BRB Nos. 05-0683 BLA
and 05-0683 BLA-A

BONITA ENGLE o/b/o JOSEPH A. WILK	)	
Claimant-Petitioner Cross-Respondent	)	
v.	)	
ZAKREWSKY COAL COMPANY	)	DATE ISSUED: 03/10/2006
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 – Denial of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

David B. Marateck (Makowski, Marateck, Konopka & Marateck), Shamokin, Pennsylvania, for claimant.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order – Denial of Benefits (04-BLA-5274) of Administrative Law Judge Ralph A. Romano with respect to 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] In his Decision and Order, the administrative law judge initially determined that employer is the properly designated responsible operator. The administrative law judge then credited the miner with at least twenty-seven years of coal mine employment and considered whether the latest application for benefits, filed on September 9, 1987, was a duplicate claim pursuant to 20 C.F.R. §725.309(d) (2000).[2]

The administrative law judge determined that, based upon employer's post-hearing concession that the miner had pneumoconiosis arising out of coal mine employment and was totally disabled, a material change in conditions was established. On the merits, the administrative law judge found that the evidence of record was insufficient to prove that pneumoconiosis was a substantially contributing cause of the miner's total disability under 20 C.F.R. §718.204(c). Specifically, the administrative law judge discredited the opinions of the physicians who found a causal connection between the miner's coal dust exposure and his totally disabling respiratory impairment because they relied upon an inaccurate smoking history. Accordingly, benefits were denied.

Claimant contends that as the miner died before he was able to testify about his smoking history at a formal hearing, a due process violation occurred due to the length of time that transpired between the filing of the miner's claim in 1987 and the formal hearing in 2004. Employer has responded and urges affirmance of the denial of benefits. In its cross-appeal, employer argues that the long delay in the processing of the claim violated its right to due process, as witnesses who could have testified as to the ownership of another putative responsible operator became unavailable. The Director, Office of

[1] Claimant is the daughter of the miner, Joseph A. Wilk. Mr. Wilk died on October 28, 2000. Claimant is pursuing Mr. Wilk's claim on behalf of his estate.

[2] The miner previously filed claims that were finally denied in 1979 and 1983. Director's Exhibits 38, 39. The amended version of 20 C.F.R. §725.309 does not apply in this case involving a duplicate claim that was pending on January 19, 2001, the effective date of the amended regulations. 20 C.F.R. §725.2(c).

Workers' Compensation Programs (the Director), has responded and urges the Board to reject claimant's and employer's due process arguments.[3]

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 applicable 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 pursuant to 20 C.F.R. Part 718, claimant must establish 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

When addressing the sole issue on the merits – whether the miner was totally disabled due to pneumoconiosis – the administrative law judge discredited the opinions in which Drs. Weber and Karlavage opined that pneumoconiosis was a contributing cause of the miner's totally disabling pulmonary impairment because the physicians relied upon a smoking history that understated the miner's use of cigarettes.[4] Decision and Order at 15; Director's Exhibit 11; Claimant's Exhibits 1, 3. The administrative law judge determined that the miner had smoked at least half a package of cigarettes per day for thirty-two years based upon Dr. Singzon's and Dr. Dittman's reports and Dr. Dittman's

[3] We affirm as unchallenged on appeal the administrative law judge's finding of a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] In a letter dated December 9, 2004, Dr. Weber stated that he treated the miner for four years and that the miner smoked "a few years as a young man." Claimant's Exhibit 3. Dr. Karlavage examined the miner at the request of the Department of Labor on October 19, 1987. On the Report of Physical Examination form, Dr. Karlavage checked a box indicating that the miner never smoked. Director's Exhibit 11. Dr. Karlavage determined in this report that the miner had pneumoconiosis but did not offer an opinion as to disability or disability causation. *Id*. In 1993, Dr. Karlavage reported that he had been the miner's treating physician for several years and that Mr. Karlavage "does not have any substantial smoking history. He has not used tobacco to any extent in his lifetime to my knowledge." Claimant's Exhibit 1. Dr. Karlavage indicated that the miner had pneumoconiosis caused by coal dust exposure and was totally disabled by it. *Id*.

observation of tar stains on the miner's hands.[5] Decision and Order at 15; Director's Exhibits 24, 38, 39, 58, 196. Claimant argues that the miner's right to due process was violated because the Director delayed the adjudication of this case so long that the miner died before he could testify at a formal hearing that his history of cigarette use was minimal and less than that relied upon by the administrative law judge to discredit the opinions of Drs. Weber and Karlavage.

We hold that claimant's contention is without merit. A party's right to due process is violated when that party is deprived of the opportunity to fully present its case. *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). Here, the miner had several opportunities to accurately describe his smoking history and the miner's statements were recorded and admitted into the record. The administrative law judge fulfilled his duty as fact-finder in weighing the differing accounts given by the miner and resolving the conflict between them. The administrative law judge's finding that the miner smoked at least half a pack of cigarettes per day for thirty-two years is rational and supported by substantial evidence in the form of the reports of Drs. Singzon and Dittman.[6] Thus, the administrative law judge acted within his discretion as fact-finder in

[5] Dr. Singzon stated in his report of a 1979 examination of the miner performed at the request of the Department of Labor (DOL) that the miner had smoked half a pack per day for thirty-two years. Director's Exhibit 38. Dr. Singzon examined the miner at DOL's request again in 1982 and recorded a smoking history of half a pack per day for thirty years. Director's Exhibit 39. In his first report, Dr. Singzon diagnosed chronic bronchitis related to smoking and "probably coal dust exposure." He did not offer an opinion as to the extent or cause of any impairment. Director's Exhibit 38. In his second report, Dr. Singzon diagnosed mild chronic bronchitis and attributed it solely to smoking. Director's Exhibit 39. Dr. Dittman indicated in a 1988 report that the miner, who was fifty-nine at the time of the examination, vacillated somewhat when relating his smoking history. The miner told Dr. Dittman that he had starting smoking at age fifteen and had quit when he was thirty-four or forty-five. He also stated that when he smoked, he smoked half a pack per day. Dr. Dittman observed that the miner's hands were stained with cigarette tar. Director's Exhibit 24. Dr. Dittman examined the miner again in 1991 and 1995 and indicated that he reported that he smoked a half pack per day between the ages of 9 and 20. Director's Exhibits 58, 196.

[6] Contrary to claimant's contention, the administrative law judge was not required to discredit the smoking history recorded by Dr. Dittman because the doctor did not indicate whether the miner smoked pipes or cigars in addition to cigarettes. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989)(*en banc*).

determining that the opinions of Drs. Weber and Karlavage were insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c), as they relied upon an inaccurate smoking history. *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

We affirm, therefore, the administrative law judge's finding that total disability due to pneumoconiosis was not proved at Section 718.204(c). Because we have affirmed the administrative law judge's finding that the evidence was insufficient to establish an essential element of entitlement, we must also affirm the denial of benefits. *Trent*, 11 BLR at 1-27. In light of our affirmance of the denial of benefits, we will not address employer's cross-appeal.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge