

BRB No. 03-0319 BLA

ANDREW J. IRVIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED	)	09/26/2003
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	

DECISION and ORDER

Appeal of the Decision and Order--Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Jeffrey L. Suher, Monroeville, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Howard M. Radzely, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order--Denying Benefits (2002-BLA-5105) of Administrative Law Judge Daniel L. Leland 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).<sup>1</sup> Claimant=s first application for benefits filed on July 30,

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<sup>1</sup> 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.

1980, was finally denied on April 21, 1988, because claimant did not establish any element of entitlement. Director's Exhibit 1. On March 22, 2001, claimant filed his current application for benefits, which is considered a subsequent claim for benefits because it was filed more than one year after the final denial of a previous claim. Director's Exhibit 3; 20 C.F.R. § 725.309(d).

Claimant's claim proceeded to a hearing before the administrative law judge on October 2, 2002. At the hearing, claimant, by counsel, requested that the record be held open so that he could submit Dr. Jan Madison's report of a physical examination that Dr. Madison performed in September 2002. Hearing Transcript (Tr.) at 6, 7. There being no objection by the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge granted claimant's request, ruling that we'll leave the record open for 30 days for Dr. Madison's report. Tr. at 13. At the close of the hearing, the administrative law judge reminded the parties that we're leaving the record open for Dr. Madison's report. Tr. at 50.

On November 1, 2002, claimant submitted the following items to the administrative law judge:

1. An October 8, 2002 letter from Dr. Joel H. Weinberg to Dr. Herbert Bazron, reporting the results of Dr. Weinberg's examination and testing of claimant on October 8.
2. An October 30, 2002 letter from Dr. Weinberg to claimant's counsel reporting the results of the October 8, 2002 examination and testing.
3. An October 8, 2002 x-ray reading by Dr. Jeff Ralston.
4. An October 8, 2002 pulmonary function study conducted by Dr. Weinberg.
5. An October 8, 2002 history and physical examination report completed by Dr. Weinberg.
6. Dr. Weinberg's *curriculum vitae*.

Claimant's Letter Via Facsimile, November 1, 2002, with attachments.

On November 12, 2002, the Director objected to claimant's submissions because they were outside the scope of the administrative law judge's ruling holding the record open for the submission of Dr. Madison's physical examination report. Director's Letter, November 12, 2002, at 1. The Director moved to strike from the record the evidence submitted by claimant on November 1, 2002.

In an Order Striking Claimant=s Additional Evidence issued on November 13, 2002, the administrative law judge ruled that A[t]he record was held open only for the submission of a medical report by Dr. Madison, not for the general submission of additional evidence.@ Order at 1. Additionally, the administrative law judge found that claimant=s post-hearing submissions violated the twenty-day rule of 20 C.F.R. ' 725.456(b) for the timely exchange and submission of evidence, and that claimant Ahas not shown good cause as to why this evidence should be admitted.@ *Id.* Consequently, the administrative law judge ordered claimant=s evidence Astricken from the record.@ Order at 2.

In the ensuing Decision and Order--Denying Benefits issued on December 26, 2002, the administrative law judge found that the medical opinion evidence developed since the prior denial of benefits established the existence of legal pneumoconiosis pursuant to 20 C.F.R. ' 718.201(a)(2), 718.202(a)(4), and therefore demonstrated a change in one of the applicable conditions of entitlement as required by 20 C.F.R. ' 725.309(d). The administrative law judge further found that the record as a whole did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. ' 718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge abused his discretion in excluding claimant=s post-hearing evidence. The Director responds, urging affirmance.

The Board=s scope of review is defined by statute. The administrative law judge=s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. ' 921(b)(3), as incorporated into the Act by 30 U.S.C. ' 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge=s procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

The administrative law judge did not abuse his discretion in excluding claimant=s post-hearing submissions. *Clark*, 12 BLR at 1-153. As the administrative law judge found, none of the items that claimant submitted on November 1, 2002 was within the scope of the administrative law judge=s ruling holding the record open for the post-hearing submission of Dr. Madison=s report. Tr. at 13, 50. Additionally, we detect no abuse of discretion in the administrative law judge=s finding that claimant did not establish good cause for the submission of this evidence in violation of the twenty-day rule set forth at 20 C.F.R. ' 725.456(b). The record contains no response from claimant to the Director=s November 12, 2002 motion to strike, and review of claimant=s November 1, 2002 letter to the administrative law judge and of claimant=s December 12, 2002 closing brief reveals no explanation by claimant for his late submissions. Finally, because claimant=s post-hearing submissions were excluded due to his own mistake as to the scope of the administrative law judge=s ruling holding the record open, we reject as meritless claimant=s contention that his right to procedural due process was denied. *See North Am. Coal Co. v. Miller*, 870 F.2d 948,

950, 12 BLR 2-222, 2-226 (3d Cir. 1989).

Because claimant alleges no error in the administrative law judge's evaluation of the evidence or in his application of the law pursuant to 20 C.F.R. Part 718, the denial of benefits is affirmed. *See* 20 C.F.R. ' ' 802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Cox v. Benefits Review Board*, 791 F. 2d 445, 446-47, 9 BLR 2-46, 2-48 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711-12 (1983).

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

SO ORDERED.

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

PETER A. GABAUER, JR.  
Administrative Appeals Judge