

BRB No. 98-0502 BLA

HENRY E. MYERS	)	
	)	
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa, Kingston, Pennsylvania, for claimant.

Jennifer U. Toth (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1879) of Administrative Law Judge Robert D. Kaplan 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). The instant case involves a duplicate claim filed on January 29, 1996.<sup>1</sup> After crediting claimant with three years of coal

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<sup>1</sup>The relevant procedural history of the instant case is as follows: Claimant

mine employment, the administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that the newly submitted evidence was sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(c). The administrative law judge also noted that the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c). Inasmuch as the newly submitted evidence was sufficient to establish both the existence of pneumoconiosis and total respiratory disability, the administrative law judge found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge, therefore, addressed the sole remaining issue, *i.e.*, whether the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis. The administrative law judge found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis 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 erred in finding the evidence

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initially filed a claim for benefits on August 10, 1979. Director's Exhibit 19. The district director denied the claim on November 24, 1980. *Id.* There is no indication that claimant took any further action in regard to his 1979 claim.

Claimant filed a second claim on May 22, 1985. Director's Exhibit 20. The district director denied the claim on August 26, 1985. *Id.* There is no indication that claimant took any further action in regard to his 1985 claim.

Claimant filed a third claim on March 3, 1989. Director's Exhibit 21. The district director denied the claim on May 3, 1989. *Id.* There is no indication that claimant took any further action in regard to his 1989 claim.

Claimant filed a fourth claim on September 11, 1990. Director's Exhibit 22. The district director denied the claim on January 4, 1991 and March 19, 1991. *Id.* There is no indication that claimant took any further action in regard to his 1990 claim.

Claimant filed a fifth claim on April 6, 1992. Director's Exhibit 23. The district director denied the claim on June 18, 1992. *Id.* There is no indication that claimant took any further action in regard to his 1992 claim.

Claimant filed a sixth claim on January 29, 1996. Director's Exhibit 1.

insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). The Director responds in support of the administrative law judge's denial of benefits.<sup>2</sup>

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge erred in finding the evidence insufficient to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). In finding the evidence insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), the administrative law judge credited the opinions of Drs. Sahillioglu and Talati that claimant's total disability was not due to pneumoconiosis over Dr. Aquilina's contrary opinion. Decision and Order at 12-13.

Claimant contends that the administrative law judge erred in discrediting Dr. Aquilina's opinion because he relied upon an inaccurate smoking history. The administrative law judge noted that claimant testified that he began smoking in 1944 and smoked until the early 1980's. Decision and Order at 12. The administrative law judge discredited Dr. Aquilina's opinion because the doctor relied on "varying and inconsistent accounts of [c]laimant's history of cigarette smoking, virtually all of which are less than [c]laimant ...conceded to under oath." *Id.*

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<sup>2</sup>Inasmuch as no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.203(c), 718.204(c) and 725.309, these findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge's length of coal mine employment is similarly affirmed.

The administrative law judge, however, erred in not rendering a specific finding regarding the length of claimant's smoking history. See generally *Bowman v. Director, OWCP*, 7 BLR 1-718 (1985). While the administrative law judge accurately noted that claimant testified that he began smoking in 1944 and quit in the early 1980's, the administrative law judge failed to reconcile this finding with claimant's earlier testimony that he had only smoked a half a pack of cigarettes a day for twenty years. See Transcript at 33. This testimony, if credited, would amount to no more than a ten pack year smoking history. We note that Dr. Aquilina, in his most recent deposition testimony, explained that he relied upon a cigarette smoking history of less than twenty pack years.<sup>3</sup> Claimant's Exhibit 3. The administrative law judge also failed to address the various smoking histories set out in the medical evidence.<sup>4</sup> Finally, even if Dr. Aquilina had a somewhat inaccurate understanding of the extent of claimant's smoking history, the administrative law judge failed to explain how this misunderstanding undermined Dr. Aquilina's opinion regarding the etiology of claimant's total disability. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b) and remand the case for further consideration.<sup>5</sup>

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<sup>3</sup>In his October 28, 1980 report, Dr. Aquilina indicated that claimant had smoked a half a pack of cigarettes a day for thirty-five years. Director's Exhibit 19. In his July 9, 1985 report, Dr. Aquilina noted a thirty-five year smoking history. Director's Exhibit 20. In his March 28, 1996 report, Dr. Aquilina noted that claimant had smoked a pack of cigarettes a day or less from 1965 until 1987. Director's Exhibit 8. Dr. Aquilina subsequently issued a report dated May 29, 1996 wherein he noted that he was "aware of [claimant's] positive tobacco abuse history and minimal coal dust exposure history." Director's Exhibit 13. During a June 18, 1997 deposition, Dr. Aquilina noted that claimant had a smoking history of less than twenty pack years. Claimant's Exhibit 3.

<sup>4</sup>In his March 14, 1989 report, Dr. Sahillioglu noted that claimant had smoked a pack of cigarettes a day for thirty years. Director's Exhibit 21. In his October 12, 1990 report, Dr. Talati noted that claimant had smoked a pack of cigarettes a day from 1948 until 1989. Director's Exhibit 22. In his May 6, 1992 report, Dr. Talati noted that claimant had smoked a pack of cigarettes a day from 1944 until 1989. Director's Exhibit 23. However, in his most recent report, dated April 12, 1997, Dr. Talati noted that claimant had smoked only a half a pack of cigarettes a day from 1950 until 1979. Director's Exhibit 28.

<sup>5</sup>Claimant also argues that Dr. Talati's most recent opinion is inconsistent with his earlier opinions. In his October 12, 1990 medical report, Dr. Talati diagnosed,

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*inter alia*, possible simple coal workers' pneumoconiosis. *Id.* However, in his May 6, 1992 and April 12, 1997 reports, Dr. Talati did not render a diagnosis of pneumoconiosis. Director's Exhibits 23, 28. On remand, the administrative law judge is instructed to address whether Dr. Talati's opinion is sufficiently reasoned given the apparent contradictory conclusions reached in his various reports. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

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