BRB Nos. 07-0206 BLA
and 07-0206 BLA-A

R.L.B.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 11/30/2007
	)	
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 on Remand Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Johnson (Jackson Kelly PLLC), Morgantown, West Virginia for employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand Denying Benefits (2002-BLA-0026) of Administrative Law Judge Richard A. Morgan on modification of 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). This case is on appeal to the Board for a second time. Pursuant to claimant's previous appeal, the Board, on reconsideration, vacated the administrative law judge's Decision and Order

denying benefits and remanded the case for further consideration. [*R.L.B.*] *v. Island Creek Coal Co.*, BRB Nos. 04-0382 BLA and 04-0382 BLA-A (Sept. 9, 2005) (recon. *en banc*) (Dolder, C.J., and Smith, J., concurring and dissenting)(unpub.).[1] In its Decision and Order on Reconsideration, the Board reaffirmed its prior holding that the administrative law judge had permissibly found that the x-ray evidence failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but vacated the administrative law judge's determination that the evidence did not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[2] as the administrative law judge's findings thereunder did not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).[3] The Board further held that, should the administrative law judge find that the medical opinion evidence establishes pneumoconiosis, he must then weigh all of the relevant evidence, *i.e.*, x-rays and medical opinions, together to determine if pneumoconiosis is established, citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Further, in addressing the contentions raised by employer in its cross-appeal, the Board instructed the administrative law judge to reconsider the medical opinions on the issue of total disability pursuant to 20 C.F.R.§718.204(b)(2)(iv) and, specifically, to determine whether the physicians understood the exertional requirements of claimant's usual coal mine employment when they made their assessments on total disability.

On remand, the administrative law judge found that the medical opinion evidence failed to support a finding of pneumoconiosis pursuant to Section 718.202(a)(4). The

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[1] Prior to its Decision and Order on Reconsideration *En Banc*, vacating the administrative law judge's denial of benefits and remanding the case for further consideration, the Board had issued a decision affirming the denial of benefits. [*R.L.B.*] *v. Island Creek Coal Co.*, BRB Nos. 04-0382 BLA and 04-0382 BLA-A. (Feb. 17, 2005) (unpub.). The relevant procedural history of the case was set forth in that decision.

[2] Specifically, the Board held that since the administrative law judge found both claimant's and employer's physicians to be equally qualified, the administrative law judge erred in failing to explain why he found that the medical opinions submitted by claimant were not as persuasive as those submitted by employer. [*R.L.B.*] *v. Island Creek Coal Co.*, BRB Nos. 04-0382 BLA and 04-0382 BLA-A (recon. *en banc*) (Sept. 9, 2005) (Dolder, C.J., and Smith, J., concurring and dissenting)(unpub.).

[3] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), provides that every adjudicatory decision must include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.

administrative law judge further found that the evidence of record failed to support a finding of a totally disabling respiratory impairment pursuant to Section 718.204(b)(2). Accordingly, the administrative law judge found that claimant failed to establish either a change in conditions, based on the new evidence, or a mistake in the determination of fact, based on all of the evidence of record and, therefore failed to establish a basis for modifying the previous denial of benefits. 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits on modification.

On appeal, claimant contends that the administrative law judge erred in concluding that the medical opinion evidence did not establish pneumoconiosis at Section 718.202(a)(4). Claimant also argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability at Section 718.204(b)(2)(iv). Employer responds, arguing that the administrative law judge properly found that the evidence failed to establish pneumoconiosis at Section 718.202(a)(4) and total disability at Section 718.204(b)(2)(iv), and urging that the denial of benefits be affirmed. In reply, claimant reiterates its contentions. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief.[4] On cross-appeal, employer contends that the administrative law judge did not properly analyze all of the medical opinion evidence on pneumoconiosis at Section 718.204(b)(2)(iv). Employer asserts, however, that should the Board affirm the denial of benefits, it need not consider the cross-appeal. In response to the cross-appeal, claimant contends that the administrative law judge properly analyzed the medical opinion evidence to which employer refers.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[4] The administrative law judge's findings that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3) and that total disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983).

Claimant argues that the administrative law judge erred in according only minimal weight to the medical opinions of Drs. Cohen and Hinkamp, finding pneumoconiosis, pursuant to Section 718.202(a)(4).[5]

In considering the opinion of Dr. Cohen at Section 718.202(a)(4), Director's Exhibit 88; Claimant's Exhibit 3, the administrative law judge found that it was poorly reasoned because the doctor's bases for finding pneumoconiosis were not supported by the evidence. Specifically, the administrative law judge noted that Dr. Cohen's reliance on x-rays showing irregular opacities to explain his diagnosis of pneumoconiosis was not sufficient to support his finding of pneumoconiosis, since the majority of claimant's x-

[5] Claimant argues that the administrative law judge erred in finding that Dr. Cohen's opinion was poorly reasoned since Dr. Cohen fully considered claimant's work and medical histories, as well as the results of claimant's examinations and objective tests and based his medical conclusion on current scientific knowledge. Claimant asserts that the administrative law judge "mischaracterized and distorted" the opinion of Dr. Cohen, Claimant's Brief at 9, because, contrary to the administrative law judge's determination, Dr. Cohen did not rely solely on the x-ray evidence, to diagnose pneumoconiosis. Instead, claimant contends that Dr. Cohen acknowledged that the majority of the x-ray evidence was negative but stated that he would have diagnosed pneumoconiosis whether or not the x-ray evidence had shown opacities typical of pneumoconiosis. Employer's Exhibit 8; Claimant's Exhibit 3. In addition, claimant argues that, contrary to the administrative law judge's determination, it was entirely appropriate for Dr. Cohen to rely upon claimant's restrictive impairment with diffusion capacity as a basis for diagnosing of pneumoconiosis. Claimant asserts that, contrary to the administrative law judge's determination, Dr. Cohen provided specific discussion regarding the relationship between coal dust exposure and restrictive impairment. In addition, claimant asserts that, contrary to the administrative law judge's discussion, "it was entirely proper for Dr. Cohen to use a process of exclusion to conclude that the reduction in [claimant]'s diffusing capacity was caused by his three decades of exposure to coal mine dust." Claimant's Brief at 12.

Claimant also argues that the administrative law judge erred in according little weight to Dr. Hinkamp's medical conclusions, as Dr. Hinkamp clearly articulated that claimant's coal mine dust exposure caused his restrictive impairment. Claimant contends that the administrative law judge erred in requiring a more detailed explanation of an affirmative relationship between claimant's pulmonary disease and his coal mine employment from Dr. Hinkamp, since Dr. Hinkamp considered the causes of claimant's chronic restrictive impairment before ruling out obesity and idiopathic pulmonary fibrosis as the cause of that condition. Accordingly, claimant contends that the administrative law judge erred in finding Dr. Hinkamp's opinion poorly reasoned and documented.

rays did not show evidence of irregular opacities. The administrative law judge also found that even though Dr. Cohen provided detailed reasoning excluding smoking and obesity as plausible causes of claimant's restrictive impairment with diffusion impairment, his opinion was not well-reasoned because he failed to discuss in sufficient detail why he found that claimant's coal dust exposure caused restrictive impairment with diffusion impairment. Lastly, the administrative law judge found that while Dr. Cohen identified a history that included the symptoms and signs of chronic lung disease, he failed to explain how such a history supported a finding of pneumoconiosis. The administrative law judge rationally concluded, therefore, that Dr. Cohen's opinion was insufficient to affirmatively establish that claimant suffered from pneumoconiosis. Decision and Order on Remand at 5-6. 20 C.F.R. §§718.201, 718.202(a)(4); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985).

Likewise, in considering the opinion of Dr. Hinkamp diagnosing pneumoconiosis, at Section 718.202(a)(4), Claimant's Exhibit 2, the administrative law found that it was entitled to little weight. Specifically, the administrative law judge found that Dr. Hinkamp failed to set forth adequate reasoning affirmatively detailing how coal dust exposure gave rise to the restrictive respiratory pattern claimant had. Thus, the administrative law judge properly found that Dr. Hinkamp's opinion was poorly reasoned and entitled to little weight at Section 718.202(a)(4). Decision and Order on Remand at 6.[6] *See Hicks*, 138 F.3d at 538, 21 BLR at 2-339; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.[7]

[6] The administrative law judge found Dr. Ranavaya's opinion, diagnosing pneumoconiosis based on his March 29, 1996 examination of claimant, entitled to "significantly diminished weight," Decision and Order on Remand at 5, because the doctor did not have the benefit of reviewing other evidence of record. Decision and Order on Remand at 5. As claimant has not challenged the administrative law judge's accordance of little weight to the opinion of Dr. Ranavaya, that finding is affirmed. *See Skrack*, at 6 BLR 1-711.

[7] Claimant also asserts that the administrative law judge erred in crediting opinions finding pneumoconiosis, as better reasoned without sufficiently analyzing those opinions, *i.e.*, the opinions of Drs. Crisalli, Rosenberg and Branscomb, Employer's Exhibits 4, 5, 9.

We affirm, therefore, the administrative law judge's finding that the medical opinion evidence failed to establish pneumoconiosis pursuant to Section 718.202(a)(4), and cannot, therefore, establish a basis for modification. As claimant has failed to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4), a requisite element of entitlement, we must affirm the administrative law judge's denial of benefits. We need not address either claimant's or employer's allegations concerning total disability and disability causation at 20 C.F.R. §718.204(b)(2)(iv), (c), as such arguments are moot. *See Trent*, 11 BLR at 1-27; *see generally Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits on modification is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

We will not consider this argument, however, since the administrative law judge properly found that the only opinions that could support a finding of pneumoconiosis were unreasoned, and claimant could not, therefore, carry his burden of establishing pneumoconiosis. *See generally Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).