

BRB No. 98-0680 BLA

LEWIS A. MORGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

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

Gary K. Stearman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (95-BLA-2143) 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). This case is on appeal to the Board for the third time. In the original Decision and Order issued October 18, 1989, the administrative law judge credited claimant with eleven years and five months of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) and that although the evidence was sufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), it was also insufficient to establish that the respiratory impairment was due to pneumoconiosis

pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. Claimant appealed and as the Director, Office of Workers' Compensation Programs (the Director), requested, the Board vacated the administrative law judge's decision and remanded the case to the district director to arrange for a complete pulmonary evaluation. *Morgan v. Director, OWCP*, BRB No. 89-3792 BLA (Aug. 24, 1992) (unpub.).

After considering the evidence of record which included a new pulmonary evaluation, the district director denied benefits and, at claimant's request, the case was forwarded to the Office of Administrative Law Judges for a hearing. In an Order dated September 28, 1995, the administrative law judge stated that because the Board had previously affirmed his findings regarding the length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204(c), these findings were no longer at issue. In a Decision and Order issued April 10, 1996, the administrative law judge found the evidence sufficient to establish total disability due pneumoconiosis pursuant to 20 C.F.R. §718.204(b).

Accordingly, benefits were awarded. The Director appealed and the Board held that the administrative law judge was not precluded from reconsidering each element of entitlement if evidence relevant thereto was admitted into the record on remand. *Morgan v. Director, OWCP*, BRB No. 96-1040 BLA (Sept. 27, 1996)(unpub.)(Dolder, J., concurring in part and dissenting in part). Accordingly, the administrative law judge's decision and order was vacated and the case awarding benefits was remanded to the administrative law judge to reconsider all elements of entitlement in light of all of the evidence of record. On remand, the administrative law judge found that the medical opinion evidence was insufficient to establish that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in finding that total disability due to pneumoconiosis was not established pursuant to 20 C.F.R. §718.204(b). The Director urges affirmance of the denial of benefits.

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 the 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 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. The administrative law judge, in the instant case, reconsidered the entirety of the medical opinion evidence and acted within his discretion in concluding that claimant's totally disabling respiratory impairment was not due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Claimant's assertions that the administrative law judge applied an erroneous standard and that he erred in his evaluation of the opinions of Dr. Shareef are without merit. The administrative law judge properly reviewed the evidence of record pursuant to the applicable standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989) and rationally concluded that the evidence was insufficient to establish that pneumoconiosis contributed to claimant's total disability. *See* 20 C.F.R. §718.204(b); Decision and Order on Remand at 7-8. The administrative law judge initially considered the first medical report of Dr. Shareef, who originally diagnosed pneumoconiosis and concluded that twenty to thirty percent of claimant's pulmonary impairment was due to pneumoconiosis. Decision and Order on Remand at 7; Director's Exhibit 53. The administrative law judge noted that in a subsequent opinion, Dr. Shareef attributed claimant's respiratory impairment to emphysema and partly to coronary artery disease, but only found that "pneumoconiosis might be contributing to a very small extent." Decision and Order on Remand at 7; Director's Exhibit 57. The administrative law judge thus permissibly concluded that total disability due to pneumoconiosis under the court's standard was not established since Dr. Shareef merely speculated that pneumoconiosis might have contributed minimally to claimant's totally disabling pulmonary impairment. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams, supra*; Decision and Order on Remand at 7. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Inasmuch as the administrative law judge rationally accorded diminished weight to the opinion of Dr. Shareef and the remaining physicians do not support claimant's burden of proof, we affirm the administrative law judge's finding that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b).<sup>1</sup> Consequently, claimant's failure to establish that his total disability was due to pneumoconiosis pursuant to Section 718.204(b),

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<sup>1</sup> The administrative law judge permissibly concluded that Dr. Clarke's opinion was unreasoned as he did not discuss claimant's smoking history and relied on an inaccurate length of coal mine employment. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984).

an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718.  
*Anderson, supra; Trent, supra.*

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge