BRB No. 03-0470 BLA
Case No. 99-BLA-1291

JAMES M. CAREY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY	)	
	)	DATE ISSUED: 11/17/2004
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER on
Party-in-Interest	)	RECONSIDERATION

Appeal of the Decision and Order on Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Maureen Hogan Krueger, Jenkintown, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Richard A. Seid (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer has filed a timely Motion for Reconsideration requesting the Board to reconsider its Decision and Order dated April 9, 2004, in the captioned case which arises under 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] In that decision, the Board affirmed, *inter alia*, the administrative law judge's finding that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Carey v. Reading Anthracite Co.*, BRB No. 03-0470 BLA (Apr. 9, 2004) (unpublished). In affirming the administrative law judge's finding pursuant to 20 C.F.R. §725.309 (2000), the Board rejected employer's contention that claimant had the burden of establishing that his pneumoconiosis was progressive. *Id.* The Board also affirmed the administrative law judge's finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The Board, therefore, affirmed the administrative law judge's award of benefits.

Employer presently contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Employer further contends that the administrative law judge erred in failing to consider whether claimant's disabling shoulder injury precluded an award of benefits. In addition to its Motion for Reconsideration, employer has filed a Motion to Remand, requesting that the Board remand the case to the administrative law judge so that the record can be reopened for the submission of evidence addressing the nature of claimant's pneumoconiosis. Employer requests that full briefing in support of its Motion for Reconsideration be held in abeyance pending a ruling on its Motion to Remand. The Director, Office of Workers' Compensation Programs (the Director), has filed a motion to clarify the procedural status of employer's Motion to Remand. The Director asserts that employer, while not asking the Board to vacate its affirmance of the administrative law judge's award of benefits, urges the Board to remand the case to the administrative law judge for additional evidentiary development concerning the nature of claimant's pneumoconiosis. The Director contends that the Board's rules do not allow it to affirm an administrative law judge's award of benefits and to remand a case to an administrative law judge for further substantive proceedings on a claimant's entitlement. Consequently, the Director argues that employer's motion seeks an invalid ruling by the Board. Claimant has filed a response brief, requesting that the Board deny employer's

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Motion for Reconsideration.[2] In a combined Reply Brief, employer reiterates its request that the Board remand the case for further development of the evidence.

Citing 20 C.F.R. §718.201(c), employer notes that the revised regulations provide that pneumoconiosis is "recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." Employer asserts that Section 718.201(c) has shifted the burden of proving the absence of progression or latency to the employer. Consequently, employer contends that due process and fundamental fairness require that it be provided with an opportunity to rebut the presumption that claimant's pneumoconiosis is progressive or latent with medical evidence. *See* Employer's Motion for Reconsideration at 3. We disagree. The Board has held that the amendments to 20 C.F.R. §718.201 did not alter claimant's burden of proving that he suffers from pneumoconiosis arising out of coal mine employment by a preponderance of the evidence and without the benefit of any presumption of latency or progressivity.[3] *Workman v. Eastern Associated Coal Corp.*, BRB No. 02-0727 BLA (Aug. 19, 2004) (Motion for Recon.) (*en banc*) (published), slip op. at 5. Thus, there has not been a change in the law that would necessitate the Board's remanding this case to the administrative law judge for the submission of new evidence. Moreover, employer failed to request the opportunity to submit additional evidence after the Board remanded this case in 2001 to the administrative law judge for further consideration. *See Carey v. Reading Anthracite Co.*, BRB No. 01-0203 BLA (Nov. 30, 2001) (unpublished). Given the facts and circumstances of this case, we hold that employer was provided an adequate opportunity to submit evidence regarding whether claimant suffered from

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[2] Claimant also contends that employer's request to hold the briefing in abeyance is improper and must be denied.

[3] The Board has held that a miner is not required to separately prove that he suffers from one of the particular kinds of pneumoconiosis that has been found in the medical literature to be latent and progressive, and that his disease actually progressed. The Board has further held that:

> Because the potential for progressivity and latency is inherent in every case, a miner who proves the current presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it previously was not, has demonstrated that the disease from which he suffers is of a progressive nature.

Workman v. Eastern Associated Coal Corp., BRB No. 02-0727 BLA (Aug. 19, 2004) (Motion for Recon.) (*en banc*) (published), slip op. at 5.

pneumoconiosis. Consequently, we deny employer's request that the case be remanded to the administrative law judge for further development of the evidence.

The Board has previously rejected employer's remaining contentions of error. The Board rejected employer's contention that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Carey v. Reading Anthracite Co.*, BRB No. 03-0470 BLA (Apr. 9, 2004) (unpublished), slip op. at 5-8. The Board further rejected employer's contention that the administrative law judge erred in finding the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* at 9-10. The Board also rejected employer's contention that the administrative law judge erred in failing to consider whether claimant's disabling shoulder injury precluded an award of benefits. *Id.* at 12-13. Since employer has not raised any new contentions of error regarding the administrative law judge's findings, we find no basis to alter our previous holdings.

In light of our disposition of this case, employer's request that briefing be held in abeyance and the Director's motion to clarify the procedural status of employer's Motion to Remand are rendered moot.

Accordingly, we deny employer's Motion for Reconsideration and reaffirm our Decision and Order of April 9, 2004 affirming the administrative law judge's Decision and Order on Remand awarding benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge