BRB No. 97-1598 BLA

ROBERT CRESS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY)		DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Edith Barnett, Administrative Law Judge, United States Department of Labor.

Robert Cress, Big Stone Gap, Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of legal counsel,[1] appeals the Decision and Order on Remand (95-BLA-1742) of Administrative Law Judge Edith Barnett 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). This case is on appeal to the Board for the second time. In her original Decision and

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Order dated July 23, 1996, the administrative law judge noted employer's stipulation to twenty years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718. The administrative law judge considered only the later evidence submitted subsequent to Administrative Law Judge Sheldon R. Lipson's 1993 denial and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. The administrative law judge thus found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) and benefits were denied. Claimant appealed and in *Cress v. Westmoreland Coal Co.*, BRB No. 96-1549 BLA (Feb. 26, 1997)(unpub.), the Board, after noting the procedural history of this case, affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(c)(1)-(4), but vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4). The Board thus remanded the case for further consideration of the medical opinions and a determination of whether the existence of pneumoconiosis was established by a preponderance of the evidence thereunder. The Board also vacated the administrative law judge's finding that a material change in conditions was not established pursuant to 20 C.F.R. §725.309(d) and instructed the administrative law judge to consider the other elements of entitlement if she found that the existence of pneumoconiosis was established. On remand, the administrative law judge reconsidered the recently submitted medical opinion evidence of record and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and thus insufficient to establish a material change in conditions. Accordingly, benefits were again denied. In the instant appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, are supported by substantial evidence, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated 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 establish 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 of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order on Remand, 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 that there is no reversible error contained therein. With respect to the merits of the claim, the administrative law judge rationally determined that the recent medical opinion evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge considered the recent medical opinion evidence of record and permissibly accorded greater weight to the opinion of Dr. Dahhan as it was the most thorough and well reasoned since he reviewed claimant's medical records and performed a physical examination and his conclusions are also supported by Dr. Jarboe's opinion. *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Piccin*, *supra*; Decision and Order on Remand at 2-3. Additionally, the administrative law judge acted within his discretion as trier-of-fact in according less weight to the opinion of Dr. Paranthaman diagnosing bronchitis due to coal dust exposure as Dr. Paranthaman's diagnosis was conclusory in that the physician reached his diagnosis by process of elimination. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); Decision and Order on Remand at 2. 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 (1989). 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)(4) and, thus, a material change in conditions pursuant to Section 725.309(d), as it is supported by substantial evidence and is in accordance with law. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge