BRB No. 04-0697 BLA

EMSY ROOP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PIKEVILLE COAL COMPANY	)	
	)	DATE ISSUED: 02/25/2005
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Emsy Roop, Louisa, Kentucky, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (2003-BLA-5828) of Administrative Law Judge Linda S. Chapman denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

[1] Susie Davis, President of the Kentucky Black Lung Coalminers & Widows Association in Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order). The Board acknowledged the instant appeal on June 15, 2004, stating that the case would be reviewed under the general standard of review.

1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found, in accordance with the parties' stipulation, thirty-one years of coal mine employment and that employer was the proper responsible operator. Decision and Order at 2; Hearing Transcript at 18-19. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 1, 3, 10. After determining that the instant claim was a subsequent claim,[2] 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 2-4, 10-13. Consequently, the administrative law judge concluded that claimant failed to establish any element of entitlement previously adjudicated against him and denied the subsequent claim pursuant to 20 C.F.R. §725.309. Decision and Order at 13. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds asserting that substantial evidence supports the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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

[2] Claimant had filed two prior claims for benefits on April 13, 1981 and on December 9, 1992, which were finally denied by the district director. Director's Exhibits 2, 31. Claimant did not further pursue either claim. Director's Exhibit 31. Claimant filed the instant claim on September 20, 2001, in which the district director awarded benefits on February 25, 2003. Director's Exhibits 2, 25. Employer subsequently requested a hearing before the Office of Administrative Law Judges.

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 subsequent claim can be adjudicated 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.[3] *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The Court has further held that the administrative law judge must compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence is substantially more supportive of claimant. *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001).

After consideration of the administrative law judge's Decision and Order 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. The administrative law judge rationally found 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 3-4; Director's Exhibit 31. Considering the newly submitted evidence, the administrative law judge noted that of the four newly submitted x-ray interpretations, two were read negative for the existence of pneumoconiosis, one by Dr. Rosenberg, a B-reader, and the other by Dr. Wiot, a B-reader and Board-certified radiologist, and two were interpreted as positive, one by Dr. Poulos, a B-reader and Board-certified radiologist, and the other by Dr. Baker, who possessed no radiological qualifications but is Board-certified in Internal medicine and Pulmonary disease. Decision and Order at 10; Director's Exhibits 11, 12; Employer's Exhibits 3, 4. The administrative law judge concluded that at best the x-ray evidence was in equipoise and therefore insufficient to meet claimant's burden of proof. Decision and Order at 10.

The administrative law judge, within her discretion as fact-finder, rationally determined that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) as the conflicting x-ray interpretations by readers with similar qualifications were in equipoise. Decision and Order at 10; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Woodward*

[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 Exhibit 8.

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*); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Consequently, the administrative law judge permissibly concluded that the claimant failed to carry his burden of proof to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) by a preponderance of the x-rays. *Ondecko*, 512 U.S. 267, 18 BLR 2A-1.

The administrative law judge also correctly found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §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, 718.306 are not applicable to this claim.[4] *See* 20 C.F.R. §§718.202(a)(2)-(3); Decision and Order at 10; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly noted the entirety of the newly submitted medical opinion evidence of record and rationally considered the quality of the evidence in determining whether the opinions of record were 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 11-12. The administrative law judge rationally acted within her discretion, as fact-finder, in concluding that the opinion of Dr. Baker was insufficient to meet claimant's burden of proof because she found it to be conclusory and not well-documented or reasoned since Dr. Baker did not offer any explanation for his diagnosis of pneumoconiosis other than his own x-ray interpretation and claimant's length of coal dust exposure. *See Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Hutchens*, 8 BLR 1-16; Decision and Order at 11-12; Director's Exhibit 11.

[4] 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 2. Lastly, this claim is not a survivor's claim or filed prior to June 30, 1982; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Additionally, the administrative law judge also noted that Dr. Baker opined that the miner suffered from chronic obstructive pulmonary disease, chronic bronchitis, and hypoxemia due to his exposure to coal mine dust which could satisfy the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). Director's Exhibit 11. The administrative law judge, in a proper exercise of her discretion, rationally found that Dr. Baker's diagnosis was unreliable and thus, insufficient to establish the existence of pneumoconiosis since the opinion did not discuss whether claimant's significant heart disease and obesity may have affected claimant's current condition and because the physician did not provide any explanation or basis for his conclusion. *See Napier*, 301 F.3d 703, 22 BLR 2-537; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark,* 12 BLR 1-149; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens*, 8 BLR 1-16; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 11-12; Director's Exhibit 11.

Moreover, the administrative law judge rationally found that the preponderance of the newly submitted medical opinion evidence did not establish the existence of pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Worhach*, 17 BLR 1-105 ; *Trumbo,* 17 BLR 1-85; *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991); *Clark,* 12 BLR 1-149; *Gee,* 9 BLR 1-4; *Perry,* 9 BLR 1-1. In so finding, the administrative law judge permissibly relied on the opinions of Drs. Repsher and Rosenberg, who opined that claimant did not have pneumoconiosis or any condition caused by the inhalation of coal dust, over the medical opinion of Dr. Baker, who opined that claimant suffered from pneumoconiosis, as the former physicians offered well-documented and reasoned opinions which were supported by the medical evidence of record. *See Williams*, 338 F.3d 501, 22 BLR 2-623; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Worhach*, 17 BLR 1-105; *Trumbo,* 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Clark,* 12 BLR 1-149; *Fields*, 10 BLR 1-19; *Perry,* 9 BLR 1-1; *Hutchens*, 8 BLR 1-16; Decision and Order at 11-12; Director's Exhibits 11, 13; Employer's Exhibits 1, 5, 8, 9. It is for the administrative law judge to 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); *Rowe*, 710 F.2d 251, 5 BLR 2-99. Consequently, we affirm the administrative law judge's findings that the newly submitted evidence of record is 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 20 C.F.R. §718.204(b), the administrative law judge properly determined that the newly submitted pulmonary function studies yielded both qualifying and non-qualifying results and the blood gas studies were non-qualifying.[5] *See* 20 C.F.R. §718.204(b)(2)(i), (ii); *Winchester*

[5] A "qualifying" pulmonary function study or blood gas study yields values that are

v. Director, OWCP, 9 BLR 1-177 (1986); Director's Exhibits 11, 13; Employer's Exhibit 3; Decision and Order at 7-8, 12. 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* 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 8; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989).

Moreover, the administrative law judge considered the newly submitted medical opinion evidence of record and rationally concluded that the opinions were insufficient to establish claimant's burden of proof pursuant to Section 718.204(b)(2)(iv). *Rowe*, 710 F.2d 251, 5 BLR 2-99. The administrative law judge permissibly concluded that Dr. Baker's opinion, that claimant is totally disabled due to pneumoconiosis, was brief and unexplained and that the contrary opinions of Drs. Repsher and Rosenberg were more persuasive as the physicians offered a detailed explanation that was supported by the medical evidence of record. Decision and Order at 13; Director's Exhibits 11, 13; Employer's Exhibits 1, 5, 8, 9; *Lafferty*, 12 BLR 1-190; *Fagg*, 12 BLR 1-77; *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (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*, 9 BLR 1-4; *Perry*, 9 BLR 1-1.

Consequently, the administrative law judge permissibly found that the newly submitted arterial blood gas study evidence and the medical opinions of record were sufficient to overcome the qualifying pulmonary function studies. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); Decision and Order at 13. The administrative law judge's finding that the weight of the evidence of record is insufficient to support a finding of total disability is affirmed as it is supported by substantial evidence.[6] *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999); *Fields*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock*, 9 BLR 1-195; *Gee*, 9 BLR 1-4.

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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).

[6] While the administrative law judge stated that only one of the pulmonary function studies was qualifying, the record indicates, as the administrative law judge initially set forth in her summary of the evidence, that two of the three newly submitted pulmonary function studies were qualifying. Decision and Order at 7, 12; Director's Exhibits 11, 13; Employer's Exhibit 3. The error is harmless, however, in light of the administrative law judge's determination that the contrary probative evidence, indicating that claimant is not disabled by a respiratory or pulmonary impairment, is more persuasive. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 13.

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 Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *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 to weigh the medical evidence and to draw her 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). Because 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 any element of entitlement previously adjudicated against him. *See* 20 C.F.R. §725.309; *Ross*, 42 F.3d 993, 19 BLR 2-10; *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. Consequently, we affirm the denial of benefits. *See Kirk*, 264 F.3d 602, 22 BLR 2-228; *Ross*, 42 F.3d 993, 19 BLR 2-10.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge