

BRB No. 02-0276 BLA

LEONARD M. LUSK)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED:
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Timothy S. Williams (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Second Remand - Awarding Benefits (94-BLA-0128) of Administrative Law Judge Clement J. Kichuk rendered 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).¹ This case is before the Board for a third time.² In the Board's prior Decision and Order, the Board affirmed the award of benefits by Administrative Law Judge Samuel J. Smith. Subsequently, however, pursuant to a Motion for Reconsideration filed by employer, the Board vacated the award of benefits and remanded the case to the administrative law judge for reconsideration of the existence of pneumoconiosis pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) because the case at bar arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. The court held in *Compton* that all relevant evidence must be weighed together in determining whether the existence of pneumoconiosis has been established. The Board, however, affirmed the credibility findings made by the administrative law judge in his weighing of the medical opinion evidence at 20 C.F.R. §718.202(a)(4). The Board also awarded claimant's counsel's fee request of \$1742.50 to be paid by employer at such time as an award of benefits becomes final. *See Lusk v. Consolidation Coal Company*, BRB No. 99-0189 BLA and 96-0792 BLA (Sep. 29, 2000)(unpub.). On remand, Judge Kichuk (administrative law judge) considered the x-ray and CT scan evidence, along with the medical opinion evidence, Decision and Order on Second Remand at 9, and found the medical opinion evidence sufficient to establish the existence of legal pneumoconiosis. Accordingly, benefits were again awarded.

On appeal, employer argues that the administrative law judge failed to weigh together all of the evidence relevant to the existence of pneumoconiosis in determining that the medical opinion evidence established the existence of legal pneumoconiosis. Employer also contends that the administrative law judge must consider the credibility of the medical opinion evidence in making this determination. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), also urges

¹ The 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, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The prior history of this case is set forth in *Lusk v. Consolidation Coal Company*, BRB No. 99-0189 BLA (Dec. 9, 1999)(unpub.).

affirmance inasmuch as the administrative law judge's Decision and Order is supported by substantial evidence and complies with the Board's remand instructions.

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 pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from 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 establish 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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order on Second Remand - Awarding Benefits of the administrative law judge is supported by substantial evidence, contains no reversible error, and must be affirmed. Contrary to employer's argument, the administrative law judge properly considered together and fully discussed all the evidence relevant to the existence of pneumoconiosis, *i.e.*, x-rays, CT scans, and medical opinions pursuant to *Compton, supra*. Decision and Order on Second Remand, 5-12. The administrative law judge quoted the *Compton* court's statement:

A medical diagnosis finding no coal workers' pneumoconiosis is not equivalent to a legal finding of no pneumoconiosis Evidence that does not establish medical pneumoconiosis, *e.g.* an x-ray read as negative for coal workers' pneumoconiosis, should not necessarily be treated as evidence weighing against a finding of legal pneumoconiosis.

Decision and Order at 8. After considering the negative x-ray and CT scan evidence, the administrative law judge determined, in accordance with *Compton*, that this evidence did not undermine the finding of legal pneumoconiosis, supported by the medical opinion evidence. Decision and Order at 9. Further, we reject employer's contention that the credibility of the medical opinion evidence must be considered again inasmuch as the Board affirmed the administrative law judge's previous credibility findings. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Accordingly, the Decision and Order On Second Remand - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge