BRB No. 02-0185

VEON F. BAYS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEWELL COAL COMPANY	)	
	)	DATE
Employer-Respondent	)	ISSUED:_____
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Ray Ratliff, Charleston, West Virginia, for claimant.

Ashley M. Harman (Jackson & Kelly), Morgantown, West Virginia, for employer.

Barry H. Joyner (Eugene Scalia, 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, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (1999-BLA-672) of Administrative Law Judge Richard A. Morgan on a 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] In this duplicate claim,[2] the administrative law judge found that claimant=s prior claim was denied by a district director on October 30, 1996, for failing to establish total disability due to pneumoconiosis. Decision and Order at 2, 18; Director's Exhibit 23. Considering the evidence submitted after the prior denial, the administrative law judge determined that claimant's newly submitted evidence failed to establish that claimant is now totally disabled by pneumoconiosis. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find that claimant established entitlement to benefits based upon the x-ray and medical opinions of record. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has responded, urging the Board to reject employer's contention that application of the revised definition of pneumoconiosis is impermissibly retroactive.

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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. 718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1- 4 (1986)(*en banc*). 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*).

[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, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The instant claim was filed on June 17, 1998 and is claimant's fifth application for benefits. Director's Exhibit 1.

As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge properly applied the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev=g en banc*, *Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997), to determine whether claimant demonstrated a material change in conditions at Section 725.309 (2000). In *Rutter*, the Court held that in ascertaining whether a claimant established a material change in condition pursuant to Section 725.309 (2000), the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him.

Regarding the issue of whether claimant is totally disabled, claimant contends that the administrative law judge should have excluded some of employer's exhibits as they are duplicative and cumulative. Claimant's Brief at 20-21. Contrary to claimant's contention, the United States Court of Appeals for the Fourth Circuit has recognized that an administrative law judge is authorized to exclude unduly repetitious evidence under the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), 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), but that several factors such as a physician's qualifications and the sophistication of his or her reasoning may distinguish various opinions in the record submitted for consideration. The Court therefore has held that an administrative law judge should admit all relevant evidence, erring on the side of inclusion, but has further stated that it is within the administrative law judge's discretion to exclude evidence which has little or no additional probative value. *See Underwood v. Elkay Mining, Inc.*,105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). In *Underwood*, the Court also noted that cumulative evidence, when it increases confidence in the outcome of the proceedings, would not constitute prejudicial error. *Id*. Inasmuch as the administrative law judge acted within his discretion, we affirm his decision to admit and consider all of employer's evidence. *See Underwood, supra*; *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

Claimant next argues that the administrative law judge erred in crediting the medical opinions submitted at employer's request because the physicians rendering these opinions did not possess accurate knowledge of the exertional requirements of claimant's usual coal mine employment. This contention is without merit. Pursuant to Section 718.204(b), claimant has the burden of affirmatively establishing that he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(1); *Jewell Smokeless Coal Corp. v. Street,* 42 F.3d 241 (4th Cir. 1994). In the present case, the administrative law judge determined that claimant cannot perform his prior coal mine employment, but further found that claimant failed to prove that his total disability is respiratory in nature. Decision and Order at 27. Because the administrative law judge premised his finding upon the absence of proof of total respiratory disability, rather than a comparison of claimant's physical limitations to the exertional requirements of claimant's usual coal mine work, the extent to which the physicians of record were familiar with claimant's last job in the mines is not relevant in this case. We reject, therefore, claimant's allegation of error in this regard.

Finally, claimant contends that the documented and reasoned medical opinions of Drs. Ranavaya and Durham establish that claimant is totally disabled due to pneumoconiosis. Claimant's Brief at 18-19. Other than asserting that these opinions are sufficient to establish total respiratory disability or invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304, however, claimant's counsel has failed to identify any error in the administrative law judge=s consideration of this evidence. The Board is not empowered to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge as the trier-of-fact, and the Board as the review tribunal. See 20 C.F.R. '802.301(a) (2000); *Sarf v. Director, OWCP,* 10 BLR 1-119 (1987). The Board=s circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order and explain why the evidence which supports the result reached is not substantial or how the Decision and Order is contrary to law. *See* 20 C.F.R. '802.211(b) (2000); *Sarf, supra*; *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff=g* 7 BLR 1-610 (1984); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). In light of the fact that claimant has not identified a basis upon which the Board can review the administrative law judge's weighing of the opinions of Drs. Ranavaya and Durham pursuant to Section 718.204(b)(2)(iv), we must affirm the administrative law judge's finding that these opinions are insufficient to establish total respiratory disability. *See Sarf*, *supra*; *Fish*, *supra*. We also affirm, therefore, the administrative law judge's determination that claimant did not prove the existence of a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2)(i)-(iv).

Because claimant's prior claim was denied based upon the failure to establish total disability due to pneumoconiosis, the administrative law judge rationally determined that claimant failed to establish a material change in conditions by failing to establish total respiratory disability. 20 C.F.R. §725.309; s*ee Rutter*, *supra*. We decline, therefore, to address claimant's contentions regarding the administrative law judge's consideration of the evidence relevant to the existence of pneumoconiosis, as error, if any, in the administrative law judge's findings is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983).

Accordingly, the administrative law judge=s Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge