BRB No. 03-0197 BLA

JACK M. JONAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 08/21/2003
SANDS HILL COAL COMPANY	)	
	)	
and	)	
	)	
OHIO BUREAU OF WORKERS= COMPENSATION	)	
	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Rita S. Fuchsman, Chillicothe, Ohio, for claimant.

Gregory K. Johnson (Black Lung Fund, Ohio Bureau of Workers= Compensation), Columbus, Ohio, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-1207) of Administrative Law Judge Rudolf L. Jansen 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).[1] The administrative law judge found, and the parties acknowledged, thirty-three years of qualifying coal mine employment. Decision and Order at 4. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that although the evidence of record was sufficient to establish total disability pursuant to 20 C.F.R. ' 718.204(b)(2)(ii) and (iv), the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(1)-(4).[2] Decision and Order at 7-12. The administrative law judge further found that claimant failed to establish

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed his claim for benefits on September 8, 2000, which was initially granted by the district director. Director=s Exhibits 1, 14. Carrier filed a controversion and the district director subsequently denied the claim on May 29, 2001. Director=s Exhibits 18, 21. Claimant requested a hearing and the case was referred to the Office of Administrative Law Judges on September 13, 2001. Director=s Exhibits 22, 26. Claimant died on June 7, 2002. Claimant=s Exhibit 2.

that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. '718.204(c). Decision and Order at 13. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis and total disability causation as he failed to give proper weight to the opinion of Dr. Mavi pursuant to Sections 718.202(a)(4) and 718.204(c). Employer responds that substantial evidence supports the administrative law judge=s denial of benefits. The Director, Office of Workers= Compensation Programs, has filed a letter indicating that he will not respond in the instant 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, 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 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 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[3]The administrative law judge=s length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. ''718.202(a)(1)-(3), 718.204(b)(2)(i)-(iv) and his credibility determinations with respect to the death certificate and the opinion of Dr. Rayani are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 credibility determinations are supported by substantial evidence and contain no reversible error therein.[4] *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Claimant initially argues that the administrative law judge erred in failing to accord appropriate weight to the opinion of Dr. Mavi as it is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant=s Brief at 4-9. We do not find merit in claimant=s argument. Claimant=s contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board=s powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). 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).

[4]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 State of Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director=s Exhibit 2.

In addressing the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge properly noted the entirety of the medical opinion evidence of record and rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. Decision and Order at 9-11. The administrative law judge, in a proper exercise of his discretion, fully considered the relevant evidence and permissibly concluded that the opinion of Dr. Mavi was unreasoned, as the physician=s diagnosis is based upon claimant=s length of coal dust exposure and the physician offers no other support for his conclusions.[5] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) *(en banc)*; *Anderson*, 12 BLR 1-111; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 9; Director=s Exhibits 9, 13; Claimant=s Exhibit 1.

We also reject claimant=s argument that Dr. Mavi=s opinion is entitled to greater weight because he was claimant=s treating physician. Claimant=s Brief at 8. The United States Court of Appeals for the Sixth Circuit recently stated that Athe opinions of treating physicians get the deference they deserve based on their power to persuade.@ *Eastover Mining Co. v. Williams*, F.3d , 2003 WL 21756342 (6th Cir. 2003). Finding that Dr. Mavi=s opinion is not well reasoned, the administrative law judge rationally found the medical opinion entitled to less weight and insufficient to establish the existence of pneumoconiosis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, BLR 2- (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Further, the administrative law judge acted within his discretion, as fact-finder, in according greater

[5] In Nov. 2000, Dr. Mavi examined the miner and listed his diagnoses and bases as:

1. Pneumoconiosis-work history in coal mine (sic) and a x-ray findings,
2. COPD-smoking history and x-ray and pulmonary function tests,
3. Coronary Artery Disease and Congestive Heart Failure- by medical history.

Director=s Exhibit 9. In a subsequent letter dated February 1, 2002, Dr. Mavi=s summarized his November 2000 report and prior interactions with the miner, noting the blood gas study demonstrated a severe respiratory insufficiency, the pulmonary function study indicated a severe obstructive defect and the x-ray impression was congestive heart failure. Director=s Exhibit 13. Dr. Mavi noted an earlier smoking history of 20-30 years but concluded the miner=s 47 years of coal mine work history and prolonged exposure to coal dust resulted in pneumoconiosis. *Id*. In another follow-up letter dated September. 17, 2001, Dr. Mavi stated the miner has a Amixed obstructive pulmonary disease as well as a component of pneumoconiosis, but provides no additional medical reasoning for his conclusions. Claimant=s Exhibit 1.

weight to the opinion of Dr. Zaldivar, that claimant does not suffer from pneumoconiosis, than to the contrary opinion of Dr. Mavi, as he found Dr. Zaldivar=s opinion was well-reasoned. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields*, 10 BLR 1-19; *Perry*, 9 BLR 1-1; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985)*; Hall v. Director, OWCP*, 8 BLR 1-193 (1985); Decision and Order at 10; Director=s Exhibits 9, 13, 20, 25; Claimant=s Exhibits 1, 2. Consequently, we affirm the administrative law judge=s credibility determination with respect to Dr. Mavi and his finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) as it is supported by substantial evidence and is in accordance with law. *See Napier*, 301 F.3d 703; *Trent*, 11 BLR 1-26*; Perry*, 9 BLR 1-1.

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*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally considered all the evidence of record and properly determined that it was insufficient to establish that the miner suffered from pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Clark*, 12 BLR 1-149*; Trent*, 11 BLR 1-26 *Perry*, 9 BLR 1-1. 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*, 12 BLR 1-149; *Anderson*, 9 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge=s finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as it is supported by substantial evidence and is in accordance with law. Decision and Order at 8-11; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Inasmuch as claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a miner=s claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address claimant=s arguments regarding the administrative law judge=s findings pursuant to Section 718.204(c). *Id.*

Accordingly, the administrative law judge=s Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER
Administrative Appeals Judge