

BRB No. 03-0537 BLA

ROBERT HUNLEY)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 03/29/2004
)	
NEW HOPE COMPANY OF)	
KENTUCKY)	
)	
and)	
)	
LIBERTY MUTUAL 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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-BLA-1017) of Administrative Law Judge Joseph E. Kane awarding 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).¹ This case is before the Board for a second time.² In this petition for modification, the administrative law judge found the newly submitted evidence sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b), (c), which established a change in conditions pursuant to Section 725.310. Accordingly, benefits were awarded.

On appeal, employer challenges the findings of the administrative law judge that claimant established that his total respiratory disability was due to pneumoconiosis. Claimant has not participated in this appeal. 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 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

¹The 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. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²Claimant filed an initial application for benefits on April 23, 1993. Director's Exhibit 1. In a Decision and Order issued on July 22, 1997, Administrative Law Judge Edward Terhune Miller found that claimant established the presence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1),(4), 718.203 (2000), but that claimant was unable to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c) (2000). Accordingly, benefits were denied. Director's Exhibit 89. On appeal, the Board affirmed the denial of benefits. *Hunley v. New Hope Company of Kentucky*, BRB No. 97-1627 BLA (June 29, 1998)(unpub.). Claimant filed a petition for modification on September 28, 1998, which was denied by Administrative Law Judge Robert L. Hillyard on February 8, 2000, due to claimant's failure to establish a totally disabling respiratory impairment at Section 718.204(c) (2000), or a mistake of fact or change in condition at Section 725.310 (2000). Director's Exhibits 103, 116. Claimant filed the present request for modification on January 29, 2001. Director's Exhibit 117.

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*).³

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.⁴ We reject employer's contention that the administrative law judge provided an invalid basis to discredit Dr. Dahhan's opinion that the miner's coal workers' pneumoconiosis did not contribute to his total respiratory disability.

The administrative law judge found that Dr. Dahhan concluded that the miner's airway disease was due solely to his forty-plus years of smoking. Decision and Order at 8, 12. The administrative law judge, however, acted within his discretion as the trier-of-fact in according minimal weight to this opinion because he found Dr. Dahhan's reliance on claimant's bronchodilator treatment was too limited in light of the other medical evidence. Decision and Order 13. Employer's Exhibit 1; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.); *Gilliam v. G&O Coal Co.*, 7 BLR 1-59 (1984).

We further reject employer's assertion that the administrative law judge erroneously placed the burden of proof on employer to rule out coal dust exposure as a cause of claimant's disability, as the Decision and Order indicates that the administrative law judge correctly applied the holding in *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52 (6th Cir. 1989), and required claimant to establish that his total respiratory disability was due, in part, to pneumoconiosis. Decision and Order at 13. Employer's contention that the opinions of Drs. Smiddy and Langub, both of whom attributed claimant's total respiratory disability to coal dust exposure and smoking, and the opinion of Dr. Peesapati, who found totally disabling chronic obstructive pulmonary disease due to pneumoconiosis and possibly due to cigarette smoking, are insufficient to satisfy claimant's burden of proof to establish causation is without merit. Employer's Exhibits 2-4; Claimant's Exhibit 7. We initially reject employer's contention regarding Dr. Peesapati's opinion since the Decision and Order

³Since the miner's last coal mine employment took place in the Commonwealth of Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴We affirm the findings of the administrative law judge at Section 718.204(b), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

indicates that the administrative law judge accorded only “minimal weight” to this report as this physician “did not fully explain how Claimant’s cigarette smoking affected his condition.” Decision and Order at 13; Employer’s Exhibit 3.

The record indicates that Dr. Langub noted claimant’s lengthy smoking history, indicated that it was not possible to completely separate the effects of smoking from coal dust exposure since each cause produces an identical reaction in the lungs, and specifically diagnosed severe pneumoconiosis which rendered claimant totally disabled in addition to diagnosing a respiratory condition due to smoking. Employer’s Exhibit 4; Claimant’s Exhibit 7. Dr. Smiddy also noted claimant’s smoking history and diagnosed pneumoconiosis with a severe respiratory impairment that was partially amenable to bronchodilator treatment, as well as smoking-related chronic bronchitis and chronic obstructive pulmonary disease. Employer’s Exhibit 2. Thus, the record does not support employer’s contentions that these physicians failed to indicate that claimant’s pneumoconiosis contributed in any measurable way to his disability, did not explain the significance of claimant’s smoking history, or that Dr. Smiddy’s causation opinion is equivocal. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Gross v. Dominion Coal Corp.*, 22 BLR 1- (2003); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). It was within the administrative law judge’s discretion as the fact-finder to find the opinions of Drs. Langub and Smiddy well reasoned and documented, and entitled to greater weight than the contrary opinion of Dr. Dahhan. Decision and Order at 12-14; Employer’s Exhibits 1, 2, 4; Claimant’s Exhibit 7; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

We further reject employer’s argument that the Decision and Order fails to specify the basis for the administrative law judge’s findings, and therefore violates the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). The Decision and Order indicates that the administrative law judge accurately summarized each relevant medical report of record, and rationally found that the opinions of Drs. Langub and Smiddy outweighed the contrary report of Dr. Dahhan. Decision and Order at 6-8, 13-14. As the administrative law judge has specified the basis of his determination, the requirements of the APA have been satisfied. *Director, OWCP v. Congleton*, 793 F.2d 428, 7 BLR 2-12 (6th Cir. 1984); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988). Accordingly, we hold that substantial evidence supports the administrative law judge’s findings at Section 718.204(c), and they are affirmed. We further affirm the determination that claimant’s newly submitted evidence established a change in condition pursuant to Section 725.310, and the administrative law judge’s finding that the record evidence as a whole established claimant’s entitlement to benefits. Decision and Order at 9-14; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir.

1994); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge