BRB No. 01-0448 BLA

BILLIE W. PRINCE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
	)	
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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Dick Adams (Adams Law Firm), Madisonville, Kentucky, for claimant.

William S. Mattingly (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; Richard A. Seid and 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0503) of Administrative Law Judge Robert L. Hillyard denying benefits 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] The administrative law judge found twenty-nine years of coal mine employment established, as stipulated by the parties, and noted that, because this claim is a duplicate claim,[2] claimant must establish a material change in conditions pursuant to 20

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On February 21, 2001, the Board acknowledged claimant's appeal of the administrative law judge's Decision and Order denying benefits and, by attached memorandum, the parties were granted an opportunity to address the issue of whether the amended regulatory provisions would affect the outcome of this case. Claimant filed a Motion to Remand dated March 12, 2001, requesting that the Board remand this case to the administrative law judge for review under the revised regulations and, on March 30, 2001, employer filed a response to claimant's Motion, urging that it be denied. By Order dated April 6, 2001, the Board informed the parties that the Board would address claimant's Motion to Remand in its Decision and Order and ordered claimant to file a Petition for Review and brief in support of his appeal, which should include his response to the preliminary injunction order and state his position regarding the impact of the amended regulations on his case. Finally, by letter dated May 23, 2001, the Director, Office of Workers' Compensation Programs (the Director), responded, contending that the outcome of this case is not affected by any revisions to the regulations.

Subsequently, on August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations. Specifically, contrary to claimant's Motion to Remand, the revised regulation limiting the amount of medical evidence that a party may submit, *see* 20 C.F.R. §725.414, applies only to claims filed after January 19, 2001, *see* 20 C.F.R. §724.2(c), and, therefore, does not apply to this claim, *see* Director's Exhibit 1.

[2] Claimant originally filed a claim on February 14, 1983, which was ultimately denied

C.F.R. §725.309(d) (2000), *see* 20 C.F.R. §725.2(c), in accordance with the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).[3] The administrative law judge noted that the existence of pneumoconiosis arising out of coal mine employment was conceded by employer and was established in claimant's two prior claims, *see* 20 C.F.R. §§718.202(a) and 718.203(b); Director's Exhibits 49, 50. The administrative law judge considered the new evidence, dated subsequent to the denial of

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in a Decision and Order issued on December 18, 1987, by Administrative Law Judge Robert D. Kaplan, Director's Exhibit 49. Judge Kaplan found at least twenty years of coal mine employment established, adjudicated the claim pursuant to 20 C.F.R. Part 718 and found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(1) and (4) and 718.203(b), but further found that total disability was not established pursuant to 20 C.F.R. §718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), *id*. No further action was taken by claimant on this claim.

Claimant filed a duplicate claim on August 16, 1993, which was ultimately denied in a Decision and Order issued on May 20, 1996, by Administrative Law Judge J. Michael O'Neill, Director's Exhibit 50. Judge O'Neill found that employer conceded that claimant had at least twenty-eight years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment, but further found that total disability was not established by the newly submitted evidence pursuant to Section 718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), and, therefore, found that a material change in conditions was not established pursuant to 20 C.F.R. §725.309(d) (2000), *see* 20 C.F.R. §725.2(c), *id*. No further action was taken by claimant on this claim.

Subsequently, claimant filed the instant, duplicate claim on June 2, 1997, Director's Exhibit 1, at issue herein, which was initially denied by the district director on September 23, 1997, Director's Exhibit 6, and December 15, 1997, Director's Exhibit 12. Claimant filed another claim on August 24, 1998, Director's Exhibit 13, within one year of the prior denial by the district director, which, therefore, was considered a request for modification, *see* 20 C.F.R. §725.310 (2000), *see also* 20 C.F.R. §725.2(c), Director's Exhibit 17.

[3] Since this case involves a request for modification of a denial of a duplicate claim by the district director, *see* Director's Exhibits 6, 12, 13, 17, the administrative law judge properly considered whether the newly submitted evidence is sufficient to establish a material change in conditions pursuant to Section 725.309(d) (2000), *see* 20 C.F.R. §725.2(c), rather than determining whether claimant established a basis for modification of the district director's denial of claimant's duplicate claim, *see* Decision and Order at 5; *Hess v. Director, OWCP*, 21 BLR 1-141 (1998).

claimant's prior claims, and found that, while it was sufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), it was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000), as revised at 20 C.F.R. §718.204(c)(1), or, therefore, to establish a material change in conditions pursuant to Section 725.309(d) (2000), *see* 20 C.F.R. §725.2(c), in accordance with the standard enunciated by the Sixth Circuit in *Ross*, *supra*. Accordingly, benefits were denied.

On appeal, claimant initially contends that the administrative law judge erred in denying claimant's Motion to Strike all of employer defenses for failing to properly respond to interrogatories submitted by claimant, attempting to discover evidence of bias on the part of physicians hired by employer. Claimant also contends that the administrative law judge erred in failing to admit certain evidence that was not submitted by claimant at least twenty days before the hearing pursuant to 20 C.F.R. §725.456(b) (2000), *see* 20 C.F.R. §725.2(c). Finally, claimant contends that the administrative law judge did not properly weigh the opinion of claimant's treating physician and erred in finding that total disability due to pneumoconiosis was not established pursuant to Section 718.204(b) (2000), as revised at 20 C.F.R. §718.204(c), and, therefore, in finding that a material change in conditions was not established pursuant to Section 725.309(d) (2000), *see* 20 C.F.R. §725.2(c). Employer responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not responded to this appeal.

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).

In order to determine whether a material change in conditions is established under Section 725.309(d) (2000), *see* 20 C.F.R. §725.2(c), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him, *see Ross*, *supra*. If claimant establishes the existence of that element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits, *id*. In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*,

9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*.

Initially, claimant contends that the administrative law judge erred in denying claimant's Motion to Strike all of employer defenses for failing to properly respond to interrogatories submitted by claimant, seeking to discover evidence of the bias held by the physicians retained by employer. Prior to the hearing, claimant submitted interrogatories to employer requesting that employer: list every claimant in the last five years that employer had referred to the physicians who were also hired by employer in the instant case; state the amount of money paid to the physicians for each evaluation; and produce copies of each evaluation report and W-2 forms relating to each physician for the last five years. In response, employer stated that the request was unduly burdensome and, absent a showing of relevancy and need for the requested answers, employer would not provide the information. Claimant responded by filing a Motion to Strike all of employer defenses for failing to answer claimant's interrogatories.

The administrative law judge issued an Order Denying Claimant's Motion to Strike on August 8, 2000, noting that the Board has held that a physician's report prepared for the purpose of litigation is no less reliable than other reports and no more likely to be slanted in favor of the party presenting it, *see Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984). In addition, the administrative law judge noted that pursuant to 20 C.F.R. §725.414(a) (2000), *see* 20 C.F.R. §725.2(c), an employer or operator "may have the miner examined by a physician selected by such operator." Finally, the administrative law judge stated that the Board has held that an administrative law judge may not base his conclusions about a physician's opinion, on past opinions by the physician seen by the administrative law judge in other cases, *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35 (1991)(*en banc*). Thus, the administrative law judge held that the information that claimant sought regarding the opinions rendered in other, previous cases by the physicians that were utilized by employer in this case were irrelevant to the issue in this case, *i.e.*, whether claimant is entitled to benefits. Consequently, the administrative law judge agreed with employer's contention that claimant's request was irrelevant and burdensome and denied claimant's Motion to Strike.

Claimant contends that Rule 26 of the Federal Rules of Civil Procedure requires that the past history of an expert who provides testimony be disclosed, including the compensation to be paid for the expert's testimony and a listing of any other cases in which the expert witness has testified within the last four years. In addition, claimant contends that the bias and prejudice created by the payment of money is relevant to the fact-finder. Thus, claimant contends that because such information is discoverable pursuant to the Federal Rules of Civil Procedure, the same should hold true and apply in a federal black lung claim.

Contrary to claimant's contention, the Board has held that the Federal Rules of Civil

Procedure, and specifically Rule 26, do not govern the scope of discovery in black lung cases, but that the standard for the scope of discovery in black lung cases is provided at 29 C.F.R. §18.14, in conjunction with the provisions of 20 C.F.R. §725.455, *see Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-76 (1997). Moreover, an administrative law judge has broad discretion as provided at 29 C.F.R. §18.14 and 20 C.F.R. §725.455 to direct and authorize discovery in accordance with 30 U.S.C. §923(b), which provides that "all relevant evidence shall be considered," and an administrative law judge's refusal to allow discovery will constitute reversible error only if it is so prejudicial as to result in a denial of due process, *see Cline*, *supra*; *Martiniano v. Golten Marine Co.*, 23 BRBS 363, 366 (1990); *Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321 (1983).

In this case, the administrative law judge properly noted that opinions provided on behalf of employer, prepared in the course of litigation, are probative evidence and are no less reliable than other reports and are not presumptively biased in favor of employer, *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992), *citing Richardson v. Perales*, 401 U.S. 389 (1971); *Chancey*, *supra*, and an administrative law judge may not base his conclusions about a physician's opinion on past opinions by the physician seen by the administrative law judge in other cases, *see Melnick*, *supra*. Thus, the administrative law judge, within his discretion, *see* 29 C.F.R. §18.14 and 20 C.F.R. §725.455, permissibly held that the discovery that claimant sought regarding the opinions rendered in other, previous cases by the physicians who were retained by employer in this case was irrelevant, *see* 30 U.S.C. §923(b); 29 C.F.R. §18.14. Consequently, because the administrative law judge acted within his discretion in denying claimant's motion, we reject claimant's contention, *see Cline*, *supra*; *Martiniano*, *supra*; *Bonner*, *supra*.

Next, claimant contends that the administrative law judge erred in failing to admit into the record treatment records from Dr. Taylor, dating from between August 3, 1999, and July 31, 2000, *see* Claimant's Exhibit 1. Although the hearing in this case was scheduled, and held, on August 29, 2000, claimant did not submit Dr. Taylor's treatment records until August 21, 2000, and they were not received by employer until August 24, 2000, *see* Claimant's Exhibit 1; Hearing Transcript at 8. Employer objected to the admission of Dr. Taylor's treatment records at the hearing, because they were not submitted at least twenty days before the hearing, *see* 20 C.F.R. §725.456(b)(1)-(2) (2000); *see also* 20 C.F.R. §725.2(c), and because claimant had not advised employer, in accordance with interrogatories submitted by employer, that such evidence would be submitted, Hearing Transcript at 9, 15.

On March 26, 1999, claimant responded to interrogatories submitted by employer asking, in relevant part, whether claimant was scheduled to undergo any examination in the future and who was his family, treating physician. Claimant responded that no future examination was scheduled and that his family, treating physician was Dr. Milum, with no

reference to Dr. Taylor. Although employer's interrogatories also requested that claimant should amend or supplement his answers if they should become inaccurate or incomplete in the future, claimant apparently did not advise employer regarding Dr. Taylor's treatment records until submitting them on August 21, 2000. In response to employer's objection at the hearing, claimant contended (and reiterates his contention on appeal) that Dr. Taylor's treatment records, dating from between August 3, 1999, and July 31, 2000, all date from after claimant's March, 1999, response to employer's interrogatories.

The administrative law judge held that because Dr. Taylor's treatment records at Claimant's Exhibit 1 were not exchanged at least twenty days prior to the hearing and were not "identified in the interrogatories," employer's objection would be sustained and they would not be admitted, Hearing Transcript at 16, although the administrative law judge stated that Claimant's Exhibit 1 would be marked as an exhibit in the record to show that they were tendered and refused, Hearing Transcript at 29. In response to a post-hearing motion by claimant to have Dr. Taylor's treatment records received into evidence, the administrative law judge reiterated in his Decision and Order that for the "reasons given at the hearing, the motion is denied," Decision and Order at 9 n. 6.

Claimant contends that the administrative law judge's denial of claimant's request to have Dr. Taylor's treatment records admitted into the record as evidence was an abuse of discretion and arbitrary and capricious. Any evidence not submitted to the district director may be received in evidence subject to the objection of any party, if it is sent to all other parties at least twenty days before the hearing, *see* 20 C.F.R. §725.456(b)(1) (2000); *see also* 20 C.F.R. §725.2(c); *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). Pursuant to 20 C.F.R. §725.456(b)(2) (2000), *see also* 20 C.F.R. §725.2(c), the administrative law judge may admit, at his discretion, documentary evidence not submitted to the district director and not exchanged by the parties within twenty days before a hearing, if the parties waive the requirement or if a showing of good cause is made as to why such evidence was not exchanged, *see* 20 C.F.R. §725.456(b)(2); *see also* 20 C.F.R. §725.2(c); *Miller*, *supra*; *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984).

The administrative law judge has broad discretion in resolving procedural issues, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Farber v. Island Creek Coal Co.*, 7 BLR 1-428, 1-429 (1984); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984), and is not required, pursuant to Section 725.456(b)(2) (2000), to make a specific finding that good cause did not exist before excluding late evidence, *see Jennings v. Brown Badgett, Inc.*, 9 BLR 1-94 (1986), *rev'd on other grounds sub nom. Brown Badgett Inc. v. Jennings*, 842 F.2d 899, 11 BLR 2-92 (6th Cir. 1988). Since employer, by objecting to the evidence, did not waive the twenty day requirement and the administrative law judge, within his discretion, found, by inference, *see*

Jennings, *supra*, that good cause was not shown for claimant's failure to exchange timely Dr. Taylor's treatment records, the administrative law judge permissibly excluded the evidence pursuant to Section 725.456(b)(2) (2000), *see* 20 C.F.R. §725.2(c); *Farber*, *supra*; *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-298 (1984); *Newland*, *supra*.[4]

Finally, regarding the merits, claimant contends that the administrative law judge failed to recognize that Dr. Milum was claimant's treating physician and, therefore, erred in failing to accord his opinion greater weight. Claimant also contends that hospital treatment records from February, 1998, indicating that claimant was given daily oxygen and breathing medications, establish a change in claimant's breathing condition since the last denial.

The administrative law judge gave greatest weight to the opinion of Dr. Selby, that claimant's impairment and/or disability was not due to his coal dust exposure or pneumoconiosis, Director's Exhibit 31; Employer's Exhibit 13, as the administrative law judge found it to be the most thorough, complete, documented and well reasoned opinion and was supported by the consulting opinions of Drs. Branscomb, Morgan, Castle, and Loudan, Director's Exhibit 6; Employer's Exhibits 2, 7-8, 10, 14. Decision and Order at 14-16. The administrative law judge accorded little weight to Dr. Simpao's opinion, Director's Exhibit 4, that coal dust exposure is medically significant in claimant's pulmonary impairment, because he found that it was not as thorough, reasoned or documented as Dr. Selby's opinion and gave little weight to the opinion of Dr. Younes, Director's Exhibits 30,

[4] Dr. Taylor's treatment records, marked as an exhibit in the record as Claimant's Exhibit 1 to show that they were submitted but not admitted, merely provide a diagnosis of "severe" chronic obstructive pulmonary disease, "mild" obstructive dyspnea and coal workers' pneumoconiosis. Thus, in any event, because Dr. Taylor does not address the cause of claimant's respiratory or pulmonary disability, which was the basis of the denial in this case, *see* 20 C.F.R. §718.204(b) (2000), as revised at 20 C.F.R. §718.204(c)(1), any potential error by the administrative law judge in failing to admit Dr. Taylor's treatment records would, ultimately, be harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

39-40, that claimant's disability was caused, in part, by his coal dust exposure, as it was cursory, unreasoned and undocumented. Finally, the administrative law judge found that Dr. Houser's consulting opinion, relating claimant's impairment to his coal mine employment, was outweighed by the other consulting physicians' opinions. Thus, the administrative law judge found that the new evidence, dated subsequent to the denial of claimant's prior claim, was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000), as revised at 20 C.F.R. §718.204(c)(1), or, therefore, to establish a material change in conditions pursuant to Section 725.309(d) (2000), *see* 20 C.F.R. §725.2(c), *see Ross*, *supra*.

Contrary to claimant's contention, the administrative law judge noted that while Dr. Selby, Director's Exhibit 31; Employer's Exhibit 13, indicated that Dr. Milum was claimant's personal physician, nothing else in the record showed that the administrative law judge, therefore, ultimately, gave Dr. Milum's opinion little weight, as Dr. Milum gave no reasoning or support for his statements and did not offer an opinion as to the cause of claimant' s disability. Decision and Order at 15; Director's Exhibits 24, 25, 27, 29; Claimant's Exhibit 3; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Moreover, claimant's mere recitation of evidence of record which is favorable to his position does not sufficiently identify any other potential error by the administrative law judge with specificity in order to provide any further basis for review of the administrative law judge's finding, *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g Cox v. Director, OWCP*, 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Thus, because the administrative law judge's finding that the new evidence, dated subsequent to the denial of claimant's prior claim, was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000), as revised at 20 C.F.R. §718.204(c)(1), is rational and supported by substantial evidence, it is affirmed. Consequently, since we affirm the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis, a requisite element of entitlement that was the basis of the prior denial, we affirm the administrative law judge's finding that a material change in conditions was not established pursuant to Section 725.309(d) (2000), *see* 20 C.F.R. §725.2(c), *see Ross*, *supra*, and that entitlement under Part 718 is precluded, *see Trent*, *supra*; *Perry*, *supra*.

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

BETTY JEAN HALL
Administrative Appeals Judge