BRB No. 00-1093 BLA

BOBBY E. SIMPSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TROJAN MINING INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
TRAVELER'S INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Bobby E. Simpson, Hellier, Kentucky, *pro se*.

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky, for employer.

Timothy S. Williams (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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (00-BLA-0254) of Administrative Law Judge Joseph E. Kane denying benefits on a duplicate 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] The administrative law judge found at least twenty-five years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4, 10. After determining that the instant claim was a duplicate claim,[2] the administrative law judge noted the proper standard and found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Decision and Order at 10-12. Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Decision and Order at 12. Accordingly, benefits were denied. On appeal, claimant generally

[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 on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed his initial claim for benefits on October 1, 1992, which was finally denied on August 27, 1995, as claimant failed to establish the existence of totally disabling pneumoconiosis. Director's Exhibit 21. Claimant filed the instant claim on April 13, 1999, which was denied by the District Director on July 22, 1999 and September 27, 1999. Director's Exhibits 1, 11, 12.

contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.[3]

[3]As the administrative law judge's length of coal mine employment determination is favorable to claimant and unchallenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on May 18, 2001, to which the Director has responded asserting that the outcome of this case will not be affected by the revised regulations. Claimant and employer have not responded to the Board's order.[4] Based on the brief submitted by the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and consistent 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 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 (2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

[4]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on May 18, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Considering the newly submitted evidence, the administrative law judge rationally found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309 (2000). *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge correctly noted that the previous claim was denied as claimant did not establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Decision and Order at 3, 9-10; Director's Exhibit 21. The United States Court of Appeals for the Sixth Circuit has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.[5] *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Considering the newly submitted 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) (2000). *Piccin, supra*. The administrative law judge, in the instant case, permissibly found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000). The administrative law judge noted that the six newly submitted x-ray interpretations were read either by B-readers or B-readers with additional qualification as board-certified radiologists. Decision and Order at 5. The administrative law judge properly concluded that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) (2000) as all of the newly submitted x-ray readings were negative. Director's Exhibits 8, 9, 24; Employer's Exhibits 1, 2; Decision and Order at 5, 10; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Trent, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). We, therefore, affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000) as it is supported by substantial evidence.[6]

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[5]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*);Director's Exhibit 2.

[6]Although the administrative law judge, in the instant case, failed to specifically

address the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000), a remand is not required as the record is devoid of any biopsy or autopsy evidence, thus precluding claimant from establishing the existence of pneumoconiosis pursuant to this subsection. *See* 20 C.F.R. §718.202(a)(2) (2000); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Further, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) (2000) since none of the presumptions set forth therein are applicable to the instant claim.[7] *See* 20 C.F.R. §§718.304, 718.305, 718.306 (2000); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 10.

With respect to 20 C.F.R. §718.202(a)(4) (2000), the administrative law judge properly considered the entirety of the newly submitted medical opinion evidence of record and rationally concluded that it was insufficient to establish the existence of pneumoconiosis. *Piccin, supra*. 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). Moreover, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating or attending physician. *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Clark, supra*; *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, a physician's opinion based upon his own tests and observations, or the review of other objective test results, may be substantial evidence in support of an administrative law judge's findings. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel, supra*.

The administrative law judge, in the instant case, properly considered the relevant evidence of record and permissibly accorded greater weight to the opinion of Dr. Fino, who opined that claimant did not have pneumoconiosis or any other occupationally acquired pulmonary condition, than to the contrary opinion of Dr. Gibson, in light of his superior qualifications and as the physician's opinion is documented, reasoned and based not only on

[7]The presumption at 20 C.F.R. §718.304 (2000) is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 (2000) because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e) (2000); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

a physical examination but also on the review of extensive medical evidence. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra*; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Hall, supra*; *Wetzel, supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 11; Director's Exhibits 7, 8; Employer's Exhibit 1. Moreover, the administrative law judge rationally accorded less weight to the opinion of Dr. Gibson as the physician's opinion is not well-documented and well-reasoned since Dr. Gibson does not explain how the objective medical evidence supports his conclusions or upon what medical evidence he relied in rendering his diagnosis, and to the opinion of Dr. Younes as the physician does not relate his diagnosis of chronic bronchitis to coal dust exposure. *See* 20 C.F.R. §718.201 (2000); *Tedesco, supra*; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Lafferty, supra*; *Clark, supra*; *Dillon, supra*; *Fields, supra*; *Perry, supra*; *Wetzel, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara, supra*; *Piccin, supra*; Decision and Order at 11; Director's Exhibits 7, 8; Employer's Exhibit 1. Additionally, although Dr. Gibson, as noted by the administrative law judge, is claimant's treating physician, the administrative law judge has provided valid reasons for finding his opinion entitled to less weight. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Wetzel, supra*; Decision and Order at 11.

In addressing the newly submitted evidence of record to determine if claimant established a material change in conditions, the administrative law judge, in the instant case, considered the entirety of the relevant medical evidence and acted within his discretion in concluding that claimant failed to establish the existence of a totally disabling respiratory impairment. *See* Black Lung Benefits Amendments, 65 Fed. Reg. 80,049(2000), to be codified at 20 C.F.R. §718.204(b); Decision and Order at 12; *Piccin, supra*. The administrative law judge properly found that total disability pursuant to Section 718.204(c)(1)-(2) (2000) had not been established, since all of the pulmonary function and blood gas study evidence of record produced non-qualifying values.[8] Decision and Order at 12; Director's Exhibit 8; Employer's Exhibit 1. Additionally, the administrative law judge properly found that the record indicates that no physician diagnosed cor pulmonale with right

[8]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).

sided congestive heart failure. Decision and Order at 12; *Newell v. Freeman United Coal Mining Co.,* 13 BLR 1-37 (1989).

With respect to 20 C.F.R. §718.204(c)(4) (2000), the administrative law judge properly considered the entirety of the medical opinion evidence of record and rationally concluded that the medical opinion evidence did not support a finding that claimant is totally disabled from a respiratory standpoint. *Perry, supra*; *Piccin, supra*; Decision and Order at 12. The administrative law judge rationally considered the opinions of record and acted within his discretion, as fact-finder, in finding the opinions of Drs. Younes and Fino, opining that claimant is not totally disabled by a pulmonary or respiratory condition, to be sufficient to prevent entitlement as their opinions are well reasoned and documented. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark, supra*; *Dillon, supra*; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields, supra*; *Gee, supra*; *Perry, supra*; *Wetzel, supra*; *Lucostic v. United States Steel Corp.,* 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 12; Director's Exhibit 8; Employer's Exhibit 1. Additionally, the administrative law judge properly found that Dr. Gibson, claimant's treating physician, did not offer an opinion as to the existence of a totally disabling pulmonary impairment. *See Tedesco, supra*; *Tussey, supra*; *Clark, supra*; *Wetzel, supra*; *Kuchwara, supra*; Decision and Order at 12; Director's Exhibit 7.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Trent, supra*; *Perry, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the newly submitted evidence does not establish that claimant has pneumoconiosis or is totally disabled, claimant has not met his burden of proof on all the elements of entitlement. *Ross, supra; Clark, supra*; *Trent, supra*; *Perry, supra*. 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 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Furthermore, since the determination of whether claimant has pneumoconiosis or a totally disabling respiratory impairment is primarily a medical determination, claimant's testimony alone, under the circumstances of this case, could not alter the administrative law judge's finding. *Anderson, supra*. Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis or total disability pursuant to Sections 718.202(a) and 718.204(c) (2000) as it is supported by substantial evidence and is in accordance with law. Inasmuch as claimant has failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), we affirm the denial of benefits. *Ross, supra*.

Accordingly, 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge