BRB No. 98-1325 BLA

MILLER BELLICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 7/9/99
	)	
VESTA MINING 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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Miller Bellich, Beallsville, Pennsylvania, *pro se*.

Christopher Pierson (Davies, McFarland and Carroll, P.C.), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (97-BLA-1633) of Administrative Law Judge Daniel L. Leland 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). In this duplicate claim, the administrative law judge found that claimant's prior claim was finally

denied on July 13, 1979.[1] The administrative law judge considered the newly

[1]Claimant filed his initial claim with the Social Security Administration (SSA) on December 20, 1971. Director's Exhibit 34. SSA denied the claim on February 15, 1972 and on November 12, 1973 because claimant was still working in gainful employment and because the record contained no evidence of complicated pneumoconiosis. *Id.* Claimant timely elected SSA review of his claim under the 1977 Amendments to the Act. *Id.* SSA denied the claim on September 29, 1978 and April 4, 1979 on the grounds that the evidence was insufficient to prove entitlement under the law. *Id.* SSA referred the claim to the Department of Labor (DOL) where the claim was again denied on June 4, 1979 and July 13, 1979 because the evidence of record was insufficient to demonstrate the presence of a totally disabling respiratory impairment. *Id.* Claimant took no further action until he filed the present claim on September 9, 1996. *Id.*, Director's Exhibit 1. The district direct denied the present claim on December 5, 1996 on the grounds that the evidence of record did not establish the existence of pneumoconiosis arising out of

submitted evidence and found it insufficient to demonstrate the presence of a totally disabling respiratory impairment and thus, insufficient to establish a material change in conditions at 20 C.F.R. §725.309. Accordingly, benefits were denied. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994);

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coal mine employment or a totally disabling respiratory impairment, and was, therefore, insufficient to demonstrate a material change in conditions at 20 C.F.R. §725.309. Director's Exhibit 19. Following a conference on June 5, 1997, the district director also denied this claim for the same reasons in a Proposed Decision and Order dated June 25, 1997. Director's Exhibit 32.

[2]We affirm the findings of the administrative law judge that the parties stipulated to forty-three years of coal mine employment and on the designation of employer as the responsible operator as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

McFall v. Jewell Ridge Coal Co., 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, we must address claimant's procedural challenges. Claimant contends that it was improper for the administrative law judge to accept the deposition of Dr. Fino thirty-three days after the hearing and to accept the post-hearing brief of employer one hundred and three days after the hearing. The record contains a letter, dated December 12, 1997, from counsel for employer requesting permission from the administrative law judge to take the deposition of Dr. Fino after the hearing as the first available date for claimant's counsel to attend the deposition was February 25, 1996. Employer's counsel advised that he would submit a copy of

the deposition transcript no later than March 25, 1998. In light of this timely request, the administrative law judge told both parties, at the hearing, that he would leave the record open until March 26, 1998 for the submission of Dr. Fino's deposition. *See* Hearing Transcript at p. 30. Dr. Fino's deposition was filed in the Office of Administrative Law Judges on March 13, 1998. Employer's Exhibit 7. At the hearing, the administrative law judge set April 27, 1998 as date for both parties to file a post-hearing brief. *See* Hearing Transcript at 30. By letter dated April 27, 1998, employer's counsel confirmed the decision of the administrative law judge to grant him an extension of time to file his post-hearing brief and noted no objection from claimant's counsel. As the administrative law judge had broad discretion in procedural matters, we find that the administrative law judge properly accepted the deposition of Dr. Fino after the completion of the hearing and to allow employer's counsel until May 18, 1998 to file his post-hearing brief. *See* 20 C.F.R. §725.455(b)(2),(c); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Furthermore, since claimant was represented by counsel at the time of both requests, claimant has not been prejudiced. *See Hardisty v. Director, OWCP*, 7 BLR 1-322 (1984), *aff'd* 776 F.2d 128, 8 BLR 2-72 (7th Cir. 1985).

Claimant contends that he was harassed by the staff of Dr. Fino and Dr. Morgan when he appeared for his physical examination and by Dr. Wald when the physician question him about his World War II experiences in 1995. Claimant

asserts that the administrative law judge and the district director failed to recognize the duress placed on him by these incidences. The record contains no evidence about such harassment nor hearing testimony from claimant concerning these incidents. Thus, while we note claimant's concerns about these incidents, we must reject these contentions as there is no basis in the record for a review of these charges. *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986). Claimant also asserts that employer intentionally refrained from communicating with him, intentionally harassed him by scheduling a second appointment with Dr. Fino on January 7, 1998 and intentionally used these acts as a delaying tactic to preclude giving him an opportunity to refute, respond or challenge Dr. Fino's report. As claimant was represented by counsel throughout the proceedings before the administrative law judge, employer's counsel properly contacted claimant's counsel concerning any matters which involved claimant as direct contact with claimant would be a violation of employer's counsel's ethical obligations. *See* DR7-104(a)(1), ABA Model Code of Professional Responsibility; Rule 4.2, ABA Model Code of Professional Conduct (1987). Employer's counsel canceled the January 7, 1998 appointment with Dr. Fino as soon as he learned that claimant had been examined by Dr. Fino on November 13, 1997. *See* Attachments to employer's brief. As employer is permitted to have claimant examined by a physician of its choice, employer did not behave inappropriately when it scheduled the January 7, 1998 physical examination with Dr. Fino to preserve its rights. *See* 20 C.F.R. §

725.414(a); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). Additionally, since claimant's counsel attended the deposition of Dr. Fino and cross-examined the physician, claimant had an opportunity to challenge the medical conclusions of Dr. Fino.[3] *See* Employer's Exhibit 7; *North American Coal Co.*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *see also Wallace v. Bowen*, 869 F.2d 187 (3d Cir. 1989). Furthermore, since claimant's counsel did not request the administrative law judge to grant additional time for a response to the findings of Dr. Fino, either at the hearing or at any other time, claimant waived any further rights to respond to the findings of Dr. Fino. *See Kankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995). Moreover, claimant has set forth no factual grounds to support his assertion of bias by the administrative law judge nor does the record reveal any bias against claimant by the administrative law judge when considering the credibility of the evidence of record or the weight to accord this evidence. *See Zamora v. C. F. & I. Steel*

[3]We note that the Office of Administrative Law Judges notified the parties of the hearing date on November 5, 1997. Thus, employer's scheduling of the January 7, 1998 examination with Dr. Fino did not delay the hearing in this claim nor was claimant in anyway prejudiced by this action.

Corporation, 7 BLR 1-568 (1984).[4]

Claimant next asserts that employer intentionally refrained from submitting the reports and deposition of Dr. Wald until after the informal conference with the district director on June 5,1997. Since the regulations do not preclude the district director from considering evidence submitted by a party after the informal conference, the district director acted reasonably when he accepted the 1985 and 1995 medical reports of Dr. Wald and his 1996 deposition after the conference. *See* 20 C.F.R. §725.417(b). In his Proposed Decision and Order denying benefits on June 25, 1997, the district director listed both the 1985 and 1995 medical opinions of Dr. Wald as part of the evidence which he considered. *See* Director's Exhibit 32. Furthermore, because the administrative law judge conducts a *de novo* review of all the evidence of record and claimant had an opportunity before the hearing to submit additional evidence, claimant was not prejudiced by the admission of this evidence. *Id.*; *see* 20 C.F.R. §725.456. Finally, claimant argues that employer's controversion dated February 14, 1997 is an untimely response to the district director's letter dated January 10, 1997. In compliance with the requirements of the regulations, the

[4]Claimant complains that it is unfair to hold him to the requirement to file his Petition for Review within thirty days. As claimant timely filed his Petition for Review, this issue is moot. *See Sigma Chi Fraternity v. Regents of University of Colorado*, 258 F. Supp. 515 (D.Colo. 1966).

district director mailed a Notice of Claim dated September 10, 1996 to employer, who filed a controversion on October 4, 1996 acknowledging that it was the responsible operator. *See* 20 C.F.R. §§725.412(a), 725.413; Director's Exhibits 22, 23. The district director denied this claim by letter dated December 5, 1996. *See* Director's Exhibit 19. After the issuance of the denial, employer submitted a controversion denying liability on December 19, 1996. *See* Director's Exhibit 24. Again, in compliance with the regulatory requirements, the district director mailed employer a Operator Notification Form 1 dated January 10, 1997, a Friday, advising employer that the claim had been denied, but that claimant had requested a hearing. *See* 20 C.F.R. §§725.410, 725.412(a); Director's Exhibit 25. Because the regulations allow employer to respond within thirty days after the receipt of this notice and because receipt of the notice can not be the date of mailing, employer's duplicate controversion dated February 14, 1997 again denying liability is a timely indication of its intent to contest the claim. *See* 20 C.F.R. §§725.410, 725.412(a), 725.413; Director's Exhibit 26.

Claimant next asserts that the 1997 totally disability award for pneumoconiosis by the Commonwealth of Pennsylvania governs the disposition of this claim under the Doctrine of Stare Decisis. Under the doctrines of res judicata and collateral estoppel, the award under Pennsylvania law is not bar to the relitigation of the issues of pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment due to pneumoconiosis, the elements of proof needed to

establish entitlement to federal black lung benefits. Because the state claim and the federal claim are not identical causes of action, the doctrine of res judicata is inapplicable. *See e.g. Trujillo v. Kaiser Steel Corp.*, 3 BLR 1-497 (1981). Collateral estoppel arises when the parties had a full and fair opportunity to litigate issues of act and law in a prior hearing.[5] *See Gargallo v. Merrill Lynch, Pierce, Fenner & Smith*, 918 F.2d 658 (6th Cir. 1990); *Virginia Hospital Association v. Baliles*, 830 F.2d 1308 (4th Cir. 1987). Such full and fair opportunity is not present where the applicable standards of proof are not the same. *See Montana v. United States*, 440 U.S. 147, 153-162 (1979); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988). Because the criteria necessary to prove entitlement under the Pennsylvania statute differ significantly from the federal standards, collateral estoppel does not apply. Furthermore, the Board has consistently held that the findings of state workers' compensation boards are not binding on the administrative law judge. *See Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984). We, therefore, decline to hold that the 1997 award of benefits for totally disabling pneumoconiosis under Pennsylvania law binds the decision making process of the administrative law judge.

[5]Employer correctly notes that it was not a party to the 1997 claim filed in Pennsylvania by claimant. *See* Director's Exhibit 29.

Finally, claimant argues that the duplicate claim standard is in error for a claim filed prior to June 30, 1973. While claimant is correct that he filed his first claim prior to June 30, 1973, his initial claim was finally denied on November 12, 1973. Claimant's second claim was reviewed under the 1977 Amendments to Act. The administrative law judge correctly found that claimant's second claim was finally denied on July 13, 1979 and that the present claim, which was filed on September 9, 1996, was a duplicate claim.[6] *See* Section 725.309(c). Since the present claim was filed after March 30, 1980, the administrative law judge properly considered the issue of a material change in conditions under 20 C.F.R. Part 718.

As this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, the administrative law judge properly applied the standard enunciated in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), for deciding whether claimant demonstrated a material change in conditions at Section 725.309. In *Swarrow*, the court held that in ascertaining whether a claimant established a material change in conditions pursuant to Section

[6]On June 2, 1979, claimant advised the district director that he did not wish to do additional testing as he was still working. *See* Director's Exhibit 34. Subsequent to this notification, the district director issued a letter dated July 13, 1979 denying the claim because the evidence was insufficient to establish the presence of a totally disabling respiratory impairment. *Id.*

725.309, the administrative law judge must consider and weigh all the newly submitted evidence, favorable and unfavorable, to determine if claimant has established at least one of the elements of entitlement previously decided against him. In the instant case, the administrative law judge correctly concluded that claimant failed to establish the presence of a totally disabling respiratory impairment in his prior claim. *See* Decision and Order at 8; Director's Exhibit 34; *Swarrow, supra*. The administrative law judge also properly reviewed only the evidence submitted following the denial of claimant's prior claim when deciding the issue of a material change in conditions. *Swarrow, supra*.

In his review of the newly submitted evidence, the administrative law judge properly concluded that the pulmonary function study performed on September 18, 1996 was the only test which conformed to the regulatory requirements set forth in 20 C.F.R. §718.103. *See Mangifest v. Director, OWCP*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). The administrative law judge correctly found that the values in this test were nonqualifying under the regulatory criteria at 20 C.F.R. §718.204(c)(1), Appendix B,[7] and properly found that the pulmonary function study evidence was insufficient to establish the presence of a totally disabling respiratory impairment.[8]

[7]A "qualifying" pulmonary function study or blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718. *See* 20 C.F.R. §718.204(c)(1) and (c)(2). A "non-qualifying test yields values which exceed the requisite table values.

[8]Because the law of the United States Court of Appeals for the Third Circuit

The administrative law judge also properly found all the newly submitted blood gas studies nonqualifying under the regulatory criteria, and properly concluded that the new evidence did not show a diagnosis of cor pulmonale. *See* 20 C.F.R. §718.204(c)(2), Appendix C and 20 C.F.R. §718.204(c)(3). At 20 C.F.R. §718.204(c)(4), the administrative law judge acted within his discretion when he accorded considerable weight to the medical opinions of Drs. Wald, Fino and Basheda because they were Board-certified in pulmonary diseases and because their medical opinions, where they conclude that claimant does not have a respiratory impairment, were better supported by the objective medical data. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-20 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge also permissibly accorded less weight to the medical opinion of Dr. Lebovitz because the physician based his finding that claimant suffered from a totally disabling respiratory impairment on a pulmonary function study found invalid by two reviewing physicians. *See* Director's Exhibit 30; Employer's Exhibit 7. Thus, the

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applies to this case, the decision of the court in *Mangifest v. Director, OWCP*, F.2d , BLR 2- (3d Cir. 199) requires the administrative law judge to consider only the objective tests which comply with the quality standards set forth at 20 C.F.R. §§718.102, 718.103, 718.105. The administrative law judge properly noted that the remaining pulmonary function studies were nonconforming under 20 C.F.R. §718.103. *Id.* The administrative law judge also correctly stated that all of these test were nonqualifying under the regulatory criteria. *See* 20 C.F.R. §718.204(c)(1), Appendix B.

administrative law judge permissibly concluded that the report of Dr. Lebovitz was not supported by its underlying documentation. *See Lucostic, supra*. We, therefore, affirm the administrative law judge's treatment of the medical opinions of Drs. Wald, Fino, Basheda, and Lebovitz as supported by substantial evidence.

We, however, vacate the Decision and Order of the administrative law judge and remand this case for further consideration. At Section 718.204(c)(4), the administrative law judge failed to consider and weigh the 1985 and 1997 disability awards by the workers' compensation board for the Commonwealth of Pennsylvania. Additionally, the administrative law judge failed to discuss the deposition testimony of Dr. Alpern concerning the validity of his pulmonary function study performed on July 17, 1984 and the effect of the physician's view on the credibility of his report.[9] *See* Director's Exhibit 29 at p. 21-27. The administrative law judge also did not discuss the deposition testimony of Dr. Morgan concerning the amount of dust exposure necessary to develop coal workers' pneumoconiosis and the impact of this testimony on the credibility of Dr. Morgan's conclusion that claimant did not suffer from a totally disabling respiratory impairment arising out of his coal mine employment. *See* Employer's Exhibit 3 at p.19-20. If, on remand, the administrative law judge finds the medical opinion evidence sufficient to demonstrate

[9]In light of these findings, the administrative law judge should also reconsider whether Dr. Alpern's pulmonary function study is conforming under Section 718.103 on remand.

the presence of a totally disabling respiratory impairment, he must weigh all the probative and contrary probative evidence to determine if claimant has established the presence of a totally disabling respiratory impairment at Section 718.204(c). *See Fields v. Island Creek Coal Company*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge