

BRB No. 01-0165 BLA

OKEY M. BROWNING)

Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS'
STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED: _____

COMPENSAT

DECISION and ORDER

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Virginia Thornsburry (Lay representative), Iager, West Virginia, for claimant.

Jeffrey S. Goldberg (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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2000-BLA-0119) of Administrative Law Judge Linda S. Chapman 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

¹Claimant's first claim, filed on August 7, 1989, was denied by the district director on January 11, 1990. Director's Exhibit 40. Claimant filed a duplicate claim on May 3, 1991 that was denied by the district director on October 17, 1991. Director's Exhibit 41. Claimant requested a formal hearing, but subsequently withdrew his claim on October 21, 1992. The instant duplicate claim was filed on June 21, 1996. Director's Exhibit 1.

amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found Bronzite Mining Corporation to be the responsible operator and dismissed Peter White Coal Mining Corporation. The administrative law judge, however, transferred the liability for payment of benefits to the Black Lung Disability Trust Fund because the Director declined to designate Bronzite Mining Corporation as a potential responsible operator before the case was forwarded to the Office of Administrative Law Judges. The administrative law judge credited claimant with thirteen years of coal mine employment and found that the newly submitted evidence established total disability from a pulmonary standpoint and thus, a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000). Considering all the evidence of record on the merits, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b)(2000) and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(2000). The administrative law judge, however, found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's finding under Section 718.204(b)(2000). The Director, Office of Workers' Compensation Programs responds, contending that the administrative law judge's denial of benefits is supported by substantial evidence.

²The 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 on August 3, 2001 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.2d 47 (D.D.C. 2001). The court's decision renders moot any arguments regarding impact of the challenged regulations.

³We affirm the administrative law judge's determinations transferring liability for payment to the Black Lung Disability Trust Fund, crediting claimant with at least thirteen years of coal mine employment, and his findings pursuant to 20 C.F.R. §§725.309, 718.202(a), 718.203(b) and 718.204(c) (2000) as unchallenged on appeal. *Skrack v. Island Creek Coal*

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 filed pursuant to 20 C.F.R. Part 718, 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 (2000); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant argues that the administrative law judge erred in failing to apply the standard enunciated in *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990), requiring claimant to prove by a preponderance of the evidence that his pneumoconiosis is at least a contributing cause of his totally disabling respiratory impairment. In the instant case, the administrative law judge determined that claimant had "not established that his total disability is due, at least in significant part, to his pneumoconiosis." Decision and Order at 19. Subsequent to the issuance of the administrative law judge's Decision and Order, the regulation concerning total disability causation was amended and the revised regulation became applicable to all pending claims. Pursuant to 20 C.F.R. §718.204(c) (2001):

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in 20 C.F.R. §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

(i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

Co., 6 BLR 1-710 (1983).

⁴The administrative law judge applied the total disability causation regulation set forth at 20 C.F.R. §718.204(b) (2000). After amendments were made to the regulations, the causation regulation is now set forth at 20 C.F.R. §718.204(c) (2001).

(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c) (2001).

We decline to consider whether the administrative law judge's weighing of the evidence was appropriate under the newly amended total disability causation regulation because in considering the evidence on the merits the administrative law judge did not discuss and weigh the opinions submitted with this duplicate claim by Drs. Patel and Leacock, stating that claimant was totally disabled due to pneumoconiosis, as well as the evidence submitted with the prior claims relevant to the issue of total disability causation. Decision and Order at 18; Claimant's Exhibits 2, 3, 5; Director's Exhibits 30, 41. Inasmuch as the administrative law judge found a material change in conditions established pursuant to Section 718.309(d) (2000), the administrative law judge must weigh all the relevant evidence of record to determine total disability causation on the merits. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1986), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223(4th Cir.1995), *cert. denied*, 117 S. Ct. 763(1997); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997).

Moreover, under the Administrative Procedure Act, the administrative law judge is required to address all relevant evidence of record, explain the rationale employed in the case and clearly indicate the specific statutory or regulatory provision pertaining to a particular finding. 5 U.S.C. §557 (c)(3)(A), as incorporated into the Act by 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). Although the administrative law judge is empowered to weigh the evidence, inasmuch as the administrative law judge's evidentiary analysis does not include relevant evidence of record, the basis for the administrative law judge's credibility determinations in this particular case cannot be affirmed. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). Therefore, we vacate the administrative law judge's finding that claimant has not established that he is totally disabled due to pneumoconiosis and remand the case for the administrative law judge to consider all of the evidence of total disability causation in accordance with applicable law. 20 C.F.R. §718.204(c) (2001).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge