

BRB No. 08-0489 BLA

R.H.)
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 Claimant-Respondent)
)
 v.)
)
 JIM WALTER RESOURCES,) DATE ISSUED: 03/16/2009
 INCORPORATED)
)
 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 Awarding Benefits (Upon Remand By the Benefits Review Board) of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Patrick K. Nakamura (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham, Alabama, for employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (Upon Remand By the Benefits Review Board) (05-BLA-6045) of Administrative Law Judge Ralph A. Romano on a subsequent claim¹ filed on September 30, 2004, pursuant to the provisions

¹ Claimant's prior claim, filed on September 13, 2000, was denied by the district director on December 20, 2000, on the grounds that claimant failed to establish any element of entitlement. Director's Exhibit 4.

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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence established twenty-four and one-half years of coal mine employment. The administrative law judge found that the new x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and, therefore, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Turning to the merits, the administrative law judge found that the x-ray and medical opinion evidence of record established pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and that pneumoconiosis was totally disabling at 20 C.F.R. §718.204(b), (c). Decision and Order at 5-12. Accordingly, benefits were awarded.²

On appeal, employer challenges the administrative law judge's decision awarding benefits. Employer contends that the administrative law judge erred in finding a change in an applicable condition of entitlement established, the threshold issue to be determined in a subsequent claim; therefore, employer argues that the administrative law judge erred in awarding benefits. Specifically, employer contends that the administrative law judge erred in finding that the new x-ray evidence established pneumoconiosis at Section 718.202(a)(1). Claimant responds, arguing that the administrative law judge properly found that the new x-ray evidence established pneumoconiosis at Section 718.202(a)(1). Claimant also contends, however, that since the administrative law judge also found the newly submitted medical opinion evidence sufficient to establish pneumoconiosis at Section 718.202(a)(4), the administrative law judge's finding that the new evidence established pneumoconiosis and, thereby, a change in an applicable condition of entitlement at Section 725.309(d) should be affirmed.³ Thus, claimant contends that

² Administrative Law Judge Paul H. Teitler previously issued a Decision and Order awarding benefits in this case. Pursuant to an appeal by employer, the Board issued a Decision and Order on April 26, 2007. [*R.H.*] v. *Jim Walters Resources, Inc.*, BRB No. 06-0585 BLA (Apr. 26, 2007)(unpub.). The Board vacated the administrative law judge's decision awarding benefits, specifically holding that Judge Teitler erred in finding that the new evidence established pneumoconiosis at 20 C.F.R. §718.202(a) and, therefore, a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). The Board also held that the administrative law judge erred in finding the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that total disability due to pneumoconiosis were established on the record. Consequently, the Board remanded the case to the Office of Administrative Law Judges. The case was reassigned to Administrative Law Judge Ralph A. Romano.

³ The administrative law judge relied upon Dr. Khan's opinion, dated October 29, 2004, to find that the medical opinion evidence established the existence of

error, if any, in the consideration of the x-ray evidence at Section 718.202(a)(1) is harmless.

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.⁴ 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arises out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

When 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 "one of the applicable conditions of entitlement ... has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because claimant failed to establish any element of entitlement. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing one of those elements, in order to have the case considered on the merits. 20 C.F.R. §725.309(d)(2), (3); *United States Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977, 988-989, 23 BLR 2-213, 2-229 (11th Cir. 2004).

Employer first contends that the administrative law judge erred in finding that the new x-ray evidence established the existence of pneumoconiosis at Section 718.202(a)(1) and, thereby, established a change in an applicable condition of entitlement at Section 725.309(d). Employer contends that because the administrative law judge erred in

pneumoconiosis at Section 718.202(a)(4). The report showed a change in an applicable condition of entitlement since the prior denial on December 20, 2000.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as the miner was employed in coal mining in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

finding that an applicable condition of entitlement was established, a threshold issue at Section 725.309(d), benefits cannot be awarded on this claim.

In finding entitlement established in this case, however, the administrative law judge also found that the new medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4), total disability at Section 718.204(b), and total disability due to pneumoconiosis at Section 718.204(c). Consequently, because employer has not challenged any of these findings, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Further, since the prior claim was denied because claimant failed to establish any element of entitlement, the administrative law judge's finding that each of the elements has been established by new evidence, is sufficient to establish a change in an applicable condition of entitlement and sufficient to warrant consideration of the case on the merits. 20 C.F.R. §725.309(d). Hence, we need not address employer's argument that the administrative law judge erred in finding that the new x-ray evidence established pneumoconiosis at Section 718.202(a)(1) and, thereby, a change in an applicable condition of entitlement at Section 725.309(d). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983). Further, because the administrative law judge found that entitlement was established based on the record as a whole at Sections 718.202(a)(4), 718.203(b), and 718.204(b), (c), *i.e.*, consideration of both old and new evidence, and employer has not challenged that finding, it is affirmed. *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits (Upon Remand By the Benefits Review Board) is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge