

BRB No. 97-0266 BLA

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

Appeal of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

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

John W. Walters (Jackson & Kelly), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (95-BLA-1811) of Administrative Law Judge Vivian Schreter-Murray 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). Initially, Administrative Law Judge John H. Bedford credited claimant with forty-two years of coal mine employment and awarded benefits. Director's Exhibit 42. Pursuant to employer's appeal, the Board vacated Judge Bedford's findings for reasons that are unrelated to this appeal and remanded the case for further consideration. *Stepp v. Westmoreland Coal Co.*, BRB No. 89-1064 BLA (Jan. 28, 1991)(unpub.); Director's Exhibit 69. On remand, Administrative Law Judge Ralph A. Romano denied benefits, Director's Exhibit 76, and on appeal, the Board affirmed the denial as supported by substantial evidence. *Stepp v. Westmoreland Coal Co.*, BRB Nos. 92-2010 BLA/A (Aug.

30, 1993)(unpub.); Director's Exhibit 90.

Claimant timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional evidence. Director's Exhibit 94. Judge Schreter-Murray denied modification based on her findings that the medical evidence of record failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Accordingly, she denied benefits.

On appeal, claimant contends that the administrative law judge erred by crediting certain medical opinions which, claimant argues, are hostile to the Act. Claimant further asserts that the administrative law judge's finding regarding claimant's smoking history does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); see also *Director, OWCP v. Congleton*, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984), and contends that the administrative law judge improperly excluded claimant's testimony when she considered the exertional requirements of his coal mine employment. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.<sup>1</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

Pursuant to Section 718.202(a)(4), claimant, citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), contends that the opinions submitted by employer are hostile to the Act and merit no weight because they are based on the erroneous assumption that obstructive disorders cannot be caused by coal mine employment. Claimant's Brief at 7. Contrary to claimant's contention, none of the the physicians whose opinions were credited by the administrative law judge assumed that coal mine employment cannot cause obstructive disorders such as claimant's chronic obstructive pulmonary disease with emphysema. See *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth, supra*. Rather, they noted the purely obstructive nature of claimant's respiratory impairment and opined that he would likely show some restriction on pulmonary function testing if coal dust exposure were a factor in

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<sup>1</sup> The administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1) is affirmed as unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

his chronic obstructive pulmonary disease, which they attributed instead to his lengthy smoking history. Director's Exhibits 3, 97; Employer's Exhibits 3-5, 8, 9, 11, 14-16, 18. Moreover, the physicians cited several additional factors in support of their opinions, including negative chest x-rays, negative physical findings, atypical blood gas study results, and claimant's smoking history. *Id.* Therefore, we reject claimant's contention.

Claimant next asserts that the administrative law judge's finding regarding the length of his smoking history does not comply with the APA and that therefore, one of the administrative law judge's bases for weighing the medical opinions is invalid. Claimant's Brief at 3-4. The administrative law judge discussed at length the various smoking histories contained in the record. Decision and Order at 3. The administrative law judge accurately noted claimant's testimony that he began smoking at age nine and quit in either 1986 or '87, smoking two to three packs per day at times. [1988] Hearing Transcript at 44-48; [1996] Hearing Transcript at 39-40. The administrative law judge afforded special consideration to the seventy-pack-year history recorded by Dr. Robinette, claimant's treating physician, Director's Exhibit 28, and reasonably concluded that, although the smoking history that claimant related to different physicians varied, "review of the entire record leaves no doubt that [claimant] was an extraordinarily heavy smoker, for the better part of 55 years." Decision and Order at 3. Contrary to claimant's contention, the administrative law judge's analysis meets the requirements of the APA because she considered all of the relevant evidence and adequately explained her finding that the record considered as a whole indicates that heavy smoking occurred over approximately fifty-five years. The administrative law judge's finding comports with claimant's testimony and the smoking histories recorded by many of the examining physicians and reviewed by the consulting physicians.<sup>2</sup> Therefore, we reject claimant's contention, and we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

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<sup>2</sup> As mentioned, Dr. Robinette recorded a history of seventy pack-years. Director's Exhibit 28. Dr. Dahhan recorded a history of seventy-five pack-years. Director's Exhibit 97. Dr. Paranthaman took a history of one pack per day for fifty years. Director's Exhibit 101. Dr. Jarboe commented that the record "documented [a] history of very heavy cigarette smoking." Employer's Exhibit 4. Dr. Kress referred to a "long, intense history of cigarette abuse." Director's Exhibit 33. Dr. Dahhan described a "lengthy smoking history." Director's Exhibit 97.

Pursuant to Section 718.204(c)(4), claimant contends that in considering whether claimant could perform his usual coal mine employment, the administrative law judge improperly “excluded” claimant's testimony regarding certain physical requirements of his job. Claimant's Brief at 4. This contention lacks merit. The administrative law judge discussed fully the relevant evidence, including claimant's testimony, in determining that claimant's job as a transloader operator was primarily sedentary but required the additional light duty of hosing down the loading area.<sup>3</sup> Decision and Order at 2-3. Contrary to claimant's contention, the administrative law judge considered claimant's testimony that his job also required him to shovel spilled coal, but found the credibility of this testimony diminished because claimant had not described this duty on the coal mine employment description form that he submitted with his claim. Director's Exhibit 5. Because the administrative law judge considered claimant's testimony, and the Board is not empowered to reweigh the evidence, see *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), or interfere with credibility determinations unless they are inherently incredible or patently unreasonable, see *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 718.204(c)(4). Inasmuch as claimant alleges no further error by the administrative law judge, we affirm the denial of modification 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>3</sup> Claimant indicated that his job as a transloader operator primarily required him to sit at a control panel in an enclosed building, where he would push buttons and manipulate levers used to control the automatic loading of railroad cars with coal. Director's Exhibit 5; [1988] Hearing Transcript at 27-28; [1996] Hearing Transcript at 21-22, 37-39. Claimant further indicated that he used a water hose to wash down the area. Director's Exhibit 5.

Accordingly, the administrative law judge's Decision and Order 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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REGINA C. McGRANERY  
Administrative Appeals Judge