

BRB No. 02-0218 BLA

KENNETH M. HUBBARD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CLINCHFIELD COAL COMPANY)	DATE ISSUED:
)	
Employer-Respondent)	
)	
and)	
)	
ACORDIA EMPLOYERS SERVICES)	
CORPORATION)	
)	
Carrier)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Daniel Sachs (Capital Law Center, P.C.), Arlington, Virginia, for claimant.

Timothy W. Gresham, H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (00-BLA-1058) of Administrative Law Judge Mollie W. Neal 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).¹ In this request for modification,² the administrative law judge accepted employer's stipulations to twenty-six years of coal mine employment and a totally disabling respiratory impairment, but, considering the newly submitted evidence along with evidence previously submitted, found that claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. The administrative law judge, therefore, denied claimant's request for modification and denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to credit the opinions of Dr. Smiddy, claimant's treating physician, that claimant was totally disabled due to pneumoconiosis. Employer responds, urging affirmance of the Decision and

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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Claimant filed the instant claim on May 10, 1996. Director's Exhibit 1. The claim was initially granted by the Office of Workers' Compensation Programs on November 5, 1996. Director's Exhibit 25. Employer appealed and the case was transferred to the Office of Administrative Law Judges for a hearing on January 15, 1997. Director's Exhibit 37. By decision dated December 2, 1997, Administrative Law Judge Thomas M. Burke denied benefits, finding that claimant failed to establish the presence of pneumoconiosis or that he was totally disabled by pneumoconiosis. Director's Exhibit 57. Claimant appealed, but the Board affirmed the denial of benefits in *Hubbard v. Clinchfield Coal Co.*, BRB No. 98-0422 BLA (April 26, 1999)(unpub.). Claimant requested modification on April 5, 2000. Director's Exhibit 71.

Order Denying Benefits of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), is not participating in this appeal.

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. See 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*).

Pursuant to Section 725.310 (2000), any party may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. *Kott v. Director, OWCP*, 17 BLR 1-9 (1992). Further, if a claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus, erroneously denied the claim, the administrative law judge has the authority, without more to modify the denial of benefits. *Jessee v. Director, OWCP*, 5 F.3d 723, BLR 2-26 (4th Cir. 1993).

Claimant asserts that the administrative law judge erred in failing to consider the newly submitted report of Dr. Smiddy in conjunction with his previously submitted reports, to find that claimant was totally disabled. Contrary to claimant's assertion, the administrative law judge properly considered all of Dr. Smiddy's reports together, Decision and Order at 6, before finding that Dr. Smiddy's reports were entitled to less weight than the contrary reports from Dr. Castle because they were "not as thorough and complete in their discussion of the findings on physical examination and laboratory testing as the reports of Dr. Castle." Decision and Order at 11; Claimant's Exhibit 1; Director's Exhibits 71, 73. This was rational. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Likewise, on the issue of disability causation the administrative law judge also rationally found Dr. Smiddy's opinion was voiced "in terms of brief statements in his letters and reports, without providing adequate reasons or the findings that form the basis for his opinion," Decision and Order at 14, in contrast to Dr. Castle's opinion which was better detailed and supported by the evidence of

record. *Hicks, supra; Underwood, supra; Clark, supra.*

Claimant also argues that the administrative law judge erred in not according Dr. Smiddy's opinion greater weight pursuant to 20 C.F.R. §718.104(d) which requires the administrative law judge to accept, under certain conditions, the opinion of the treating physician as substantial evidence and to give it controlling weight. Because Dr. Smiddy's most recent opinion is dated February 22, 2001, it is governed by 20 C.F.R. §718.104(d). *See* 20 C.F.R. §718.101(b). Section 718.104(d) states in pertinent part that:

In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence, and the record as a whole. 20 C.F.R. §718.104(d)(5).

In this case, the administrative law judge properly considered the weight to be accorded to Dr. Smiddy's opinion, but found insufficient discussion of the reasons or findings which form the basis for his conclusions. Therefore, having found Dr. Smiddy's February 22, 2001 opinion unreasoned and undocumented, the administrative law judge properly found that it was not entitled to greater weight based on Dr. Smiddy's status as a treating physician at Section 718.104(d)(5). Contrary to claimant's argument, that the administrative law judge did not provide adequate grounds for discrediting Dr. Smiddy's report, the administrative law judge found that Dr. Smiddy did not provide any report "related to his on-going treatment of claimant nor does he provide findings related to his unique perspective as claimant's treating physician which supports his conclusory statements." Decision and Order at 11; 20 C.F.R. §718.104(d); *see Hicks, supra.*

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge