i.e.*, whether his pneumoconiosis has progressed to the point of becoming totally disabling. See *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc rehearing*); *McNew, supra*. If this is established, the administrative law judge must weigh both the old and the new medical opinions at Section 718.204(c)(4), then weigh all of the contrary probative evidence together 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), *aff'd* 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *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. See *Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990)(pneumoconiosis must be a necessary cause, but need not be a sufficient cause of disability).

³ However, we reject employer's contention that the administrative law judge's reliance on the disability causation opinions of Drs. Rao and Kelly violates 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). Employer's Brief at 30. The administrative law judge identified the evidence relied upon and explained his analysis sufficiently to permit review of his reasoning. Decision and Order on Remand at 4, 7.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge