

BRB No. 01-0292 BLA

LESTER WOLFGANG)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KOCHER COAL COMPANY)	
)	DATE ISSUED:
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for employer.

Edward Waldman (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 Denying Benefits Upon Remand (1999-BLA-00011) of Administrative Law Judge Ainsworth H. Brown on a duplicate claim¹ 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).² This case has a lengthy procedural history. In his Decision and Order issued on July 21, 1999, the administrative law judge denied claimant's second request for modification of the denial of this duplicate claim. The administrative law judge found that new evidence submitted in support of modification of his prior denial of modification on March 31, 1997,³ was insufficient to establish the sole remaining contested element of entitlement, *i.e.*, disability causation pursuant to 20 C.F.R.

¹Claimant's original claim for benefits, filed on July 15, 1983, was abandoned. Director's Exhibits 1, 36. Claimant filed the instant claim for benefits on March 28, 1986. Director's Exhibit 2.

²The 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 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

³In the prior denial of modification, the administrative law judge found that the weight of the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000), an element of entitlement which claimant had previously failed to establish, but the administrative law judge denied benefits on the ground that claimant failed to establish that his disability was due to pneumoconiosis. Director's Exhibit 144.

§718.204(b) (2000). The administrative law judge further found that claimant failed to establish either a mistake in a prior determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000), and therefore denied benefits.

On appeal, the Board agreed with claimant's arguments that the administrative law judge mischaracterized the record and committed reversible error in weighing the relevant medical opinions at Section 718.204(b) (2000). Consequently, the Board vacated the administrative law judge's findings thereunder, and remanded this case for further consideration of the evidence relevant to claimant's burden of establishing that his coal mine employment-related pneumoconiosis was a substantial contributor to his total disability under *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).⁴ *Wolfgang v. Kocher Coal Co.*, BRB No. 99-1140 BLA (Aug. 18, 2000)(unpub.).

On remand, the administrative law judge again found the evidence insufficient to establish disability causation pursuant to Section 718.204(b) (2000),⁵ and thus denied modification and benefits.

In the present appeal, claimant challenges the administrative law judge's disability causation findings pursuant to Section 718.204(b) (2000), and his denial of modification. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to 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

⁴This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁵The administrative law judge applied the disability causation regulation set forth at 20 C.F.R. §718.204(b) (2000). After revision of the regulations, the disability causation regulation is now set forth at 20 C.F.R. §718.204(c) (2001).

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 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 (2000). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

After consideration of the administrative law judge’s Decision and Order, the arguments on appeal and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Claimant challenges the administrative law judge’s credibility determinations on the issue of disability causation at Section 718.204(b) (2000), and maintains that the administrative law judge applied an inconsistent standard of review to the evidence. Specifically, claimant argues that the administrative law judge selectively analyzed constituent parts of the medical opinions of Drs. Similaro, Raymond Kraynak and Matthew Kraynak, while ignoring inadequacies and defects in the contrary opinion of employer’s expert, Dr. Dittman. Claimant asserts that the consultative opinion of his expert, Dr. Similaro, and the opinions of claimant’s treating physicians, Drs. Raymond and Matthew Kraynak, are sufficiently well reasoned and documented to establish that claimant’s pneumoconiosis is a substantially contributing cause of his total respiratory disability. Claimant essentially seeks a reweighing of the evidence, which is beyond the scope of our review. *See O’Keeffe, supra; Anderson, supra.*

The administrative law judge accurately reviewed the conflicting medical opinions of record and their underlying documentation, and acknowledged that Dr. Dittman’s opinion was not entitled to determinative weight due to various defects contained therein. Decision and Order at 2-3. Nevertheless, the administrative law judge determined that Dr. Dittman better explained the bases for his conclusions, and the administrative law judge acted within his discretion as trier of fact in finding that the opinions of Drs. Similaro, Matthew Kraynak and Raymond Kraynak were neither persuasive nor sufficient to satisfy claimant’s affirmative burden because these physicians did not set forth the reasoning underlying their conclusion that pneumoconiosis caused claimant’s disability.⁶ Decision and Order at 3; *see*

⁶The administrative law judge additionally determined that claimant was not a good social historian, and that claimant’s actual smoking history was most likely 25 pack years, as initially recorded by Dr. Ahluwalia. Decision and Order at 3. Thus, the administrative law judge reasonably rejected Dr. Simelaro’s unexplained conclusions that a 25 pack year history was probably an exaggeration of the actual smoking history and that claimant’s

Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge's findings pursuant to Section 718.204(b) (2000) are supported by substantial evidence, and thus are affirmed. Consequently, we affirm the administrative law judge's denial of modification pursuant to Section 725.310 (2000), as supported by substantial evidence and within his discretion, and affirm his denial of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

anthracosilicosis played a more significant role in his obstructive airway disease than smoking. Decision and Order at 3; Claimant's Exhibit 6. Further, while Drs. Similaro and Matthew Kraynak indicated that smoking would not cause claimant's positive x-ray opacities, the administrative law judge noted that no physician of record opined that such opacities were attributable to smoking, and that Drs. Similaro and M. Kraynak did not explain why positive x-ray opacities would necessarily lead to the conclusion that pneumoconiosis is a substantial contributing cause of disability. Decision and Order at 2-3; Claimant's Exhibits 6, 8. Lastly, the administrative law judge permissibly credited Dr. Dittman's interpretation of his own pulmonary function study results over the conflicting interpretation provided by Dr. Raymond Kraynak, based on Dr. Dittman's superior qualifications as a Board-certified internist and Board-eligible pulmonologist. Decision and Order at 2-3; Claimant's Exhibit 5; Employer's Exhibit 1; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

BETTY JEAN HALL
Administrative Appeals Judge