BRB No. 04-0632 BLA

BILLY EUGENE COLLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INC.	)	DATE ISSUED: 02/28/2005
	)	
and	)	
	)	
JAMES RIVER COAL 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.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-222) of Administrative Law Judge Daniel J. Roketenetz 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, and the parties stipulated to, at

least eleven years of qualifying coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 5, 7; Hearing Transcript at 7. The administrative law judge properly noted that the instant case involves a modification request of a subsequent claim and determined, after considering all of the evidence of record, that claimant failed to establish 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 4-5, 7-20. 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 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the

---

[1]Claimant filed his initial claim for benefits on March 3, 1993, which was denied by the Department of Labor (DOL) on August 4, 1993. Director's Exhibit 25. Claimant filed a second application for benefits on December 19, 1996, which was denied by DOL on April 2, 1997. Director's Exhibit 26. Claimant filed his third claim on December 20, 1999, which was denied by the district director on March 23, 2000 as claimant failed to establish any element of entitlement. Director's Exhibits 1, 10. Claimant subsequently requested modification on September 26, 2000, which was denied by the district director on December 21, 2000. Director's Exhibits 17, 21. Claimant again requested modification on December 13, 2001, which was denied by the district director on March 10, 2003. Director's Exhibits 36, 62. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 63.

[2]The administrative law judge's length of coal mine employment determination 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).

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] Initially, the administrative law judge properly considered the merits of this claim *de novo*, without making a preliminary determination that claimant established a change in condition or a mistake in the determination of fact pursuant to 20 C.F.R. §725.310, as this case involves a request for modification of a prior denial of benefits by the district director. *See Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); Director's Exhibits 10, 21, 25, 26, 62; Decision and Order at 4-5, 7-8.

Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge erred by relying on the physicians' radiological credentials and improperly relied on the numerical superiority of the negative x-ray readings. Claimant also suggests that the administrative law judge "may have 'selectively analyzed' the x-ray evidence ....." Claimant's Brief at 3. We disagree. The administrative law judge considered the fifteen readings of the six x-rays of record and accorded greater weight to the readings by physicians possessing radiological credentials. Decision and Order at 9-11. Because the sole positive reading was rendered by a physician lacking radiological qualifications, the administrative law judge found that the x-ray evidence did not support a finding of the existence of pneumoconiosis.[4] Director's Exhibit 53; Decision and Order at 10-11. Contrary to claimant's assertions, a review of the record reflects that the administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings pursuant to 20

---

[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 Exhibits 2, 15, 26, 36.

[4]The record indicates that Dr. Simpao has no special qualifications for the interpretation of x-rays. Director's Exhibit 53. Drs. Wiot, Spitz and Sargent are B-readers and Board-certified radiologists. Director's Exhibits 8, 15, 16, 25. Drs. Wicker, Baker, Broudy and Fino are B-readers. Director's Exhibits 7, 26, 30, 49.

C.F.R. §718.202(a)(1). Director's Exhibits 7, 8, 15, 16, 25, 26, 29, 30, 49, 53; Employer's Exhibits 5, 7; Decision and Order at 9-11; *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 (1988)(*en banc*).

Claimant further asserts that the administrative law judge failed to find the existence of pneumoconiosis established based upon the medical opinion evidence. Claimant specifically contends that the administrative law judge erred in failing to accord appropriate weight to the opinion of Dr. Simpao, the Department of Labor examining physician, as it is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant's Brief at 4-5. 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 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); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly noted the entirety of the medical opinion evidence of record and 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); *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 11-17. Claimant generally asserts that the administrative law judge erred in failing to accord greater weight to the opinion of Dr. Simpao, opining that claimant has coal workers' pneumoconiosis, as he was a Department of Labor examining physician. We disagree. Although Dr. Simpao examined claimant on behalf of the Department of Labor, the administrative law judge is not required to accord any additional or determinative weight to the physician's opinion on this basis. Decision and Order at 16-17, Director's Exhibit 50; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

Moreover, the administrative law judge acted within his discretion, as fact-finder, in according greater weight to the opinions of Drs. Fino and Broudy, as supported by the opinions of Drs. Dahhan and Wicker, opining that claimant does not have pneumoconiosis, than to the contrary opinion of Dr. Simpao, as he found the physicians offered well reasoned and documented opinions which are better supported by the objective medical evidence of

record.[5] *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 16-17; Director's Exhibits 5, 25, 26, 29, 30, 48, 50; Employer's Exhibits 1-3. Because the administrative law judge weighed all of the medical opinions and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm his conclusion as it is supported by substantial evidence and is in accordance with law. *See Rowe*, 710 F.2d 251, 5 BLR 2-99; *Clark*, 12 BLR 1-149; *Perry*, 9 BLR 1-1.

With respect to 20 C.F.R. §718.204(b)(2)(iv), claimant asserts that the administrative law judge failed to give adequate consideration to the opinion of Dr. Simpao. Claimant's Brief at 6-7. Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant evidence of record as it relates to total disability and permissibly concluded that the medical opinion evidence fails to carry claimant's burden pursuant to Section 718.204(b)(2)(iv). Decision and Order at 19-20; Director's Exhibits 5, 25, 26, 29, 30, 48, 50; Employer's Exhibits 1-3; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). The administrative law judge permissibly found the reliability of Dr. Simpao's opinion questionable since the physician failed to explain why claimant's mild impairment would preclude him from returning to his job as a belt examiner and as the opinion was outweighed by the preponderance of the contrary medical evidence.[6] Director's Exhibit 50; Decision and Order at 19-20; *Collins*, 21 BLR 1-181; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Fagg*, 12 BLR 1-77; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Perry*, 9 BLR 1-1; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens*, 8 BLR 1-16; *see also Rowe*, 710 F.2d 251, 5 BLR 2-99.

Moreover, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Fino, Broudy and Baker, than to the contrary opinion of Dr. Simpao, as the

---

[5]The administrative law judge's credibility determinations with respect to the opinions of Drs. Baker, Dahhan and Wicker are affirmed as unchallenged on appeal. *See Skrack*, 6 BLR 1-710.

[6]Dr. Simpao diagnosed coal workers' pneumoconiosis and opined that claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust free environment based on his mild impairment. Director's Exhibit 50.

physicians offered well reasoned and documented opinions which are supported by the objective medical evidence of record. *See Williams*, 338 F.3d 501, 22 BLR 2-623; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; Decision and Order at 19-20; Director's Exhibits 5, 25, 26, 29, 30, 48, 50; Employer's Exhibits 1-3. Moreover, contrary to claimant's contention, opinions that are found to be unreliable or find no significant or compensable impairment, need not be discussed by the administrative law judge in terms of claimant's former job duties. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Additionally, claimant is not entitled to a presumption of disability as the record contains no evidence of complicated pneumoconiosis and the instant claim was filed after January 1, 1982. Claimant's Brief at 6. 20 C.F.R. §§718.304, 718.305(e); Director's Exhibit 1; Decision and Order at 4, 11; *Kabachka v. Windsor Power House Coal Corp.*, 11 BLR 1-171 (1988); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Rather, claimant must establish each element of entitlement by a preponderance of the evidence. *See Trent*, 11 BLR 1-26*; Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1.

Finally, we reject claimant's, argument citing the Board's decision in *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), that he is totally disabled for comparable and gainful work because of his age, work experience and education. Initially, the Board's decision in *Bentley* is inapposite.[7] Moreover, under Section 718.204(b), the test for total disability is medical, not vocational. *See* 20 C.F.R. §718.204(b)*; Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Ramey v. Kentland v. Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

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 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 or total disability, claimant has not met his burden of proof on all the elements of entitlement.

---

[7]In *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), a case decided under the 20 C.F.R. Part 410 regulations, the Board noted that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding at Section 410.426(a) that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(a), (b)(1).

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 findings that the evidence of record is insufficient to establish the existence of pneumoconiosis and total disability as they are supported by substantial evidence and are in accordance with law. *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.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge