BRB No. 03-0504 BLA

GLENN WEBB	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROXANA COAL COMPANY, INCORPORATED	)	DATE ISSUED: 04/28/2004
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Glenn Webb, Whitesburg, Kentucky, *pro* se.

David H. Neeley (Neeley & Reynolds, PSC), Prestonsburg, Kentucky, for employer/carrier.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant, representing himself, appeals the Decision and Order (01-BLA-1195) of Administrative Law Judge Daniel J. Roketenetz 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).[1] The instant case involves a duplicate claim filed on June 6, 2000.[2] The district director denied the claim on September 22, 2000. Claimant subsequently filed a request for modification. In a Proposed Decision and Order dated June 18, 2001, the district director denied claimant's request for modification. The case was subsequently forwarded to the Office of Administrative Law Judges for a hearing.

The administrative law judge found that the issue before him was whether the evidence was sufficient to establish modification pursuant to 20 C.F.R. §725.310 (2000). Because claimant requested modification of a duplicate claim, the administrative law judge considered whether the newly submitted evidence was sufficient to establish one of the elements of entitlement that formed the basis for the previous denial of benefits. The administrative law judge noted that if the newly submitted evidence was sufficient to do so, the evidence would be sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) [3] as a matter of law. After crediting claimant with at least twenty years of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R.

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on November 12, 1973. Director's Exhibit 35. The district director denied the claim on December 12, 1975 and July 21, 1979. *Id.* There is no indication that claimant took any further action in regard to his 1973 claim.

Claimant filed a second claim on December 10, 1992. Director's Exhibit 34. The district director denied the claim on May 24, 1993 and August 10, 1994. *Id.* There is no indication that claimant took any further action in regard to his 1992 claim.

Claimant filed a third claim on June 6, 2000. Director's Exhibit 1.

[3] Although Section 725.309 has been revised, these revisions apply only to claims filed after January 19, 2001.

§718.204(b)(2)(i)-(iv).[4] The administrative law judge also found that the newly submitted evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge 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 under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In considering the instant claim, the administrative law judge should have considered whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), rather than determining whether claimant established a basis for modification of the district director's denial of claimant's 2000 duplicate claim.[5] *See Hess v. Director, OWCP*, 21 BLR 1-141 (1999).

[4] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[5]The Board has held that any party dissatisfied with a district director's determination on a duplicate claim is entitled to have the matter considered by the Office of Administrative Law Judges. *See Rice v. Sahara Coal Co.*, 15 BLR 1-19 (1991) (*en banc*). Moreover, an administrative law judge may properly review, *de novo*, the issue of whether the evidence establishes a material change in conditions. *Id.*

This error, however, is harmless in view of the administrative law judge's ultimate consideration of whether the newly submitted evidence (the evidence submitted since the denial of claimant's 1992 claim) was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994). Claimant's 1992 claim was denied because claimant failed to establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibit 34. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a finding of total disability pursuant to 20 C.F.R. §718.204(b).[6]

The administrative law judge found that the newly submitted x-ray evidence was in equipoise, at best, and, therefore, insufficient to establish the existence of pneumoconiosis.[7] Decision and Order at 11-12. The newly submitted x-ray evidence consists of interpretations of three x-rays taken on July 13, 2000, September 7, 2000 and September 21, 2000.

Dr. Barrett, a B reader and Board-certified radiologist, interpreted claimant's July 13, 2000 x-ray as positive for pneumoconiosis. Director's Exhibit 10. Dr. Baker, a B reader, also interpreted this x-ray as positive for pneumoconiosis. Director's Exhibit 8.

---

[6] Claimant may establish a material change by submitting new evidence that establishes either that he suffers from pneumoconiosis or that he suffers from a totally disabling respiratory or pulmonary impairment. Contrary to our dissenting colleague's contention, it is not necessary for the administrative law judge to also address whether the newly submitted evidence is sufficient to establish total disability due to pneumoconiosis. If the new evidence is insufficient to establish both the existence of pneumoconiosis and total disability, a finding of total disability due to pneumoconiosis is obviously precluded.

[7] In his consideration of the newly submitted x-ray evidence, the administrative law judge properly accorded greater weight to the interpretations rendered by B readers and/or Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 11.

However, Dr. Sargent, a B reader and Board-certified radiologist, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 9. Two B readers, Drs. Repsher and Wiot,[8] also interpreted this x-ray as negative for pneumoconiosis. Employer's Exhibit 3. Thus, equally qualified physicians interpreted claimant's July 13, 2000 x-ray as both positive and negative for pneumoconiosis.

Dr. Westerfield, a B reader, rendered the only interpretation of claimant's September 7, 2000 x-ray, finding it positive for pneumoconiosis. Director's Exhibit 25. However, two equally qualified physicians, Drs. Broudy and Repsher, interpreted claimant's September 21, 2000 x-ray as negative for pneumoconiosis.[9] Director's Exhibit 26; Employer's Exhibit 1.

Having reasonably found that the newly submitted x-ray evidence was "in equipoise," the administrative law judge properly found that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). We, therefore, affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

The administrative law judge also addressed whether the newly submitted biopsy evidence was sufficient to establish the existence of pneumoconiosis. Dr. Alam performed a bronchoscopy on May 31, 2001. Claimant's Exhibit 2. After reviewing biopsy specimens of claimant's right lower lobe, Dr. Chan prepared a pathology report on June 5, 2001 wherein he diagnosed "? Lesion right lower lobe; COPD." *Id.* Dr. Chan noted that there were "fragments of alveolar tissue with focal mild deposition of anthracotic pigment." *Id.* The administrative law judge noted that Section 718.202(a)(2) provides that a finding in a biopsy of anthracotic pigment is not sufficient, by itself, to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(2); Decision and Order at 12. The administrative law judge, therefore, properly found that the biopsy evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). *Id.*

[8] Although the administrative law judge characterized Dr. Wiot as being a B reader and a Board-certified radiologist, the record only reveals that he is a B reader. *See* Employer's Exhibit 3. However, the administrative law judge's error is harmless inasmuch as his finding that the x-ray evidence is, at best, equally probative, is supported by substantial evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[9] There are no positive interpretations of claimant's September 21, 2000 x-ray in the record.

The administrative law judge also properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).[10] Decision and Order at 12-13

The administrative law judge next considered whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis. While Drs. Alam, Breeding, Baker and Westerfield diagnosed pneumoconiosis, Director's Exhibits 8, 25, 27, 28; Claimant's Exhibits 1, 3; Employer's Exhibit 2, Drs. Broudy and Repsher opined that claimant did not suffer from the disease. Director's Exhibit 26; Employer's Exhibit 1. In his consideration of whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge found that the opinions of Drs. Alam and Breeding were not sufficiently reasoned. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Although the administrative law judge recognized that each of these physicians treated claimant, he accurately noted that these physicians based their opinions on evidence that was insufficient to support a finding of pneumoconiosis. The administrative law judge found that Dr. Alam's finding of coal workers' pneumoconiosis was based upon biopsy evidence of "antherosilicotic deposition," a finding that the administrative law judge properly found insufficient to support a finding of pneumoconiosis.[11] Decision and Order at 17; Director's Exhibit 27; Claimant's Exhibit 3. Similarly, the administrative law judge found that Dr. Breeding's diagnosis of pneumoconiosis[12] was based on Dr. Kabir's

---

[10] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

[11] In a report dated June 11, 2001, Dr. Alam noted that claimant's lung biopsy was "positive for antherosilicotic deposition in his lungs compatible with black lung." Director's Exhibit 27. Dr. Alam opined that claimant definitely had "coal worker's pneumoconiosis as diagnosed by lung biopsy." *Id.*

In a "Black Lung Disability Report" dated June 3, 2002, Dr. Alam indicated without explanation, that claimant suffered from coal workers' pneumoconiosis. Claimant's Exhibit 1. Dr. Alam reiterated his diagnosis during an August 28, 2002 deposition. Claimant's Exhibit 3 at 16-18.

[12] In a letter dated April 6, 2001, Dr. Breeding stated that:

interpretation of an August 3, 2000 CT scan, an interpretation that the administrative law judge properly found insufficient to support a finding of pneumoconiosis.[13] Decision and Order at 12, 17; Director's Exhibit 28. The administrative law judge, therefore, acted within his discretion in finding that the opinions of Drs. Alam and Breeding were not sufficiently reasoned. *See Clark*, *supra*; *Lucostic*, *supra*; Decision and Order at 17.

We further note that the administrative law judge was not required to accord greater weight to the opinions of Drs. Alam and Breeding based upon their status as claimant's treating physicians. The Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.[14] *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.* As discussed, *supra*, the administrative law judge properly accorded less weight to the opinions of Drs. Alam and Breeding, that claimant suffered from pneumoconiosis, because he found that their

---

> [Claimant] has severe coal worker's pneumoconiosis and COPD with emphysematous changes on his chest x-ray.
>
> CT scan of the chest on 8/3/00 read by Dr. Kabir showed wide spread central lobular as well as paracentral emphysema. His chest x-ray dated 7/19/00 also showed COPD.
>
> [Claimant's] work history along with his changes on his CT scan are consistent with black lung disease.

Director's Exhibit 28.

[13] Dr. Kabir interpreted claimant's August 3, 2000 CT scan as revealing "[w]ide spread centrilobular as well as paraseptal emphysema." Claimant's Exhibit 2. Dr. Kabir explicitly stated that there was no evidence of any pulmonary mass or nodule." *Id.*

[14] The administrative law judge properly applied 20 C.F.R. §718.104(d) in this case. See Decision and Order at 17. Revised Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The United States Court of Appeals for the Sixth Circuit has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

opinions were not sufficiently reasoned. *Clark*, *supra*; *Lucostic*, *supra*; Decision and Order at 17.

The administrative law judge also permissibly discredited the diagnoses of coal workers' pneumoconiosis rendered by Drs. Baker and Westerfield because he found that they were merely restatements of x-ray opinions.[15] *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); Decision and Order at 17-18; Director's Exhibits 8, 25; Employer's Exhibit 2.

The administrative law judge properly accorded the greatest weight to the opinions of Drs. Broudy and Repsher, that claimant does not suffer from pneumoconiosis, because he found that their opinions were well reasoned and documented. *Clark*, *supra*; *Lucostic*, *supra*; Decision and Order at 17; Director's Exhibit 26; Employer's Exhibit 1.

Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge also considered whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). In his consideration of whether the newly submitted pulmonary function study evidence was sufficient to establish total disability, the administrative law judge properly found that claimant's pulmonary function studies conducted on July 13, 2000, September 7, 2000, September 21, 2000 and May 14, 2001 are non-qualifying.[16] Decision and Order at 19;

---

[15] In addition to diagnosing coal workers' pneumoconiosis, Dr. Baker also diagnosed chronic bronchitis attributable to coal dust exposure and cigarette smoking, a finding that, if credited, could support a finding of "legal" pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); Director's Exhibit 8. However, because Dr. Baker provided no basis for attributing claimant's chronic bronchitis to his coal dust exposure, the administrative law judge's failure to address this aspect of Dr. Baker's opinion constitutes harmless error. *See Larioni*, *supra*.

[16] A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. A "non-qualifying" study yields values which exceed the requisite table values.

During an August 28, 2002 deposition, Dr. Alam noted the results of a pulmonary function study conducted on January 26, 2000. *See* Employer's Exhibit 3 at 31. The

Director's Exhibits 8, 25, 26; Claimant's Exhibit 2. We, therefore, affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Because the administrative law judge properly found that all five of the arterial blood gas studies of record are non-qualifying, we also affirm the administrative law judge's finding that the newly submitted arterial blood gas study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).[17] Decision and Order at 19.

Inasmuch as there is no newly submitted evidence of record indicating that the claimant suffered from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant was precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 19.

In his consideration of whether the medical opinion evidence was sufficient to establish total disability, the administrative law judge found that Dr. Alam was the only physician to opine that claimant suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 27; Claimant's Exhibits 1, 3. However, because Dr. Alam failed to provide a basis for finding that claimant suffered from a totally disabling pulmonary impairment, the administrative law judge properly found that his opinion was not sufficiently reasoned. *See Clark*, *supra*; *Lucostic*, *supra*; Decision and Order at 19.

Moreover, the administrative law judge correctly noted that Drs. Broudy, Repsher, Baker and Westerfield opined that claimant did not suffer from a totally disabling respiratory or pulmonary impairment.[18] Decision and Order at 19. The administrative

---

administrative law judge's error, if any, in failing to consider this study, is harmless inasmuch as this study also produced non-qualifying values. *Larioni*, *supra*.

[17] The record contains the results of arterial blood gas studies conducted on January 26, 2000, July 13, 2000, September 7, 2000, September 21, 2000 and May 7, 2001. Director's Exhibits 8, 25-27; Employer's Exhibit 2.

[18] In a report dated July 13, 2000, Dr. Baker opined that claimant retained the respiratory capacity to perform the work of a coal miner. Director's Exhibit 8. In a report dated September 7, 2000, Dr. Westerfield opined that claimant did not suffer from any pulmonary impairment. Director's Exhibit 25; *see also* Employer's Exhibit 2 at 23. In a report dated September 21, 2000, Dr. Broudy opined that claimant retained the respiratory capacity to perform the work of an underground coal miner. Director's

law judge found that these opinions were well reasoned and supported by the objective evidence. *See Clark, supra*; *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982); Decision and Order at 19. Inasmuch as it is based upon substantial evidence, the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions pursuant to 20 C.F.R. 725.309 (2000). *Ross, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

_____

ROY P. SMITH
Administrative Appeals Judge

Exhibit 26. In a report dated March 12, 2002, Dr. Repsher opined that claimant retained the respiratory capacity to perform the work of an underground coal miner. Employer's Exhibit 1.

The administrative law judge properly stated that Dr. Breeding did not address whether claimant suffered from a totally disabling respiratory or pulmonary impairment. Decision and Order at 19; Director's Exhibit 28.

McGRANERY, Administrative Appeals Judge, concurring:

I write separately because the majority has ignored the teaching of the United States Court of Appeals for the Sixth Circuit on the standard applicable to a "material change in conditions" pursuant to 20 C.F.R. §725.309(d) (2000).

In *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994) the Sixth Circuit held that "to assess whether a material change is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him." The record reflects that claimant's prior claim was denied because the evidence did not show: (1) claimant has pneumoconiosis; (2) "the disease was caused at least in part by pneumoconiosis;" and (3) that he is "totally disabled by the disease." Director's Exhibit 34-67.[19] Although the majority recognizes that the third element adjudicated against claimant was failure to establish total disability due to pneumoconiosis, the majority states that claimant could establish a material change merely by showing that he was totally disabled, and ultimately, the majority holds that because claimant failed to establish total disability, he failed to establish a material change.

In *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 609, 22 BLR 2-288, 2-300 (6th Cir. 2001) the Sixth Circuit held that the administrative law judge had erred by misidentifying the element adjudicated against *Kirk* when the judge addressed the existence of total disability, even though the prior claim had been denied for failure to show total disability due to pneumoconiosis. The court declared:

> Under the act, there is a crucial distinction between "total disability" and "total disability due to pneumoconiosis," a distinction also of great practical importance in many cases aside from this one. District directors, ALJs, and the Board are therefore well-advised to craft their findings and decisions in such a way as to avoid any suggestion that these terms are in any way interchangeable.

Kirk, 264 F.3d at 609 n.7, 22 BLR at 2-301 n.7.

[19] Claimant's prior claim was denied on August 10, 1994 "for the reasons previously given…" Director's Exhibit 34-2. Those reasons were spelled out in the DOL letter dated May 24, 1993, denying his claim. Director's Exhibit 34-67.

The court could not have been clearer or more emphatic in its direction. The majority's unwillingness to obey the court's command is baffling. I point out this error because I believe the Board should strive to be correct in its decisions and because the administrative law judge's correctness in this regard warrants acknowledgement.[20]

I note, in addition, that a fair reading of the administrative law judge's decision shows that he correctly understood that the issue before him was whether claimant had established a material change in conditions, not whether he had supported his request for modification. *See* Decision and Order at 9, 20. In holding to the contrary, I believe the majority misreads the decision.

In sum, review of the administrative law judge's decision reveals that he recognized that the issue before him was whether the evidence established a material change in conditions and, specifically, whether claimant had established total disability due to pneumoconiosis, in accordance with the Sixth Circuit's teaching in *Kirk, supra*. It behooves the Board to follow his example.

REGINA C. McGRANERY
Administrative Appeals Judge

[20] I think it should also be recognized that the majority's confusion about the third element could have practical consequences adverse to claimant. It is possible that eventually claimant could establish a material change with respect to the first two elements and with respect to total disability before he was able to establish total disability due to pneumoconiosis, and that when he obtained the requisite evidence to establish that he was totally disabled due to pneumoconiosis, a claims examiner or administrative law judge would find claimant unable to establish a material change in conditions and hold his claim barred, mistakenly relying on the majority's statement of the issue. If, however, subsequent decision-makers recognize that the third element is total disability due to pneumoconiosis, the material change requirement of Section 725.309(d) (2000) could not prevent him from establishing entitlement.