BRB No. 02-0531 BLA

JOHN H. CRENSHAW	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

Natalie D. Brown (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-0372) of Administrative Law Judge Robert L. Hillyard 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).[1] The administrative law judge credited

[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,

claimant with thirty-nine years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge found that the recent evidence submitted with the instant claim was insufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1). The administrative law judge thus concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant initially asserts that the administrative law judge failed to exclude some of the medical evidence proffered by employer on the ground that it is cumulative. Claimant also asserts the administrative law judge erred in his material change in conditions analysis. Claimant specifically challenges the administrative law judge's decision to credit the opinions of Drs. Selby, Dahhan, Jarboe and Castle, that claimant's pulmonary impairment resulted solely from cigarette smoking, over the opinion of Dr. Simpao, a Department of Labor evaluating physician, who stated that claimant's pulmonary impairment was due to smoking and coal workers' pneumoconiosis. Claimant additionally challenges the administrative law judge's determination to credit the opinions of Drs. Selby, Dahhan, and Castle, asserting, in essence, that such opinions are hostile to the Act. Employer, in response, asserts that the administrative law judge's findings, that the newly submitted evidence fails to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1), are supported by substantial evidence, and accordingly, that the denial of benefits should be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

In order to establish entitlement to benefits under 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

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725 and 726 (2002).

[2] Claimant filed his initial application for benefits on September 13, 1983, which the district director denied. Decision and Order at 2; *see* Director's Exhibit 24. Claimant filed a second application for benefits on August 8, 1990. Decision and Order at 2; Director's Exhibit 25. In a Decision and Order issued on November 30, 1992, Administrative Law Judge Daniel J. Roketenetz found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) (2000), but that he failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). *Id.* Accordingly, benefits were denied. *Id.* Claimant filed the instant claim, his third, on April 17, 2000. Decision and Order at 2; Director's Exhibit 1.

C.F.R. §§718.3, 718.201, 718.202, 718.203, 718.204. Failure to establish any 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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein.

Claimant challenges the administrative law judge's determination to overrule claimant's objection at the hearing to the large quantity of medical evidence submitted by employer on the ground that the evidence is cumulative and repetitious. Contrary to claimant's contention, the amended regulation at 20 C.F.R. §725.414(a)(3)(i), which limits the submission of evidence by the responsible operator, applies only to claims filed after January 19, 2001. Furthermore, claimant's citation to *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), in support of his contention, is misplaced. An administrative law judge is allowed considerable discretion in admitting evidence, as the Administrative Procedure Act requires the admission of all evidence, timely exchanged, unless it is irrelevant, immaterial, or unduly repetitious. 5 U.S.C. §556(d), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 14 BLR 2-1 (6th Cir. 1990); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989). The Board has held that, in instances where relevancy is questionable, administrative law judges should rule in favor of admission, and then determine the weight to be assigned to the evidence. *Cochran, supra,* at 1-139. As employer states in its brief and acknowledged by the administrative law judge, "the need for supplemental reports was occasioned by Employer's receipt of additional medical records regarding the Claimant and/or the Claimant's submission of evidence." Decision and Order at 15; Employer's Brief at 25. We reject, therefore, claimant's contention and we affirm the administrative law judge's determination to allow employer to submit Employer's Exhibits 4-16 in its defense of the claim, as a permissible exercise of the administrative law judge's discretion. *See* 5 U.S.C. §556(d); *see also* 20 C.F.R. §725.456; *Lemar*, *supra*; *Cochran*, *supra*.

Claimant's 1990 claim was denied because claimant failed to establish total respiratory disability. Director's Exhibit 25. Consequently, in order to establish a material change in conditions pursuant to Section 725.309(d) (2000), the newly submitted evidence must support a finding of total respiratory disability.[3] *Sharondale*

[3] The revisions to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001. 20 C.F.R. §725.2.

Corp. v. Ross, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). In the instant case, however, the administrative law judge concluded that total respiratory disability and disability causation were not separate elements of entitlement and thus held that claimant was required to establish total disability due to pneumoconiosis in order to establish a material change in conditions. The administrative law judge then reviewed the evidence submitted subsequent to the previous denial, found that it failed to establish total disability due to pneumoconiosis and denied benefits. Because we affirm the administrative law judge's denial of benefits on the merits, *see infra*, we hold that any error by the administrative law judge in failing to find a material change in conditions is harmless.[4] *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

On the merits with respect to the administrative law judge's consideration of disability causation pursuant to Section 718.204(c)(1), claimant challenges the administrative law judge's crediting of the opinions of Drs. Selby, Dahhan, Jarboe and Castle. Claimant asserts that Drs. Selby, Dahhan, Jarboe and Castle did not consider whether claimant had "legal" pneumoconiosis and that their opinions are hostile to the Act because they foreclosed all possibility that coal dust exposure produces an obstructive impairment. We disagree. First, Drs. Selby, Castle and Jarboe explicitly stated that claimant did not have "legal" pneumoconiosis or any impairment due to coal mine employment. Employer's Exhibits 13 at p. 39, 14 at p.13, 15 at p. 13. Second, Drs. Selby, Castle and Jarboe stated that coal dust exposure can cause an obstructive impairment and thus are not in contravention of the Act. Employer's Exhibits 13 at p. 37, 14 at p. 15, 16 at p. 12; *see Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989). We reject, therefore, claimant's contention that the administrative law judge erred in crediting the opinions of Drs. Selby, Dahhan, Jarboe and Castle.

We need not address claimant's other arguments concerning the medical opinions of Drs. Selby, Dahhan, Jarboe and Castle and whether the administrative

[4] In light of our disposition of this case, we need not reach claimant's argument that because the opinions of Drs. Selby, Dahhan, Jarboe and Castle are based on both old and new evidence, their conclusions are insufficient to be considered "new evidence" on the issue of whether claimant has established a material change in conditions.

law judge properly applied the causation standard in the instant case, however, because claimant has not challenged the administrative law judge's finding that the causation opinion of Dr. Simpao was unreliable, based upon his determination that Dr. Simpao relied on an inaccurate smoking history, *see Spradlin v. Island Creek Coal Co.*, 6 BLR 1-716 (1984), and does not have comparable qualifications to Drs. Selby, Dahhan, Jarboe and Castle. Decision and Order at 21; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *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); *Larioni*, *supra*; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Thus, as the administrative law judge correctly found that the evidence submitted since the previous denial contains no credible medical opinion evidence supportive of claimant's burden of proof on the issue of causation, and the evidence submitted in the previous claim is similarly deficient, we affirm the administrative law judge's denial of benefits because it is supported by substantial evidence.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge