BRB No. 09-0772 BLA
Case No. 2007-BLA-05504

PAUL JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY WESTERN COAL COMPANY	)	
	)	DATE ISSUED: 04/12/2011
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER on RECONSIDERATION

Appeal of the Decision and Order Denying Living Miner's Benefits of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer has filed a timely Motion for Reconsideration *En Banc* of the Board's Decision and Order in *Johnson v. Peabody Western Coal Co.*, BRB No. 09-0772 BLA (Aug. 31, 2010)(unpub.). 20 C.F.R. §802.407. In *Johnson*, the Board vacated the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, holding that the administrative law judge erred in requiring claimant to submit new evidence that was

qualitatively different from the evidence considered in his prior, denied claim. *Johnson,* slip op. at 5-6. Accordingly, the Board remanded the case to the administrative law judge for reconsideration of whether the newly submitted evidence is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 and a change in applicable condition of entitlement at 20 C.F.R. §725.309.

Employer asserts on reconsideration that the Board's interpretation of Section 725.309 conflicts with the Supreme Court's statement in *Pittston Coal Group v. Sebben,* 448 U.S. 105, 12 BLR 2-89 (1988), that the ordinary principles of finality apply in black lung adjudications. Employer further maintains that the Board's holding, that Section 725.309 does not require a qualitative comparison of the old and new evidence, cannot be reconciled with the plain language of the regulation or the comments of the Department of Labor (DOL) regarding Section 725.309. Claimant has responded to employer's motion for reconsideration and urges the Board to deny employer's request. The Director, Office of Workers' Compensation Programs, has not filed a response.

Upon review of employer's contentions on reconsideration, we hold that our decision to vacate the denial of benefits and remand the case to the administrative law judge was proper. Contrary to employer's assertion, our interpretation of Section 725.309 is consistent with the DOL's view, as expressed in the comments to the amended regulations, and the terms of the regulation. As we stated in our Decision and Order:

> In amending Section 725.309, the [DOL] adopted the standard set forth in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), which did not require a qualitative comparison of the old and new evidence. 65 Fed. Reg. 79,968 (Dec. 20, 2000). Under the revised version of Section 725.309, therefore, claimant can demonstrate the requisite change in an applicable condition of entitlement by establishing, through evidence developed subsequent to the prior denial, at least one of the elements of entitlement that was adjudicated against him. *See* 20 C.F.R. §725.309(d)(2), (3); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-64 (2004)(*en banc*). There is no separate requirement that claimant submit qualitatively different evidence.

Johnson, slip op. at 5-6. In addition, employer's reliance upon the Supreme Court's decision in *Sebben* is inapposite, as the Court did not address either the prior, or the amended, version of Section 725.309. Rather, the Court invalidated the interim regulations that the DOL developed to implement the Black Lung Benefits Reform Act of 1977 and determined that the principles of *res judicata* barred it from requiring the DOL

to readjudicate claims that had been finally denied under the invalid regulations.[1] *Sebben*, 488 U.S. at 121, 12 BLR at 2-94. The present case is distinguishable, as it concerns the appropriate interpretation of Section 725.309, which, by its terms, does not involve readjudication of a finally denied claim but, rather, adjudication of a subsequent claim in which a claimant is required to submit new evidence demonstrating a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1 (2004). Accordingly, we decline to alter our decision to vacate the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309 and remand the case to the administrative law judge for reconsideration of this issue under the appropriate standard.

Notwithstanding this determination, we have ascertained that our Decision and Order contains a minor error regarding Dr. Gatenby's x-ray interpretations. In Dr. Gatenby's reading of an x-ray dated January 28, 2003, which appears in treatment records submitted in the subsequent claim, Dr. Gatenby stated, "[t]he findings are typical of progressive massive fibrosis in pneumoconiosis and are unchanged since a prior study from [June 14, 1999]." Employer's Exhibit 3. In characterizing the administrative law judge's weighing of this evidence, the Board's decision states that Dr. Gatenby's comments regarding the June 14, 1999 film were "considered in the prior, denied claim." *Johnson*, slip op. at 5. There is no indication, however, that Dr. Gatenby's interpretation of this x-ray was either admitted into the record or considered by the administrative law judge in his denial of the prior claim. Our Decision and Order is modified, therefore, and we now instruct the administrative law judge to determine whether Dr. Gatenby's comments regarding the June 14, 1999 film constitute newly submitted record evidence, which the administrative law judge must consider under Sections 718.304 and 725.309.

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[1] The Court held that the interim regulations were not valid, as they violated a section of the Black Lung Benefits Reform Act of 1977 by including criteria that were more restrictive than the criteria applicable to claims filed on or before June 30, 1973. *Pittston Coal Group v. Sebben*, 488 U.S. 105, 119-20, 12 BLR 2-89, 2-94 (1988).

Accordingly, employer's Motion for Reconsideration *En Banc* is denied, but the Board's Decision and Order is modified as indicated above.[2]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[2] As a majority of the permanent Board members has denied reconsideration, employer's request for reconsideration *en banc* is also denied. 20 C.F.R. §801.301(c).