BRB No. 04-0295 BLA

WAYNE HOWARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INC.	)	DATE ISSUED: 08/20/2004
	)	
and	)	
	)	
SUN COAL COMPANY, INC.	)	
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-5370) of Administrative Law Judge Alice M. Craft 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). The administrative law judge found at least seventeen 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 2-4. After determining that the instant claim was a subsequent claim,[1] the administrative law judge noted the proper standard and found that she would address the merits of this claim since the newly submitted evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment. Decision and Order at 3, 11-14. Considering the entire record *de novo*, the administrative law judge further found that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 14. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence and asserting that the administrative law judge erred in finding the existence of pneumoconiosis established. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to the instant appeal.[2]

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

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[1]Claimant filed his initial claim for benefits on February 23, 1993, which was finally denied by the Department of Labor on July 13, 1993, as claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed the instant claim on March 26, 2001, which was finally denied by the district director on October 21, 2002. Director's Exhibits 2, 20. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 21.

[2]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), 718.203 and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

BLR 1-1 (1986)(*en banc*).

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 contains no reversible error.[3] Considering all the relevant evidence, the administrative law judge acted within her discretion, as fact-finder, in concluding that the evidence was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Claimant argues that the administrative law judge erred in failing to find total disability as she failed to give adequate consideration to the medical opinions of record. Claimant specifically contends that the administrative law judge erred in failing to accord appropriate weight to the opinion of Dr. Baker as it is sufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Claimant's Brief at 3-5. 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 (1989).

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant evidence of record as it relates to total disability and permissibly concluded that the medical opinion evidence fails to carry claimant's burden pursuant to Section 718.204(b)(2)(iv). Claimant's Brief at 3-5; Decision and Order at 14-15; Director's Exhibits 1, 8, 10, 19; Employer's Exhibits 1, 7; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). The administrative law judge properly considered this evidence and permissibly found that the report by Dr. Baker was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) as the physician's diagnosis was based on the need to limit further exposure to coal dust.[4] Director's Exhibit 10; Decision and Order at 14; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Collins v. J &*

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[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last 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 Exhibits 1, 3.

[4]Dr. Baker diagnosed coal workers' pneumoconiosis, chronic bronchitis and chronic obstructive pulmonary disease and opined that claimant was 100% occupationally disabled for work in the coal mining industry or similar dusty occupations as he should limit further exposure to coal dust. Director's Exhibit 10.

L Steel, 21 BLR 1-181 (1999); *Lafferty*, 12 BLR 1-190; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Fagg*, 12 BLR 1-77; *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986)(*en banc*), *aff=d on recon. en banc*, 9 BLR 1-104 (1986); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, contrary to claimant's contention, opinions finding no significant or compensable impairment need not be discussed by the administrative law judge in terms of claimant's former job duties. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Claimant's assertion that he is entitled to a presumption of total disability also lacks merit as the record contains no evidence of complicated pneumoconiosis and this claim was filed after January 1, 1982. 20 C.F.R. §§718.304, 718.305(e); Director's Exhibit 2; Decision and Order at 11, 14; *Kubachka v. Windsor Power House Coal Co.*, 11 BLR 1-171 (1988); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Rather, claimant must establish each element of entitlement by a preponderance of the evidence. *See Trent,* 11 BLR 1-26; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1. Therefore, contrary to claimant's assertion, the administrative law judge, in a proper exercise of her discretion, fully addressed claimant's testimony and all of the medical opinion evidence, including the opinion of Dr. Baker, and rationally found that this evidence could not carry claimant's burden of proof.[5] Decision and Order at 14; Director's Exhibits 1, 8, 10, 19; Employer's Exhibits 1, 7; *Zimmerman*, 871 F.2d 564, 12 BLR 2-254; *Taylor*, 12 BLR 1-83; *Trent*, 11 BLR 1-26*; Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1.

Finally, claimant, citing the Board's decision in *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), argues that he is totally disabled from performing comparable and gainful work because of his age, work experience and education. Claimant's argument lacks merit as the Board=s decision in *Bentley* is inapposite.[6] Moreover, under Section 718.204(b), the test for

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[5]Dr. Hussain opined that claimant has a mild impairment and retains the respiratory capacity to perform his last work in the mines or comparable work in a dust-free environment. Director's Exhibit 8. Dr. Dahhan opined that claimant has a mild respiratory impairment that is not severe enough to prevent claimant's last coal mine employment and therefore he has the respiratory capacity to perform his last work in the mines. Director's Exhibit 19; Employer's Exhibit 7. Dr. Vuskovich opined that the level of impairment from which claimant is suffering would not prevent him from performing his last coal mine employment. Employer's Exhibit 1.

[6]In *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), a case decided under the 20 C.F.R. Part 410 regulations, the Board noted that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding at 20 C.F.R. §410.426(a) that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(a), (b)(1).

total disability is medical, not vocational. *See* 20 C.F.R. §718.204(b); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Ramey v. Kentland Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Thus, claimant's arguments are rejected. Consequently, as claimant makes no other specific challenge to the administrative law judge's findings with respect to total disability, we affirm the administrative law judge's credibility determinations as they are supported by substantial evidence and are in accordance with law. *See Trent*, 11 BLR 1-26; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Mabe*, 9 BLR 1-67; *Budash*, 9 BLR 1-48; *Perry*, 9 BLR 1-1; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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 Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *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). The administrative law judge is empowered to weigh the medical evidence and to draw her 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*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge=s finding that the evidence of record is insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b) is supported by substantial evidence and in accordance with law, we affirm the denial of benefits. *See* 20 C.F.R. §718.204(b); *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. Because claimant has failed to establish the existence of a totally disabling respiratory or pulmonary impairment, we need not address employer's contentions regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

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

BETTY JEAN HALL
Administrative Appeals Judge