BRB Nos. 05-0976 BLA
and 05-0976 BLA-A

SIM B. HOWZE, JR.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
BUFFALO MINING COMPANY	)	DATE ISSUED: 07/27/2006
	)	
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr. (Clifford, Mann & Swisher, L.C.), Charleston, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia for employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (2003-BLA-5163) of Administrative Law Judge Mollie W. Neal denying benefits on a subsequent 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). The administrative law judge found the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that total disability were established, 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), but that total disability due to pneumoconiosis (disability

causation), 20 C.F.R. §718.204(c), the element of entitlement previously adjudicated against claimant, was not established. Accordingly, the administrative law judge found that claimant failed to establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d). Benefits were, accordingly, denied.

On appeal, claimant contends that the administrative law judge erred in finding that Dr. Rasmussen's well-documented and well-reasoned opinion, that claimant was totally disabled due to pneumoconiosis failed to establish disability causation. On cross-appeal, employer contends that, although the administrative law judge's denial of benefits was proper, the administrative law judge erred in excluding certain evidence proffered by employer because all of its evidence was relevant and the limitations placed on the amount of evidence that may be submitted by the parties in the amended regulations is arbitrary and capricious. Employer also contends that the evidence should have been allowed under the good cause exception. *See* 20 C.F.R. §§725.414, 725.456(b)(1). Employer contends that the administrative law judge further erred in discrediting the opinions of Drs. Rosenberg and Crisalli. The Director, Office of Workers' Compensation Programs, (the Director) has not filed a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was finally denied because he failed to establish disability causation. 20 C.F.R. §718.204(c); *see* Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing this element of entitlement in order to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see Lisa*

Lee Mines v. Director, OWCP [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*).[1]

Claimant challenges the administrative law judge's finding that the evidence fails to establish that pneumoconiosis is a substantially contributing cause of his total respiratory disability.[2] Specifically claimant contends that the administrative law judge erred in disregarding Dr. Rasmussen's finding that claimant was disabled due to pneumoconiosis which was based on the doctor's objective findings. Claimant contends that the administrative law judge erred in according diminished weight to the opinion because the doctor did not explain the impact, if any, of claimant's past smoking history of approximately one pack of cigarettes per day from the age of eighteen in 1947 until he quit in 1974, approximately twenty-seven years. In addition, claimant contends that Dr. Rasmussen relied on a positive x-ray and a pulmonary function study showing severe, slightly reversible obstructive ventilatory impairment, and that Dr. Rasmussen concluded that, in light of claimant's significant forty-two year history of exposure to coal mine dust it was medically reasonable to conclude that claimant's disability was due to pneumoconiosis. Thus, claimant contends that the administrative law judge did not carefully review Dr. Rasmussen's opinion which contained information regarding smoking and which concluded that both smoking and pneumoconiosis caused claimant's respiratory disability and that their effects could not be separated. In addition, claimant

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[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

[2] Section 718.204(c)(1) provides, in pertinent part, that a miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 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).

contends that because Dr. Rasmussen is claimant's treating physician, the administrative law judge should have accorded his opinion additional weight.[3]

In considering the opinion of Dr. Rasmussen, the administrative law judge found that the doctor concluded that claimant was disabled due to pneumoconiosis based on his objective findings, but that the doctor's opinion was entitled to less weight because the doctor did not explain the impact, if any, of claimant's past smoking history. Review of Dr. Rasmussen's opinion shows that the doctor concluded that claimant had both clinical and legal pneumoconiosis which were due to his coal mine employment. Dr. Rasmussen stated that claimant reported a coal mine employment history of forty-two and one-half years and a smoking history of approximately twenty-seven pack years. The administrative law judge found that the doctor merely concluded that claimant was disabled due to pneumoconiosis without discussing the impact, if any, of his past smoking history. Claimant's Exhibit 5; Decision and Order at 22. Thus, we conclude that the administrative law judge's accordance of little weight to Dr. Rasmussen's opinion was rational. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *see also Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Sabett v. Director, OWCP*, 7 BLR 1-299, 1-301 n.1 (1984); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986)(An opinion may be given less weight where the physician did not have a complete picture of the miner's condition). In addition, contrary to claimant's contention, the administrative law judge was not required to accord greater weight to the opinion of Dr. Rasmussen because he was claimant's treating physician since the administrative law rationally concluded that the physician's opinion was not adequately explained. *See* 20 C.F.R.

[3] Section 718.104(d) provides, in pertinent part, that the administrative law judge must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record and shall consider the following factors in weighing the opinion of the treating physician:

1) Nature of relationship.
2) Duration of relationship.
3) Frequency of treatment.
4) Extent of treatment.

The regulation also requires the administrative law judge to consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

§718.104(d)(5). The administrative law judge further determined that there was no other credible medical evidence supportive of a finding of disability causation at Section 718.204(c).[4] We, therefore, reject claimant's argument and affirm the administrative law judge's finding that claimant failed to establish that pneumoconiosis was a substantially contributing factor to his totally disabling respiratory impairment. As the administrative law judge has properly determined that the newly submitted evidence has failed to establish that claimant's pneumoconiosis was a substantially contributing factor to his disabling respiratory impairment, we affirm the administrative law judge's determination that claimant has failed to establish a change in an applicable condition of entitlement subsequent to the prior denial. 20 C.F.R. §725.309(d); *see Rutter*, 86 F.3d 1358, 1364, 20 BLR 2-227, 2-234; *White*, 23 BLR 1-1, 1-3.

Because claimant has failed to establish that pneumoconiosis was a substantially contributing factor to his totally disabling respiratory impairment, a requisite element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, entitlement under the Act is precluded. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Likewise, because we affirm the administrative law judge's denial of benefits, and the only evidence which could establish disability causation was rejected, we need not reach employer's arguments on cross-appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984).[5]

[4] In reaching this determination, the administrative law judge found that while Drs. Ranavaya and Gaziano, Director's Exhibits 16; Claimant's Exhibit 4, also attributed claimant's disability to coal mine employment, the opinions were also entitled to little weight as they failed to consider the impact of claimant's smoking history on his pulmonary condition. This finding is affirmed, as claimant has not challenged it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] While we do not address employer's arguments on cross-appeal, we do note that the amended regulations imposing limitations on the amount of evidence has been upheld as valid, *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004)(*en banc*). We further note that employer has failed to identify any good cause reasons for the submission of additional evidence. *See Cox v. Benefits Review Board*, 79 F.2d 445, 446, 9 BLR 2-49 (6th Cir. 1986).

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

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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BETTY JEAN HALL
Administrative Appeals Judge