BRB No. 98-1390 BLA

JOSEPH M. DELIK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
CENTRAL OHIO COAL COMPANY	)	
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order on Remand of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Barbara A. Holmes (Blaufield & Schiller), Pittsburgh, Pennsylvania, for claimant.

Christopher C. Russell (Porter, Wright, Morris & Arthur), Columbus, Ohio, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-0401) of Administrative Law Judge Rudolf L. Jansen awarding 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). This case involving a duplicate claim is before the Board for the second time.[1] Initially, the administrative

[1] Claimant's initial application for benefits filed on April 16, 1991 was denied on

law judge credited claimant with twenty-three years of coal mine employment and found that the evidence developed since the denial of claimant's prior claim failed to establish any element of entitlement previously decided against him and therefore did not demonstrate a material change in conditions as required by 20 C.F.R. §725.309(d). Accordingly, he denied benefits.

Claimant appealed, and in *Delik v. Central Ohio Coal Co.*, BRB No. 97-0294 BLA (Oct. 20, 1997)(unpub.), the Board concluded that the administrative law judge's decision was not supported by substantial evidence. The Board noted that the administrative law judge confused the report of a Department of Labor examining physician with that of claimant's treating physician, which led him to discredit claimant's treating physician as rendering inconsistent opinions regarding pneumoconiosis and disability, when in fact no such inconsistency existed. *Delik*, slip op. at 3. Additionally, the Board held that the administrative law judge failed to compare a physician's assessment of physical limitations with the exertional requirements of claimant's coal mine employment to determine whether claimant is disabled. *Delik*, slip op. at 3-4. Accordingly, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c)(4) and remanded the case for him to reconsider the new medical evidence and determine whether a material change in conditions was established, and if so, to consider whether the record established entitlement to benefits. *Delik*, slip op. at 4.

On remand, the administrative law judge reweighed the new medical evidence as instructed and found that claimant suffers from a totally disabling respiratory impairment pursuant to Section 718.204(c), demonstrating a material change in conditions under Section 725.309(d). Considering the merits of entitlement, the administrative law judge found that the weight of the record evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4) and 718.203(b), and that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c), (b). Accordingly, he awarded benefits.

July 23, 1991 and again after reconsideration on July 14, 1992. Director's Exhibit 23. On November 3, 1993, claimant filed the present application for benefits which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; 20 C.F.R. §725.309(d).

On appeal, employer contends that the administrative law judge impermissibly found entitlement established on remand, when he denied benefits previously, and erred by according additional weight to the opinion of claimant's treating physician. Claimant has not responded, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under 20 C.F.R. Part 718, a miner must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether the miner has established at least one of the elements previously decided against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 BLA 2-10, 2-18-19 (6th Cir. 1994). If so, the miner has demonstrated a material change in conditions and the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Id*.

[2] We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b), 718.204(c)(1)-(3), and regarding the benefits commencement date. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Claimant was previously denied benefits because he failed to establish any element of entitlement pursuant to Sections 718.202(a) and 718.204. Director's Exhibit 23. In the current claim, the administrative law judge found initially that the new evidence failed to establish any element, but on remand, after weighing the evidence more carefully, the administrative law judge found a material change in conditions established and concluded that all of the evidence supported entitlement.

Employer contends that the administrative law judge erred by reaching a different conclusion on remand because the administrative law judge's initial findings "are the 'law of case' and . . . are binding upon the [administrative law judge]." Employer's Brief at 7. Contrary to employer's contention, the administrative law judge was not bound by his previous findings when he rendered his decision on remand; the Board vacated the administrative law judge's previous findings and remanded the case for a reweighing. *See Dale v. Wilder Coal Co*., 8 BLR 1-119, 120 (1985). Nothing in the Board's remand language specifically limited the administrative law judge to crediting the same reports that he credited previously. Therefore, we reject employer's contention.

Employer next asserts that the administrative law judge on remand arbitrarily and capriciously reversed his earlier credibility determinations. Employer's Brief at 6. Employer apparently ignores the fact that the administrative law judge's prior weighing of the medical opinions was based upon factual errors and failed to include all of the evidence relevant to disability. *Delik*, slip op at 3-4. The administrative law judge's more careful consideration of the evidence on remand obviously explains much of the difference in his credibility determinations. Additionally, the administrative law judge provided specific reasons to support his changed weighing of the medical opinions on remand.

For example, in finding a material change in conditions established, the administrative law judge acknowledged his previous decision to deny benefits at the threshold, but found "[u]pon further reflection," that the newly submitted medical evidence demonstrated a material change in conditions under Section 725.309(d) by establishing total respiratory disability pursuant to Section 718.204(c). Decision and Order on Remand at 4. In so finding, the administrative law judge recognized that claimant's treating physician, Dr. Snyder, contrary to his earlier finding, opined consistently "[i]n both of [his] reports" that claimant is totally disabled by a pulmonary condition. Decision and Order on Remand at 5. Additionally, the administrative law judge indicated that Dr. Branditz's assessment of a mild to moderate respiratory limitation, which he had previously overlooked, supported a finding of disability when compared with the physical requirements of claimant's job as a shovel oiler, as did Dr. Orfahli's diagnosis of moderately severe pulmonary disease with significant dyspnea on minimal exertion. Decision and Order on Remand at 5; *see Cross*

Mountain Coal, Inc. v. Ward, 93 F.3d 211, 218-19, 20 BLR 2-360, 2-374 (6th Cir.1996); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). The administrative law judge recognized that Drs. Knight and Adamo[3] concluded that claimant is not disabled, but permissibly found their opinions to be outweighed by those of Drs. Snyder and Branditz, in light of Dr. Snyder's status as claimant's treating physician, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992), and based upon the recency of Dr. Branditz's examination and testing. Decision and Order on Remand at 5-6; *see Cooley v. Island Creek Coal Co*., 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). Finally, in weighing the contrary probative evidence, the administrative law judge found that the medical opinions warranted more weight than the non-qualifying pulmonary function and blood gas studies, since the examining physicians could account for both the objective study results and claimant's physical signs and symptoms. Decision and Order on Remand at 6; *see Beatty v. Danri Corporation and Triangle Enterprises,* 16 BLR 1-11 (1991); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

The administrative law judge similarly explained his weighing on the merits, providing valid, detailed reasons for finding pneumoconiosis, total disability, and disability causation established. Decision and Order at 6-12; *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). With the exception of the administrative law judge's decision to accord additional weight to the opinion of claimant's treating physician, *see* discussion, *infra*, employer does not challenge the validity of any of these credibility determinations or allege that substantial evidence does not support the administrative law judge's findings, but simply charges the administrative law judge with making an arbitrary "flip flop." Employer's Brief at 6. Since the administrative law judge gave clear reasons for the weight he accorded to the medical opinions, we find no support in the record for employer's contention that the administrative law judge acted arbitrarily or capriciously in weighing specific medical opinions differently on remand than he did in his prior disposition of the

[3] As in his previous decision, the administrative law judge recognized that Dr. Adamo is a "highly-qualified physician and provided sufficient reasoning to support" his opinion, Decision and Order on Remand at 9, but explained that his reweighing of the medical opinions on remand, particularly those of Drs. Snyder, Branditz, and Orfahli, changed his view of the relative credibility of Dr. Adamo's opinion. Decision and Order on Remand at 5-6, 9-12. Therefore, employer's allegation that the administrative law judge arbitrarily abandoned his prior weighing of Dr. Adamo's opinion lacks merit. Employer's Brief at 6.

case. *See Pavesi v. Director, OWCP*, 785 F.2d 956, 963, 7 BLR 2-184, 2-196 (3d Cir. 1985)(agency may change its position if the change is supported by a reasoned explanation). Therefore, we reject employer's contention.

Finally, employer contends that the administrative law judge erred by according greater weight to the opinion of claimant's treating physician. Employer's Brief at 7-8. Claimant's treating physician is Dr. Snyder, who has been treating him for breathing problems since 1991. Director's Exhibits 3, 21, 23; Hearing Transcript at 16. Employer does not argue that Dr. Snyder's opinion is flawed in any way. Instead, employer attacks the administrative law judge's reliance on the opinion of Dr. Orfahli, who is not claimant's treating physician and who was not credited on that basis.[4] However, even if employer's argument were directed at the proper physician, as the administrative law judge found, Dr. Snyder explained how his opinion relating claimant's disabling pulmonary condition to his coal mine employment was based on his examination of claimant, claimant's coal mine employment history, symptoms, chest x-ray, and objective study results. Director's Exhibit 3, 21, 23; *see Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983). The physicians of record agree that claimant never smoked. Director's Exhibit 5, 16, 23; Employer's Exhibit 3. Under these circumstances, the administrative law judge permissibly accorded additional weight to Dr. Snyder's opinion as a treating physician. *See Tussey, supra*; *Berta, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985). Therefore, we reject employer's contention, and affirm the administrative law judge's findings pursuant to Sections 725.309(d), 718.202(a)(4), and 718.204(c), (b).

[4] Dr. Snyder referred claimant to Dr. Orfahli, who specializes in Internal Medicine and Lung and Respiratory Diseases, for a pulmonary evaluation. Director's Exhibit 16. The administrative law judge found Dr. Orfahli's diagnosis of pneumoconiosis to be supportive of Dr. Snyder's diagnosis. Decision and Order on Remand at 8.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge