BRB Nos. 04-0382 BLA
and 04-0382 BLA-A

ROBERT L. BROWNING	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 02/17/2005
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis and Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Dorothea J. Clark and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (02-BLA-0026) of Administrative Law Judge Gerald M. Tierney 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] Claimant filed this claim on March 4, 1996. Director's Exhibit 1. The district director made an initial finding of entitlement, and employer requested a hearing. Director's Exhibit 2. Administrative Law Judge Clement Kennington denied the claim on July 17, 1998, based on claimant's failure to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Director's Exhibit 4. Claimant appealed, and the Board affirmed Judge Kennington's denial of benefits, in *Browning v. Island Creek Coal Co.*, BRB No. 98-1439 BLA (Aug. 6, 1999)(unpub.), Director's Exhibit 6. On August 4, 2000, claimant timely requested modification of the prior denial of benefits pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 88. Considering all of the evidence of record, the administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), but also found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(a)(4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant asserts that the administrative law judge failed to analyze the x-ray and medical opinion evidence at Section 718.202(a)(1) and (a)(4), respectively. Claimant specifically argues that the administrative law judge failed to resolve the conflicts in the evidence or to explain his findings. Claimant also challenges the administrative law judge's finding on disability causation at Section 718.204(c). Employer responds, and seeks affirmance of the decision below. Claimant has filed a reply brief. Employer has also filed a cross-appeal in which it challenges the administrative law judge's finding that claimant established total respiratory or pulmonary disability at 20 C.F.R. §718.204(b). Employer argues that the administrative law judge erred in finding that employer's experts did not consider the exertional requirements of claimant's usual coal mine employment when expressing their opinions. Claimant responds to employer's cross-appeal, and argues that while the administrative law judge's finding at Section 718.204(b)(2)(iv) is correct, the Board should direct the administrative law judge on remand to clarify his weighing of the opinions of Drs. Morgan and Crisalli. The Director, Office of Workers' Compensation Programs, has not filed a brief in either 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

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[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, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

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 (2000). Failure to establish any one of these elements precludes a finding of 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), claimant may, within a year of a final order, request modification of a denial of benefits. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Further, if a claimant avers generally, or simply alleges, that the administrative law judge improperly found or mistakenly decided the ultimate fact of entitlement, and thus erroneously denied the claim, the administrative law judge has the authority, without more (*i.e.*, there is no need for a smoking gun factual error, changed conditions or startling new evidence), to modify the denial of benefits. *Id.*

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). In considering whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge found that claimant had not met his burden of proof.[2] Decision and Order at 4. Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). The administrative law judge in the

[2] The record contains seventy-one interpretations of twelve x-rays. Four x-rays, dated February 5, 1979, March 30, 1981, February 14, 1992 and March 28, 1995, were read only as negative. Director's Exhibit 35. The remaining x-rays dated March 29, 1996, September 25, 1996, February 25, 1997, June 23, 1997, June 27, 1997, November 8, 1999, July 11, 2000 and October 11, 2000, were read as both positive (seventeen times), negative (forty-four times), and unreadable (three times). Director's Exhibits 27, 28, 37, 38, 52, 54, 56, 58 - 60, 66, 67, 88, 97 - 99, 106 - 109, 111 – 114; Claimant's Exhibit 1; Employer's Exhibits 2, 3, 6, 7.

instant case permissibly found the x-ray evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant next argues that the administrative law judge must consider the "party affiliation" of the medical experts, noting that all of the negative x-ray readings were submitted by employer, while the positive x-ray readings were submitted by both claimant and the Department of Labor. However, unless the opinions of the physicians retained by the parties are properly held to be biased, based on evidence in the record, the administrative law judge may neither credit nor discredit any opinion for this reason alone. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Based on the foregoing, we affirm the administrative law judge's finding at Section 718.202(a)(1).

Regarding the medical opinion evidence at Section 718.202(a)(4), claimant contends that the administrative law judge again failed to resolve the conflicting evidence. At Section 718.202(a)(4), the administrative law judge discussed the experts' opinions and credentials, and then stated:

> What the physician opinion evidence demonstrates is that the issue of whether Claimant's respiratory defect arose out of coal mine employment is one upon which the pulmonary experts differ. I do not find the opinions of Drs. Cohen and Hinkamp more persuasive than the opinions of Drs. Crisalli, Morgan, Branscomb, and Rosenberg. It is claimant who carries the burden of proof. Claimant has not met his burden in this case.

Decision and Order at 8. The administrative law judge thereby permissibly found that the opinions by Drs. Cohen and Hinkamp were not more persuasive than the contrary opinions by physicians who opined that claimant's respiratory problems were not due to coal dust exposure. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge provided permissible reasons for his weighing of the medical opinions, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as it is supported by substantial evidence and is in accordance with law. Based on the foregoing, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Finally, in its cross-appeal, employer alleges error in the administrative law judge's finding that claimant established total respiratory or pulmonary disability at Section 718.204(b)(2)(iv). Because we affirm the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis, an essential element of entitlement, we need not address this issue. *See Trent,* 11 BLR at 1-27; *Perry,* 9 BLR at 1-5.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge