BRB No. 00-0177 BLA

ODIS L. HICKS	)	
Claimant-Petitioner	)	
v.	)	
SHURROCK COAL CORPORATION	)	DATE ISSUED:
and	)	
OLD REPUBLIC 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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Phillip D. Damron, Prestonsburg, Kentucky, for claimant.

John D. Maddox (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-1158) of Administrative Law Judge Daniel J. Roketenetz 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.). The administrative law judge found, and the parties stipulated to, twenty-seven 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 3;

Hearing Transcript at 8. After determining that the instant claim was a duplicate claim, 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) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant contends that the evidence is sufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(c)(4), and a material change in conditions pursuant to 20 C.F.R. §725.309. 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.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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; *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 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

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[1]Claimant filed his initial claim for benefits on February 27, 1992, which was denied on October 21, 1992, as claimant failed to establish totally disabling pneumoconiosis arising out of coal mine employment. Director's Exhibit 55. Claimant filed the instant claim on April 24, 1997, which was denied by the District Director on April 8, 1998. Director's Exhibits 1, 35.

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

change in conditions at 20 C.F.R. §725.309. *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 2-4; Director's Exhibit 55. 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, 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. *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). *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). The administrative law judge noted that of the twenty-two newly submitted x-ray interpretations, nineteen were read as negative by B-readers and the remaining three positive interpretations were read by physicians with no special qualifications. Decision and Order at 6. The administrative law judge rationally concluded that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as the preponderance of x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 19-21, 24-33, 53, 54; Employer's Exhibits 1, 2; Claimant's Exhibit 1; Decision and Order at 4-6; *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) as it is supported by substantial evidence.

With respect to 20 C.F.R. §§718.202(a)(4) and 718.204(c)(4), claimant contends that the administrative law judge erred in failing to accord greater weight to the opinions of Drs. Sundaram and Rivera as they were claimant's attending physicians. 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

[3]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*).

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 the contrary opinions, that claimant does not have pneumoconiosis and suffers no impairment due to coal dust exposure and could perform his last coal mining job, greater weight as they were better supported by the objective evidence of record. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); Decision and Order at 6-10, 12; Director's Exhibits 14-17, 50-52; Claimant's Exhibit 1; Employer's Exhibits 3-7. Moreover, the administrative law judge rationally accorded less weight to the opinion of Dr. Sundaram as the physician's opinion is not well-documented and well-reasoned since Dr. Sundaram does not explain his diagnosis of pneumoconiosis other than the reliance upon his own chest x-ray, and to the opinion of Dr. Rivera as the physician does not explain his conclusions and appears to base his opinion on Dr. Sundaram's diagnosis. *See Tedesco, supra*; *Worhach, supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark, supra*; *Dillon, supra*; *Fields, supra*; *Perry, supra*; King, supra*; Wetzel, supra*; *Lucostic, supra; Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin, supra*; Decision and Order at 10, 12; Director's Exhibits 15, 16, 51; Employer's Exhibit 3; Claimant's Exhibit 1. Additionally, although Drs. Sundaram and Rivera are the miner's treating/attending physicians, the administrative law judge has provided valid reasons for finding their opinions 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 10, 12.

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, supra*; *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© 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, 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