BRB Nos. 03-0267 BLA
and 03-0267 BLA-A

RUSH NOEL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 12/22/2003
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	Decision and Order

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Dorothea J. Clark and William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (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: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (02-BLA-0089) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a duplicate claim[1] 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).[2] The administrative law judge credited claimant with at least nineteen years of coal mine employment based on the parties' stipulation and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)–(iv). Further, the administrative law judge found the newly submitted evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). Claimant also challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R.

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[1]Claimant filed the initial claim on June 20, 1990. Director's Exhibit 33. This claim was denied by the Department of Labor on October 19, 1990. *Id*. Although claimant requested a hearing on November 27, 1990, the Department of Labor administratively closed the case on February 7, 1991 because claimant indicated that he was willing to accept its decision to deny benefits. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed another claim on September 8, 1998. Director's Exhibit 34. This claim was denied by the Department of Labor on January 7, 1999. *Id*. On May 5, 2000, claimant filed a letter of intent to file a claim. Director's Exhibit 1. Claimant filed the most recent claim on May 24, 2000. *Id*.

[2]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.

[3]The revisions to the regulation at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

§718.202(a)(4). Lastly, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. On cross-appeal, employer contends that the administrative law judge erred in retroactively applying the revised regulations to this case. The Director, Office of Workers' Compensation Programs (the Director), responds by letter to claimant's appeal and employer's cross-appeal, urging the Board to reject claimant's contention that the administrative law judge did not apply the correct material change in conditions standard in this case and to reject employer's general contention that it was denied due process by the administrative law judge's application of the revised regulations to this case.[4]

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).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. In *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him to assess whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). In the instant case, the administrative law judge stated that "[t]he previous claim was denied when it was determined that the [c]laimant did not establish the presence of pneumoconiosis arising out of coal mine employment or total disability due thereto." Decision and Order at 5; Director's Exhibit 34.

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). Specifically, claimant asserts that the administrative law judge erred in failing to make a specific finding with regard to whether the evidence is sufficient to establish a material change in conditions. In addressing the material change in conditions issue, the

[4]Since the administrative law judge's length of coal mine employment finding and his findings of no pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), no total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) and no total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), based on the newly submitted evidence, are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

administrative law judge stated:

> The present claim arises in the Sixth Circuit. Therefore, applying the [*Ross*] standard herein, the evidence submitted subsequent to the date of the prior denial will be reviewed, to 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. If he is successful in establishing a material change, then all of the record evidence must be reviewed to determine whether he is entitled to benefits.

Decision and Order at 4-5. Based on his weighing of the newly submitted evidence, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(b). Claimant correctly contends that the administrative law judge did not render a specific finding that the evidence is insufficient to establish a material change in conditions. We, however, hold harmless any error by the administrative law judge in this regard since he denied benefits because the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), total disability at 20 C.F.R. §718.204(b) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant also asserts that the administrative law judge erred in failing to correctly apply the material change in conditions standard adopted by the Sixth Circuit in *Ross*. Claimant's contention is based on the premise that the newly submitted medical reports relied on by the administrative law judge are based on "new" and "old" medical evidence. The administrative law judge considered the newly submitted opinions of Drs. Branscomb, Castle, Chavda, Ghio, Hamman, Jarboe, Lombard and Repsher. As the Director argues, the Sixth Circuit, in *Ross*, did not restrict the new medical evidence exclusively to evidence developed since the prior denial. *Ross*, 42 F.3d at 997-998, 19 BLR at 2-18. Although the reports of Drs. Branscomb, Castle, Chavda, Ghio, Hamman, Jarboe, Lombard and Repsher are based on both "old" and "new" evidence, the reports are relevant and probative because they address the miner's current condition. *Ross*, 42 F.3d at 997-998, 19 BLR at 2-18. Thus, we reject claimant's assertion that the administrative law judge erred in failing to correctly apply the material change in conditions standard adopted by the Sixth Circuit in *Ross*.

Next, claimant contends that the administrative law judge erred in finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Whereas Dr. Chavda opined that claimant suffers from pneumoconiosis, Director's Exhibit 7, Drs. Branscomb, Castle, Ghio, Jarboe, Lombard and Repsher opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 15; Employer's Exhibits 6, 7, 9, 11, 12, 17, 18. Although Dr. Hamman indicated that claimant

suffers from chronic obstructive pulmonary disease, he did not render an opinion that this pulmonary condition is related to coal dust exposure. Director's Exhibit 20; Employer's Exhibit 2. The administrative law judge properly accorded greater weight to the opinions of Drs. Branscomb, Castle, Ghio, Jarboe, Lombard and Repsher than to the contrary opinion of Dr. Chavda because he found them to be better reasoned and documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In considering the conflicting opinions, the administrative law judge stated:

> When asked upon what he based this opinion, Dr. Chavda stated that it was based upon the [c]laimant's daily symptoms of cough and shortness of breath and his obstructive and restrictive airway impairment. While these observations may be accurate regarding the [c]laimant's symptoms, there is no rationale or reasoning in Dr. Chavda's report which makes the causal connection between the symptoms and the [c]laimant's coal mine dust exposure…. Indeed, Dr. Chavda found the chest x-ray he read to be negative, the blood gas study indicative of good oxygenation, and the pulmonary function study to reveal a mild obstructive airway disease, none of these findings being particularly supportive of the diagnosis rendered. Accordingly, I find his opinion to be outweighed by the medical opinions of Drs. Lombard, Ghio, Repsher, Castle, Jarboe and Branscomb, supported as they are by the [c]laimant's treatment records which make no diagnosis of, nor mention any treatment for, coal worker's (sic) pneumoconiosis.

Decision and Order at 8.

In addition, the administrative law judge stated, "[i]n finding the reports of the other physicians to be more persuasive, I also rely upon the quality of the reports and the qualifications of the physicians who rendered these reports." *Id*. Dr. Branscomb is Board-certified in internal medicine. Employer's Exhibit 13. Similarly, Drs. Castle, Ghio, Jarboe, Lombard and Repsher are Board-certified in internal medicine and pulmonary disease. Director's Exhibit 15; Employer's Exhibits 4, 6, 8, 10, 14, 17. The record does not contain the credentials of Dr. Chavda. Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and reject claimant's challenge thereto. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Finally, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts that the administrative law judge erred in failing to find that Dr.

Simpao's opinion is sufficient to establish a totally disabling respiratory or pulmonary impairment. The administrative law judge considered the newly submitted opinions of Drs. Branscomb, Castle, Chavda, Ghio, Hamman, Jarboe, Lombard and Repsher.[5] The administrative law judge correctly found that "[e]very physician who examined the [c]laimant or who reviewed the medical records herein since the prior denial, found him to be able to return to his prior coal mine employment, from a pulmonary or respiratory standpoint." Decision and Order at 10. In a report dated October 20, 1998, Dr. Simpao opined that claimant suffers from a moderate pulmonary impairment. Director's Exhibit 34. The record shows that Dr. Simpao's opinion was submitted in connection with claimant's prior claim. Thus, since Dr. Simpao's opinion is not part of the newly submitted evidence, we reject claimant's assertion that the administrative law judge erred in failing to find that Dr. Simpao's opinion is sufficient to establish a totally disabling respiratory or pulmonary impairment in the instant duplicate claim. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Based on the foregoing, we hold that the administrative law judge properly found the newly submitted evidence to be insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), total disability at 20 C.F.R. §718.204(b) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). We, therefore, affirm the administrative law judge's determination that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000) and the denial of benefits.[6] *Ross*, 42 F.3d at 997-98, 19 BLR at 2-18.

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[5]The newly submitted medical opinion evidence consists of Dr. Branscomb's June 19, 2002 report and July 16, 2002 deposition transcript, Dr. Castle's June 27, 2002 report, Dr. Chavda's June 29, 2000 report, Dr. Ghio's May 15, 2002 report and July 25, 2002 deposition transcript, Dr. Hamman's May 16, 2001 report, Dr. Jarboe's June 9, 2002 report, Dr. Lombard's February 18, 2001 report and Dr. Repsher's June 5, 2002 report.

[6]In view of our disposition affirming the administrative law judge's denial of benefits, we need not address employer's contention, on cross-appeal, that the administrative law judge erred in applying the revised regulations in this case.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge