BRB Nos. 05-0710 BLA
and 05-0710 BLA-A

WILLIAM WESLEY SMITH	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	DATE ISSUED: 04/27/2006
	)	
MARTIN COUNTY COAL	)	
CORPORATION	)	
	)	
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 On Remand - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Stumbo, Moak & Nunnery, PSC), Prestonsburg, Kentucky, for claimant.

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

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand–Denial of Benefits (03-BLA-5085) of Administrative Law Judge Robert L. Hillyard rendered 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). This case is before the Board for a second time. In his original Decision and Order, the administrative law judge found that this case involves the filing of a subsequent claim on May 9, 2001, pursuant to 20 C.F.R. §725.309.[1] The administrative law judge then credited claimant with thirty years of coal mine employment and adjudicated the claim under 20 C.F.R. Part 718. Addressing the merits of entitlement, the administrative law judge accepted employer's concession of the existence of pneumoconiosis and a totally disabling pulmonary impairment. However, the administrative law judge found the newly submitted medical opinion evidence insufficient to establish that pneumoconiosis was a substantially contributing factor to claimant's total disability. Consequently, he found that claimant failed to establish the element of entitlement previously adjudicated against him pursuant to Section 725.309(d). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's denial of benefits and remanded the case for further consideration of the medical evidence relevant to Section 718.204(c). *Smith v. Martin County Coal Corp.*, 23 BLR 1-71 (2004). As a preliminary procedural matter, the Board held that the parties cannot waive application of the evidentiary limitations set forth at 20 C.F.R. §725.414 and, therefore, the case was remanded to the administrative law judge for application of these

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[1] Claimant's initial application for benefits was filed with the Social Security Administration (SSA) on May 16, 1973 and denied by SSA on April 10, 1979. Director's Exhibit 1. Claimant filed his first application for benefits with the Department of Labor (DOL) on July 29, 1977, and was awarded benefits in 1980. However, employer appealed the award and the claim was ultimately denied on March 2, 1985 because claimant failed to establish a total respiratory disability due to pneumoconiosis. *Id.* Claimant filed a second claim with DOL on April 1, 1996, which was denied by the district director on August 27, 1996. *Id.* The claim was then transferred to the Office of Administrative Law Judges. Following a formal hearing, Administrative Law Judge Donald W. Mosser denied benefits in a Decision and Order issued April 20, 1998, finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment and, therefore, that the disability causation element was moot. *Id.* The Board affirmed Judge Mosser's denial of benefits. *Smith v. Martin County Coal Corp.*, BRB No. 98-1138 BLA (May 20, 1999)(unpub.). *Id.* Claimant filed his third and current claim on May 9, 2001. Director's Exhibit 3.

limitations. *Smith*, 23 BLR at 1-73-74. Specifically, the case was remanded for the administrative law judge to require the parties to present their evidence as delineated under Section 725.414. *Id*. The Board instructed the administrative law judge that if a party submitted evidence in excess of the Section 725.414 limitations, the administrative law judge had the discretion to admit such evidence, pursuant to a finding that the party submitting the evidence established "good cause" for the submission of the additional evidence pursuant to Section 725.456(b)(1). *Smith*, 23 BLR at 1-74. With regard to the administrative law judge's findings at Section 718.204(c), the Board instructed the administrative law judge to reconsider the relevant medical evidence of record on the issue of disability causation, specifically, the medical opinions of Drs. Baker and Zaldivar. *Smith*, 23 BLR at 1-75-76.

On remand, the administrative law judge considered the submission of evidence by each party and found that claimant's evidence did not violate the evidentiary limitations under Section 725.414. With regard to the submission of evidence by employer, the administrative law judge accepted the medical opinions of Drs. Zaldivar and Jarboe under Section 725.414. However, he denied employer's request to submit the additional reports of Drs. Repsher and Castle. The administrative law judge found that employer did not establish good cause for the admission of the additional evidence because the additional evidence was not required for the administrative law judge to properly analyze and weigh the medical evidence in this claim. Addressing the merits of entitlement, the administrative law judge again noted employer's concession to the existence of pneumoconiosis and a totally disabling respiratory impairment. Weighing the evidence pursuant to Section 718.204(c), the administrative law judge found the weight of the medical evidence did not establish that claimant's total respiratory disability was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, arguing that the administrative law judge erred in finding that the medical opinion evidence is insufficient to establish that pneumoconiosis is a substantially contributing cause of his total disability. In particular, claimant contends that the administrative law judge erred in weighing the medical opinion evidence of record. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response brief in claimant's appeal.

In its cross-appeal, employer argues that the administrative law judge erred in excluding relevant medical evidence as being in excess of the regulatory limitations of Section 725.414. Specifically, employer contends that the administrative law judge erred in excluding the medical opinions of Drs. Repsher and Castle and in finding that good cause was not established for admitting these opinions. Claimant does not respond to

employer's cross-appeal. The Director recommends, in a limited response, that the Board reject employer's contention and affirm the administrative law judge's exclusion of this evidence as within a reasonable exercise of his discretion.

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).

Employer contends that the administrative law judge erred in applying Section 725.414 to exclude Dr. Repsher's and Dr. Castle's medical reports[2] proffered by employer because, employer asserts, the evidentiary limits imposed by Section 725.414 are arbitrary and capricious. Employer's Brief at 18. The Board has rejected this argument and has held that Section 725.414 is a valid regulation. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004)(*en banc*).

Additionally, employer argues that the administrative law judge erred in finding that no good cause existed under Section 725.456(b)(1) for exceeding the limits of Section 725.414 with extra medical reports. The administrative law judge did not abuse his discretion in determining that employer did not establish good cause under Section 725.456(b)(1). The administrative law judge considered employer's argument that the assessments from two additional pulmonary specialists would help the administrative law judge understand claimant's medical condition. The administrative law judge found, however, that employer's two affirmative case medical reports from Drs. Zaldivar and Jarboe, which included extensive deposition testimony by both pulmonologists, were sufficient for the administrative law judge to analyze and weigh the evidence in this case. Decision and Order on Remand at 4. It was employer's burden to demonstrate good cause. *Dempsey*, 23 BLR at 1-62. On the facts and arguments presented, we detect no abuse of discretion in the administrative law judge's determination that employer did not demonstrate good cause for exceeding the limits of Section 725.414. *Id*.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

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[2] The applicable provision of 20 C.F.R. §725.414 limited employer to "no more than two medical reports" in support of its affirmative case. 20 C.F.R. §725.414(a)(3)(i). On remand, employer designated the reports of Drs. Jarboe and Zaldivar as its two affirmative case medical reports and the administrative law judge admitted them.

totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *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 denied because he failed to establish that his total respiratory disability is due to pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish, with qualitatively different evidence, one of the elements of entitlement that was previously adjudicated against him).

Pursuant to Section 718.204(c), the administrative law judge found that the medical opinion evidence is insufficient to establish that claimant's total respiratory disability was due to pneumoconiosis. In particular, the administrative law judge found that the hospitalization records and Dr. Klein's opinion do not address the issue of disability causation and, therefore, are not probative. Decision and Order on Remand at 10. Similarly, the administrative law judge found the opinions of Drs. Feinberg and Walz entitled to little weight on the issue of disability causation as their opinions contain no explanation of their conclusions. *Id*. The administrative law judge then found that Dr. Baker's opinion, that claimant's mild impairment was due to coal workers' pneumoconiosis, was entitled to little weight because Dr. Baker provided no documentation or support for his diagnosis that the impairment was caused by pneumoconiosis. Decision and Order on Remand at 11. Rather, the administrative law judge found the contrary medical opinions of Drs. Zaldivar and Jarboe, that claimant's total respiratory disability was not due pneumoconiosis, entitled to determinative weight because they were well-reasoned and documented and better explained. Decision and Order on Remand at 11, 13. Consequently, the administrative law judge found that the evidence did not establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c).

On appeal, claimant generally contends that the administrative law judge erred in weighing the medical opinion evidence. In particular, claimant contends that the administrative law judge erred in not crediting the medical opinions of Drs. Klein and Baker, that claimant's total disability is due to pneumoconiosis, arguing that these

opinions are reasoned and documented. Claimant further contends that the administrative law judge erred in crediting the contrary opinion of Dr. Zaldivar, arguing that the physician does not diagnose pneumoconiosis and, therefore, his opinion is not credible. These contentions lack merit.

Contrary to claimant's contention, Dr. Klein's diagnosis of the existence of pneumoconiosis is not a sufficient basis for establishing that claimant's total disability was due to pneumoconiosis. Rather, the administrative law judge rationally found that Dr. Klein's opinion is not probative because the physician did not address the issue of disability causation. Decision and Order at 10; Director's Exhibit 12; Claimant's Exhibit 3; 20 C.F.R. §718.204(c); *Hill*, 123 F.3d at 418, 21 BLR at 2-19; *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-56 (6th Cir. 1989). Similarly, the administrative law judge rationally found that the treatment notes and summaries submitted by claimant were not probative because they did not provide a specific opinion that claimant's total respiratory disability was due to pneumoconiosis. Decision and Order at 12; Claimant's Exhibit 3; 20 C.F.R. §718.204(c); *Hill*, 123 F.3d at 418, 21 BLR at 2-19.

Furthermore, we affirm the administrative law judge's decision to accord little weight to Dr. Baker's opinion. Contrary to claimant's contention, the administrative law judge considered Dr. Baker's professional qualifications in Internal Medicine and Pulmonary Diseases. Decision and Order at 11. However, the administrative law judge reasonably found that Dr. Baker's opinion was entitled to little weight because the physician failed to explain how the underlying documentation supported his diagnosis. Decision and Order on Remand at 11; Director's Exhibit 11; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985). Specifically, the administrative law judge found that despite Dr. Baker's credentials, his opinion was entitled to little weight because the physician failed to provide documentation or support for his opinion that claimant's mild impairment was due to pneumoconiosis or coal dust exposure. *Id*. Because the administrative law judge validly discounted the only evidence supportive of claimant's burden at Section 718.204(c), we affirm his determination that claimant has failed to establish that his total respiratory disability is due to pneumoconiosis by a preponderance of the evidence. 20 C.F.R. §718.204(c); *Hill*, 123 F.3d at 418, 21 BLR at 2-19; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Because the administrative law judge's finding that the evidence of record did not establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c) is supported by substantial evidence and in accordance with law, claimant has failed to establish the element of entitlement previously adjudicated against

him. *Trent,* 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Consequently, we affirm the denial of benefits in this subsequent claim.

Accordingly, the administrative law judge's Decision and Order on Remand–Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge