

BRB No. 98-0954 BLA

GILDO J. COASSOLO)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	Date Issued: <u>6/30/99</u>
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Thomas S. Cometa (Cometa and Cappellini), Kingston, Pennsylvania, for claimant.

Cathryn Celeste Helm (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (96-BLA-1402) of Administrative Law Judge Robert D. Kaplan 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). The administrative law judge found that claimant found that the parties stipulated to 13.89 years of coal mine employment, and based on the filing date of the duplicate claim, applied the regulations found at 20 C.F.R. Part 718. Hearing Transcript at 8, 22-23. The first claim was filed on November 14, 1984, which was denied by the administrative law judge on May 27, 1987.

Director's Exhibit 29. Claimant filed a duplicate claim on June 4, 1990, which was denied on November 16, 1992. Director's Exhibits 1, 50. Claimant appealed, and in *Coassolo v. Director, OWCP*, BRB No. 93-0715 BLA (Mar. 23, 1994)(unpub.), the vacated the administrative law judge's Decision and Order and remanded for further consideration at 20 C.F.R. §718.202(a), and additionally found that claimant established a material change in conditions at 20 C.F.R. §725.309, rendering the 1990 claim viable.

Director's Exhibit 56. On February 10, 1995, the administrative law judge again denied benefits, which the Board affirmed. Director's Exhibits 57, 60. On October 10, 1995, claimant filed a request for modification. The administrative law judge reviewed all the evidence at 20 C.F.R. §718.202(a), both old and new, pursuant to *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d 1997), and found no mistake in a determination of fact or a change in conditions pursuant to Section 725.309. Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in failing give greater weight to the opinions of Drs. Aquilina and Kuchemba at Section 718.202(a)(4).¹ The Director, Office of Workers'

¹We affirm the administrative law judge's finding that the evidence fails to

Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order.

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

establish a change in conditions at 20 C.F.R. §718.202(a)(1)-(3) as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Additionally, although the administrative law judge failed to make a *de novo* review of all the evidence of record to determine whether a mistake of fact occurred in the prior denial, we need not address this issue, as claimant failed to raise it.

Claimant contends that the administrative law judge erred in failing to accord greater weight to the opinions of Drs. Aquilina and Kuchemba pursuant to Section 718.202(a)(4). The evidence of record contains the opinions of three physicians. Dr. Talati found no pneumoconiosis, but diagnosed a severe obstructive lung disease.² Director's Exhibit 76; Decision and Order at 8. In addition, Dr. Kuchemba diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease. Director's Exhibit 65; Claimant's Exhibit 1. Dr. Aquilina diagnosed coal workers' pneumoconiosis causally related to his exposure to coal dust while employed in the mining industry. Director's Exhibit 53.

The administrative law judge accorded no weight to Dr. Kuchemba's opinion because he relied on the absence of any smoking history, whereas the administrative law judge found that claimant had a smoking history. Further, in his deposition, Dr. Kuchemba stated that a positive smoking history would play a role in his diagnosis, since "usually the number one cause of chronic obstructive disease is a significant tobacco exposure. Claimant's Exhibit 1 at 27. Although claimant contends that claimant's smoking history was minimal and sporadic, the record indicates that the miner's smoking history is in the range of none to twenty years, and the administrative

² The administrative law judge found that Dr. Talati is entitled to greater weight, as his opinion is reasoned and documented, a finding which claimant does not challenge. See *Skrack, supra*; Decision and Order at 8.

law judge reasonably found, as the trier of fact, that claimant had a smoking history.³ Decision and Order at 9; *see generally Seals v. Glen Coal Co.*, 19 BLR 1-80 (1995)(*en banc*)(Brown, J. concurring).⁴ As Dr. Kuchemba's premise was based on an inaccurate medical history, the administrative law judge permissibly found his opinion not entitled to any weight. *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994).

³ For example, at the 1986 hearing, claimant testified that he currently smokes one pack per month, and that he "cut down considerably" to that rate. Director's Exhibit 29 at 25-26.

⁴ Moreover, we note that the administrative law judge's finding of a smoking history is unchallenged by claimant on appeal. *See Skrack, supra*.

Similarly, we reject claimant's contention the administrative law judge erred in according little weight to Dr. Aquilina's opinion, as he failed to consider claimant's exposure to flour dust in the pizzeria, and failed to mention claimant's smoking history in his 1993 opinion.⁵ As his opinion omits relevant facts, the administrative law judge permissibly found Dr. Aquilina's opinion defective and accorded it little weight. Decision and Order at 10-11; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Moreover, as the Director notes, where the record establishes an alternative source of dust exposure, claimant has the burden of producing competent medical evidence ascribing the miner's pneumoconiosis to coal mine employment. *See Grant v. Director, OWCP*, 857 F.2d 1102 (6th Cir. 1988); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987). In this case, as claimant was exposed to both coal dust and flour dust, and the reports of Drs. Kuchemba and Aquilina fail to discuss these issues, the administrative law judge properly found them insufficient to establish the existence of pneumoconiosis. *See Grant, supra*; *Tucker, supra*.

The properly weighed all evidence together at Section 718.202(a), and found that

⁵ Claimant was exposed to flour dust for about thirty to forty years. 1997 Hearing Transcript at 9.

it fails to establish the existence of pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d 1997). The administrative law judge therefore properly found that claimant failed to establish a change in conditions established pursuant to Section 725.310, and we therefore affirm the administrative law judge's finding that claimant has not established entitlement to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge