BRB No. 03-0597 BLA

VERNON PRUITT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 02/27/2004
STUMP COAL COMPANY, INC.	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Vernon Pruitt, Phelps, Kentucky, *pro se*.

John T. Chafin (Chafin & Davis, P.S.C.), Prestonsburg, Kentucky, for employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (2002-BLA-5353) of Administrative Law Judge Joseph E. Kane 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).[2] The administrative law judge found that claimant established thirty-four and one-quarter 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 3-5, 9. After determining that the instant claim was a duplicate claim,[3] 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 a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 3, 9-15. Consequently, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. 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.[4]

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[1]Susie Davis, a benefits counselor with the Kentucky Black Lung Association in Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision. The Board acknowledged the instant appeal on June 26, 2003, stating that the case would be reviewed under the general standard of review.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]Claimant filed his initial claim for benefits on March 24, 1973, which was finally denied on September 12, 1979, as claimant failed to establish the existence of totally disabling pneumoconiosis. Director=s Exhibit 1. Claimant filed a second application for benefits on March 16, 1988, which was finally denied on August 17, 1988. Director's Exhibit 2. Claimant filed another application for benefits on February 11, 1999, which was finally denied on June 1, 1999 as claimant failed to establish any element of entitlement. Director's Exhibit 3. Claimant filed the instant claim on April 6, 2001, which was denied by the district director on April 5, 2002. Director's Exhibits 6, 26.

[4]As the administrative law judge's length of coal mine employment determination is favorable to claimant and unchallenged on appeal, it is affirmed. *Skrack v. Island Creek*

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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 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*). 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.[5] *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

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 3, 10; Director's Exhibits 1-3. Considering the newly submitted evidence, the administrative law judge noted that of the four newly submitted x-ray interpretations: three were read as negative for the existence of pneumoconiosis by B-readers and/or Board-certified radiologists, and the single positive interpretation was by a physician with no special qualifications. Decision and Order at 7, 11. The administrative law judge permissibly concluded that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) as the

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Coal Co., 6 BLR 1-710 (1983).

[5]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*); Director's Exhibits 1-3, 7.

preponderance of the newly submitted x-ray readings by physicians with superior qualifications were negative. Director's Exhibits 14-16; Employer's Exhibit 1; Decision and Order at 7, 11; *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*); *Trent*, 11 BLR 1-26; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

The administrative law judge also correctly found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2)-(3) since the record does not contain any biopsy or autopsy results demonstrating the presence of pneumoconiosis and the presumptions set forth at 20 C.F.R. §§718.304, 718.305 and 718.306 are not applicable to this claim.[6] *See* 20 C.F.R. §§718.202(a)(2)-(3); Decision and Order at 11; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to Section 718.202(a)(4), the administrative law judge properly noted the newly submitted medical opinion evidence of record and considered the quality of the evidence in determining whether the opinions are supported by the underlying documentation and adequately explained. *See 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); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 12. The administrative law judge rationally acted within his discretion, as fact-finder, in concluding that the opinions of Drs. Baker and Ammisetty were insufficient to meet claimant's burden of proof as the physicians did not explain their conclusions and their opinions regarding the presence or absence of pneumoconiosis were only restatements of an x-ray reading. *Worhach*, 17 BLR 1-105; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields*, 10 BLR 1-19; *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens*, 8 BLR 1-16; Director's Exhibit 14; Employer's Exhibit 2; Decision and Order at 12. The administrative law 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). Consequently, we affirm the administrative law judge's findings that the newly submitted evidence of record is

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[6]The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 6. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as they are supported by substantial evidence and in accordance with law.

In considering the existence of a totally disabling respiratory impairment pursuant to Section 718.204(b), the administrative law judge properly determined that the newly submitted pulmonary function studies and blood gas studies were non-qualifying.[7] *See* 20 C.F.R §718.204(b)(2)(i), (ii); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Director's Exhibits 14, 16; Decision and Order at 13-14. The administrative law judge further properly found that there is no evidence of cor pulmonale with right sided congestive heart failure in the record pursuant to Section 718.204(b)(2)(iii). *See* Decision and Order at 14; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989).

In addition, the administrative law judge found that the medical report of Dr. Ammisetty, while stating that claimant's pulmonary function tests demonstrated a "mild obstruction," did not address claimant's respiratory impairment level and failed to provide sufficient analysis. The administrative law judge also reasonably accorded less weight to the opinion of Dr. Baker, since he provided contradictory diagnoses regarding claimant's impairment ratings.[8] *See Collins*, 21 BLR 1-181; *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Trumbo*, 17 BLR 1-85; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Clark*, 12 BLR 1-149; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Gee*, 9 BLR 1-4; *Hutchens*, 8 BLR 1-16; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); Decision and Order at 15; Director's Exhibit 14; Employer's Exhibit 2. Consequently, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish claimant is totally disabled pursuant to Section 718.204(b).

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), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *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

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[7]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2) (i), (ii).

[8]Dr. Baker diagnosed a minimal respiratory impairment but opined later in his report that claimant suffered from no respiratory impairment. Director's Exhibit 14.

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). Inasmuch as 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(b) is supported by substantial evidence and in accordance with law, claimant has failed to establish a material change in conditions pursuant to Section 725.309 (2000). *See Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. Consequently, we affirm the denial of benefits. *See Ross*, 42 F.3d 993.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge