

BRB No. 99-1215 BLA

DANIEL E. KNOTTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BUFFALO COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
THE WEST VIRGINIA COAL WORKERS'	)	
PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-	)	
Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick, Morgantown, West Virginia, for claimant.

K. Keian Weld (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (96-BLA-1216) of Administrative Law Judge Stuart A. Levin 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 is before the Board for a second time.

In his first Decision and Order, the administrative law judge determined that claimant's prior claim was finally denied on April 23, 1980<sup>1</sup> and that the present claim, which was filed on December 21, 1994, was a duplicate claim. Based on the parties' stipulations at the hearing, the administrative law judge credited claimant with 40 years of coal mine employment, and found the newly submitted evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 as claimant now suffers from a totally disabling respiratory impairment, an element of entitlement previously adjudicated against him. On the merits, the administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and that claimant's totally disabling respiratory impairment was not related to pneumoconiosis at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, the Board affirmed the finding of the administrative law judge that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)<sup>2</sup> and the findings at 20 C.F.R. §718.202(a)(2)-(3) as unchallenged on appeal,

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<sup>1</sup> The record reflects that the Department of Labor finally denied claimant's prior claim on May 19, 1981 on the grounds that the evidence submitted by claimant did not establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory impairment due to pneumoconiosis. *See* Director's Exhibit 48. Claimant took no further action.

<sup>2</sup> In the instant appeal, claimant again argues that Dr. Jaworski's diagnosis of asbestos establishes the existence of pneumoconiosis as defined at 20 C.F.R. §718.201. Since the Board addressed and rejected this argument in its prior Decision and Order, *see Knotts v. Buffalo Coal Co.*, BRB No. 97-1826 (Dec. 16, 1998)(unpub.), the Board will not address claimant's argument again. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

along with the administrative law judge's findings that a material change in conditions was established at Section 725.309, that the presence of a totally disabling respiratory impairment was established at 20 C.F.R. §718.204(c), and that 40 years of coal mine employment were established based on the parties' stipulation. The Board, however, vacated the administrative law judge's findings at Sections 718.202(a)(4) and 718.204(b) and remanded the case for the administrative law judge to reconsider the deposition testimony of Dr. Jaworski in its entirety. *Knotts v. Buffalo Coal Co.*, BRB No. 97-1826 (Dec. 16, 1998)(unpub.).

On remand, the administrative law judge reviewed the deposition testimony of Dr. Jaworski. The administrative law judge determined that the deposition testimony of Dr. Jaworski was internally inconsistent and again found his report equivocal. Decision and Order on Remand at 3. The administrative law judge credited the reports of Drs. Sagin and Fino, which relate claimant's respiratory impairment solely to smoking. Decision and Order on Remand at 3-5. Thus, the administrative law judge found the evidence of record insufficient to establish that pneumoconiosis was a cause of claimant's totally disabling respiratory impairment. Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge at Sections 718.202(a)(4) and 718.204(b) as well as his treatment of the medical opinion of claimant's treating physician, Dr. Jaworski. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), 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 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).

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. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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*).

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. To meet his burden of proof at Section 718.202(a)(4), claimant must establish the existence of pneumoconiosis by demonstrating the presence of a respiratory impairment significantly

related to or substantially aggravated by dust exposure in his coal mine employment. 20 C.F.R. §§718.202(a)(4), 718.201. To support his burden of proof, claimant submitted a medical report from his treating pulmonologist, Dr. Jaworski, who diagnosed chronic obstructive lung disease related to claimant's smoking and coal dust exposure. See Director's Exhibits 38, 45. In finding this report insufficient to show that claimant's disabling respiratory impairment was related to his coal mine employment, the administrative law judge acted within his discretion in according Dr. Jaworski's medical opinion less weight after reviewing the physician's rationale and underlying documentation. Decision and Order on Remand at 3; see *Island Creek Coal Company v. Compton*, No. 98-2051 (4th Cir. May 2, 2000); *Tedesco v. Director, OWCP*, 18 BLR 1-104 (1994); *Puleo v. Florence Mining Co.*, 8 BLR 1-198 (1984); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); see also *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Risher v. Director, OWCP*, 940 F.2d 327, 15 BLR 2-186 (8th Cir. 1991). As the report of Dr. Jaworski is the only medical evidence of record supportive of claimant's burden of proof, the administrative law judge properly found the evidence of record insufficient to establish that coal mine employment was a factor in claimant's respiratory impairment. Thus, the administrative law judge properly concluded that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(4) and that pneumoconiosis was a cause of claimant's totally disabling respiratory impairment at Section 718.204(b). We, therefore, affirm the administrative law judge's findings at Sections 718.202(a)(4) and 718.204(b), and the denial of benefits as it is supported by substantial evidence.

Accordingly, the Decision and Order of the administrative law judge denying 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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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge