BRB No. 00-0228 BLA

WILLIAM H. BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	
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 Upon Remand and the Order Denying Motion for Reconsideration of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Upon Remand and the Order Denying Motion for Reconsideration (91-BLA-01389) of Administrative Law Judge Ainsworth H. Brown 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).[1] This case has been before the Board previously and

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations

involves a duplicate claim filed on March 6, 1984.[2] In the initial decision, Administrative Law Judge Glenn Robert Lawrence applied the material change standard set out in *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988) and found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (1999).[3] Judge Lawrence, therefore, considered the merits of claimant's 1984 claim. After crediting claimant with thirty-seven years of coal mine employment, Judge Lawrence concluded that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). Judge Lawrence found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). Judge Lawrence then determined that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c) (2000). Accordingly, Judge Lawrence awarded benefits. By Decision and Order dated April 19, 1994, the Board affirmed Judge Lawrence's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§725.309 (1999), 718.202(a)(1)-(3) and 718.204(c)(1), (2) (2000), as unchallenged on appeal. *Brown v. Eastern Associated Coal Co.*, BRB No. 92-1844 BLA (Apr. 19, 1994) (unpub.). The Board also affirmed Judge Lawrence's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204(b) and (c) (2000), and, therefore, affirmed the award of benefits. *Id.* Employer sought reconsideration, which the Board summarily denied. *Brown v.*

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became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The relevant procedural history of the instant case is as follows: Claimant filed a claim for black lung benefits on February 13, 1980. Director's Exhibit 19. The district director denied the claim on September 16, 1980. *Id.* By letter dated December 5, 1980, an attorney informed the Department of Labor that claimant had asked him to represent claimant in connection with his claim for benefits and submitted an appointment of representation form. *Id.* The attorney also requested that the Department of Labor provide him with a copy of its file on claimant's claim so that he could determine how to assist claimant in obtaining benefits. *Id.* There is no indication that claimant took any further action in regard to his 1980 claim. Claimant filed a second claim on March 6, 1984. Director's Exhibit 1.

[3] The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

Eastern Associated Coal Corp., BRB No. 92-1844 BLA (Apr. 11, 1996) (Order) (unpub.). Thereafter, employer filed an appeal with the United States Court of Appeals for the Fourth Circuit.

Subsequent to the issuance of the Board's April 11, 1996 Order denying reconsideration, the United States Court of Appeals for the Fourth Circuit adopted a new standard for establishing a material change in conditions and held that claimant must prove "under all of the probative medical evidence of his condition *after* the prior denial, at least one of the elements previously adjudicated against him." *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996)(emphasis in original), *cert. denied*, 117 S.Ct. 763 (1997). In light of the Court's holding, "[e]mployer specifically moved for remand before the Fourth Circuit with the very intent of submitting argument and evidence addressing the new standard" and "[n]either the claimant nor the Director objected." Employer's Brief at 16. Consequently, by Order dated September 6, 1996, the United States Court of Appeals for the Fourth Circuit granted employer's motion to remand the case to the Office of Administrative Law Judges for reconsideration in light of *Rutter*. *Eastern Associated Coal Corp. v. Director, OWCP [Brown]*, No. 96-1788 (4th Cir., Sept. 6, 1996) (Order) (unpub.).

By Order dated May 29, 1997, the Board remanded the case involving the award of benefits to the Office of Administrative Law Judges for further proceedings consistent with the remand order of the United States Court of Appeals for the Fourth Circuit.[4] *Brown v. Eastern Associated Coal Corp.*, BRB No. 92-1844 BLA

[4] At the time the instant case was pending before the Board on remand from the United States Court of Appeals for the Fourth Circuit, a separate case involving issues regarding an overpayment of benefits to claimant in the instant case was referred to the Office of Administrative Law Judges for a hearing. The record indicates that, based on the administrative law judge's award, claimant began receiving interim, federal black lung benefit payments along with state benefits, but that claimant's West Virginia State Award caused a total offset of federal black lung benefits and resulted in an overpayment. In an Order of Remand dated February 14, 1997, Administrative Law Judge Daniel L. Stewart noted that by Order dated October 24, 1996, the overpayment case, OALJ Case No. 96-1294, was scheduled for a hearing on February 24, 1997. Judge Stewart further noted that the award of benefits to claimant underlying the overpayment case had been remanded for reconsideration by the United States Court of Appeals for the Fourth Circuit and presently before the Board. In light of these circumstances, Judge Stewart, with the agreement of the parties, determined that it would be appropriate to consolidate the cases and schedule them for a hearing at the same time. Accordingly, the

(May 29, 1997)(unpub.).

On remand to the Office of Administrative Law Judges, Administrative Law Judge Ainsworth H. Brown (the administrative law judge), without holding a hearing, reopening the record or consolidating the case with the overpayment case, reconsidered the claim due to Judge Lawrence's unavailability. The administrative law judge, without independently evaluating the evidence, found that Judge Lawrence's evaluation of the evidence, as affirmed by the Board, satisfied the material change in conditions standard set forth in *Rutter*. Noting that the Board's May 19, 1997, Order did not vacate Judge Lawrence's award of benefits, the administrative law judge concluded that the award remained in effect. Claimant's attorney subsequently requested attorney's fees. In addition, employer requested reconsideration, alleging that it was not properly served with the Decision and Order and asserting that the case should have been consolidated with the overpayment case and scheduled for a hearing, in accordance with Judge Stewart's Order and the agreement of the parties. Employer also argued that the administrative law judge erred in failing to properly consider whether the evidence established a material change in conditions pursuant to Section 725.309 (1999). The administrative law judge subsequently awarded attorney's fees and denied employer's motion for reconsideration.

Employer appealed the award of benefits and the denial of reconsideration to the Board and in *Brown v. Eastern Associated Coal Corp.*, BRB No. 98-0602 BLA (May 26, 1999)(unpub.), the Board held that, contrary to the administrative law judge's conclusion, Judge Lawrence's Decision and Order had been vacated, rendering it null and void. Accordingly, the Board vacated the administrative law judge's finding under Section 725.309 (1999) and remanded the case with instructions to consider whether claimant established a material change in conditions under the standard adopted by the Fourth Circuit in *Rutter*. The Board did not address employer's arguments regarding a new hearing or reopening the record.

On remand for the second time, before considering the merits, the administrative law judge discussed employer's argument that the change in the case

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scheduled hearing was canceled and the case was remanded to the district director for appropriate action.

law with respect to the material change in conditions issue was significant. The administrative law judge noted that employer's "argument under the guise of the material change veil is merely a reiteration of its disagreement with Judge Lawrence's findings." Decision and Order at 2. The administrative law judge explained that while it may have been a legal error for Judge Lawrence to have relied on *Spese*, *supra*, "Judge Lawrence, in fact, covered the entire record so that citation has little appreciable bearing on his findings that all of the [elements of entitlement] have been met." *Id*. The administrative law judge further stated that "[t]he argument before the Board that there was now a significant change in the law borders on the fatuous." *Id*. In summary, after noting the parties' appeal rights, the administrative law judge stated that "when the Board carefully considered all of the argument[s] about Judge Lawrence's decision, having another or continuous opportunities to attack the decision makes one wonder about the fairness of the process." *Id*. The administrative law judge next addressed the medical opinion evidence and found that a material change in conditions pursuant to Section 725.309 (1999) was established as the medical reports supported a finding of legal pneumoconiosis under Section 718.202(a)(4) (2000). The administrative law judge also determined that the evidence of record was sufficient to establish that claimant was totally disabled and that the total disability was due to pneumoconiosis pursuant to Section 718.204(b), (c)(2), (4) (2000). Accordingly, benefits were awarded as of March 1, 1984. On reconsideration, the administrative law judge rejected employer's contentions regarding conducting a new hearing, reopening the record or consolidating this case with the overpayment case. The administrative law judge also rejected employer's contentions regarding his findings on the issue of a material change in conditions and the merits of entitlement. Accordingly, the motion for reconsideration was denied.

On appeal, employer contends that the administrative law judge erred in failing to conduct a new hearing on remand so that the record could be reopened and evidence submitted addressing the changed standard for a material change in conditions. In addition, employer contends that the administrative law judge erred in finding a material change in conditions established pursuant to Section 725.309 (1999). Employer further asserts that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000) as well as total disability due to pneumoconiosis established pursuant to Section 718.204(b), (c) (2000). Finally, employer avers that the administrative law judge erred in his onset date determination and requests remand of the case to a different administrative law judge. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has not responded to employer's brief on the merits in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has not responded to the Board's Order.[5] Based on the briefS submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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).

[5] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

Employer initially contends that the administrative law judge erred in failing to provide it with a hearing on remand or an opportunity to address the new material change in conditions standard articulated in *Rutter*, *supra*, thereby denying the parties their procedural due process rights. A party's right to due process must be scrupulously preserved throughout the adjudicatory proceedings. A fundamental requirement of due process is the opportunity to be heard to ensure a fair disposition of the case. *Grannis v. Ordean*, 234 U.S. 385 (1914). In some cases, therefore, due process may require that a *de novo* hearing, or additional hearing on a specific issue, be held. Procedural due process also requires proper and adequate notification of proceedings and the parties must have the opportunity to fairly respond to evidence, and present their own case in full. Failure to invoke the right to be heard, however, may result in waiver of the denial of due process. *See Kincell v. Consolidation Coal Co.*, 9 BLR 1-221, 1-223 (1986). After the Board remanded the case to the Office of Administrative Law Judges, Associate Chief Judge Thomas M. Burke notified employer and the other parties, by Order dated July 18, 1997, that "[a]s Judge Lawrence is no longer with this Office, this case will be transferred to another Administrative Law Judge for a decision on the record" and gave the parties thirty days from issuance to object or file briefs on the merits. Claimant responded, but employer, as it concedes in its brief, did not respond to Associate Chief Judge Burke's Order.[6] Employer's Brief at 3. Because employer did not object at that time, as instructed, we hold that it waived its opportunity to request a hearing on remand. We hold that the administrative law judge did not abuse the discretion granted to him in resolving procedural issues in declining to reopen the record for the submission of evidence. 20 C.F.R. §725.456(e); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 and 13 BLR 1-57 (1989)(*en banc* recon.)(McGranery, J., concurring); *Toler v. Associated Coal Co.*, 12 BLR 1-49 (1989); *Borgeson v. Kaiser Steel Coal Co.*, 12 BLR 1-169 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *White v. Director, OWCP*, 7 BLR 1-348, 1-351 (1988); *see Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986). Consequently, the administrative law judge acted within his discretion in rejecting employer's request for a new hearing.

Next, employer contends that the administrative law judge failed to follow the Board's remand instructions to apply the standard in *Rutter* in determining whether a change in conditions was established, asserting that the administrative law judge's comments regarding the new standard are "indicative of an intransigence and

[6] In spite of these instructions, employer avers that it believed "its earlier request for a hearing and for consolidation with the overpayment proceeding to be sufficient." Employer's Brief at 3.

outright hostility to employer's position," thus requiring remand to a different administrative law judge. Employer's Brief at 18-19. In the alternative, employer asserts that even under *Rutter*, the administrative law judge erred by finding a material change in conditions, arguing that under the *Rutter* standard, once a claimant proves a change in his condition as to some element of entitlement, the claimant benefits from an "irrebuttable presumption" that the change is material. We reject both of these contentions. While the administrative law judge may have included *dicta* in his decision regarding the distinction between the *Spese* standard and the *Rutter* standard, his action did not rise to the level of intransigence or hostility as he acknowledged his responsibility to consider whether the new evidence established an element of entitlement previously adjudicated against claimant. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); Decision and Order on Remand at 2-7.

Turning to employer's arguments on the merits, employer raises several contentions regarding the administrative law judge's weighing of the medical evidence under Sections 718.202(a)(4) and 718.204(b), (c) (2000). Employer's contentions, on the whole, amount to little more than a request to reweigh the evidence of record, a task we may not perform. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We decline to address, therefore, each specific allegation raised by employer. Nevertheless, employer raises one argument regarding the administrative law judge's finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), and a general contention regarding the administrative law judge's findings under Section 718.204(b) and (c) (2000), that, along with new case law, merit specific consideration.

Employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a)(4) (2000). In finding the existence of "legal" pneumoconiosis established, the administrative law judge considered only the medical opinions. Decision and Order on Remand at 2-5. Subsequent to the issuance of the administrative law judge's Decision and Order on Remand and Order Denying Motion for Reconsideration, the United States Court of Appeals for the Fourth Circuit held in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2- (4th Cir. 2000), that all relevant evidence is to be considered together at Section 718.202(a) (2000). We, therefore, vacate the administrative law judge's finding that the existence of pneumoconiosis was established and instruct the administrative law judge, on remand, to weigh the x-ray evidence with the physicians' opinions to determine whether claimant established the existence of pneumoconiosis by a preponderance of all of the evidence in accordance with the standard articulated in *Compton*, *supra*.

In addition, employer argues that the opinions of Drs. Honrado, Floresca and Daniel and the Occupational Pneumoconiosis Board are not well-reasoned and supported, and that the administrative law judge erred in failing to adequately explain his reasons for crediting these opinions over the contrary opinions of Drs. Morgan, Lane, Lapp and Zaldivar in contravention of 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), and the decisions of the United States Court of Appeals for the Fourth Circuit in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In *Hicks* and *Akers*, the Fourth Circuit held that an administrative law judge should not automatically credit the testimony of a treating or an examining physician merely because the physician treated or personally examined the miner; rather, the administrative law judge should also consider the qualifications of the physicians, the explanations of their medical opinions and the documentation underlying their opinions. In evaluating the medical opinion evidence, the administrative law judge should assess "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Akers*, *supra*; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31, 32 (4th Cir. 1997). In this case, the administrative law judge did not consider and discuss the weight he accorded the various credentials of the physicians of record and, in view of case law from the Fourth Circuit, we vacate the administrative law judge's findings that the existence of pneumoconiosis and disability causation were established, and remand this case to the administrative law judge for a full review of the record as a whole in light of these authorities. Furthermore, the administrative law judge must consider all factors relevant to the quality of the evidence in determining whether the opinions of Drs. Daniel, Honrado and Floresca and the Occupational Pneumoconiosis Board as well as the opinions of Drs. Morgan, Lane, Lapp and Zaldivar, are supported by the underlying documentation and adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999). Additionally, the administrative law judge is also instructed to review the evidence of record pursuant to the applicable standard set forth at 20 C.F.R. §718.204(c)(2000).

Employer lastly contends that the administrative law judge erred in awarding benefits from March 1, 1984. Decision and Order on Remand at 7. We agree. As employer correctly asserts, the administrative law judge did not discuss and weigh the medical evidence before making this determination. We, therefore, vacate the administrative law judge's order to award benefits from March 1, 1984, and, on remand, if the administrative law judge again finds entitlement established, he must discuss and weigh the medical evidence to determine whether it establishes the date on which total disability due to pneumoconiosis commenced. *See* 20 C.F.R.

§725.503 (2000); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Eifler v. Office of Workers' Compensation*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the Decision and Order Upon Remand and the Order Denying Motion for Reconsideration of the administrative law judge awarding benefits are vacated and the case is remanded to the administrative law judge for further consideration in accordance with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON
Administrative Appeals Judge