

BRB No. 96-0975 BLA

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

Appeal of the Decision and Order of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Edward Waldman (J. Davitt McAteer, 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (95-BLA-02265) of Administrative Law Judge Ainsworth H. Brown 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). The administrative law judge initially concluded that he would not consider claimant's memorandum brief because it was submitted after the extended briefing schedule and because no motion to admit was filed. The administrative law judge then noted that claimant waived the mistake in fact issue and

¹Claimant is Wilmer L. Maurer, the miner, whose initial claim for benefits was filed on December 2, 1988 and denied in a Decision and Order issued on January 19, 1990. Director's Exhibit 17. Claimant's present claim was filed on February 4, 1991 and denied in a Decision and Order issued on March 8, 1994. Director's Exhibits 1, 28. Claimant filed a petition for modification on March 2, 1995. Director's Exhibit 29.

found that claimant established the existence of pneumoconiosis which arose from his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203 and failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to allow claimant the opportunity to submit evidence in rebuttal to the Director's post hearing evidence, in finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(1) and (4), and in failing to make findings regarding whether claimant established a change in conditions pursuant to 20 C.F.R. §725.310. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance.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 into the Act 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Failure to prove any of these requisite elements compels a denial of benefits. *See Anderson, supra; Baumgartner, supra; Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Claimant first contends that he was denied the right to a full and fair hearing because he was not permitted to submit evidence in rebuttal to the Director's post-hearing submission of Dr. Ahluwalia's medical opinion and Dr. Sahillioglu's validation report. Claimant's Brief at 3-11. Upon addressing this issue in a letter dated March 22, 1996, the administrative law judge stated:

I have read with interest your faxed letter of March 19 noting your exception that is based on a mischaracterization of the record. At page 5 of the hearing transcript the claimant requested and was granted the opportunity to

²We affirm the administrative law judge's finding regarding the submission of claimant's memorandum brief and pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(c), and 718.204(c)(2), (3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

supply an equal number of chest x-ray rereadings. At page 11 I indicated that it looked like 60 days would be required post hearing for evidence to be submitted and then I inquired "Any other preliminary matter you wish to bring to my attention?" The response was "Nothing more on behalf of the claimant..."

At the close of the hearing the claimant testified that he would have to make the appointment for the Director's Examination himself whereupon I asked if there was anything further and nothing further was said with respect to post hearing submissions.

It was not until mid-November that the Claimant, in effect, requested that the record be reopened. This was opposed by the Director and, hence, I made my ruling on February 26, 1996, after reviewing the hearing transcript. If the Claimant still wishes to reopen the record the only available means that I can think of is for a remand to the District Director for further evidence gathering.

Letter of March 22, 1996.

It is within the administrative law judge's discretion to reopen the record for the submission of evidence. 20 C.F.R. §725.456(e); *see Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Toler v. Associated Coal Co.*, 12 BLR 1-49 (1989); *Borgeson v. Kaiser Steel Coal Co.*, 12 BLR 1-169 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *White v. Director, OWCP*, 7 BLR 1-348, 1-351. In this case, the record indicates that claimant was aware of the Director's intention to submit Dr. Ahluwalia's report post-hearing and was given an opportunity to request permission to submit rebuttal to that report. Because claimant did not request to submit post-hearing rebuttal evidence, we hold that the administrative law judge permissibly refused to reopen the record for the submission of claimant's rebuttal evidence. *See Lynn, supra; Toler, supra; Clark, supra.*

Claimant also contends that the Director was not given permission to submit Dr. Sahillioglu's report post-hearing. Claimant's Brief at 5. We disagree. At the hearing, the administrative law judge provisionally admitted Claimant's Exhibits 1-7 because it appeared that they were exchanged in violation of the twenty day rule. Hearing Transcript at 6-8. In his letter of February 26, 1996, the administrative law judge properly stated that because the evidence was exchanged in violation of the twenty day rule, the Director had a right to submit rebuttal to this evidence and that claimant would not have a right to rebut the rebuttal provided by the Director. Section 725.456(b)(3); *see Baggett v. Island Creek Coal Co.*, 6 BLR 1-1311 (1984); *Horn v. Jewell Ridge Coal Corp.*, 6 BLR 1-933 (1984). Thus, we reject this contention.

Claimant next contends that the administrative law judge erred in failing to specifically weigh the pulmonary function study evidence at 718.204(c)(1). Claimant's Brief at 12-15. While the administrative law judge does not specifically weigh all of the pulmonary function study evidence, this error is harmless because the record contains only one qualifying pulmonary function study which was found to be invalid by Dr. Sahillioglu. Claimant's Exhibit 7; Director's Exhibit 44. The administrative law judge permissibly found Dr. Sahillioglu's invalidation study to be credible

and corroborated by the results of the pulmonary function study performed by Dr. Ahluwalia. Decision and Order at 5. *See Tedesco v. Director, OWCP*, 18 BLR 1-103, 1-106 (1994); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Thus, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(1).

Claimant also contends that the administrative law judge erred in weighing the opinions of Drs. Karlavage, Kraynak and Ahluwalia. Claimant's Brief at 16-19. Drs. Karlavage and Kraynak opined that claimant suffers from total respiratory disability, while Dr. Ahluwalia opined that claimant has no pulmonary impairment. Director's Exhibits 8, 17, 32, 38; Claimant's Exhibits 3, 11. The administrative law judge permissibly assigned greater weight to Dr. Ahluwalia's opinion because of his superior credentials. Decision and Order at 6; Director's Exhibit 42; Claimant's Exhibit 1; *Clark, supra*; *Lafferty, supra*; *Dillon v. Peabody Coal Co.*; 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(4).

Claimant also contends that the administrative law judge failed to make findings with respect to whether a change in conditions was established pursuant to Section 725.310. Claimant's Brief at 19. This contention lacks merit. The administrative law judge, in the instant case, was fully aware of the modification issue. Decision and Order at 2, 6. The administrative law judge initially noted that claimant specifically waived the mistake of fact inquiry. Hearing Transcript at 9; Decision and Order at 2. Thus, the only available means to establish modification was to show a change in conditions. *See* 20 C.F.R. §725.310. The administrative law judge properly considered the newly submitted evidence in conjunction with the prior evidence and concluded that it was insufficient to establish total disability. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Because the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204 is supported by substantial evidence, a remand is not required for further discussion of whether a change in conditions was established. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge