

BRB No. 97-0439 BLA

ALVIS L. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTLAND ELKHORN COAL CORPORATION	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order - Award of Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Lois A. Kitts (Baird, Baird, Baird, & Jones, P.S.C.), Pikeville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-1157) of Administrative Law Judge Paul H. Teitler awarding benefits on a duplicate claim<sup>1</sup> filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended,

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<sup>1</sup>Claimant filed his first application for benefits with the Social Security Administration on June 7, 1973. Director's Exhibit 34. This claim was finally denied on September 27, 1973. *Id.* Claimant filed a claim for benefits with the Department of Labor on August 18, 1987, which Administrative Law Judge Bernard J. Gilday denied in a Decision and Order dated November 20, 1990, and the Board affirmed the denial on October 23, 1991, *Smith v. Kentland Elkhorn Coal Company*, BRB No. 91-0585 BLA (Oct. 23, 1991) (unpub.). Claimant subsequently submitted additional evidence, which the Department of Labor considered on May 19, 1992 and found insufficient to establish entitlement. Director's Exhibit 34. Claimant did not challenge this denial. Claimant filed the instant claim for benefits on February 14, 1994. Director's Exhibit 1.

30 U.S.C. §901 *et seq.* (the Act). After reviewing the newly submitted evidence, the administrative law judge determined that because claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), an element of entitlement previously adjudicated against him, claimant had demonstrated a material change in conditions under 20 C.F.R. §725.309(d). Hence, the administrative law judge reviewed all of the medical evidence of record and found that claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), that he is totally disabled pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4), and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in finding pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability at 20 C.F.R. §718.204(c)(1). Employer also contends that Dr. Mettu's opinion is insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Claimant has not filed a response. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in 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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge improperly accorded greater weight to the medical opinion of Dr. Mettu, who opined that claimant has pneumoconiosis, rather than the opinions of Drs. Fino, Broudy, and Branscomb, who found no evidence of the disease. Director's Exhibits 28, 31, 34; Employer's Exhibits 3, 4, 7. Specifically, employer argues that Dr. Mettu's opinion is insufficient to establish pneumoconiosis or that claimant's total disability is due to pneumoconiosis because in 1987 Dr. Mettu found no evidence of pneumoconiosis, whereas in 1994 he diagnosed pneumoconiosis. We disagree. It was within the discretion of the administrative law judge to credit Dr. Mettu's opinion as reasoned inasmuch as Dr. Mettu distinguished his conclusions in 1987 from those of 1994 regarding the existence of pneumoconiosis.<sup>2</sup> See *Fagg v. Amax Coal Co.*,

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<sup>2</sup>After examining claimant and administering clinical tests on September 11, 1987 and during his first deposition on May 19, 1988, Dr. Mettu diagnosed chronic bronchitis and pulmonary impairment due to smoking and working in the mines, but found no evidence of occupational lung disease caused by coal mine employment. Director's Exhibits 28, 34. In a report dated July 12, 1994, Dr. Mettu again diagnosed chronic bronchitis and, on September 12, 1994, found pneumoconiosis resulting in pulmonary impairment due to claimant's thirty-three years of coal mine employment and one pack per day of cigarette smoking. Director's Exhibits 10, 11, 31. During his second deposition on January 12, 1995, Dr. Mettu discussed his initial opinion that claimant did not have pneumoconiosis and his present opinion that the miner does have pneumoconiosis. Dr. Mettu testified that he examined claimant in 1987, 1988, and 1994, and emphasized that he has always diagnosed chronic bronchitis attributable to claimant's cigarette smoking, Director's Exhibits

12 BLR 1-77, 1-79 (1988). The administrative law judge, within a proper exercise of his discretion as the trier-of-fact, accorded determinative weight to Dr. Mettu's opinion because he found this physician's deposition testimony and medical reports to be better reasoned, see *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and documented, see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), than those of Drs. Fino, Broudy, and Branscomb.<sup>3</sup> Decision and Order at 10. Inasmuch as the administrative law judge's determination to accord probative weight to Dr. Mettu's opinion as reasoned and documented is rational and supported by substantial evidence, we reject employer's arguments.

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28, 31, 34, but that he did not "100% rule out" claimant's coal dust exposure as a cause. Director's Exhibit 31 at 12-18. Moreover, Dr. Mettu testified that notwithstanding the negative x-ray evidence, claimant's cigarette smoking history, and the fact that claimant has not worked in the coal mines since 1987, claimant suffers from industrial bronchitis caused by his extensive coal mine employment history and smoking history. Director's Exhibit 31 at 18-19.

<sup>3</sup>Drs. Broudy and Branscomb opined that claimant does not have pneumoconiosis but suffers from mild chronic bronchitis related to cigarette smoking. Director's Exhibits 28, 31, 34; Employer's Exhibits 3, 7. Dr. Fino found no pneumoconiosis, but diagnosed obstructive lung disease due to both emphysema and some asthmatic bronchitis, neither of which are caused by inhalation of coal dust. Director's Exhibits 28, 34; Employer's Exhibit 4.

In addition, employer avers that the administrative law judge impermissibly accorded less weight to the opinions of Drs. Fino, Broudy, and Branscomb, who opined that claimant does not suffer from pneumoconiosis. Employer notes that these physicians are pulmonary specialists and B-readers. Dr. Mettu is Board-certified in both internal medicine and the subspecialty of pulmonary medicine. Director's Exhibit 28 at 3, Director's Exhibit 31 at 4. Similarly, Drs. Broudy and Fino are Board-certified in both internal medicine and the subspecialty of pulmonary medicine. Director's Exhibit 31; Employer's Exhibit 4. Dr. Branscomb is Board-certified in internal medicine, but not pulmonary medicine. Employer's Exhibit 7 at 5, 19. Inasmuch as Dr. Mettu is either equally qualified or more qualified than Drs. Broudy, Branscomb and Fino, we reject employer's argument that the latter physicians deserve greater weight.<sup>4</sup> We, therefore, affirm the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4) and 718.204(b).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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<sup>4</sup>Employer generally asserts that the administrative law judge's finding that total disability is demonstrated pursuant to Section 718.204(c)(1) is not supported by substantial evidence. Employer has failed to frame its challenge in terms of alleged errors committed by the factfinder, and therefore, has not satisfied the threshold requirement that permits review of the administrative law judge's findings in this regard. *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Hence, we will not address the administrative law judge's Section 718.204(c)(1) finding.