

BRB No. 01-0361 BLA

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

Appeal of the Decision and Order on Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Sarah M. Hurley (Eugene Scalia, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (97-BLA-01180) of Administrative Law Judge Paul H. Teitler denying modification and 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 This case has been before the Board previously.² In the last decision, the administrative law judge noted that the claim was a

¹The 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, 722, 725 and 726 (2001).

²The procedural history of this case was set forth in detail in the Board's prior

modification request and found nineteen years of coal mine employment, based upon a stipulation by the parties. Decision and Order dated October 29, 1998 at 2-3. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that claimant failed to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204 (2000). Decision and Order dated October 29, 1998 at 4-12. The administrative law judge therefore concluded that claimant failed to establish modification pursuant to 20 C.F.R. §725.310 (2000). Decision and Order dated October 29, 1998 at 12. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(c)(1)-(3). The Board vacated, however, the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(c)(4) and remanded the case for further consideration. *Marcavage v. Director, OWCP*, BRB No. 99-0266 BLA (June 27, 2000)(unpublished).

On remand, the administrative law judge concluded that claimant established the existence of pneumoconiosis based upon the newly submitted x-ray evidence of record. Decision and Order on Remand at 4. The administrative law judge also considered the medical opinions of record and concluded that they were insufficient to establish that claimant was totally disabled due to pneumoconiosis and thus, claimant failed to establish a change in conditions. Decision and Order on Remand at 4-6. The administrative law judge also concluded, based upon his review of the prior evidence of record, that there was no mistake of fact in the earlier decisions. Decision and Order on Remand at 7. Accordingly, modification and benefits were denied. In the instant appeal, claimant contends that the administrative law judge mischaracterized his hearing testimony and the opinion of Dr. Ahluwalia. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge's denial of benefits is supported by substantial evidence.³

decision in *Marcavage v. Director, OWCP*, BRB No. 99-0266 BLA (June 27, 2000)(unpublished), which is incorporated herein by reference.

³The administrative law judge's determination that there was no mistake of fact in the prior decision as well as his finding that the x-ray evidence of record established the existence of pneumoconiosis in this case are affirmed as unchallenged on appeal. *Skrack v.*

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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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 on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Claimant argues that the administrative law judge erred in his characterization of both claimant's testimony of record and the opinion of Dr. Ahluwalia. Claimant's Brief at 2-3. We agree. Initially, claimant contends that the administrative law judge's summary of claimant's hearing testimony is inaccurate. Claimant's Brief at 2-3. In summarizing claimant's June 17, 1993 hearing testimony, the administrative law judge found that claimant was hospitalized for a skull fracture in 1980, for a seizure disorder in 1991 and 1995, for arrhythmia in 1984 and that his medical history further included asthma, a hernia operation and skin cancer being removed in 1996. Decision and Order on Remand at 5. A review of the June 17, 1993 hearing transcript, however, indicates that claimant testified that he was hospitalized for cardiac arrhythmia in 1980, not 1984, and that he did not testify to any of the remaining medical history set forth by the administrative law judge. Director's Exhibit 53.

Claimant further contends that the administrative law judge erred in his characterization of the opinion of Dr. Ahluwalia. Claimant's Brief at 3. We agree. The administrative law judge noted that claimant admitted to Dr. Ahluwalia that he had smoked and that the physician stated that claimant's smoking history was equivalent to 44 packs per year. Decision and Order on Remand at 5. The record, however, does not support the findings of the administrative law judge with respect to the opinion of Dr. Ahluwalia. Rather,

Island Creek Coal Co., 6 BLR 1-710 (1983).

the record reflects that claimant testified that he was a non-smoker and that Dr. Ahluwalia clearly stated in his medical opinion that claimant never smoked. Director's Exhibits 13, 53. Consequently, the administrative law judge has mischaracterized the evidence in the record before him. Decision and Order on Remand at 5-6; Director's Exhibits 13, 53.

Although we agree with claimant that the administrative law judge's evidentiary analysis does not accord with the above cited evidence of record, a remand is not required in the instant case. Claimant, in his brief, has failed to specifically set forth or explain how the administrative law judge's failure to properly state claimant's testimony and smoking history, as set forth by Dr. Ahluwalia,⁴ has affected the outcome of this case.⁵ See 20 C.F.R. §802.301(a) (2000); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). In the instant case, other than asserting that the administrative law judge erred in setting forth the hearing testimony and the information relied upon by Dr. Ahluwalia, see Claimant's Brief at 2-3, claimant has failed to identify any errors made by the administrative law judge in reliance upon this information or in his ultimate finding that Dr. Rashid provided a thorough evaluation of claimant and that the objective testing supported the physician's conclusion that claimant has a coronary condition and that he is not disabled due to pneumoconiosis. Thus, as claimant's counsel has failed to adequately raise or brief any issue arising from the administrative law judge's weighing of the medical opinion evidence, particularly the evidence supportive of claimant's burden of proof on remand, the Board has no basis upon which to review the decision denying benefits.⁶ Consequently, we

⁴Dr. Ahluwalia, examined the miner on April 30, 1992, and noted that claimant never smoked. The physician opined that claimant had a normal physical examination with arrhythmia by history and that claimant suffered from no significant respiratory impairment. Director's Exhibit 13.

⁵Although the administrative law judge discounted Dr. Kruk's opinion because claimant's history is not complete, any error is harmless as the administrative law judge properly discounted Dr. Kruk's opinion because he relied on an invalid pulmonary function study and performed no other testing, and these findings are not challenged on appeal. *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Skrack, supra*; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Claimant's Exhibit 13; Decision and Order on Remand at 5.

⁶In the Board's prior decision, dated June 27, 2000, the Board affirmed the administrative law judge's rejection of the opinion of Dr. Kraynak as the physician relied upon a pulmonary function study that was found to be unreliable and Dr. Kraynak provided no other basis for his finding. *Marcavage, supra*.

affirm the administrative law judge's finding that the evidence of record is insufficient to establish entitlement to benefits as it is supported by the record and is in accordance with law. *See Sarf, supra; Fish, supra*. Inasmuch as claimant has failed to establish entitlement, modification of the prior decision must be denied pursuant to 20 C.F.R. §725.310 (2000) and the denial of benefits is affirmed. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge