

BRB No. 01-0123 BLA

GEORGE B. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STONE GAP COAL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
Employer	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Thomas F. Phalen, Jr.,  
Administrative Law Judge, United States Department of Labor.

George B. Smith, McCarr, Kentucky, *pro se*.

Barry H. Joyner (Howard M. Radzely, 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER,  
Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on  
Remand (98-BLA-187) of Administrative Law Judge Thomas F. Phalen, Jr. 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 seq.* (the Act).<sup>1</sup> This case has been before

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<sup>1</sup>The Department of Labor has amended the regulations implementing the Federal

the Board previously.<sup>2</sup> In the prior Decision and Order, the administrative law judge noted that the instant case is a duplicate claim and found twelve and three-quarter years of qualifying coal mine employment. Decision and Order dated July 27, 1998 at 3-5.

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Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001).

<sup>2</sup>The procedural history of this case has previously been set forth in detail in the Board's prior decision in *Smith v. Stoney Gap Coal Co.*, BRB No. 98-1584 BLA (March 29, 2000)(unpublished), which is incorporated herein by reference.

Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) or total disability pursuant to 20 C.F.R. §718.204(c) (2000) and therefore insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Decision and Order dated July 27, 1998 at 10-14. On appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(2)-(3) (2000) but vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c)(1), (4) and the denial of benefits and remanded the case for the administrative law judge to provide a basis for his weighing of the evidence. *See Smith v. Stoney Gap Coal Co.*, BRB No. 98-1584 BLA (March 29, 2000)(unpublished).

On remand, the administrative law judge concluded that claimant failed to establish a material change in conditions as the evidence was insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c)(1), (4) (2000). Decision and Order on Remand at 3-6. Accordingly, benefits were denied. In the instant appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge mischaracterized the evidence of record, and thus a remand is required.<sup>3</sup>

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes

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<sup>3</sup>The Director has filed a Motion to Remand in this case. The Board accepts the Director's Motion to Remand as his response brief, and herein decides this case on its merits.

entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order must be vacated and the case remanded to the administrative law judge for further consideration.<sup>4</sup> Considering the medical opinion evidence to determine if a material change in conditions was established, the administrative law judge permissibly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). See *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Claimant asserts that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. Hussain, stating that claimant has coal workers' pneumoconiosis, as he was a Department of Labor examining physician. We disagree. Although Dr. Hussain examined claimant on behalf of the Department of Labor, the administrative law judge is not required to accord any additional or determinative weight to the physician's opinion on this basis. Decision and Order on Remand at 4, Director's Exhibit 11; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. See *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

The administrative law judge, in the instant case, properly considered the relevant evidence of record and permissibly accorded the opinion of Dr. Broudy, that claimant does not have pneumoconiosis and suffers no impairment due to coal dust exposure, substantial weight as the physician examined the miner and reviewed the medical evidence of record, his opinion was well documented, and supported by the objective evidence and by the opinions of Drs. Lane, Fino and Anderson, who also diagnosed no pneumoconiosis. See *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghioghny and Ohio Coal Co.*, 7 BLR 1-829 (1985); Decision and Order on Remand at 3-4; Director's Exhibits 11, 34, 35; Employer's Exhibits 4, 6, 8.

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<sup>4</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Moreover, the administrative law judge rationally accorded less weight to the opinion of Dr. Hussain as the physician's opinion is undercut since his diagnosis of pneumoconiosis is based upon a positive x-ray reading, which was reread as negative by five highly qualified experts. See *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Worhach, supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark, supra*; *Dillon, supra*; *Fields, supra*; *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986); *Perry, supra*; *Lucostic, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *Piccin, supra*; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order on Remand at 4; Director's Exhibits 11, 13-15; Employer's Exhibits 3, 5, 6. We therefore affirm the administrative law judge's finding that the preponderance of the medical opinion evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) as it is supported by substantial evidence. *Melnick, supra*; *Perry, supra*; *Arnoni, supra*.

In seeking remand, the Director argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), (4) (2000) in that he mischaracterized the results of the October 29, 1996 pulmonary function study.<sup>5</sup> Director's Brief at 5-7. We agree. In finding that claimant failed to establish total disability pursuant to Section 718.204(c)(1) (2000), the administrative law judge noted that the results of the recent pulmonary function studies are split as to the presence of a totally disabling respiratory disease. Decision and Order on Remand at 5. The administrative law judge concluded that of the five recent pulmonary test results, the October 29, 1996 non-qualifying pre-bronchodilator and the August 12, 1997 non-qualifying post-bronchodilator studies were entitled to some weight and that there were two qualifying studies, of which the August 12, 1997 test was entitled to little weight as the administering physician questioned claimant's effort.<sup>6</sup> Decision and Order on Remand at 5. Thus, the administrative law judge

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<sup>5</sup>The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record..." 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).

<sup>6</sup>A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2) (2000).

found that claimant failed to prove by a preponderance of the pulmonary function study evidence that he suffers from a totally disabling respiratory impairment. Decision and Order on Remand at 5. Additionally, in weighing the medical opinion evidence pursuant to Section 718.204(c)(4) (2000), the administrative law judge concluded that the opinion of Dr. Hussain, that claimant has a severe totally disabling respiratory impairment, was contradicted by the non-qualifying pre-bronchodilator pulmonary function results. Decision and Order on Remand at 6.

The record, however, indicates that the pre-bronchodilator study of October 29, 1996 is qualifying. Director's Exhibit 9. Under the APA, the administrative law judge is required to address all relevant evidence of record, explain the rationale employed in the case and clearly indicate the specific statutory or regulatory provision pertaining to a particular finding. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Although the administrative law judge is empowered to weigh the evidence, inasmuch as the administrative law judge's evidentiary analysis does not coincide with the evidence of record, the basis for the administrative law judge's credibility determinations in this particular case can not be affirmed. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). We therefore vacate the administrative law judge's findings under Section 718.204(c)(1) and (4) (2000) and remand this case to the administrative law judge for further consideration.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge