BRB Nos. 98-0196 BLA
and 98-0196 BLA-A

CRIMMETT OWENS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY)		DATE ISSUED:
	)	
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 of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Bobby Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (97-BLA-00916) of Administrative Law Judge Daniel F. Sutton denying modification and 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). This case involves a request for modification on a duplicate claim and is before the Board for the second time.[1] The

[1] In its most recent decision in this case, the Board noted that the administrative law judge had accepted the parties stipulation of twenty-eight years and seven months of coal mine employment, and that since claimant established he suffered from pneumoconiosis

administrative law judge considered the x-ray evidence submitted by claimant and determined that it failed to establish a basis for modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in determining that the new evidence did not establish a change in conditions or mistake in fact pursuant to Section 725.310. Employer responds asserting that the denial of benefits is supported by substantial evidence. Employer has also filed a cross-appeal, arguing that if the case is remanded, the administrative law judge must consider evidence submitted by employer which was excluded from the record.[2] The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not participate in this appeal.

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arising out of his employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b), and total disability pursuant to 20 C.F.R. §718.204(c)(1), a material change in conditions was demonstrated pursuant to 20 C.F.R. §725.309. The claim was denied, however, because the evidence did not establish causation pursuant to 20 C.F.R. §718.204(b). The Board considered claimant's arguments at Section 718.204(b) and affirmed the administrative law judge's weighing of the evidence at that subsection. *See Owens v. Westmoreland Coal Co.*, BRB Nos. 92-2174 BLA and 92-2174 BLA-A (July 26, 1994)(unpub.). Claimant then submitted additional evidence and requested modification of the decision. Director's Exhibit 71.

[2] Pursuant to 20 C.F.R. §725.456(b)(2), the administrative law judge excluded Dr. Dahhan's deposition transcript and Dr. Fino's report, as this evidence was not exchanged with the other parties at least 20 days prior to the date of the scheduled hearing. Decision and Order at 2.

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 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 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 of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Initially, claimant's contention that the administrative law judge's Decision and Order fails to comport with 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), is without merit.[3] The administrative law judge fully discussed the relevant evidence of record and his reasoning is readily ascertainable from his discussion of the evidence.

With respect to the merits, claimant contends that the administrative law judge erred in determining that there is no mistake in fact as the x-ray interpretations submitted on modification by claimant were an attack on the credibility of the employer's physicians who "diagnosed the absence of disability causation based on their erroneous premise that claimant did not suffer from pneumoconiosis." Claimant's Petition for Review at 5. In reconsidering the medical opinions at Section 718.204(b), the administrative law judge found that Dr. Smiddy, who opined that claimant was totally and permanently disabled due to pneumoconiosis and chronic lung disease, noted a smoking history of one-half pack per day for ten years, which varied significantly from the smoking history claimant testified to at the

[3] The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefore, 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).

hearing before the previous administrative law judge. Decision and Order at 6; Director's Exhibits 47, 58. The administrative law judge further found that Dr. Robinette, who opined that claimant has a severe pulmonary disorder which has arisen as a consequence of his underground mining experience, failed to explain "by reference to any of the objective medical evidence how he arrived at his conclusions regarding the causation of the [c]laimant's disability" and also noted a reduced smoking history. Decision and Order at 7; Director's Exhibit 36. Lastly, the administrative law judge found that Dr. Paranthaman did not discuss the basis of his conclusion that claimant's smoking and coal dust exposure contributed equally to his disability. Decision and Order at 7; Director's Exhibits 17, 19. The administrative law judge rationally accorded diminished weight to the opinions of Drs. Smiddy, Robinette and Paranthaman based on their failure to note an accurate smoking history and to provide a full explanation for their conclusions, and permissibly relied on the better reasoned and documented opinions of Drs. Dahhan, Morgan, Castle and Fino, who provided detailed explanations of how the objective data supported their conclusions that claimant's disability was due to smoking and not pneumoconiosis. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibits 37, 40, 44, 51, 54, 57, 59, 80. Therefore, we affirm the administrative law judge's conclusion that claimant failed to establish a mistake in fact pursuant to Section 725.310. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Claimant also contends that the administrative law judge erred in determining that a change in conditions was not established, but cites to no error made by the administrative law judge. Claimant's Petition for Review at 6. The Board is not authorized to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of authority between the administrative law judge as the trier-of-fact, and the Board as a reviewing tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). As we have emphasized previously, the Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order with specificity and demonstrate that substantial evidence does not support the result reached or that the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *Sarf, supra*. Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See Sarf, supra*; *Fish, supra*. Consequently, we affirm the administrative law judge's finding that claimant failed to establish a change in conditions.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on

appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). As the administrative law judge's findings are supported by substantial evidence and are rational, we affirm his conclusion that claimant failed to establish modification pursuant to Section 725.310 as it is supported by substantial evidence and in accordance with law. *Jessee*, *supra*.

Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310, we affirm the denial of benefits. *Jessee, supra*. In light of our affirmance of the administrative law judge's Decision and Order, we agree with employer that we need not address its contentions on cross-appeal.

Acccordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge