

BRB No. 00-0873 BLA

ELMER W. UNDERWOOD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	DATE ISSUED: _____
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

Jeffrey S. Goldberg (Judith E. Kramer, Acting 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, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (99-BLA-0840) of Administrative Law Judge Daniel L. Leland denying modification on a miner's duplicate 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).² Initially, the administrative law judge dismissed

¹Claimant is Elmer Underwood, the miner, who filed his present claim for benefits on January 11, 1991. Director's Exhibit 1. This claim was denied on February 4, 1997 by the United States Court of Appeals for the Fourth Circuit. *See* Director's Exhibit 128. Thereafter, claimant filed a request for modification on January 7, 1998. Director's Exhibit 100. Claimant's first claim for benefits, filed on February 3, 1983, was finally denied on November 14, 1984. Director's Exhibit 29.

²The Department of Labor amended the regulations implementing the Federal Coal

all the potential responsible operators in the case and found the Director, Office of Workers' Compensation Programs (the Director), and the Black Lung Disability Trust Fund to be responsible for the payment of benefits, if entitlement was established. Decision and Order at 6-7. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). Decision and Order at 7-9. Therefore, the administrative law judge found the evidence insufficient to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310(a) (2000). Decision and Order at 7-9. Accordingly, modification was denied.

On appeal, claimant contends that *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984) mandates the payment of benefits because of the Director's failure to identify a responsible operator in this case. The Director responds, urging affirmance of the denial of benefits.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will 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). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which claimant and the Director have responded.³ Based on the briefs submitted by the parties, and our review, we hold that the

Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³Both claimant and the Director, Office of Workers' Compensation Programs (the Director), assert that the regulations at issue in the lawsuit do not affect the outcome of this

disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

case.

The procedural history regarding the designation of a responsible operator in this case is complex and will not be discussed in detail. It is pertinent to note, however, in relation to claimant's assertion, that the Director was unable to determine which of the miner's numerous coal mine employers should be liable for benefits when this case was before the district director on the miner's first and second applications for benefits and on remand from the Office of Administrative Law Judges.⁴ Consequently, the Director named several of claimant's previous coal mine employers as potential responsible operators. To defend their interests, these potential responsible operators submitted medical evidence in an effort to defeat claimant's entitlement to benefits. When this case was most recently referred to the Office of Administrative Law Judges on claimant's request for modification, numerous potential responsible operators were still named as defendants to this case.⁵ At the hearing on claimant's request for modification, the administrative law judge dismissed all the potential responsible operators and substituted the Director as the party responsible for the payment of benefits out of the Black Lung Disability Trust Fund, 2000 Hearing Transcript at 22-23. Decision and Order at 6-7.

Claimant now asserts that the Director's failure to identify a responsible operator and his naming of numerous possible responsible operators in this case resulted in an

⁴When this case came before Administrative Law Judge Edward Terhune Miller, on the miner's second application for benefits and after Judge Peter McC. Giesey's decision on remand, Judge Miller found "that judicial efficiency justifies deferral of [the determination of the responsible operator issue] unless and until Claimant demonstrates his entitlement to benefits." 1994 Decision and Order at 6.

⁵Prior to the administrative law judge's dismissal of all potential responsible operators and his substituting the Director for the potential responsible operators in this case, the following were named as defendants: W & G Construction Company, Jack Williams, Carl N. Graybeal, Excel Development Company, Whitesville A & S Coal Company, Hobet Mining, Incorporated, and Princess Beth, Incorporated. *See* Decision and Order at 1, 6-7.

overwhelming amount of evidence being developed against him and, consequently, a denial of benefits. Claimant's Brief at 4-5. Therefore, claimant asserts, citing *Crabtree*, he should be awarded benefits. Claimant's Brief at 5. *Crabtree* does not support claimant's contention that because the Director was unable to designate a responsible operator in this case, claimant should be entitled to benefits. The Board held in *Crabtree* that the United States "Department of Labor was not entitled to a second opportunity to identify another putative responsible operator," if the operator it previously named is dismissed from the case. *Crabtree*, 7 BLR at 1-356. The Board reasoned that to hold otherwise would require a claimant, who had established entitlement against one employer, to re-establish entitlement against another employer. *See Crabtree*, 7 BLR at 1-357.

In this case, however, claimant has never established his entitlement to benefits. Therefore, given the Director's inability to properly designate a responsible operator, the administrative law judge, citing *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995), found the Director and the Black Lung Disability Trust Fund⁶ liable for the payment of benefits to claimant, if they are awarded. Decision and Order at 7. However, the administrative law judge did not find that claimant was entitled to benefits. As the Director asserts, *Crabtree* does not allow an administrative law judge to remand for payment of benefits to claimant by the Black Lung Disability Trust Fund when entitlement to benefits has never been established. Therefore, we reject claimant's assertion that *Crabtree* mandates a payment of benefits to claimant.⁷ *See Matney, supra; Crabtree, supra.*

⁶The Director is charged with responsibility for defending the interests of the Black Lung Disability Trust Fund. *See Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *White v. Director, OWCP*, 7 BLR 1-348 (1984).

⁷While 20 C.F.R. §725.414 of the amended regulations attempts to eliminate the excessive development of the medical evidence by the parties, this revised regulation applies only to new claims filed after January 19, 2001. *See* 20 C.F.R. §725.414.

Regarding the merits of the claim, on appeal claimant has not challenged or alleged error in the administrative law judge's weighing of the medical evidence or his denial of modification. Therefore, we affirm, as unchallenged, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis and total respiratory disability, *see* 20 C.F.R. §§718.202(a), 718.204(b), based on the evidence submitted since claimant's request for modification.⁸ *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see also Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Inasmuch as claimant has not challenged the administrative law judge's consideration of the medical evidence and we hold that claimant's assertion regarding *Crabtree* is without merit, *see* discussion, *supra*, we also affirm the administrative law judge's denial of modification pursuant to 20 C.F.R. §725.310 (2000).⁹

Accordingly, the administrative law judge's Decision and Order denying modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

⁸In the amended regulations, 20 C.F.R. §718.204 has been renumbered. The regulation at 20 C.F.R. §718.204(c)(1)-(c)(4) (2000), which discusses the methods for establishing total respiratory disability, is found at 20 C.F.R. §718.204(b)(2)(i)-(b)(iv) of the amended regulations. The regulation at 20 C.F.R. §718.204(b) (2000), which discusses total disability due to pneumoconiosis, is found at 20 C.F.R. §718.204(c) of the amended regulations.

⁹Although substantive revisions have been made to the regulation governing modification at 20 C.F.R. §725.310, this revised regulation applies only to claims filed after January 19, 2001.

REGINA C. McGRANERY
Administrative Appeals Judge