

BRB No. 97-1205 BLA

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

Appeal of the Decision and Order - Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (Marvin Krislov, Deputy Solicitor for National Operations; 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (96-BLA-1562) of Administrative Law Judge Ralph A. Romano, 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). Claimant filed the instant request for

modification of his previously denied claim on August 10, 1995.¹ See Director's

¹The relevant procedural history of this case is as follows: Claimant filed his initial claim for Black Lung benefits with the Department of Labor (the Department) on June 20, 1988. Director's Exhibit 63. That claim was finally denied on October 5, 1988. *Id.* Claimant filed his second application for benefits with the Department, a duplicate claim, on September 24, 1992. Director's Exhibit 1. That claim was denied by the district director on January 21, 1993. Director's Exhibit 12. Claimant requested modification of his denied duplicate claim on July 7, 1993. Director's Exhibit 30. That request was denied by the district director on February 23, 1994, *Id.*, and claimant filed another request for modification on February 24, 1994. Director's Exhibit 31. The district director denied that request on August 25, 1994. Director's Exhibit 58. Claimant filed the instant request for modification on August 10, 1995. Director's Exhibit 45. On June 12, 1996, the district director denied claimant's latest request for modification. Director's Exhibit 61. On June 19, 1996, claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 62. Administrative Law Judge Ralph A. Romano conducted a hearing on the claim in Wilkes-Barre, Pennsylvania, on December 11, 1996. Decision and Order at 1; Hearing Transcript at 1. Judge Romano issued his

Exhibit 45. In his decision, the administrative law judge credited claimant with 6.8 years of qualifying coal mine employment, and found the existence of coal mine-related pneumoconiosis established under 20 C.F.R. §§718.202, 718.203. Additionally, the administrative law judge found that the evidence of record established the existence of a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c). However, the administrative law judge then determined that claimant failed to establish that his total disability is due to his pneumoconiosis under 20 C.F.R. § 718.204(b), and accordingly denied benefits. Claimant appeals, arguing that the administrative law judge erred in failing to credit him with additional years of coal mine employment. Additionally, claimant contends that the administrative law judge committed several prejudicial errors in his weighing of the medical opinion evidence at Section 718.204(b). The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge's decision is supported by substantial evidence and should be affirmed.²

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 under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove 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*).

decision on May 12, 1997.

²The administrative law judge's findings under 20 C.F.R. §§718.202(a), 718.203(c) and 718.204(c) are unchallenged on appeal, and are hereby affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, claimant contends that the administrative law judge acted inconsistently in finding Dr. Aquilina's opinion "reasoned" under Section 718.204(c) (in finding the existence of a totally disabling respiratory or pulmonary impairment), but unreasoned under Section 718.204(b) (in finding that pneumoconiosis did not cause claimant's total respiratory disability). We disagree with claimant's assertion that the administrative law judge acted inconsistently. The administrative law judge found the medical opinion evidence supportive of a finding of total disability, in general, well-reasoned for the purpose of establishing the existence of a totally disabling respiratory or pulmonary impairment under Section 718.204(c). Contrary to claimant's contention, the administrative law judge did not act "inconsistently" in then finding Dr. Aquilina's opinion unreasoned regarding the cause of that impairment under Section 718.204(b), which is a separate inquiry. The administrative law judge properly found that Dr. Aquilina failed to consider as causation factors, claimant's extensive history of smoking and welding, and his cardiac disease and obesity. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Director's Exhibit 24. Claimant's first assignment of error is therefore rejected.

Next, under Section 718.204(b), claimant contends that the administrative law judge substituted his opinion for that of the doctor in discrediting Dr. Weiss's opinion. The Director agrees that the administrative law judge erred in discrediting Dr. Weiss's opinion because the doctor "indicated an improvement in cardiopulmonary function with rehabilitation which is uncharacteristic of pneumoconiosis," Decision and Order at 17, without identifying any "medical evidence indicating that improvement in pneumoconiosis is uncharacteristic of that condition." Director's Brief at 2, n.3.³ However, the Director contends that the administrative law judge's error is harmless in this instance because the administrative law judge furnished other, proper reasons for discrediting Dr. Weiss's opinion at Section 718.204(b). The Director is correct. Notwithstanding claimant's contention, Dr. Weiss's opinion is unsupportive of causation at Section 718.204(b) because, as the administrative law judge found, the doctor failed "to describe pneumoconiosis as a substantial contributor to the claimant's total disability," among the several conditions he diagnosed. See *Bonessa v. United States Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); see also *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

³Additionally, the administrative law judge improperly noted, "obstructive defects and improvement after bronchodilator are indicative of an etiology other than pneumoconiosis," again without citing an evidentiary basis. Decision and Order at 16.

Next, claimant argues that the administrative law judge selectively analyzed Dr. Sahillioglu's opinion, in that he noted items in the doctor's opinion which weigh against claimant, and failed to note items in the claimant's favor. We disagree. In weighing Dr. Sahillioglu's opinion under Section 718.204(b), the administrative law judge properly noted that Dr. Sahillioglu attributed claimant's total disability not to pneumoconiosis, but to his heart disease and chronic obstructive pulmonary disease (which Dr. Sahillioglu in turn attributed to natural causes). See *Bonessa, supra*; Decision and Order at 17. Moreover, the administrative law judge properly noted that Dr. Sahillioglu lacked an accurate smoking history. See *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Accordingly, inasmuch as Dr. Sahillioglu's opinion is unresponsive to claimant's burden of proof, the administrative law judge, contrary to claimant's contention, properly found disability causation was not established under Section 718.204(b), based upon this opinion. See *Bonessa, supra*; Decision and Order at 17.

Finally, claimant argues that the administrative law judge failed to support his statement that Drs. Aquilina and Fasciano did not adequately account for "claimant's social and medical histories," and claimant contends that the administrative law judge improperly implied that Drs. Szustak, Weiss and Aquilina did not have knowledge of claimant's cardiac problems. We disagree with both of claimant's contentions. Initially, regarding Drs. Aquilina and Fasciano, the administrative law judge did not imply that these doctors were unaware of claimant's previous medical histories, but merely, within his discretion as trier-of-fact, discredited these opinions because their diagnoses failed to account for claimant's heart problems, obesity, smoking and welding histories. See *Cooper v. U.S. Steel Corp.*, 7 BLR 1-842 (1985); *Bobick, supra*; *Maypray, supra*; see also *Clark, supra* (the administrative law judge may properly discredit a physician's opinion for failing to adequately explain his diagnosis). Finally, regarding Dr. Szustak,⁴ the administrative law judge permissibly discredited the doctor's opinion regarding the cause of claimant's disability because he failed to account for claimant's heart problems although the doctor had diagnosed congestive heart failure. See *Cooper, supra*; see also *Clark, supra*. Accordingly, claimant's several arguments are rejected,⁵ and the

⁴Contrary to claimant's contention, the administrative law judge did not imply that Dr. Weiss was unfamiliar with claimant's cardiac problems, but found that the doctor did not identify pneumoconiosis as a cause of claimant's disability. See *Discussion, supra*; Decision and Order at 17.

⁵In light of our disposition, we need not address claimant's argument regarding the administrative law judge's years of coal mine employment finding as it does not

administrative law judge's finding that the evidence of record fails to establish that claimant's totally disabling respiratory or pulmonary impairment is due to pneumoconiosis under 20 C.F.R. §718.204(b) is affirmed. See *Bonessa, supra*. Inasmuch as total disability causation is a requisite element of entitlement under Part 718, the administrative law judge properly denied benefits in this case. See *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

affect the outcome of this case. Cf. *Larioni v. Director, OWCP*, 6 BLR 1-1276.