

BRB No. 98-0195 BLA

SLIMP RATLIFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MIDDLE CREEK COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Bobby Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Laura M. Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (91-BLA-1667) of Administrative Law Judge Clement J. Kichuk denying 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). This case involves a request for modification and is before the Board for the second time.<sup>1</sup> On remand, the

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<sup>1</sup> Claimant filed his claim for benefits on July 28, 1982. Director's Exhibit 1. Claimant was credited with twenty-one and one-quarter years of coal mine employment and the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203, but found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204. Director's Exhibit

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47. While the case was pending on appeal, claimant submitted additional evidence and the Board remanded the case to the district director to consider whether claimant had established a basis for modification. Director's Exhibit 54. Modification was denied, and claimant requested a hearing before an administrative law judge. Director's Exhibits 72, 74. The administrative law judge found that claimant failed to establish a basis for modification of the previous decision pursuant to 20 C.F.R. §725.310 as the evidence failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and total disability pursuant to 20 C.F.R. §718.204(c). Claimant appealed to the Board, which affirmed the administrative law judge's determination that claimant's evidence was insufficient to establish total disability, and thus a change in conditions pursuant to Section 725.310. However, the Board vacated the administrative law judge's determination that claimant failed to establish a mistake in fact because the administrative law judge did not specifically discuss evidence, which if credited, could establish total disability pursuant to Section 718.204(c)(4). The Board remanded the case for the administrative law judge to consider the entire record in order to determine whether there was a mistake in fact. *Ratliff v. Middle Creek Coal Co.*, BRB No. 93-1431 BLA (Oct. 31, 1994)(unpub.). Employer filed a motion for reconsideration, which was denied by the Board. *Ratliff v. Middle Creek Coal Co.*, BRB No. 93-1431 BLA (Nov. 19, 1996)(unpub.).

administrative law judge considered all of the medical evidence of record and found that it failed to establish the existence of pneumoconiosis or total disability. Therefore, the administrative law judge concluded that claimant did not establish a mistake in fact pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in his weighing of the medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c)(4). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not participate in this appeal.<sup>2</sup>

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 in accordance 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 establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

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<sup>2</sup> The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1)-(3) are affirmed as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order on Remand, 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 that there is no reversible error contained therein. Claimant initially contends that the administrative law judge erred in discrediting the opinions of Drs. Berry, Baxter, Nash, Modi and Endres-Bercher at Section 718.202(a)(4) because they considered a positive x-ray interpretation in reaching their conclusions regarding the existence of pneumoconiosis. The administrative law judge found that Drs. Berry, Baxter, Nash, Modi and Endres-Bercher diagnosed coal workers' pneumoconiosis, but "relied heavily" on their positive x-ray readings in arriving at this conclusion. Decision and Order on Remand at 21. The administrative law judge accorded the greatest weight to Dr. Stewart, a reviewing physician, that claimant does not suffer from pneumoconiosis, as he found the opinion to be reasoned and consistent with the objective tests, and because Dr. Stewart possessed superior credentials as a Board-certified pulmonologist and B-reader. Decision and Order on Remand at 22; Director's Exhibit 34; Employer's Exhibit 5. Contrary to claimant's contention, an administrative law judge may, in a permissible exercise of discretion, determine that a medical opinion is based only on x-ray reading even if it purports to be based on clinical findings. See *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). The administrative law judge rationally questioned the underlying documentation that the medical opinions were rendered upon given that the x-rays upon which these opinions were based were also read as negative by better qualified physicians.<sup>3</sup> See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Moreover, the administrative law judge explained fully why he found Dr. Stewart's opinion to be better reasoned and entitled to greater weight than the other medical opinions in that the physician's opinion was based upon a review of the medical record and the physician possessed superior qualifications in diagnosing pulmonary diseases. See *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Massey v. Eastern Associated Coal Corp.*, 7 BLR 1-37 (1984). Thus, we affirm the administrative law judge's conclusion that claimant failed to establish pneumoconiosis pursuant to Section 718.202(a)(4).

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<sup>3</sup> With respect to Dr. Baxter, the administrative law judge also rejected the physician's opinions because he relied on a film which was not part of the record and was not read by any other physician, the physician had no particular qualifications for evaluating pulmonary diseases, and made no mention of claimant's smoking history. Decision and Order on Remand at 17; Director's Exhibits 11, 33.

Claimant also contends that the administrative law judge improperly rejected the opinions of Drs. Baxter, Berry and Modi at Section 718.204(c)(4) because they based their findings partially on non-qualifying objective tests. Initially, we note that the administrative law judge properly found that Dr. Modi did not offer an opinion on the issue of disability. Decision and Order on Remand at 24; Director's Exhibit 33. Turning to claimant's contention at Section 718.204(c)(4), contrary to claimant's argument, an administrative law judge may rationally question the credibility of a medical opinion if the underlying documentation does not support the finding of total disability and the physician does not explain the basis for his diagnosis.<sup>4</sup> See *McMath, supra*; *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Furthermore, the administrative law judge acted within his discretion in according the greatest weight to the opinion of Dr. Stewart, that claimant was able, from a respiratory standpoint, to return to coal mine employment, but would not be able to do so because of his cardiac condition. The administrative law judge found this opinion to be well-reasoned and documented, and again, noted the physician's superior qualifications. The administrative law judge additionally found this opinion to be supported by the well-reasoned and documented opinions of Drs. Endres-Bercher and Garzon. Director's Exhibit 26-27. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Inasmuch as the administrative law judge's findings are supported by substantial evidence and are rational, we affirm his conclusion that claimant failed to establish a mistake in fact pursuant to Section 725.310. See *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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<sup>4</sup> The administrative law judge found that Dr. Baxter did not state the basis of his opinion that claimant is totally disabled and that the pulmonary function test which was part of the underlying basis of the physician's opinion was not contained in the record. Director's Exhibit 33. Moreover, the administrative law judge found that this opinion was inconsistent with the preponderance of the objective test evidence. Decision and Order on Remand at 24-25. The administrative law judge found that Dr. Berry noted limitations that manifested themselves first in 1971, but did not explain how claimant continued to work until 1982 or comment on the significance of claimant's smoking history. Director's Exhibit 12. The administrative law judge also noted that Dr. Berry did not indicate that he had any awareness of claimant's usual coal mine employment. *Id.* Lastly, the administrative law judge found that all pulmonary function tests performed subsequent to Dr. Berry's November 1982 report are non-qualifying. Decision and Order on Remand at 25. The administrative law judge found that Dr. Nash's opinion was undermined by the normal pulmonary function and arterial blood gas values he obtained from claimant, and thus, accorded the opinion no weight. Decision and Order on Remand at 25-26; Director's Exhibit 62.

Accordingly, the administrative law judge Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge