BRB No. 04-0297 BLA

JOHN ROARK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY	)	DATE ISSUED: 08/20/2004
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
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 Thomas F. Phalen, Jr., 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 (2002-BLA-5190) of Administrative Law Judge Thomas F. Phalen, Jr. 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 thirteen and three-quarter years of qualifying coal mine employment and that employer did not contest that it was the proper

responsible operator. Decision and Order at 2-5; Director's Exhibit 27. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 11. After considering all of the evidence of record, the administrative law judge determined that claimant failed to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204. Decision and Order at 12-17. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (4) and 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. 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

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[1]Claimant filed his claim for benefits with the Department of Labor on February 16, 2001, which was denied by the district director on March 18, 2002. Director's Exhibits 1, 24. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 25.

[2]The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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*).

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] Claimant's assertion that the administrative law judge erred in failing to find the existence of pneumoconiosis established lacks merit. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). He permissibly found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) as the preponderance of x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 9, 11, 12; Employer's Exhibits 1, 2, 4; Decision and Order at 12; *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); *Worhach v. Director*, OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Claimant further asserts that the administrative law judge erred in failing to find the existence of pneumoconiosis established based upon the medical opinions of Drs. Baker and Hussain. Claimant's Brief at 4-5. We disagree. In considering the medical opinions pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR 1-105; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark,* 12 BLR 1-149; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara*, 7 BLR 1-167; Decision and Order at 12-15. The administrative law judge acted within his discretion, as fact-finder, in concluding that the opinion of Dr. Hussain was insufficient to meet claimant's burden of proof as the physician did not offer any explanation for his diagnosis of pneumoconiosis other than his own x-ray interpretation. *See Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP*

[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 Exhibit 2.

[Stephens], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Hutchens*, 8 BLR 1-16; Decision and Order at 14; Director's Exhibit 9.

Additionally, the administrative law judge permissibly found the opinion of Dr. Baker insufficient to establish the existence of pneumoconiosis. *Kuchwara*, 7 BLR 1-167; Decision and Order at 13-14. Dr. Baker opined that the miner suffered from chronic bronchitis, which could satisfy the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). Director's Exhibit 11. However, the administrative law judge, in a proper exercise of his discretion, rationally found that Dr. Baker=s diagnosis of chronic bronchitis which may be related, in part, to coal dust exposure was unreliable and thus insufficient to establish the existence of pneumoconiosis since the opinion was vague, conclusory and contradictory[4] as the physician did not provide any supporting rationale or identify any data he relied upon in reaching his conclusion. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149*; Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens*, 8 BLR 1-16; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 13-14; Director=s Exhibit 11.

Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Dahhan and Vuskovich, than to the contrary opinions of Drs. Baker and Hussain, as the physicians offered well reasoned and documented opinions which are supported by the objective medical evidence of record. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; Decision and Order at 14-15; Director's Exhibit 12; Employer's Exhibit 3. We therefore affirm the administrative law judge=s credibility determinations with respect to the medical opinion evidence as they are supported by substantial evidence and are in accordance with law.

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

[4]Dr. Baker, in his April 28, 2001 report, based upon his negative x-ray and normal pulmonary function and blood gas studies opined that claimant did not have any disease arising from his exposure to coal dust but the physician subsequently marked Ayes@ to the question of whether claimant=s pulmonary impairment is the result of exposure to coal dust. Director's Exhibit 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 permissibly concluded that the evidence of record does not establish the existence of 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*, 12 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 as it is supported by substantial evidence and is in accordance with law. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Because 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 the administrative law judge's additional findings pursuant to 20 C.F.R. §718.204. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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