

BRB No. 02-0887 BLA

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

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

Rocco V. Valvano, Jr., Scranton, Pennsylvania, for claimant.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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 GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits on Remand (00-BLA-0841) of Administrative Law Judge Paul H. Teitler on a duplicate 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 is the second time that this duplicate claim is before the Board.² The Board previously affirmed as unchallenged the administrative law judge=s

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 codified at 20 C.F.R. Parts 718, 722, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

²The prior procedural history is set forth in the Board=s Decision and Order of May 9, 2002. *Cappellini v. Director, OWCP*, BRB No. 01-0674 BLA (May 9, 2002)

finding of eight and one-half years of coal mine, but vacated the administrative law judge's finding that the existence of pneumoconiosis was not established on the merits at 20 C.F.R. '718.202(a)(4). *Cappellini v. Director, OWCP*, BRB No. 01-0674 BLA (May 9, 2002) (unpublished). Specifically, the Board determined that the administrative law judge mischaracterized, and erred in discrediting, the opinions of Drs. Levinson and Sahillioglu. Accordingly, the Board remanded the case for reconsideration, and instructed the administrative law judge to determine first whether the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. '725.309 (2000) pursuant to *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). *Cappellini*, slip op. at 6. The Board stated that the previous claim was denied because claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a) and that his disability was not due to pneumoconiosis at 20 C.F.R. '718.204(c). *Id.*; Director's Exhibit 16.

On remand, the administrative law judge found that the new medical opinion evidence developed in connection with claimant's duplicate claim failed to establish the existence of pneumoconiosis and precluded a finding of a material change in conditions pursuant to Section 725.309 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's evaluation of the medical opinions of Drs. Sahillioglu and Levinson. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's denial of benefits.

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 into the Act by 30 U.S.C. '932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that on remand the administrative law judge failed to abide by the Board's instructions and simply reasserted his previous analysis, which was determined to be flawed. Claimant's Brief at 5. Claimant's contentions are without merit. Initially, we affirm the administrative law judge's finding that Dr. Sahillioglu's diagnosis of AP 1/0 pneumoconiosis was a mere restatement of an x-ray opinion, and therefore, could not establish the existence of pneumoconiosis under Section 718.202(a)(4) as unchallenged on appeal. Decision and Order-Denial of Benefits on Remand at 6; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); see *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993);

(unpublished).

Anderson v. Valley Camp Coal Co., 12 BLR 1-111, 1-113 (1989); Director=s Exhibit 6. Further, the administrative law judge reasonably found that the opinion of Dr. Sahillioglu lacked documentation to support a finding of pneumoconiosis. Decision and Order-Denial of Benefits on Remand at 6; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). The administrative law judge reconsidered the opinion and concluded that Dr. Sahillioglu=s statements that the pulmonary function study Amay suggest@ a mild degree of restrictive pulmonary disease if verified by volume determination, and that claimant=s pneumoconiosis Amay be related to various work that claimant has done@ could not establish Alegal@ pneumoconiosis as it was equivocal. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Director=s Exhibit 6. The administrative law judge also found that Dr. Sahillioglu failed to affirmatively link his diagnosis of mild restrictive lung disease to claimant=s coal mine employment. Decision and Order-Denial of Benefits on Remand at 6; *Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995).

In addition, the administrative law judge found that Dr. Levinson=s opinion was equivocal and flawed. Decision and Order-Denial of Benefits on Remand at 6-7. The administrative law judge found that in his October 22, 2000 report, Dr. Levinson stated that claimant had a mild obstructive impairment, while in his hearing testimony on December 11, 2000, he stated that claimant had a pulmonary restriction with no obstruction. Decision and Order-Denial of Benefits on Remand at 6; Claimant Exhibit 1; Hearing Transcript at 21. Claimant contends that Dr. Levinson=s report and testimony are not conflicting because pneumoconiosis may have both obstructive and restrictive components. Claimant is correct that the definition of legal pneumoconiosis includes any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment, *see* 20 C.F.R. ' 718.201(a)(2). The administrative law judge, however, found that Dr. Levinson did not explain why he first stated that claimant had a mild obstructive impairment, then changed his opinion stating that claimant had a pulmonary restriction with no obstruction. Claimant=s Exhibit 1; Hearing Transcript at 21. The administrative law judge therefore rationally found Dr. Levinson=s opinion inherently conflicting and insufficient to establish a material change in conditions. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

Claimant also argues that the administrative law judge erred in finding that Dr. Levinson=s opinion only established that claimant Amay be on a course to develop a respiratory impairment in the future,@ and asserts that the administrative law judge, without any medical foundation, Ainterjects Claimant=s weight as being the possible cause of a restrictive pulmonary impairment.@ Claimant=s Brief at 9. We disagree. The administrative law judge reviewed the pulmonary function studies relied on by Dr. Levinson and reasonably found that the physician had not logically explained how claimant=s

generally normal values indicated that claimant was suffering from a respiratory impairment. *Lango*, 104 F.3d 573, 21 BLR 2-12; *Director, OWCP v. Siwiec*, 894 F.2d 635, 639, 13 BLR 2-259 (3d Cir. 1990). We therefore affirm the administrative law judge's finding that Dr. Levinson's opinion is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4).

Inasmuch as the administrative law judge's finding at Section 718.202(a)(4) is rational and claimant did not challenge the administrative law judge's previous findings under Section 718.202(a)(1)-(3), we affirm the administrative law judge's finding that the newly submitted medical evidence of record failed to establish the existence of pneumoconiosis under Section 718.202(a), and thus claimant failed to establish a material change in conditions pursuant to Section 725.309(d) (2000). *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Swarrow*, 72 F.3d at 316, 20 BLR at 2-92; *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits on Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge