BRB No. 00-0371 BLA

SHELBY T. BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED:
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

Richard A. Dean (Arter & Hadden, LLP), Washington, DC, for employer.

Barry H. Joyner (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 and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (98-BLA-1113) of Administrative Law Judge Pamela Lakes Wood 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 considered the instant claim, which is a duplicate claim filed on November 7, 1997, under the applicable regulations at 20 C.F.R.

[1]Claimant filed an initial claim for benefits on March 5, 1992. Director's Exhibit 26. In a

Part 718. After crediting claimant with thirty-six years of coal mine employment based upon the stipulation of the parties, the administrative law judge found the newly submitted evidence associated with claimant's duplicate claim sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). The administrative law judge consequently found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge determined that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202 and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Consequently, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's finding that a material change in conditions was established under Section 725.309. Employer further contends that, in weighing the medical opinion evidence on the merits, specifically with regard to total disability and disability causation under Section 718.204(c) and (b), the administrative law judge violated the Administrative Procedure Act, (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), because she failed to provide adequate reasons for crediting Dr. Rasmussen's opinion and discounting the contrary opinions of record. Claimant has filed a response brief in support of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter in which he agrees with employer's position that the administrative law judge improperly found a material change in conditions established under Section 725.309. The Director thus urges the Board to remand the case for reconsideration of this issue. Employer has filed a reply brief reiterating contentions raised in its Petition for Review and brief.

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).

On appeal, employer contends that the administrative law judge erred in finding the new evidence associated with the instant duplicate claim sufficient to establish a material change in conditions under Section 725.309, a contention with which the Director agrees. This contention has merit. Section 725.309 provides that a duplicate claim is subject to

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Decision and Order dated January 26, 1994, Administrative Law Judge Victor Chao accepted employer's concession that claimant established pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). *Id*. Judge Chao further found, however, that claimant failed to established total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) and, accordingly, denied benefits. *Id.* Claimant appealed. The Board affirmed, as unchallenged on appeal, Judge Chao's findings under Sections 718.202(a), 718.203(b) and 718.204(c)(1)-(3). *Brown v. Eastern Associated Coal Co.*, BRB No. 94-0752 BLA (Mar. 26, 1996)(unpublished). The Board further rejected claimant's contention that Judge Chao erred in failing to find total disability established under 20 C.F.R. §718.204(c)(4). *Id*. Thus affirming Judge Chao's finding that claimant failed to establish total disability under Section 718.204(c), the Board affirmed the denial of benefits. *Id*. Claimant took no further action until filing the instant duplicate claim on November 7, 1997. Director's Exhibit 1.

automatic denial on the basis of the prior denial unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held in *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), that in addressing whether the material change in conditions requirement of Section 725.309(d) has been satisfied, 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. *See also LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). In the instant case, the administrative law judge correctly stated that the previous claim was finally denied on the basis that claimant failed to establish total disability. The administrative law judge then considered whether the newly submitted evidence was sufficient to establish that element of entitlement.

As employer and the Director note, in evaluating the new medical opinion evidence with regard to total disability, the administrative law judge focused upon whether or not Drs. Rasmussen, Zaldivar, Fino and Tuteur assumed claimant's work as a dispatcher involved heavy manual labor. Decision and Order at 12-13. At the previous hearing before Judge Chao, claimant testified that his dispatcher work did not require any lifting or heavy labor. 1993 Hearing Transcript at 16. At the later hearing before the administrative law judge, claimant changed this testimony, indicating that his work as a dispatcher involved loading supplies, lifting fifty pound bags of sand and cleaning his office. 1999 Hearing Transcript at 12-13. In crediting the new testimony that claimant's prior coal mine employment as a dispatcher involved heavy manual labor, and comparing the exertional requirements of this job to the medical opinions, the administrative law judge was not focusing on new evidence relating to claimant's present medical condition, but was rather focusing on evidence relating to claimant's employment conditions during the pendency of his prior claim. As employer and the Director assert, the new evidence with regard to claimant's prior work as a dispatcher cannot provide a basis for a material change in conditions under Section 725.309. Instead, such evidence is relevant in the context of whether modification can be established by showing a mistake in a prior determination of fact pursuant to 20 C.F.R. §725.310. The instant case does not involve a timely request for modification, however. We thus vacate the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309, and remand the case for the administrative law judge to reconsider whether Dr. Rasmussen's new opinion supports a finding that claimant has become totally disabled without focusing on claimant's changed testimony that his prior work, in fact, involved heavy labor. On remand, the administrative law judge

[2]We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to the newly submitted evidence under 20 C.F.R. §718.204(c)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 11-12. On remand, if the administrative law judge finds the new medical opinion evidence sufficient to establish total disability under 20 C.F.R. §718.204(c)(4), she must then weigh the new evidence supportive of a finding of total disability against the new, contrary probative evidence at Section 718.204(c). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

should consider whether Dr. Rasmussen's general statement that claimant is totally disabled for any gainful employment is sufficient to establish a material change in conditions by establishing that claimant has become totally disabled since the previous denial of benefits. *See Rutter, supra*.

Inasmuch as we herein remand this case for the administrative law judge to reconsider the issue of whether a material change in conditions was established under Section 725.309, we vacate the administrative law judge's weighing of the evidence of record under Section 718.204(c), (b). In remanding this case, we agree with employer that the administrative law judge did not provide a sufficient rationale for crediting Dr. Rasmussen's opinion and rejecting the contrary opinions of Drs. Zaldivar, Fino and Tuteur, which indicate that, to the extent claimant does have a totally disabling respiratory impairment, such disability is due entirely to claimant's cigarette smoking history. Director's Exhibits 9, 26; Employer's Exhibits 1, 2, 3. The administrative law judge, in effect, improperly substituted her own medical conclusion for the conclusions of the experts when weighing this evidence. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

First, the administrative law judge credited Dr. Rasmussen's opinion simply on the basis that the doctor's opinion, that claimant is totally disabled due to the effects of coal dust exposure as well as smoking, was consistent with claimant's history of coal mine dust exposure for more than thirty-six years. Decision and Order at 16; Director's Exhibits 9, 26; Claimant's Exhibit 1. In addition, the administrative law judge rejected the opinions of Drs. Zaldivar and Fino by concluding that Drs. Zaldivar and Fino did not suggest a way in which the effects of cigarette smoking could be separated from the effects of coal mine dust exposure. Decision and Order at 16; Employer's Exhibits 1, 3. As employer argues, the administrative law judge mischaracterized the opinions of Drs. Zaldivar and Fino in rejecting them on that basis. Drs. Zaldivar and Fino, in fact, explained how claimant's pulmonary function studies, arterial blood gas studies and physiological findings indicated to them that claimant's respiratory impairment was related to smoking and not coal dust exposure. Director's Exhibit 26; Employer's Exhibits 1, 3. Also, with regard to Dr. Tuteur, the administrative law judge rejected this physician's opinion upon stating generally that Dr. Tuteur premised his opinion on an assumption that chronic obstructive pulmonary disease cannot be caused or contributed to by pneumoconiosis. Decision and Order at 16; Director's Exhibit 26; Employer's Exhibit 3. As employer states, Dr. Tuteur found that claimant has simple pneumoconiosis. Director's Exhibit 26; Employer's Exhibit 3. Moreover, like Drs. Zaldivar and Fino, Dr. Tuteur provided a medical basis for opining that claimant's respiratory impairment was due to smoking, a basis which the administrative law judge did not adequately discuss. *Id*. If the administrative law judge reaches the merits of the claim on remand, she must reweigh the medical opinions and resolve the conflicts posed by the evidence by adequately considering the qualifications of the respective physicians, the explanations of their medical opinions, the documentation underlying their

[3]We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of pneumoconiosis under 20 C.F.R. §§718.202(a) and 718.203(b). *See Skrack, supra;* Decision and Order at 13-15.

medical judgments, and the sophistication and bases of their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)*; Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge