

BRB No. 01-0107 BLA

CLEETUS E. DISHMON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL	)	DATE ISSUED:
COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS’	)	
COMPENSATION PROGRAMS, UNITED )	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

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

Douglas A. Smoot (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

Per Curiam:

Claimant appeals the Decision and Order - Denying Benefits (99-BLA-1265) of Administrative Law Judge Robert J. Lesnick 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).<sup>1</sup> The administrative law judge considered the instant claim, a

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<sup>1</sup>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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted,

duplicate claim which was filed on September 29, 1998, pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000).<sup>2</sup> After crediting claimant with at least ten years of coal mine employment,<sup>3</sup> the administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and (a)(4) (2000) and 718.203(b) (2000), elements of entitlement which claimant previously established. The administrative law judge further found the new evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000), the element of entitlement which was previously adjudicated against claimant.<sup>4</sup> The administrative law judge determined that, therefore, claimant failed to

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refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

<sup>2</sup>Claimant initially filed a claim on July 2, 1973, which was finally denied by the district director on January 2, 1980 for claimant's failure to establish total disability. Director's Exhibit 31. Claimant took no further action thereafter until filing a second claim on May 15, 1987. Director's Exhibit 30. Administrative Law Judge Charles P. Rippey denied this claim in a Decision and Order dated April 25, 1990, finding that claimant failed to establish total disability. *Id.* Claimant did not take any further action thereafter until filing the instant duplicate claim on September 29, 1998. Director's Exhibit 1.

<sup>3</sup>The administrative law judge stated at one point in his Decision and Order that claimant testified that he worked in coal mine employment for thirty-four to thirty-five years. Decision and Order at 2. The administrative law judge's specific finding, however, was that claimant established at least ten years of coal mine employment, based upon claimant's Social Security records and hearing testimony. *Id.* at 7.

<sup>4</sup>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

establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).<sup>5</sup> Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge improperly weighed the newly submitted medical opinion when considering it with regard to total disability at Section 718.204(c)(4) (2000). Employer has filed a response brief in support of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he does not presently intend to participate in this appeal.<sup>6</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

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disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

<sup>5</sup>Although the amended regulations revised the provision at 20 C.F.R. §725.309 (2000), the revision at Section 725.309 became effective on January 19, 2001, and does thus not apply to the instant claim. *See* 20 C.F.R. §§725.2 and 725.309.

<sup>6</sup>We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to the newly submitted evidence under 20 C.F.R. §§718.202(a)(1) and (a)(4) (2000), 718.203(b) (2000) and 718.204(c)(1)-(3) (2000). *Skrack v. Island Creek Coal Co.*, 7 BLR 1-710 (1983); Decision and Order at 8-9; *see* 20 C.F.R. §§718.202(a)(1) and (a)(4), 718.203(b) and 718.204(b)(2)(i)-(iii).

On appeal, claimant argues that the administrative law judge improperly rejected Dr. Rasmussen's opinion on the basis that Dr. Rasmussen, who found that claimant is totally disabled from a pulmonary standpoint from performing "heavy or very heavy manual labor," Director's Exhibit 10, never discussed his opinion in terms of claimant's last coal mining job as a truck driver. We agree. Dr. Rasmussen examined claimant on November 25, 1998, diagnosed claimant with pneumoconiosis arising out of coal mine employment, found that claimant exhibited a moderate loss of respiratory function, and concluded that claimant is totally disabled from a pulmonary standpoint from performing heavy manual labor. Director's Exhibit 10. Contrary to the administrative law judge's finding that Dr. Rasmussen never discussed these conclusions in terms of claimant's coal mine job, *see* Decision and Order at 9, Dr. Rasmussen's report reveals that he found that claimant's last coal mining job as a truck driver entailed heavy manual labor. *Id.* Specifically with regard to claimant's coal mine employment, Dr. Rasmussen noted that claimant last worked as a truck driver for the last one and one-half years, driving refuse from the tipples to the gob pile. *Id.* Dr. Rasmussen also stated that, during the period that claimant was working as a truck driver, claimant shoveled coal at the preparation plant to clean up, and thus did some heavy labor.<sup>7</sup> *Id.* Because the administrative law judge's finding, that Dr. Rasmussen failed to discuss his opinion that claimant is totally disabled in terms of claimant's coal mine employment, does not coincide with the record, we vacate the administrative law judge's finding that the newly submitted medical evidence is insufficient to establish total disability under Section 718.204(c)(4) (2000). *See* 20 C.F.R. §718.204(b)(2)(iv). Additionally, claimant argues that the administrative law judge should have discounted the opinions of Drs. Zaldivar, Fino, Castle, Dahhan and Morgan, indicating that claimant is not totally disabled from a respiratory or pulmonary standpoint, because these physicians did not adequately discuss all aspects of claimant's job duties as a truck driver, but only considered claimant's ability to do a portion of his job. On remand, the administrative law judge should address whether employer's physicians exhibited a sufficient understanding of the exertional requirements of claimant's last employment. Finally, the administrative law judge should consider Dr. Karam's opinion.<sup>8</sup> *See* 20 C.F.R. §718.204(b).

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<sup>7</sup>At the hearing in the prior claim, which was held on February 6, 1990, claimant testified that he walked around the preparation plant often, shoveling and cleaning up coal when the plant was "down." Hearing Tr. at 25. He testified that this work entailed frequent stair climbing in the four story plant. *Id.* Claimant indicated that he also had to climb up and down a nineteen foot ladder to get in and out of the truck all day long on the job. *Id.* This testimony was duly noted by the administrative law judge. Decision and Order at 3.

<sup>8</sup>In summarizing the new medical opinion evidence, the administrative law judge referred to Dr. Karam's March 5, 1999 letter. Dr. Karam, claimant's cardiologist, stated in the letter that claimant is "permanently and completely disabled" due to his "overall medical problem," a problem which, in Dr. Karam's opinion, included coronary artery disease and

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pneumoconiosis. Decision and Order at 5; Director's Exhibit 19. Because the administrative law judge did not weigh Dr. Karam's report with the newly submitted medical opinions with regard to total disability, it appears that the administrative law judge may have construed Dr. Karam's letter as indicative that claimant is totally disabled from coronary artery disease alone, and not from a pulmonary or respiratory standpoint. Decision and Order at 5, 9-10; Director's Exhibit 19. On remand, the administrative law judge is instructed to reconsider the medical opinion of Dr. Karam and thoroughly explain his weighing of that opinion.

Because the administrative law judge's finding that the newly submitted evidence was insufficient to establish total disability is vacated, we also vacate the administrative law judge's finding that a material change in conditions was not established under Section 725.309 (2000). If, on remand, the administrative law judge finds the medical opinion evidence associated with the duplicate claim sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), he must then weigh all of the newly submitted, relevant evidence, like and unlike, pursuant to Section 718.204(b). 20 C.F.R. §718.204(b)(i)-(iv); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). If the administrative law judge finds the newly submitted evidence sufficient to establish total disability, and thus a material change in conditions, he must then consider the claim on the merits. 20 C.F.R. §725.309(d) (2000); *see Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.2d 402, 19 BLR 2-223 (4th Cir. 1995).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge