BRB No. 98-1502 BLA
Case No. 97-BLA-0594

KENTON CAUDILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH OF KENTUCKY, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER on RECONSIDERATION *EN BANC*
	)	
Party-in-Interest	)	

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen, Chartered), Washington, D.C., for employer.

Jeffrey S. Goldberg (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, BROWN[1] and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

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[1]Due to his unavailability, Administrative Appeals Judge James F. Brown did not participate in this decision.

PER CURIAM:

Employer has filed a timely Motion for Reconsideration and Suggestion for Rehearing *En Banc* of the Board's Decision and Order issued on August 17, 1999 in the above-captioned case which arises under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). In that decision, the Board affirmed the unchallenged finding of fourteen years of coal mine employment and the 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) by Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge). However, the Board vacated 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 since the administrative law judge did not consider whether the newly submitted evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c).[2] The Board, therefore, remanded the case for further consideration of the evidence. The Board instructed the administrative law judge to consider all of the evidence of record to determine whether it supports a finding of entitlement to benefits on the merits under 20 C.F.R. Part 718, if he finds that claimant established a material change in conditions under 20 C.F.R. §725.309.

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[2]Claimant's first claim was filed on August 11, 1989. Director's Exhibit 45. Administrative Law Judge Bernard J. Gilday, Jr. issued a Decision and Order denying benefits on June 2, 1992. *Id.* The basis of Judge Gilday's denial was claimant's failure to establish the existence of pneumoconiosis. *Id.* The denial became final because claimant did not pursue this claim any further. Claimant filed a duplicate claim on December 4, 1995. Director's Exhibit 1.

In support of its Motion for Reconsideration, employer contends that the Board erred in vacating the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309. Employer's contention is based on the premise that since Administrative Law Judge Bernard J. Gilday, Jr. (the previous administrative law judge) did not render a finding with respect to the issue of total disability in the prior denial of benefits, the issue of total disability is irrelevant to a material change in conditions finding at 20 C.F.R. §725.309 under the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Claimant responds,[3] contending that an element of entitlement which a prior fact-finder did not explicitly address in the denial of the previously filed claim constitutes "an element of entitlement previously adjudicated against a claimant" and as a result is an element which must be considered in determining whether the newly submitted evidence establishes a material change in

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[3]By Order dated April 13, 2000, the Board requested supplemental briefing on reconsideration from claimant and the Director, Office of Workers' Compensation Programs (the Director), with respect to the administrative law judge's material change in conditions finding at 20 C.F.R. §725.309. *Caudill v. Arch of Kentucky, Inc.*, BRB No. 98-1502 BLA (Apr. 13, 2000)(*en banc*)(unpub.). The Board specifically requested claimant and the Director to address the issue of whether an element of entitlement which a prior fact-finder did not explicitly address in the denial of the previously filed claim constitutes "an element of entitlement previously adjudicated against a claimant" and is therefore an element of entitlement which must be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 in accordance with *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). *Id*.

conditions at 20 C.F.R. §725.309. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the issue of whether claimant can establish a material change in conditions at 20 C.F.R. §725.309 by proving an element of entitlement not decided against him in the prior claim does not arise in this case because the administrative law judge in the prior claim found that claimant established total disability at 20 C.F.R. §718.204(c). Alternatively, the Director contends that claimant cannot establish a material change in conditions at 20 C.F.R. §725.309 by proving an element of entitlement that was not affirmatively decided against him in the prior claim.

After consideration of the arguments made by the parties on reconsideration, we grant employer's motion for reconsideration *en banc*, and grant its request for relief. Initially, we address the Director's contention that the issue of whether claimant can establish a material change in conditions at 20 C.F.R. §725.309 by proving an element of entitlement not decided against him in the prior claim does not arise in this case because the administrative law judge in the prior claim did, in fact, find that claimant established total disability at 20 C.F.R. §718.204(c). As the Board observed, the administrative law judge correctly noted that claimant's previous claim for benefits was denied "based on the finding that [c]laimant did not establish the existence of pneumoconiosis." [1998] Decision and Order at 7; *see* Director's Exhibit 45. The previous administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis was based on his analysis of all relevant evidence under 20 C.F.R. §718.202(a)(1)-(4). Although the previous administrative law judge additionally noted the values of the pulmonary function and arterial blood gas studies in his analysis of the evidence under 20 C.F.R. §718.202(a)(4), he did not consider this objective evidence in the context of whether it was sufficient to establish total respiratory disability under 20 C.F.R. §718.204(c). Similarly, although the previous administrative law judge considered the medical opinion evidence in his analysis of the evidence under 20 C.F.R. §718.202(a)(4), he did not consider the medical opinion evidence in the context of whether it was sufficient to establish total respiratory disability under 20 C.F.R. §718.204(c). After finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the previous administrative law judge stated, "[t]here can be no doubt that, due to chronic obstructive lung disease, which is not occupationally related, *and heart disease*, an impairment of the general public, [c]laimant is unable to return to his last coal mine job." [1992] Decision and Order at 10 (emphasis added). However, a claimant must establish the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(c) without regard to any non-respiratory or non-pulmonary impairments. *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991). Moreover, the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33

U.S.C. §919(d) and 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, we reject the Director's contention that the previous administrative law judge's conclusion constitutes a finding that claimant suffers from a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(c).

Next, we address employer's contention that the Board erred in vacating the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309. Specifically, employer asserts, and the Director agrees, that the Board erred in holding that the administrative law judge committed error in failing to address the issue of whether the newly submitted evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c), and thus, a material change in conditions. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him to assess whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *See Ross, supra*; *see also Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

The Board held that although the administrative law judge considered the newly submitted evidence at 20 C.F.R. §718.202(a), and found this evidence insufficient to establish a material change in conditions at 20 C.F.R. §725.309, the case must nonetheless be remanded for further consideration of the newly submitted evidence of record. The Board stated, "[i]n accordance with *Ross*, claimant is also entitled to consideration of whether the newly submitted medical evidence is sufficient to establish any one of the other elements of entitlement under 20 C.F.R. Part 718." *Caudill v. Arch of Kentucky, Inc.*, BRB No. 98-1502 BLA, slip op. at 5 (Aug. 17, 1999)(unpub.). Hence, since the administrative law judge did not consider whether the newly submitted evidence is sufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(c), the Board vacated the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309, and remanded the case for further consideration of the newly submitted evidence.

However, after consideration of the arguments presented by the parties on reconsideration, we now hold that an element of entitlement which the prior administrative law judge did not explicitly address in the denial of the prior claim does not constitute "an element of entitlement previously adjudicated against a claimant." Therefore, such an element may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 in accordance with *Ross*.[4] *See Ross, supra*; *see also Spese, supra*; *Rutter, supra*; *Swarrow, supra*. As the Director asserts, the material change in conditions standard in *Ross* requires an adverse finding on an element of entitlement because it is necessary to establish a baseline from which to gauge whether a material change in conditions has occurred. Consequently, in the absence of a finding that the previously submitted evidence was insufficient to establish a particular element of entitlement, new evidence cannot establish that the miner's condition has changed with respect to that element.[5] Here, the existence of pneumoconiosis was the only element of entitlement expressly adjudicated against claimant in the prior claim. Director's Exhibit 45. Inasmuch as the Board properly affirmed the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) in the instant case, we modify the Board's prior decision to affirm the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309.[6] *See Ross, supra*; *see also Spese, supra*; *Rutter, supra*; *Swarrow, supra*. We, therefore, affirm the administrative law judge's denial of benefits.

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[4]Under the "one-element standard" adopted by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), a miner is provided an opportunity to establish a material change in conditions by proving any element of entitlement *previously adjudicated against him*. Hence, the focus of the material change in conditions standard in *Ross* is on specific findings made against the claimant in the prior claim.

[5]The Director also asserts that the principle that a material change in conditions cannot be established with regard to an element of entitlement not addressed in the prior claim is consistent with principles of issue preclusion.

[6]In view of our disposition of the case under 20 C.F.R. §725.309, we decline to address employer's assertion that the Board committed error in raising the issue of whether the administrative law judge erred in failing to consider the newly submitted evidence of total disability at 20 C.F.R. §718.204(c) *sua sponte*. For that reason, we also decline to address employer's assertion that any error by the administrative law judge in failing to consider the issue of total disability is harmless since the evidence is insufficient to establish the existence of pneumoconiosis.

Accordingly, the relief requested by employer is granted, and the Board's original Decision and Order is modified to reflect an affirmance of the administrative law judge's Decision and Order denying benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

DESKBOOK

PART III.F.2.

The Board, sitting *en banc* on reconsideration, held that an element of entitlement which the prior administrative law judge did not explicitly address in the denial of the prior claim does not constitute "an element of entitlement previously adjudicated against a claimant." The Board, therefore, held that such an element may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 in accordance with ***Sharondale Corp. v. Ross***, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). ***See also Peabody Coal Co. v. Spese***, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997); ***Lisa Lee Mines v. Director, OWCP*** **[*Rutter*]**, 86 F.3d 1358, 20 BLR 2-227, (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). ***Caudill v. Arch Of Kentucky, Inc.***, BRB No. 98-1502 BLA (Sept. 29, 2000).