BRB No. 01 - 0403 BLA

TRAVIS D. GOODEN	)	
	)	
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 H. Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Natalie D. Brown (Jackson & Kelly PLLC), Lexington, Kentucky, 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 - Denial of Benefits (00-BLA-0370) of Administrative Law Judge Robert L. Hillyard 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*.[1] The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000) and total respiratory disability at 20 C.F.R. §718.204 (2000), and thus, was insufficient to establish a material change in a condition of entitlement pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied the claim.

The relevant procedural history of this claim is as follows: Claimant filed his first claim for benefits with the Department of Labor (DOL) on October 5, 1994. The claim was informally denied by DOL on March 2, 1995 on the basis that the evidence failed to establish the existence of pneumoconiosis arising out of coal mine employment, and therefore, total disability due to pneumoconiosis at 20 C.F.R. §718.204 (2000). Director's Exhibit 46, pp.13-17. Claimant took no further action on this claim. Claimant then filed a second claim with DOL on November 5, 1998. Director's Exhibit 1. Following a hearing, Administrative Law Judge Robert L. Hillyard issued a Decision and Order dated December 18, 2000, wherein he denied the claim. Claimant then filed the instant appeal with the Board.

[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 they 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.

Claimant initially asserts that, given the recent Black Lung Act amendments set forth at 20 C.F.R. §§725.4, 718.104, 718.201 and 725.407, the case must be remanded to the administrative law judge to apply the amended regulations. Claimant also contends that the administrative law judge failed to exclude some of the medical evidence proffered by employer on the ground that it is cumulative. Claimant challenges the administrative law judge's finding that claimant smoked cigarettes for 40 years, alleging that the administrative law judge has mischaracterized the evidence. Claimant additionally challenges the administrative law judge's determination to credit opinions which were based upon an assumption that five and three-quarters years of coal mine employment is insufficient exposure to contract pneumoconiosis, in essence, asserting that such opinions are hostile to the Act. Claimant also challenges the administrative law judge's finding that the newly submitted evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000) and total respiratory disability pursuant to Section 718.204(c) (2000). Claimant asserts, thereby, that the administrative law judge erred in finding that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to Section 725.309(d) (2000). Employer, in response, asserts that the administrative law judge's findings, that the newly submitted evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) and total respiratory disability at Section 718.204(c) (2000), 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 filed a response brief limited to the issue of the impact and applicability of the amended regulations. The Director states that the amended regulations will not affect the outcome of the case.[2] On March 29, 2002, the Board issued a show cause order, requesting that the Director show cause why the case should not be remanded to the district director for claimant to be provided with a complete pulmonary evaluation. On April 12, 2002, the Director filed a response, accompanied by a motion to accept his pleading out of time. On April 23, 2002, the Board received claimant's objection to the Director's motion to accept his

[2]Some of the administrative law judge's findings are not challenged by any party: that claimant has established five years and four months of qualifying coal mine employment, that employer is the putative responsible operator, that claimant has one dependent for the purposes of augmentation, and that the newly submitted evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3)(2000), *see* 20 C.F.R. §718.202(a)(1)-(3), that the newly submitted evidence fails to establish total respiratory disability at Section 718.204(c)(1-(3)(2000), *see* 20 C.F.R. §718.204(b)(2)(i)-(iii). We affirm, therefore, these findings. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

pleading out of time and his reply to the Director's response to the Board's Show Cause Order.[3] Employer has filed a reply to claimant's submission.

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 establish entitlement to benefits in a living miner's claim under the 20 C.F.R. Part 718 regulations, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 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)(*en banc*).

We first address claimant's contention that the district director failed to provide claimant with a complete pulmonary evaluation, as required by Section 413(b) of the Act. 30 U.S.C. §923(b). The regulations provide for a DOL-sponsored "medical examination

[3]The Director, Office of Workers' Compensation Programs (the Director), moves for the Board to accept his pleading out of time and explains that counsel was unable to complete his review of the Board's Show Cause Order due to a brief absence from the office and to other briefing obligations. Claimant has filed a response, arguing that the Director asserts no valid reason as to why a timely response to the Board's Show Cause Order could not have been filed. Claimant also responds to the merits of the Director's Show Cause Response. We accept the Director's explanation and, consequently, his response to the Board's Show Cause Order. 20 C.F.R. §§802.215, 802.217. We further accept claimant's response to the Director's pleading and employer's reply thereto as part of the record. 20 C.F.R. §802.215.

and testing." 20 C.F.R. §§725.405, 725.406. In connection with the instant duplicate claim, only Dr. Simpao conducted a "medical examination and testing" of claimant on behalf of DOL. The administrative law judge accorded less weight to Dr. Simpao's opinion for several reasons: because the x-ray underlying the report was reread as negative by "a majority of dually qualified physicians," Decision and Order at 21; because Dr. Burki subsequently invalidated the pulmonary function study underlying the report; because the blood gas study underlying the report produced non-qualifying values; and because the physician failed to discuss the impact of claimant's cardiac condition on his respiratory symptoms, Decision and Order at 25. The administrative law judge thus concluded that Dr. Simpao's opinion as to the existence of pneumoconiosis was unsupported by the objective evidence, and that his opinion with respect to the degree of claimant's impairment was unreasoned, undocumented and unsupported by the evidence. Decision and Order at 21, 25. Claimant argues that since the administrative law judge found that Dr. Simpao's opinion was unreasoned, undocumented and unsupported by the evidence, and thus entitled to less weight, DOL has not satisfied its obligation to provide claimant with a credible and complete medical evaluation. Claimant thus seeks a remand of the case.

The Director responds that he has satisfied his obligation under Section 413(b) of the Act by virtue of Dr. Simpao's examination of the claimant and by Dr. Younes's review of the evidence of record. Director's Response to Order to Show Cause at 2, 3. The Director acknowledges that the administrative law judge accorded less weight to Dr. Simpao's report and accorded no weight to the report purportedly authored by Dr. Younes because the authoring physician's signature is illegible. The Director argues that the fact that the administrative law judge discredited Dr. Simpao's opinion regarding the existence of pneumoconiosis based on other evidence of record which undermined the physician's report, is irrelevant to the issue of whether his obligations under Section 413(b) of the Act has been fulfilled. The Director asserts that the medical evidence procured by the Director for purposes of meeting his obligation under of the Act is not required to be the best, or the most credible, evidence of record. The Director also refers to the fact, with regard to the issue of total respiratory disability, that Dr. Simpao found that claimant's mild impairment prevented him from performing his usual coal mine employment, while Dr. Younes stated, based on his review of the medical evidence, that he could not determine the extent of claimant's pulmonary impairment "since spirometry isn't valid," Director's Exhibit 38. The Director argues:

> When the Director obtains more than one medical opinion in connection with the statutory examination and those opinions reach different conclusions, he is entitled to determine which opinion is more reliable.

> [citation omitted] The resulting fact that one of the opinions may not be credited is not a violation of the Director's obligation under Section 413(b).

Director's Response to Show Cause Order at 5. Lastly, the Director argues that even setting aside Dr. Younes's opinion, the fact that Dr. Simpao's opinion was discredited on the issue of total disability is solely attributable to claimant's failure to exert good effort on the underlying pulmonary function study, and is not the result of any intrinsic defect in Dr. Simpao's examination and report. The Director thus asserts that Dr. Simpao's opinion satisfied the Director's duty to provide claimant with a complete pulmonary evaluation under Section 413(b) of the Act.

As an initial matter, we hold that to the extent that the Director relies on a review of the medical evidence purportedly prepared by Dr. Younes, *see* Director's Exhibit 38, to meet his obligation under Section 413 of the Act, he is incorrect. Only Dr. Simpao conducted a "medical examination and testing" of claimant for the DOL in connection with the instant claim. 20 C.F.R. §725.405. We agree with the Director's contention, however, that, setting aside any reviewing opinion filed by Dr. Younes, the Director has satisfied his obligation under Section 413 of the Act based on Dr. Simpao's report. *See Hodges v. BethEnergy Mines, Inc*., 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98(1990)(*en banc*). Specifically, we find persuasive the Director's argument that Dr. Simpao's examination and resulting report does not contain an intrinsic defect, making it incredible on its face. We acknowledge that the pulmonary function study underlying Dr. Simpao's report was subsequently invalidated by Dr. Burki because "[v]ariability and curve shapes indicate suboptimal effort." *See* Director's Exhibit 13. The fact that the administrative law judge accorded less weight to Dr. Simpao's report based, *inter alia*, on Dr. Burki's invalidation of the underlying pulmonary function study, does not render Dr. Simpao's opinion incredible *per se*. It would be irrational for the Board to assess whether the Director has met his statutory obligation under Section 413(b) based on the level of effort exerted by claimant on any one objective test and to hold the Director responsible for any deficiency therein.

Next, we reject claimant's contention that the amendments to 20 C.F.R. §§725.4[4], 718.104, 718.201 and 725.407 compel remand of this case. Section 718.104 only applies to evidence developed after January 19, 2001, and all of the evidence in this case was

[4]The regulation of 20 C.F.R. §725.4, entitled "applicability of other parts to this title", in pertinent part, merely identifies what claims fall under the 20 C.F.R. Part 718 regulations. Pursuant to 20 C.F.R. §725.4,the administrative law judge properly applied the 20 C.F.R. Part 718 regulations to the instant case.

developed prior to that date. 20 C.F.R §718.101(b). Section 725.2(c) states that 20 C.F.R. §725.407 is only applicable to claims filed after, or benefit payments made after, January 19, 2001. Neither Section 718.104 nor Section 725.407 is to be retroactively applied. *See* 20 C.F.R. §§718.101(b); 725.2(c). As claimant filed the instant claim on November 5, 1998, the amended regulations at Sections 718.104 and 725.407 are not applicable herein. With respect to Section 718.201, while it is true that Section 718.201 applies to the instant claim, the opinions of Drs. Selby and Branscomb do not include a diagnosis of "legal" pneumoconiosis, as alleged by claimant and thus we reject claimant's contention to contrary. *See infra*, at 10-11.

Claimant next 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. Claimant cites *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), in support of his contention. 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, claimant, like employer, submitted five medical opinions in support of his claim. We reject, therefore, claimant's contention and we affirm the administrative law judge's determination to allow it to submit five opinions in its defense of the claim, as a permissible exercise of the administrative law judge's discretion. *See* 5 U.S.C. §556(d); *Lemar, supra; Cochran, supra.*

Claimant also challenges the administrative law judge's finding with regard to claimant's smoking history. Claimant alleges that the administrative law judge erred when he found that claimant smoked for 40 years. Claimant states that he was 52 years old at the time of the hearing and that he had not started smoking when he was 12 years old, thus, he could not have smoked for 40 years. Claimant's contention has no merit. The administrative law judge found that claimant testified that he had smoked two packs per day from 1966-1981, a period of fifteen years. H. Tr. At 34-35; Decision and Order at 3. He then found that claimant smoked one-half pack per day from 1981 until the date of the hearing on May, 17, 2000, and that he was still smoking at that time. Decision and Order at 3.[5] The administrative law judge then concluded that: "[b]ased on the evidence,

[5] The administrative law judge based his finding, that claimant smoked one-half of

including claimant's testimony, I find that the Claimant has a smoking history of two packs per day for fifteen years from 1966 to1981, and one-half pack per day from 1981 to the present for a total of forty years, and he continues to smoke." Decision and Order at 3. The administrative law judge found that claimant had a two pack per day history for 15 years and then, as the time period between 1981-2000 is twenty years, one- half pack per day history for twenty years for a total history of forty pack years. We affirm the administrative law judge's finding of 40 pack years, as it is supported by substantial evidence, but note his typographical error in that he omitted the term "pack" from his finding in the Decision and Order. [6]

We next consider the administrative law judge's findings on the issue of a material change in conditions. Section 725.309(c) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in the conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements previously adjudicated against him. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Claimant's 1994 claim was denied because claimant failed to establish the existence of pneumoconiosis and total respiratory disability. Director's Exhibit 46. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), the newly submitted evidence must support a finding of pneumoconiosis or total respiratory disability.

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a pack per day during this period, on claimant's testimony, that after he quit he resumed at a rate of about one-half pack per day, H. Tr. at 34, and on claimant's statement's to Drs. Selby, Chavda and Simpao, who reported smoking histories which were all greater than one-half pack per day for this time period. Director's Exhibits 13, 32, 39; Claimant's Exhibit 4.

[6]Thus, the administrative law judge should have stated that claimant smoked for a total of forty "pack" years.

At 20 C.F.R. §718.202(a)(4) (2000), claimant challenges the administrative law judge's crediting of the opinions of Drs. Castle, Jarboe, Morgan and Branscomb. Claimant asserts that the opinions of Drs. Castle, Jarboe, Morgan and Branscomb are in conflict with the purpose of the Act as they concluded that five and three quarters years of coal mine employment is insufficient to produce pneumoconiosis. We disagree. First, the Board has held that it will not consider on appeal a party's assertion that physicians' opinions are in conflict with the purpose of the Act unless it is first raised at the hearing before the administrative law judge. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-(1984). While claimant argued below that some of the evidence was unduly repetitious and some was untimely submitted, claimant did not raise before the administrative law judge an objection that some evidence was in conflict with the purpose of the Act. Second, claimant's contention is misplaced as Drs. Castle, Jarboe, Morgan and Branscomb did not preclude the possibility of pneumoconiosis occurring in a miner with a coal mine employment history of five and three quarters years. Rather, each merely stated that it was unlikely, and all relied, in part, upon x-rays that were read as negative for pneumoconiosis, and thus, submitted documented opinions. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Jones v. Kaiser Steel Corp.*, 8 BLR 1-339 (1985). We reject, therefore, claimant's contention that the administrative law judge erred in crediting the opinions of Drs. Castle, Jarboe, Morgan and Branscomb.

In considering the evidence at Section 718.202(a)(4) (2000), the administrative law judge correctly found that the record contains ten newly submitted reports. The administrative law judge correctly concluded that Drs. Castle, Jarboe, Morgan, Branscomb and Selby all opined that claimant did not suffer from pneumoconiosis. Decision and Order at 18. The administrative law judge credited the opinions of Drs. Castle, Jarboe, Morgan and Branscomb, over the opinions of Drs. Traughber, Simpao, Perkins and a doctor whose name the administrative law judge found to be illegible, on the basis that the former doctors possessed superior credentials.[7] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge also permissibly gave more weight to the opinions of Drs. Castle, Jarboe, Morgan, Branscomb and Selby over those of Drs. Traughber, Simpao, Perkins and a doctor whose name the administrative law judge found to be illegible, on the basis that the former

[7]Dr. Castle and Dr. Jarboe are Board-certified in internal medicine. Claimant's Exhibits 7, 9. Dr. Morgan is a B-reader. Exhibit 16. Dr. Branscomb is Board-certified in internal medicine. Exhibit 4. The credentials of Drs. Traughber, Simpao and Perkins are not in the record.

opinions were better supported by the objective evidence of record and contained accurate coal mine employment and smoking histories. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *McMath v. Director, OWCP*, *12 BLR 1-6 (1988); Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987). Further, the administrative law judge permissibly discounted Dr. Chavda's opinion on the basis that it was equivocal, as Dr. Chavda stated that claimant's chronic obstructive pulmonary impairment was "probably" due to both smoking and coal mining. Director's Exhibit 32; Decision and Order at 19; *See Justice v. Island Creek Coal Mining Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Moreover, contrary to claimant's arguments, Drs. Selby and Branscomb both opined that any respiratory impairments that claimant had were due to cigarette smoking and not coal dust inhalation, and thus, the opinions of Drs. Selby and Branscomb do not constitute opinions of legal pneumoconiosis. We affirm, therefore, the administrative law judge's finding that the newly submitted evidence of record fails to establish the existence of pneumoconiosis at Section 718.202(a)(4)(2000). *See* 20 C.F.R. §718.202(a)(4).

Claimant next challenges the administrative law judge's findings that the newly submitted evidence fails to establish total respiratory disability at Section 718.204(c)(4)(2000). The administrative law judge correctly found that of the nine newly submitted opinions of record, Drs. Chavda, Traughber, Simpao and Perkins concluded that claimant suffered from a total respiratory impairment, in contrast with Drs. Castle, Jarboe, Morgan, Branscomb and Selby, who concluded that claimant did not suffer from a totally disabling respiratory impairment. Decision and Order at 23-25. The administrative law judge permissibly accorded greater weight to the opinions of Drs. Castle, Jarboe, Morgan, Branscomb and Selby, *inter alia* , on the basis that their opinions were better supported by the objective evidence of record. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987*)*. The administrative law judge rationally discounted the opinions of Drs. Chavda, Perkins and Simpao on the bases that their opinions were undocumented, unreasoned and unsupported by the objective evidence of record. *See Id.* Further, acting within his discretion, the administrative law judge discounted the opinion of Dr. Traughber on the basis that he relied exclusively upon pulmonary function studies which were found to be invalid. *See Id.*

Finally, claimant asserts that the administrative law judge erred by failing to provide Dr. Perkins's opinion additional weight due to his status as claimant's treating physician. Claimant's argument has no merit. The administrative law judge recognized that Dr. Perkins was claimant's treating physician, Decision and Order at 23, but he chose to discount Dr. Perkins's opinion for other, valid reasons. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). We affirm, therefore, the administrative law

judge's finding that the newly submitted medical opinions of record fail to establish total respiratory disability at Section 718.204(c)(4)(2000). *See* 20 C.F.R. §718.204(b)(iv).

As the newly submitted evidence fails to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4), and total respiratory disability at Section 718.204(c)(2000), it is thereby insufficient to establish that a material change in a condition of entitlement pursuant to Section 725.309(c)(2000). *See Ross, supra;* 20 C.F.R. §718.202(a)(1)-(4); 20 C.F.R. §718.204(b)(i)-(iv); 20 C.F.R. §725.309(d).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge