

BRB No. 99-0642 BLA

STEVEN WORLEY)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: _____
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Living Miner's Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Jill M. Otte (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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Living Miner's Benefits (98-BLA-0912) of Administrative Law Judge Larry W. Price 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, a duplicate claim filed on March 10, 1997, pursuant to the applicable regulations at 20 C.F.R. Part 718.¹ The administrative law judge determined that the newly submitted

¹Claimant filed an initial claim for benefits on February 12, 1975. Director's Exhibit 31. The district director denied the claim on October 30, 1979. *Id.* Claimant filed with the district director a letter dated November 9, 1979, in which claimant requested a hearing before an administrative law judge. *Id.* Subsequently, by letter dated November 21, 1979, the district director corresponded with claimant and, without reference to claimant's request for a hearing, advised claimant that if he had no additional evidence to submit, his claim would "remain in a disallowed status." *Id.* The record

evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) and that, because this element of entitlement had not been established previously, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309. After crediting claimant with ten months of coal mine employment, the administrative law judge further found that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge therefore denied benefits. On appeal, claimant argues that the administrative law judge erred in crediting him with only ten months of coal mine employment, and erred in rejecting Dr. Zawahry's medical opinion that claimant has coal workers' pneumoconiosis under Section 718.202(a)(4). Claimant also contends that, assuming *arguendo* that the administrative law judge permissibly rejected Dr. Zawahry's opinion, the administrative law judge erred in failing to remand the case to the district director for claimant to obtain a complete, credible pulmonary evaluation. The

does not reflect that the district director otherwise further corresponded with claimant after claimant requested a hearing in his November 9, 1979 letter.

The record reflects that no further action was taken until claimant filed a second claim on February 24, 1993. *Id.* After conducting a hearing on October 5, 1995, Administrative Law Judge Robert S. Amery denied benefits in a Decision and Order dated December 12, 1995. *Id.* In his decision, Judge Amery determined that claimant's 1993 claim was neither a duplicate claim nor a request for modification because claimant's 1975 claim was still pending. *Id.* Judge Amery thus considered entitlement pursuant to 20 C.F.R. Part 410. *Id.* After crediting claimant with "about seven years" of coal mine employment, Judge Amery determined that the evidence was insufficient to establish the existence of pneumoconiosis and, accordingly denied benefits. *Id.* Claimant thereafter filed an appeal with the Board, which the Board dismissed because the appeal was not timely filed. *Worley v. Director, OWCP*, BRB No. 96-0554 BLA (Feb. 9, 1996)(unpublished Order). Claimant took no further action in pursuit of benefits until filing the instant duplicate claim on March 10, 1997. Director's Exhibit 1.

Director, Office of Workers' Compensation Programs (the Director), has submitted a Motion to Remand urging the Board to vacate the administrative law judge's decision and remand the case for further evidentiary development.

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).

Initially, we reject claimant's contention that the administrative law judge erred in crediting him with only ten months of coal mine employment. Claimant argues that the previous finding in this case that he established seven years of coal mine employment, which was rendered by Administrative Law Judge Robert S. Amery in his Decision and Order denying claimant's 1993 claim, Director's Exhibit 31, was final under principles of *res judicata*, and that the administrative law judge was precluded from revisiting the length of coal mine employment issue.² Contrary to claimant's contention, however, the Director was not able to fully litigate the length of coal mine employment issue, as the Director was not adversely affected by Judge Amery's Decision and Order denying benefits and, therefore, did not have standing to challenge Judge Amery's finding that claimant established seven years of coal mine employment.³ See *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990). Thus, the administrative law judge was not precluded from rendering a finding with regard to the issue of length of coal mine employment. Claimant does not challenge the method by which the administrative law judge calculated only ten months of coal mine employment, but only contends that the administrative law judge was precluded from revisiting the issue, a contention which, for the reason stated *supra*, lacks merit. Accordingly, we affirm the administrative law judge's determination that claimant established ten months of coal mine employment. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant further argues that the administrative law judge erred in rejecting Dr.

²As the Director notes in his Motion to Remand, claimant's allegation of error actually involves the principle of collateral estoppel, not *res judicata*, since claimant alleges that what is precluded from reconsideration in the instant case is a particular issue, *i.e.*, the issue of length of coal mine employment, and not ultimately the prior denial of benefits. See Motion to Remand at 4, n.4.

³Claimant's argument that the Director had an opportunity to challenge Judge Amery's finding, but failed to avail himself of the opportunity by filing a response to claimant's appeal of Judge Amery's decision or by filing a cross-appeal lacks merit. The Notice of Appeal of Judge Amery's decision which claimant filed with the Board was postmarked January 18, 1996, and received by the Board on January 22, 1996. Director's Exhibit 31. Inasmuch as the last date for filing an appeal of Judge Amery's Decision and Order was January 12, 1996, the Board dismissed claimant's appeal as untimely. *Worley v. Director, OWCP*, BRB No. 96-0554 BLA (Feb. 9, 1996)(unpublished Order).

Zawahry's medical opinion, which indicates that claimant suffers from pneumoconiosis. We disagree. The administrative law judge permissibly rejected Dr. Zawahry's opinion under Section 718.202(a)(4) as an undocumented opinion, given the doctor's reliance upon an inflated coal mine employment history of seven years, rather than ten months. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); Decision and Order at 7; Director's Exhibit 10.

Claimant further contends that, after rejecting Dr. Zawahry's opinion under Section 718.202(a)(4), the administrative law judge erred in refusing to remand the case to the district director for claimant to be afforded a complete, credible pulmonary evaluation. In his Motion to Remand in this case, the Director too argues that the Department of Labor failed to discharge its statutory obligation to provide claimant with a complete, credible pulmonary evaluation in connection with his duplicate claim. The administrative law judge stated that he would not remand the case for further evidentiary development because Dr. Michos's January 16, 1998 opinion that claimant does not have pneumoconiosis, as well as a pulmonary function study administered on September 2, 1997, fulfilled the Director's duty of providing claimant with a complete and credible pulmonary evaluation. Decision and Order at 9, n. 6. Dr. Michos did not examine claimant, however, but merely reviewed the evidence of record in submitting his opinion. Director's Exhibit 26. In addition, the pulmonary function study administered on September 2, 1997 was not performed in conjunction with a full pulmonary evaluation of claimant on that date. Director's Exhibit 7. The only complete pulmonary evaluation associated with claimant's duplicate claim was conducted by Dr. Zawahry on June 11, 1997. Director's Exhibit 10. As discussed *supra*, the administrative law judge properly rejected Dr. Zawahry's medical opinion. We grant, therefore, claimant's and the Director's request to remand this case to the district director so that claimant may be provided with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim, as required by the Act. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); see *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*).

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's Benefits is affirmed in part, and vacated in part, and the case is remanded to the district director to allow for a complete, credible pulmonary evaluation, at no expense to claimant, and for reconsideration of the duplicate claim in light of the evidence and consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge