BRB No. 02-0477 BLA

MICHAEL SLUCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY,) INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' 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.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

William E. Wyatt, Jr. and John J. Notarianni (Fine, Wyatt & Carey, P.C.), Scranton, Pennsylvania, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (01-BLA-0347) of Administrative Law Judge Robert D. Kaplan rendered 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).[1] This case is before the Board for a second time.[2] In a

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

Decision and Order issued on March 21, 2002, the administrative law judge found that new evidence, considered in conjunction with previously submitted evidence, was sufficient to establish the existence of pneumoconiosis and that a mistake in a determination of fact had, therefore, been made in the prior denial of benefits. The administrative law judge further found that the evidence of record established that claimant's pneumoconiosis arose out of coal mine employment, and that claimant suffered from a totally disabling respiratory impairment based on the parties' stipulation, but found that claimant failed to establish that his disability was due to pneumoconiosis. Accordingly, benefits were again denied.

On appeal, claimant contends that the administrative law judge erred in finding that causation was not established, based on the opinion of Dr. Kraynak, claimant's treating physician. Employer responds, urging affirmance of the administrative law judge's Decision

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on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his first claim for benefits on June 22, 1987, Director's Exhibit 26-1. That claim was denied by Administrative Law Judge Robert D. Kaplan on June 12, 1989, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 26-42. The Board affirmed the denial of benefits in *Sluck v. Reading Anthracite Company, Inc.*, BRB No. 89-2371 (March 29, 1991)(unpub.). Director's Exhibit 26-46. Claimant did not request further review of that denial. Claimant filed a duplicate claim on July 30. 1997, Director's Exhibit 1, which was also denied by Judge Kaplan because claimant failed to show the existence of pneumoconiosis and thereby a material change in conditions since the previous denial.

and Order. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, 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 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant contends that the administrative law judge erred in rejecting Dr. Kraynak's opinion because it relied on invalid pulmonary function studies. Claimant contends it was irrational to reject the opinion on this ground in view of the parties' agreement that claimant suffered from a totally disabling respiratory impairment based on diagnostic testing. Claimant also contends that it was error to reject Dr. Kraynak's causation opinion for this reason yet accept his existence of pneumoconiosis opinion, which was based, in part, on the same diagnostic studies. Further claimant contends, to preserve his position in any future appeal, that the administrative law judge's review of the diagnostic tests and finding that they are invalid is error.

In finding that the evidence of record was insufficient to establish causation, the administrative law judge found that the opinion of Dr. Kraynak, that claimant's pneumoconiosis was totally disabling, was "seriously diminished" because he relied heavily on invalid pulmonary function and blood gas studies "to isolate the substantial cause of claimant's overall symptoms and breathing problems." Decision and Order at 17. The administrative law judge also found Dr. Kraynak's opinion "seriously undermined" by his view that cigarette smoking could not be the only cause of claimant's lung condition in light of his positive x-ray, grossly abnormal blood gas, markedly decreased pulmonary function,

[3] We affirm the administrative law judge's findings of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and total disability as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and smoking history. Decision and Order at 17. Turning to Dr. Dittman's opinion, the administrative law judge found that it did not weigh in claimant's favor since it noted that claimant had the symptoms of an obstructive lung condition due to cigarette smoking, while pneumoconiosis in its simple form was a restrictive disease. Dr. Dittman further opined that even assuming the existence of pneumoconiosis, "it would not be impairing nor disabling based on claimant's examination, pulmonary function studies, and the pathophysiology of simple coal workers' pneumoconiosis." Decision and Order at 18.

Contrary to claimant's argument, the administrative law judge could reasonably discount Dr. Kraynak's opinion on causation based on his reliance on invalid diagnostic studies, *i.e.*, pulmonary function studies and blood gas studies found to be invalid, because Dr. Kraynak "relied heavily on these tests to isolate the substantial cause" of claimant's disabling respiratory impairment. Decision and Order at 17; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *see also Lango v. Director, OWCP*, 104 F.3d 537, 21 BLR 2-12 (3d Cir. 1997). Moreover, contrary to claimant's argument, the administrative law judge was not precluded from discounting Dr. Kraynak's opinion on causation because he relied on invalid diagnostic testing after he had accorded "some weight" to the same opinion on pneumoconiosis, since there was no suggestion that Dr. Kraynak's assumption concerning the pulmonary function studies formed the entire basis for his conclusion regarding the existence of pneumoconiosis, and the administrative law judge found that the weight of the evidence, *i.e.*, the generally positive x-ray evidence and the opinions of Drs. Corazza and Kraynak, supported a finding of the existence of pneumoconiosis. *See generally Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Nor, contrary to claimant's argument, was the administrative law judge barred from considering the effect of the invalid studies on the credibility of Dr. Kraynak's opinion since the administrative law judge did not find that claimant was totally disabled based on those tests, but instead found that all the diagnostic tests of record, both pulmonary function studies and blood gas studies, were invalid, Decision and Order at 10-13, and that the element of total disability was established solely based on the parties' stipulation that claimant has a total respiratory disability. Decision and Order at 16. Finally, claimant's general assertion that the administrative law judge erred in finding the tests invalid cannot be addressed as it does not raise a specific allegation of error. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). The administrative law judge's finding that the medical opinion evidence failed to establish that claimant's total disability was due to pneumoconiosis is, therefore, affirmed. *See* 20 C.F.R. §718.204(c).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge