

BRB Nos. 01-0161 BLA
and 01-0161 BLA-A

EARL MULLINS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BUFFALO MINING COMPANY)	
)	DATE ISSUED:
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	
Cross-Respondent)	DECISION and ORDER

Appeal of the Decision on Remand-Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly), Morgantown, West Virginia, for employer.

Dorothy L. Page (Howard M. Radzely, 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision on Remand-Rejection of Claim (1995-BLA-1590) of Administrative Law Judge Edward Terhune Miller denying benefits on a 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).¹ This case is before the Board for the third time.² In the last appeal, the Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the new evidence of record was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1), (4) (2000), and thus sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The Board vacated, however, the administrative law judge's findings that the weight of the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) and insufficient to establish that pneumoconiosis was a contributing cause of claimant's disability at 20 C.F.R. §718.204(b) (2000). The Board remanded this case for the administrative law judge to reevaluate the evidence thereunder in accordance with the principles enunciated in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Warth v. Southern Ohio Coal Co.*,

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 (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. 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

²The full procedural history of this case is set forth in *Mullins v. Buffalo Coal Co.*, BRB No. 96-0834 BLA (Dec. 19, 1996)(unpub.), and *Mullins v. Buffalo Mining Co.*, BRB Nos. 98-1638 BLA and 98-1638 BLA-A (Apr. 28, 2000)(unpub.).

60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); and *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. The Board also vacated the administrative law judge's finding that employer was properly designated the responsible operator herein, and instructed the administrative law judge to weigh all evidence relevant to this issue if, on remand, he determined that claimant was entitled to benefits. *Mullins v. Buffalo Mining Co.*, BRB Nos. 98-1638 BLA and 98-1638 BLA-A (Apr. 28, 2000)(unpub.).

On remand, the administrative law judge found that employer was properly designated the responsible operator herein, but further found that the weight of the evidence was insufficient to establish either the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) (2000), or disability causation pursuant to Section 718.204(b) (2000). Accordingly, benefits were denied.

In the present appeal, claimant challenges the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.204(b) (2000). Employer responds, urging affirmance of the denial of benefits. Employer also cross-appeals, challenging its designation as the responsible operator herein. The Director, Office of Workers' Compensation Programs (the Director), has declined to address the merits of claimant's appeal, but responds to employer's cross-appeal, urging affirmance of the administrative law judge's designation of employer as the responsible operator.³

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).

Claimant has not challenged the administrative law judge's finding that the weight of the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3) (2000), but contends that the administrative law judge erred in finding the weight of the medical opinions of record insufficient to establish the existence of

³The administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) (2000) is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis pursuant to Section 718.202(a)(4) (2000). Specifically, claimant maintains that the opinions of the physicians who concluded that claimant suffers from legal pneumoconiosis are better reasoned than the contrary opinions of employer's physicians, which claimant asserts are against the spirit of the regulations because the physicians first excluded a diagnosis of pneumoconiosis and then sought to justify their conclusions by relying on claimant's smoking history, the large number of negative x-ray interpretations generated by employer, and the fact that claimant's pulmonary impairment was obstructive in nature. Claimant essentially seeks a reweighing of the evidence, which is beyond the Board's scope of review. *See O'Keefe, supra.*

In evaluating the conflicting medical opinions to determine whether they were reasoned and documented, the administrative law judge permissibly gave little weight to the opinions of Drs. Manuel, Acosta, and Ranavaya on the ground that these physicians failed to provide adequate explanations for their determinations and their diagnoses were conclusory. Decision on Remand at 7-8; Director's Exhibits 39-41; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2- (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Similarly, the administrative law judge properly discounted the report from the West Virginia Occupational Pneumoconiosis Board, which indicated that claimant suffered a forty percent pulmonary functional disability due to occupational pneumoconiosis, as he determined that the report was conclusory, the underlying test results were not contained within the record, and the record did not indicate the legal or medical criteria which the state board relied upon in reaching its conclusions. Decision on Remand at 8; *see Clark, supra.*

The administrative law judge reasonably accorded little weight to the opinion of Dr. Carillo, that claimant's severe obstructive pulmonary disease was attributable to both smoking and dust exposure in coal mine employment, on the grounds that this examining physician did not explain how the underlying documentation supported his conclusions and his qualifications were not contained in the record. Decision on Remand at 8-9; Director's Exhibit 20; *see Hicks, supra; Akers, supra; Clark, supra; Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730 (1983). The administrative law judge acted within his discretion in according greater weight to the contrary opinion of Dr. Zaldivar, that claimant's pulmonary condition was attributable entirely to smoking and was unrelated to dust exposure in coal mine employment, as the administrative law judge determined that this examining physician possessed superior qualifications as a pulmonary specialist, and that his opinion was not based upon any categorical assumption proscribed in *Warth, supra*, but was well reasoned and supported by the consultative opinions of pulmonary experts, Drs. Jarboe and Fino. Decision on Remand at 9-11; Employer's Exhibits 9, 15, 24, 27; *see Hicks, supra; Akers, supra; Stiltner, supra.* The administrative law judge also permissibly gave little weight to the consultative opinion of Dr. Rasmussen, that coal dust exposure was the main contributing factor to claimant's pulmonary condition, as the administrative law judge found that Dr.

Rasmussen's report focused on medical literature which supported the premise that coal dust exposure can cause the various pulmonary conditions suffered by claimant, but the physician did not specify the evidence of record which he relied upon to buttress his conclusions, nor did he explain how he arrived at his diagnosis and the role played by claimant's extensive smoking history. The administrative law judge further found that Dr. Rasmussen's credentials were outweighed by those of Drs. Zaldivar, Jarboe and Fino. Decision on Remand at 10-11; Claimant's Exhibit 4; *see Hicks, supra; Akers, supra*. The administrative law judge's findings and inferences pursuant to Section 718.202(a)(4) (2000) are supported by substantial evidence and are affirmed. Inasmuch as claimant failed to establish the existence of pneumoconiosis under any of the applicable criteria, *see Compton, supra*, the administrative law judge properly found that claimant could not establish disability causation, thus we affirm his denial of benefits. Decision on Remand at 11; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we need not reach employer's arguments on cross-appeal regarding the issue of its designation as the responsible operator herein.

Accordingly, the Decision on Remand-Rejection of Claim of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge