

BRB No. 98-1151 BLA

PAUL SALVATORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SILVERBROOK ANTHRACITE, INCORPORATED	)	
	)	
and	)	
	)	
INSERVCO INSURANCE COMPANY	)	
	)	
Employer/Carrier- Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: <u>8/20/99</u>
	)	
Party-in-Interest	)	DECISION and ORDER

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

Thomas S. Cometa, Kingston, Pennsylvania, for claimant.

Paul K. Paterson (Mascelli & Paterson), Scranton, Pennsylvania, for employer/carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (97-BLA-1717) of Administrative Law Judge Ainsworth H. Brown 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 is before the Board for the third time. In the Decision and Order issued on April 22, 1991, the administrative law judge

found that claimant established 26.9 years of coal mine employment, and based on the filing date applied the regulations found at 20 C.F.R. Part 718. The administrative law judge also found that claimant established pneumoconiosis arising from coal mine employment at 20 C.F.R. §§718.202(a) and 718.203(b), but found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Director's Exhibit 35. Claimant appealed, and in *Salvatore v. Silverbrook Anthracite, Inc.*, BRB No. 91-1310 BLA (Apr. 9, 1992)(unpub.), the Board affirmed the denial. Director's Exhibit 43. On February 22, 1993, claimant filed a request for modification. Director's Exhibit 48. In a Decision and Order issued on March 14, 1995, the administrative law judge found that claimant failed to establish total respiratory disability and denied claimant's request for modification. Director's Exhibit 101. Claimant appealed, and in *Salvatore v. Silverbrook Anthracite, Inc.*, BRB No. 95-1290 BLA (Nov. 28, 1995)(unpub.), the Board affirmed the denial. Director's Exhibit 112. Claimant filed another request for modification on November 27, 1996, Director's Exhibit 113, which the administrative law judge denied on March 5, 1997. In his Decision and Order, the administrative law judge found the evidence insufficient to establish a change in conditions or a mistake in fact and denied modification. Claimant appeals, contending that the administrative law judge erred in failing to find the newly submitted evidence establishes total disability due to pneumoconiosis at 20 C.F.R. §718.204(c)(4).<sup>1</sup> Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and 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*

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<sup>1</sup>Claimant concedes that the administrative law judge committed no error in failing to find total disability at Section 718.204(c)(1)-(3), a finding which we affirm. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Additionally, we affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact as unchallenged on appeal. *Skrack, supra*.

*v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant appeals, contending that the administrative law judge erred in failing to credit the medical opinions of Drs. Manganiello and Aquilina at Section 718.204(c)(4). The newly submitted evidence consists of medical opinions from four physicians. Dr. Manganiello determined that claimant is totally and permanently disabled as a result of anthracosilicosis. Claimant's Exhibit 1; Director's Exhibit 11. Dr. Aquilina determined that claimant is totally disabled due to pneumoconiosis. Claimant's Exhibit 2; Director's Exhibit 115. Dr. Levinson, on the other hand, found no significant pulmonary impairment from claimant's coal mine employment or any other cause. Responsible Operator Exhibits 1, 4. Dr. Spagnolo found no reliable objective evidence that claimant has a totally disabling respiratory impairment. Director's Exhibit 121.

The administrative law judge permissibly accorded greater weight to the opinions of Drs. Levinson and Spagnolo, who are certified pulmonary experts, as their credentials are superior to those of Drs. Manganiello and Aquilina.<sup>2</sup> Decision and Order at 4; *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987). In addition, the administrative law judge permissibly credited the opinion of Dr. Levinson for three reasons: his opinion regarding the validity of the pulmonary function studies is unrefuted; he found the physical examination to be normal, and he provided a cogent discussion. *See generally Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994). Finally, the administrative law judge permissibly gave lesser weight to the opinions of Drs. Manganiello and Aquilina based on their lesser qualifications, and because the report of Dr. Levinson was better supported by the objective studies and was better explained. *See Carson, supra; Scott, supra; Martinez, supra.*

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<sup>2</sup> The administrative law judge noted that Drs. Levinson and Spagnolo are certified pulmonary experts and that Dr. Manganiello was simply a licensed physician. The administrative law judge also noted that Dr. Aquilina's certification was in anesthesia. Decision and Order at 4.

Claimant contends that the Dr. Spagnolo's opinion is "incomplete" since the administrative law judge found Dr. Spagnolo's assessment related only to part of the current record, and that the administrative law judge therefore erred in finding his opinion supportive of Dr. Levinson. *See* Decision and Order at 4. We reject this contention, as the administrative law judge permissibly relied upon Dr. Spagnolo's opinion as additional support for Dr. Levinson's opinion, even though he found that Dr. Spagnolo's findings related to only part of the record. *See generally Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Claimant's contention that the administrative law judge erred in discrediting the medical opinions of Drs. Aquilina and Manganiello because they relied upon nonqualifying objective tests is without merit. Rather, the administrative law judge permissibly found that Dr. Levinson provided a more cogent explanation of his findings. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(en banc). We further reject claimant's contention that the administrative law judge should have accorded greater weight to the treating physicians, Drs. Aquilina and Manganiello, as the administrative law judge is not required to do so. *See Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993). Claimant is asking the Board to reweigh the evidence, which we are not empowered to do. *See Bethenergy Mines, Inc. v. Director, OWCP [Vrobel]*, 39 F.3d 458, 19 BLR 2-95 (3d Cir. 1994); *Lango, supra*. Finally, claimant argues that the administrative law judge erred in implying that the opinions of Drs. Aquilina and Manganiello were based solely on claimant's subjective complaints pursuant to Section 718.204(d)(2). We reject this argument, as the administrative law judge did not consider this regulation as a basis for his decision.<sup>3</sup>

We therefore affirm the administrative law judge's weighing of the medical opinions at Section 718.204(c)(4), and therefore affirm his finding that claimant failed to establish total disability at Section 718.204(c). As claimant failed to establish total disability and therefore failed to establish a change in conditions or a mistake in a determination of fact, we affirm the administrative law judge's denial of modification, and subsequent denial of benefits. 20 C.F.R. §725.310.

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

SO ORDERED.

JAMES F. BROWN  
Administrative Appeals Judge

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<sup>3</sup> Section 718.204(d)(2) provides that a finding of total disability shall not be made solely on the miner's statements or testimony. 20 C.F.R. §718.204(d)(2).

REGINA C. McGRANERY  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge