

BRB No. 88-0804 BLA

SHERMAN HASSELL KEEL	)	
	)	
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 of Robert L. Cox, Administrative Law Judge, United States Department of Labor.

Gary J. Sergent (O'Hara, Ruberg and Taylor), Covington, Kentucky, for claimant.

Paul L. Frieden (Judith E. Kramer, Acting 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 and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.\*

PER CURIAM:

Claimant appeals the Decision and Order (84-BLA-0073) of Administrative Law Judge Robert L. Cox 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*

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

*seq.* (the Act). The administrative law judge credited claimant

with six years, seven months and forty days of qualifying coal mine employment, and

adjudicated this claim, filed on April 14, 1976, pursuant to the regulations at 20

C.F.R. Part 410, Subpart D and

20 C.F.R. §410.490. The administrative law judge found that the x-ray evidence of

record established the existence of pneumoconiosis pursuant to 20 C.F.R.

§§410.414(a)(1), 410.428(a) and 410.490(b)(1)(i), but that claimant failed to

establish that his pneumoconiosis arose out of coal mine employment pursuant to 20

C.F.R. §§410.416(b) and 410.490(b)(2). Accordingly, benefits were denied. On

appeal, claimant challenges the administrative law judge's findings pursuant to

Sections 410.416(b) and 410.490(b)(2). The Director, Office of Workers'

Compensation Programs (the Director), responds,<sup>1</sup> challenging the administrative

law judge's weighing of the x-ray evidence at Sections 410.414(a)(1), 410.428(a)

---

<sup>1</sup> The Director has filed a Motion to Remand and a motion for an extension of time to file a response brief in this case. Despite claimant's objections, the Board grants the Director's motion for an extension of time, accepts the Director's Motion to Remand as his response brief, and herein decides this case on its merits.

and 410.490(b)(1)(i), as well as his findings regarding etiology at Sections 410.416(b) and 410.490(b)(2).<sup>2</sup>

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

---

<sup>2</sup> We note that, subsequent to the issuance of the administrative law judge's Decision and Order, the United States Supreme Court issued Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991), and the United States Court of Appeals for the Sixth Circuit, wherein appellate jurisdiction of this claim lies, issued *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). In light of said decisions, inasmuch as the miner established less than ten years of coal mine employment and the instant claim was filed prior to March 31, 1980, but adjudicated after that date, this claim is properly considered pursuant to the regulations at 20 C.F.R. §410.490 and 20 C.F.R. Part 718, and not Part 410, Subpart D. *Pauley, supra; Knuckles, supra; see also Phipps v. Director, OWCP*, 17 BLR 1-39 (1992)(en banc with Smith, J., concurring and McGranery, J., concurring and dissenting).

U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Both claimant and the Director contend that the administrative law judge erred in finding the evidence insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 410.490(b)(2). We disagree. The administrative law judge accurately determined that out of eight examining physicians, only Drs. Moore and Clarke opined that claimant's pneumoconiosis arose out of coal mine employment; that a wide disparity existed between the smoking histories reported to each of the physicians; and that claimant's testimony did not clarify the extent of his smoking. Decision and Order at 8-10, 12, 13. Although the Director argues that smoking should not be recognized as a potential source of pneumoconiosis, and claimant argues that Drs. Moore and Clarke were aware that claimant smoked and still opined that his pneumoconiosis arose out of coal mine employment, the administrative law judge acted within his discretion as trier-of-fact in finding that since the evidence was unclear as to claimant's actual smoking history, the inaccurate histories reported to Drs. Moore and Clarke rendered their opinions unreliable on the issue of etiology. Decision and Order at 12, 13; see generally *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Gouge v. Director, OWCP*, 8 BLR 1-307 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106

(1984). Since the remaining medical opinions of record did not link claimant's pneumoconiosis or any respiratory impairment to his coal mine employment, we affirm the administrative law judge's finding that claimant failed to meet his evidentiary burden pursuant to Section 410.490(b)(2), as supported by substantial evidence.

Inasmuch as claimant has failed to establish the etiology of his pneumoconiosis, he is precluded from entitlement to benefits under the Act, see *Trent v. Director, OWCP*, 11 BLR 1-26 (1987), thus we need not address the Director's arguments regarding the administrative law judge's weighing of the x-ray evidence.

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

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

LEONARD N. LAWRENCE  
Administrative Law Judge