

BRB No. 02-0235 BLA

JOHN MISTISHIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, )	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Sarah M. Hurley (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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, HALL, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-0243) of Administrative Law Judge Ainsworth H. Brown 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). This case has been before the Board previously.<sup>1</sup> In the most recent

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<sup>1</sup>The record indicates that claimant filed an application for benefits on June 30, 1992. Director's Exhibit 1. In a Decision and Order issued on June 28, 1994, Administrative Law Judge Robert D. Kaplan found that claimant established the existence of pneumoconiosis, but failed to prove that he was totally disabled. Accordingly, benefits were denied. *Id.* On appeal, the Board affirmed the denial of benefits. *Mistishin v. Director, OWCP*, BRB No. 94-2904 BLA (Mar. 28, 1995) (unpub.); Director's Exhibit 78.

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On October 10, 1995, claimant filed a petition for modification. On March 13, 1997, Judge Kaplan issued a Decision and Order Denying Benefits because claimant again did not prove that he was suffering from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 101. Claimant again appealed to the Board, which affirmed the denial of benefits. *Mistishin v. Director, OWCP*, BRB No. 97-0877 BLA (Mar. 25, 1998) (unpub.); Director's Exhibits 102, 107. The Board denied claimant's subsequent request for reconsideration. *Mistishin v. Director, OWCP*, BRB No. 97-0877 BLA (May 27, 1998)(unpub. Order); Director's Exhibit 109.

On November 3, 1998, claimant filed another petition for modification. Director's Exhibit 113. Administrative Law Judge Ralph A. Romano issued a Decision and Order denying benefits on September 27, 1999. Director's Exhibit 129. Judge Romano found that a newly submitted pulmonary function study supported a finding of total disability, but claimant did not prove that pneumoconiosis was a contributing cause of his totally disabling respiratory impairment. *Id.*

Decision and Order concerning the claim for benefits, the administrative law judge found that the newly submitted evidence was insufficient to establish a change in condition or mistake of fact pursuant to 20 C.F.R. §§725.310 (2000). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in discrediting the opinion in which Dr. Kraynak stated that claimant is totally disabled due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director) responds, urging affirmance of the denial of benefits.<sup>2</sup>

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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Claimant filed a third petition for modification on June 23, 2000, which was denied by the district director. Director's Exhibits 130, 135. Claimant requested a formal hearing which was held on May 23, 2001, before Administrative Law Judge Brown. Director's Exhibit 136.

<sup>2</sup>The administrative law judge's findings pursuant to Section 718.204(b)(2)(i)-(iii), are unchallenged on appeal and are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.<sup>3</sup> See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204(2001); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987).<sup>4</sup> 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*).

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<sup>3</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, 725 and 726 (2002). All citations, unless noted otherwise, are to the amended regulations.

<sup>4</sup>The instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error therein. Claimant's contention, that the administrative law judge erred in discrediting Dr. Kraynak's diagnosis of a totally disabling respiratory impairment under Section 718.204(b)(2)(iv), is without merit. The administrative law judge acted within his discretion when he concurred with Judge Kaplan's determination that Dr. Kraynak's medical reports and deposition, in which he diagnosed total disability due to pneumoconiosis, were unreliable because the qualifying pulmonary function studies upon which Dr. Kraynak based his opinion, in part, were invalidated by physicians with superior qualifications.<sup>5</sup> Decision and Order at 11-12; Claimant's Exhibit 1; Director's Exhibits 29, 54, 80, 86, 92- 95, 113, 124, 130, 133; *see Director, OWCP v. Siwiec*, 894 F.2d 635,13 BLR 2-259 (3d Cir. 1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Moreover, the administrative law judge was not required to credit Dr. Kraynak's opinion based on his status as claimant's treating physician, since the administrative law judge rationally concluded that his opinion was not well-supported by the objective evidence of record.<sup>6</sup> *See Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Schaaf v. Matthews*, 574 F.2d 160 (3d Cir. 1978); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985).

Claimant also challenges the administrative law judge's crediting of the 1996 medical report of Dr. Rashid and the 1992 report of Dr. Ahluwalia, neither of whom diagnosed a totally disabling respiratory impairment, as these reports are substantially older than the most recent report of Dr. Kraynak, claimant's treating physician. Director's Exhibits 20, 91.

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<sup>5</sup>A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii). The record indicates that Dr. Kraynak is Board-eligible in family medicine. Claimant's Exhibit 1. His pulmonary function studies were invalidated by Dr. Levinson, a Board-certified pulmonologist, and Dr. Sahillioglu, who is a Board-eligible pulmonologist. Director's Exhibits 86, 92.

<sup>6</sup>The Director, Office of Workers' Compensation Programs, correctly indicates that Dr. Kraynak's deposition was conducted on June 1, 2001, and therefore is subject to the requirements of the revised regulations at 20 C.F.R. §718.104(d), as it represents the opinion of a treating physician. 20 C.F.R. §718.101(b). The administrative law judge's failure to consider the criteria set forth in the regulation is harmless, however, since the administrative law judge rationally determined that the opinion was not credible. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Although the administrative law judge credited these reports over the opinion of Dr. Kraynak, we agree with the Director that this is not reversible error. The administrative law judge's rejection of Dr. Kraynak's most recent report is supported by substantial evidence. Director's Exhibit 48; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Therefore, we affirm the administrative law judge's finding that the evidence of record as a whole is insufficient to establish that claimant is totally disabled pursuant to Section 718.204(b), an essential element of entitlement, thereby precluding an award of benefits.<sup>7</sup> *See Trent, supra; Perry, supra.*

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<sup>7</sup>Inasmuch as the administrative law judge's finding, based upon a consideration of all of the evidence of record, that claimant did not prove that he is totally disabled pursuant to 20 C.F.R. §718.204(b), is tantamount to a finding on the merits, we need not address whether the administrative law judge's modification analysis comports with 20 C.F.R. §725.310. The modification analysis is subsumed into the administrative law judge's finding on the merits.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

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PETER A. GABAUER, Jr.  
Administrative Appeals Judge