BRB No. 98-0143 BLA

FERNE L. TROUP (Executrix of the Estate of DELBERT D. TROUP)	)	
Claimant-Respondent	)	
v.	)	
READING ANTHRACITE COAL COMPANY	)	DATE ISSUED:
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER
	)	*EN BANC*

Appeal of the Decision and Order - Granting Benefits on Remand from the Benefits Review Board of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

David H. Rattigan (Williamson, Friedberg & Jones), Pottsville, Pennsylvania, for claimant.

Laura Metcoff Klaus, W. William Prochot and Mark E. Solomons (Arter & Hadden, LLP), Washington, D.C., for employer/carrier.

Helen H. Cox (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: HALL, Chief Administrative Appeals Judge, SMITH, BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order - Granting Benefits on Remand from the Benefits Review Board (91-BLA-0601)(1997 Decision and Order) of Administrative Law Judge Paul H. Teitler on a duplicate 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 has previously been before the Board. The procedural history of this case is as follows. Claimant filed an application for benefits on June 25, 1973. Benefits were denied by the Social Security Administration, and the Department of Labor. The final denial on this claim was issued on September 11, 1981 by the Department of Labor claims examiner who denied benefits because claimant did not establish the existence of pneumoconiosis or that the disease was caused by his coal mine employment. Director's Exhibit 46.

On January 31, 1990, claimant filed another application for benefits. After holding a hearing, the administrative law judge issued a Decision and Order - Award of Benefits on June 3, 1992. The administrative law judge credited claimant with forty-nine years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge determined that total disability was not demonstrated pursuant to 20 C.F.R. §718.204(c)(1)-(3), but that it was demonstrated pursuant to 20 C.F.R. §718.204(c)(4). The administrative law judge also determined that claimant was totally disabled due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, he awarded benefits commencing on January 1, 1990. Decision and Order - Award of Benefits.

Employer appealed, and the Board issued a Decision and Order on December 27, 1994. The Board noted that the administrative law judge had not made a finding regarding the duplicate claim issue. The Board held that a material change in conditions, under the then-applicable standard enunciated in *Shupink v. LTV Steel,*

Co., 17 BLR 1-24 (1992), was established. The Board vacated the administrative law judge's Section 718.202(a)(1) finding, in view of *Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and vacated the administrative law judge's Section 718.204(c)(1) finding because the administrative law judge had not considered one of the pulmonary function studies. The Board also vacated the administrative law judge's finding that claimant established total disability pursuant to Section 718.204(c), and instructed the administrative law judge, on remand, to weigh the contrary probative evidence, like and unlike, as required by *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). The Board also affirmed the administrative law judge's Section 718.204(b) finding and his Section 718.203 finding. *See Troup v. Reading Anthracite Coal Co.*, BRB No. 92-2015 BLA (Dec. 27, 1994)(unpub.).

On remand, the administrative law judge issued his Decision and Order - Awarding Benefits on Remand from the Benefits Review Board on June 29, 1995. The administrative law judge found the existence of pneumoconiosis established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge noted the Board's instruction to weigh the contrary probative evidence at Section 718.204(c), and found that total respiratory disability was established pursuant to Section 718.204(c). Consequently, he awarded benefits payable from January 1, 1990. *See* Decision and Order - Awarding Benefits on Remand from the Benefits Review Board.

Employer appealed, and on March 29, 1996 the Board issued its Decision and Order. The Board rejected employer's assertion that remand was required for consideration of whether claimant established a material change in conditions under the then newly enunciated standard in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), and held that the administrative law judge's analysis of the evidence satisfied this standard. The Board affirmed the administrative law judge's reliance on Dr. Karlavage's opinion and held that the administrative law judge permissibly found Dr. Cable's opinion better reasoned than Dr. Levinson's opinion. The Board also reaffirmed its earlier holding pursuant to Section 718.204(b), based on the law of the case doctrine. Thus, the Board affirmed the award of benefits. *See Troup v. Reading Anthracite Coal Co.*, BRB No. 95-1856 BLA (Mar. 29, 1996)(unpub.).

Employer filed a Motion for Reconsideration with the Board. On January 16, 1997, the Board issued its Decision and Order on Reconsideration. The Board held that employer demonstrated the existence of intervening controlling authority, one of the exceptions to the law of the case doctrine. The Board, therefore, vacated the

administrative law judge's award of benefits and remanded the case to the administrative law judge to consider whether claimant has established a material change in conditions pursuant to 20 C.F.R. §725.309 and *Swarrow.* The Board also held that the administrative law judge failed to consider all of the evidence in determining whether claimant established entitlement and instructed the administrative law judge to consider all of the evidence of record in determining whether claimant established entitlement. *See Troup v. Reading Anthracite Coal Co.*, BRB No. 95-1856 BLA (Jan. 16, 1997)(Decision and Order on Reconsideration)(unpub.).

On remand, the administrative law judge issued his Decision and Order on September 10, 1997. The administrative law judge denied employer's motion to re-open the record and rejected employer's assertion that *Swarrow* is inconsistent with the decision of the United States Supreme Court in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT)(1997). The administrative law judge reaffirmed his finding that the existence of pneumoconiosis is established pursuant to Section 718.202(a)(4). Therefore, based on the newly submitted medical opinion evidence, the administrative law judge determined that claimant established the existence of pneumoconiosis and a material change in conditions. The administrative law judge then considered all of the evidence of record. He incorporated his previous summary of the evidence submitted with the current claim, and summarized the evidence submitted with the initial claim. The administrative law judge considered all of the evidence of record and determined that it did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), or demonstrate total disability pursuant to Section 718.204(c)(1) or (c)(2). The administrative law judge also found that Dr. Munir's medical opinion has little probative value, and that, therefore, it did not change his findings of pneumoconiosis and total disability pursuant to Sections 718.202(a)(4) and 718.204(c)(4). Accordingly, he awarded benefits commencing on January 1, 1990.

On appeal, employer asserts that the claim must fail for the lack of a party in interest, because the miner has died and no party has been substituted for claimant. Employer also alleges that due process and fundamental fairness require that it be given the opportunity to respond to changes in the law. Employer notes that the standard for determining whether claimant establishes a material change in conditions enunciated in *Swarrow*, is new, and argues that *Swarrow* is invalid in view of the decision of the United States Supreme Court in *Rambo II*. In addition, employer asserts that the administrative law judge's material change in conditions finding does not satisfy the *Swarrow* standard. Employer maintains that the case must be remanded for the administrative law judge to weigh all of the evidence concerning the existence of pneumoconiosis pursuant to the decision of the United

States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Employer also challenges many of the administrative law judge's credibility determinations and his weighing of the evidence, as well as the Board's prior affirmance of these findings. Finally, employer asserts that the administrative law judge's intransigence requires reassignment to an impartial administrative law judge.

Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter asserting that dismissal of claimant's claim, requested by employer, is not warranted. The Director also contends that reopening of the record is not appropriate in this case. Further, the Director asserts that remand for further consideration of the existence of pneumoconiosis in view of *Williams* is not necessary in this case. Employer has filed a reply brief restating its position.[1]

In addition, claimant filed a motion with the Board entitled Notice and Suggestion of Death of Claimant. In this motion, the Board is advised that claimant died on October 13, 1996, and the Board is asked to add Ferne L. Troup, the miner's widow and the executrix of his estate, as a party-in-interest. By Order dated February 3, 1998, the Board granted claimant's request and changed the caption of this case to identify Ferne L. Troup, the executrix of the Estate of Delbert D. Troup,

[1]On August 5, 1999, the Board held oral argument in this case in Philadelphia, Pennsylvania, to address the issue of whether the issuance of *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), constitutes a change in law such that due process requires that the Board instruct the administrative law judge to reopen the record to give the parties the opportunity to present new evidence in light of *Swarrow*. *Troup v. Reading Anthracite Coal Co.*, BRB No. 98-0143 BLA (Order)(June 22, 1999)(unpub.). The parties submitted briefs in support of their positions.

as claimant.[2]

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 this 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).

As an initial matter, we deny employer's request for dismissal of the claim based on the lack of a party-in-interest in this case. As employer concedes in its reply brief, this assertion is rendered moot in view of the Board's substitution of Ferne L. Troup, the executrix of the miner's estate, as the claimant in this case. *See Troup v. Reading Anthracite Coal Co.*, BRB No. 98-0143 BLA (Feb. 3, 1998)(Order)(unpub.).

Employer asserts that the one-element standard adopted by the Third Circuit in *Swarrow* for establishing a material change in conditions at Section 725.309 is invalid in view of the decision of the United States Supreme Court in *Rambo II*. Employer argues that under the *Swarrow* standard, once a claimant proves a change in his claim as to some element of entitlement, the claimant benefits from an irrebuttable presumption that the change is material. Employer asserts that this presumption violates *Ondecko, Rambo II*, and Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 30 U.S.C. §919(d) and 30 U.S.C. §932(a), which require that claimant prove a material change in conditions by a preponderance of the evidence.

We disagree. The Supreme Court, in *Rambo II*, addressed the issue of whether a longshoreman, who was experiencing no present, post-work injury reduction in wage-earning capacity, could nonetheless be entitled to nominal benefits so as to toll the one year time limitation for filing for modification. *See Rambo II, supra*. It did not address what proof was necessary to establish a material change in conditions in a black lung duplicate claim. The Court's decision in *Rambo II* does not alter the one-element standard adopted by the Third Circuit in *Swarrow*, or in other circuits. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358,

[2]Consequently, hereinafter, Delbert D. Troup is referred to as "the miner" and Ferne L. Troup is referred to as "claimant."

20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Moreover, contrary to employer's suggestion, the courts' adoption of the one-element standard did not create a presumption by which a claimant may prove a material change in conditions; rather, the courts held that a claimant may meet his burden of establishing a material change in conditions by establishing one of the elements of entitlement previously adjudicated against him. *Id.*

Employer also asserts that the administrative law judge erred on remand by refusing to reopen the record in order to permit it to supplement the record in light of *Swarrow*. Employer's assertion is based on the premise that due process and fundamental fairness require that the record be reopened to allow it to respond to changes in law which involve material and potentially dispositive matters. In addressing the issue of whether to reopen the record on remand, the administrative law judge stated that "[e]mployer had ample opportunity to develop its case, as is apparent from the record, and I find its argument regarding Employer's lack of incentive to attain medical evidence under the pre-Labelle scheme to be particularly unconvincing." 1997 Decision and Order at 4. The administrative law judge also stated that "[e]mployer...did not indicate what evidence he seeks to submit." *Id*. In its decision in *Swarrow*, the Third Circuit deferred to the Director and adopted his interpretation of a "material change in conditions." The court summarized the Director's interpretation of a "material change in conditions" as requiring the administrative law judge to:

> consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. The ALJ must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

Swarrow, 72 F.3d at 317, 20 BLR at 2-94. Thus, since *Swarrow* adopts the Director's interpretation of a material change in conditions, we reject employer's assertion that *Swarrow* mandates that, in addition to determining whether the newly submitted evidence establishes one new element of entitlement, the administrative law judge must explain how the newly submitted evidence is qualitatively different from the previously submitted evidence. *Contra Ross, supra*.[3]

[3]In *Flynn v. Grundy Mining Co.,* 21 BLR 1-40 (1997), the Board addressed the

Further, inasmuch as *Swarrow* does not require that the administrative law judge explain how the newly submitted evidence is qualitatively different from the previously submitted evidence, we hold that *Swarrow* does not create a new factual element which must be addressed in order to establish or defend against a finding of a material change in conditions. Inasmuch as the type of evidence relevant to a material change in conditions inquiry has not been affected, we reject employer's assertion that the Third Circuit's adoption of the Director's interpretation of a material change in conditions in *Swarrow* has affected its litigation strategy and its ability to present evidence on this issue such that the administrative law judge's refusal to reopen the record on remand constitutes a manifest injustice. As the Director asserts, employer had notice of the type of newly submitted evidence that would be relevant to consideration of each of the elements of entitlement which previously defeated the claim, and thus to the issue of a material change in conditions, and had the opportunity to submit such evidence at trial.

Additionally, contrary to employer's assertion that the Third Circuit's decision

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standard for establishing a material change in conditions enunciated by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The Board referred to the language in *Ross*, which requires that the administrative law judge determine how the later evidence differs qualitatively from the evidence previously submitted which was deemed insufficient to establish the requisite element of entitlement in the prior claim. *See Flynn*, 21 BLR at 1-43. The decision of the United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, in *Labelle Processing Co. v. Swarrow,* 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), enunciates that circuit's standard for establishing a material change in conditions, and does not contain any such requirement.

in *Swarrow* is not in accordance with the holding articulated by the Supreme Court in *Ondecko* since *Swarrow* shifts the burden of proof in violation of the APA, the burden of proof with respect to establishing a material change in conditions in the Third Circuit continues to be on claimant, and not on employer. *See Swarrow, supra*. As the Director asserts, while *Swarrow* imposes an increased burden on claimant to prove a material change in conditions, it does not change employer's evidentiary burden or the type of evidence relevant to the issue. Relevant case law supports the proposition that due process and fundamental fairness mandate a reopening of the record where a significant alteration in the type of evidence necessary to meet a party's burden of proof results from a change in law. *See Peabody Coal Co. v. Ferguson,*140 F.3d 634, 21 BLR 2-344 (6th Cir. 1998); *Peabody Coal Co. v. White*, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998); *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *see also Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989). However, the Third Circuit's adoption of the Director's rational interpretation of a material change in conditions in *Swarrow* does not significantly alter the type of evidence that is necessary to meet a party's burden of proof. *See Swarrow, supra*. Hence, *Swarrow* does not compel the reopening of the record on remand in order to satisfy due process and fundamental fairness. We conclude, therefore, that the decision to reopen the record on remand in this instance was a procedural matter within the discretion of the administrative law judge. *See Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *see also Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984). Thus, we reject employer's assertion that the administrative law judge's refusal to reopen the record on remand was an abuse of discretion which violated fundamental fairness and employer's right to due process.

Employer raises several contentions that the administrative law judge erred in his weighing of the medical evidence under Section 718.202(a)(4) and Section 718.204(c)(4), and his findings pursuant to Section 718.204(c)(2).[4] The Board has

[4]Employer asserts that the opinions of Drs. Cable and Karlavage are not substantial evidence of pneumoconiosis, and that the administrative law judge erred by relying on them to find the existence of pneumoconiosis established. Employer also asserts that the administrative law judge erred by finding that Dr. Levinson's opinion is not entitled to determinative weight on the issue of the existence of pneumoconiosis. Employer asserts that the Board erred when it previously affirmed the administrative law judge's weighing of the evidence pursuant to Section 718.202(a)(4). Employer also asserts that the administrative law judge erred when he previously found total disability demonstrated. Employer contends that Dr. Karlavage's opinion is not substantial evidence of total disability. Employer alleges that the Board erred by relying on the administrative law judge's decision to credit

previously rejected similar assertions raised by employer and affirmed the administrative law judge's crediting and weighing of these medical opinions at Sections 718.202(a)(4) and 718.204(c)(4), in addition to his findings pursuant to Section 718.204(c)(2). *See Troup*, BRB No. 95-1856 BLA, slip op. at 3-4; *Troup*, BRB No. 92-2015 BLA, slip op. at 5-6. Employer also challenges the finding that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(b). The Board previously affirmed the administrative law judge's finding that claimant established this element of entitlement "if, on remand, the administrative law judge again finds that the evidence is sufficient to establish the existence of pneumoconiosis and total disability." *Troup*, BRB No. 92-2015 BLA, slip op. at 7. Inasmuch as employer has not suggested that a basis for an exception to the law of the case doctrine exists, nor is any apparent, we hold that this doctrine is controlling on these issues based on the evidence currently contained in the record. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). We, therefore, decline to address these assertions any further.

In addition, employer maintains that remand is necessary for the administrative law judge to weigh evidence concerning the existence of pneumoconiosis in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). In *Williams*, the Third Circuit held that an administrative law judge must weigh all types of relevant evidence together at Section 718.202(a)(1)-(4) to determine whether claimant suffers from pneumoconiosis. In the instant case, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(3), but found it sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). However, an examination of the administrative law judge's decision reveals that the administrative law judge did not weigh all of the relevant evidence together to determine whether claimant has established the existence of pneumoconiosis in accordance with *Williams*. Therefore, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a), and remand the case to the administrative law judge for further consideration of the evidence in compliance with the requirement established in *Williams* that all types of

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Dr. Cable's opinion. Employer also asserts that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b).

relevant evidence must be weighed together to determine whether claimant suffers from pneumoconiosis. *See Williams, supra*.

Inasmuch as we remand the case to the administrative law judge for further consideration of the newly submitted evidence at Section 718.202(a) in accordance with *Williams*, we vacate the administrative law judge's finding that claimant established a material change in conditions at Section 725.309. *See Williams, supra*; *see also Swarrow, supra*. On remand, the administrative law judge must weigh the evidence submitted subsequent to the denial of the initial claim to determine whether it establishes a material change in conditions pursuant to Section 725.309 and *Swarrow*. If the administrative law judge finds a material change in conditions established, he must consider whether the evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a) on the merits.

Employer further argues that the administrative law judge has not weighed the contrary probative evidence at Section 718.204(c) on the merits, as required by the Board in *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). In the Board's 1992 Decision and Order, the administrative law judge was instructed, on remand, to weigh the contrary probative evidence to determine whether claimant had established total disability at Section 718.204(c). However, an examination of the administrative law judge's decisions reveals that he did not perform this analysis. *See* 1995 Decision and Order Awarding Benefits on Remand; 1997 Decision and Order. Therefore, we vacate the administrative law judge's finding of total disability at Section 718.204(c) on the merits and remand the case to the administrative law judge to weigh the contrary probative evidence, as required by *Shedlock*, to determine whether claimant has established total disability pursuant to Section 718.204(c) on the merits, if reached. *See Shedlock, supra*.

Finally, we reject employer's request that this case be reassigned to another administrative law judge because the record does not support employer's allegation of intransigence. The record does not reflect that the administrative law judge is unfair, partial to claimant or that he has demonstrated a bias against employer. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the Decision and Order - Granting Benefits on Remand from the Benefits Review Board is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

Deskbook Section: Part III.F.2

The Board, sitting *en banc*, held that the Supreme Court's decision in ***Metropolitan Stevedore Co. v. Rambo [Rambo II]***, 521 U.S. 121 (1997), did not alter the one-element standard adopted by the Third Circuit in ***Labelle Processing Co. v. Swarrow***, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), or in other circuits. ***See Lisa Lee Mines v. Director, OWCP*** **[Rutter]**, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); ***Sharondale Corp. v. Ross***, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The Board also held that the one-element standard adopted by the Third Circuit, in ***Swarrow***, and by the other circuits did not create, in violation of ***Director, OWCP v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g* ***Greenwich Collieries v. Director, OWCP***, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and Section 7(c) of the Administrative Procedure Act, a presumption by which a claimant may prove a material change in conditions; rather, the courts held that a claimant may meet his burden of establishing a material change in conditions by establishing one of the elements of entitlement previously adjudicated against him. ***Troup v. Reading Anthracite Coal Co.***, BLR (1999).

The Board held that, inasmuch as the Third Circuit's adoption of the Director's rational interpretation of a material change in conditions in ***Swarrow*** does not significantly alter the type of evidence that is necessary to meet a party's burden of proof, ***Swarrow*** does not compel the reopening of the record on remand in order to satisfy due process and fundamental fairness. The Board rejected employer's assertion that ***Swarrow*** mandates that, in addition to determining whether the newly submitted evidence establishes one new element of entitlement, the administrative law judge must explain how the newly submitted evidence is qualitatively different from the previously submitted evidence. Further, the Board rejected employer's assertion that the Third Circuit's adoption of the Director's interpretation of a material change in conditions in ***Swarrow*** has affected its litigation strategy and its ability to present evidence on this issue such that the administrative law judge's refusal to reopen the record on remand constitutes a manifest injustice, holding that ***Swarrow*** neither creates a new factual element which must be addressed in order to establish or defend against a finding of a material change in conditions, nor affects the type of evidence relevant to a material change in conditions inquiry. Moreover, inasmuch as the burden of proof with respect to establishing a material change in conditions in the Third Circuit continues to be on claimant, and not on employer, the Board rejected employer's assertion that since ***Swarrow*** shifts the burden of proof in violation of the Administrative Procedure Act the Third Circuit's decision in ***Swarrow*** is not in accordance with the holding articulated by the Supreme Court in ***Ondecko***.

The Board, therefore, concluded that the decision to reopen the record on remand in this instance was a procedural matter within the discretion of the administrative law judge. ***Troup v. Reading Anthracite Coal Co.***, BLR (1999).

Deskbook Section: Part IV.A.4.d(2)

The Board held that, inasmuch as the Third Circuit's adoption of the Director's rational interpretation of a material change in conditions in ***Swarrow*** does not significantly alter the type of evidence that is necessary to meet a party's burden of proof, ***Swarrow*** does not compel the reopening of the record on remand in order to satisfy due process and fundamental fairness. The Board rejected employer's assertion that ***Swarrow*** mandates that, in addition to determining whether the newly submitted evidence establishes one new element of entitlement, the administrative law judge must explain how the newly submitted evidence is qualitatively different from the previously submitted evidence. Further, the Board rejected employer's assertion that the Third Circuit's adoption of the Director's interpretation of a material change in conditions in ***Swarrow*** has affected its litigation strategy and its ability to present evidence on this issue such that the administrative law judge's refusal to reopen the record on remand constitutes a manifest injustice, holding that ***Swarrow*** neither creates a new factual element which must be addressed in order to establish or defend against a finding of a material change in conditions, nor affects the type of evidence relevant to a material change in conditions inquiry. Moreover, inasmuch as the burden of proof with respect to establishing a material change in conditions in the Third Circuit continues to be on claimant, and not on employer, the Board rejected employer's assertion that since ***Swarrow*** shifts the burden of proof in violation of the Administrative Procedure Act the Third Circuit's decision in ***Swarrow*** is not in accordance with the holding articulated by the Supreme Court in ***Ondecko***. The Board, therefore, concluded that the decision to reopen the record on remand in this instance was a procedural matter within the discretion of the administrative law judge. ***Troup v. Reading Anthracite Coal Co.***, BLR (1999).