

BRB No. 01-0249 BLA

EDWARD E. MORELAND)		
)		
Claimant-Petitioner)		
)		
v.)		
)		
ALLEGHENY MINING CORPORATION/)	DATE	ISSUED:
)		
NEW ALLEGHENY INCORPORATED)		
)		
and)		
)		
WEST VIRGINIA COAL WORKERS')		
PNEUMOCONIOSIS FUND)		
)		
Employer/Carrier-)		
Respondent)		
)		
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

David A. Colecchia (LAW CARE), Greensburg, Pennsylvania, for claimant.

Robert Weinberger (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-537) of Administrative Law Judge

Michael P. Lesniak denying benefits 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). In this duplicate claim, the administrative law judge determined that claimant's prior claim had been finally denied on April 1, 1997 because claimant failed to establish that he was totally disabled due to pneumoconiosis. *See* Decision and Order at 2, 10. Considering the newly submitted medical evidence, the administrative law judge found it insufficient to establish total disability due to pneumoconiosis and therefore insufficient to establish a material change in conditions. Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge on the issue of material change and causation. Carrier responds, in a letter brief, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed

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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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 claims, determined that the regulations at issue in the lawsuit would 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). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001).

² Claimant filed his initial application for benefits with the Department of Labor on January 28, 1974. The district director denied this claim on April 12, 1976 and again on April 27, 1981 following review under the 1977 Amendments to the Act. *See* Director's Exhibit 50. Claimant took no further action until he filed his second claim on November 5, 1996, which the district director denied on April 1, 1997 on the grounds that claimant did not establish that he was totally disabled by pneumoconiosis. *See* Director's Exhibit 51. Claimant took no further action until he filed the present claim on June 23, 1998. *See* Director's Exhibit 1.

a letter indicating that he will not participate in 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 this Board and may not be disturbed. 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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204(2001). 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*).

Claimant argues that the Decision and Order of the administrative law judge cannot be affirmed as claimant has established a material change in conditions. Specifically, claimant asserts that the administrative law judge erred in his weighing of the medical opinions of Drs. Fino and Wald: he ignored Dr. Wald's analysis of legal pneumoconiosis; he did not provide a proper reason for rejecting Dr. Wald's opinion; he failed to consider the progressive nature of pneumoconiosis; he failed to consider Dr. Wald's status as a treating physician; and he improperly relied on the report of Dr. Fino to support the denial of benefits because the report was based on outside sources and was illogical. Claimant also contends: that Dr. Wald possesses qualifications equal to those of Dr. Fino, that Dr. Wald considered the entirety of the evidence, and that Dr. Fino did not address whether claimant's coal mine employment aggravated claimant's respiratory impairment or explain why, if cigarette smoking was the sole cause of claimant's impairment, there was no improvement in claimant's pulmonary function studies after bronchodilator therapy. In response, carrier contends that since Dr. Wald diagnosed no pneumoconiosis, the administrative law judge properly accorded less weight to this report.

We agree with claimant that the findings of the administrative law judge concerning

³ We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and on the treatment of the medical opinions of Drs. Mathur, DeRienzo and Aneja, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ Contrary to claimant's argument, the hastens death standard enunciated in *Lukosevic v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir 1989) applies only to survivor's claims filed pursuant to 20 C.F.R. §718.205(c).

the credibility of the medical opinions of Drs. Fino and Wald must be vacated and that this case must be remanded for further consideration of the issue of whether claimant has demonstrated a material change in conditions based on the presence of a totally disabling respiratory impairment due to pneumoconiosis. *See* 20 C.F.R. §§725.309, 718.204(c). Initially, before the administrative law judge can credit the opinion of Dr. Fino on the basis of his status as Board-certified in internal medicine and pulmonary disease, the administrative law judge must also consider Dr. Wald's qualifications as reflected in his curriculum vitae and deposition testimony. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

In deciding whether the medical opinion evidence establishes that claimant has a totally disabling respiratory impairment due to pneumoconiosis, the administrative law judge must review the medical opinions of Drs. Fino and Wald on remand and determine if these physicians have adequately discussed the issue of the adverse effects of claimant's pneumoconiosis and coal mine dust exposure on claimant's disabling respiratory impairment. *See* 20 C.F.R. §718.204(c). When reviewing the medical opinion of Dr. Fino, the administrative law judge should address Dr. Fino's conclusion that "claimant does not suffer from an occupationally acquired pulmonary condition" to determine if this statement is conclusory or if it is an adequately explained opinion, taking into consideration any discussions presented by Dr. Fino regarding the effects of claimant's thirty years of coal mine employment on his disabling respiratory condition which Dr. Fino diagnosed as chronic obstructive bronchitis. *See* 20 C.F.R. §§718.201, 718.204(c); *Island Creek Coal Company v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000). In his Decision and Order, the administrative law judge notes that Dr. Wald concluded that claimant had an obstructive

⁵ The administrative law judge found that claimant established the presence of a totally disabling respiratory impairment. *See* Decision and Order at 11; 20 C.F.R. §718.204(b)(2)(iv).

⁶ According to his curriculum vitae and deposition testimony, Dr. Wald is Board-certified in internal medicine, is a director of hospital pulmonary laboratories, is an associate clinical professor of medicine, is claimant's treating physician, and has practiced pulmonary medicine for much of his medical career. Claimant's Exhibit 5.

⁷ Dr. Fino diagnosed chronic obstructive bronchitis due to cigarette smoking and opined that claimant did not suffer from an occupationally acquired pulmonary condition because 1) the majority of claimant's x-rays were negative; 2) claimant has an obstructive ventilatory abnormality in the absence of fibrosis so it is not related to coal mine employment; 3) claimant's total lung capacity is not reduced which rules out the presence of restrictive lung disease and significant pulmonary fibrosis; and 4) claimant's diffusing capacity is normal. *See* Director's Exhibit 49.

airways disease related to a combination of asthma and chronic bronchitis which the physician related to claimant's smoking as well as to claimant's workplace, and that Dr. Wald stated that neither of these conditions was caused by coal mine employment, but that both respiratory conditions were aggravated by coal mine dust exposure. *See* Decision and Order at 7, 11. Thus, in light of these statements by Dr. Wald and the progressive nature of pneumoconiosis, the administrative law judge, when reviewing this medical report, must provide a proper rationale for either giving less weight to Dr. Wald's report or for finding it insufficient to meet claimant's burden of proof on the issue of causation. In that regard, the administrative law judge on remand should apply the revised regulation on causation which now provides: "Pneumoconiosis is a 'substantially contributing cause' of the miner's disability if it: (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) *Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.*" 20 C.F.R. §718.204(c)(1) (emphasis added). *See Tennessee Consolidated Coal Company v. Kirk*, 2001 WL 1012089 *6 (6th Cir.).

We, therefore, vacate the finding of no material change in conditions and the denial of

⁸ In his deposition, Dr. Wald states that claimant's respiratory conditions are chronic bronchitis caused by smoking and asthma caused by an immune system predisposed to develop asthma and not caused by coal mine employment, but aggravated by exposure to irritant dusts. *See* Claimant's Exhibit 6 at 12-14, 17-21. Dr. Wald testified that claimant was disabled from his prior mining job because of a functional impairment due to chronic bronchitis; that given claimant's respiratory problems, claimant's exposure to any irritants, including his job as a coal miner, caused and will cause, if further exposed, aggravation of his underlying conditions; that claimant's exposure over the years contributed to the progression of his present conditions to the functional impairment claimant now has; and that once the chronic bronchitis developed, then coal dust caused an additional acceleration of its progression and aggravated the condition. *Id.* at 14-15, 17-18, 21-22.

benefits, and remand this case for the administrative law judge to reconsider the opinions of Drs. Fino and Wald to determine if claimant has established a material change in conditions. If the administrative law judge finds the newly submitted evidence sufficient to establish a material change in conditions, he must then consider all the evidence of record to determine if claimant has established entitlement to benefits.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge