BRB No. 99-1164 BLA

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| THOMAS C. TRAYLOR | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| PEABODY COAL COMPANY | ) | DATE ISSUED: |
| | ) | |
| 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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Joseph Kelly (Monhollon & Kelly), Madisonville, Kentucky, for claimant.

Robert R. Kaplan (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-613) 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). The administrative law judge found, and the parties stipulated to, thirty-six 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 3-6. After determining that the instant claim was a duplicate claim,[1] the administrative law judge noted the proper standard and found that the

[1]Claimant filed his initial claim for benefits with the Social Security Administration on June 5, 1973, which was denied on September 6, 1978 and by the Department of Labor on November 21, 1980. Director's Exhibit 19. Claimant did not appeal the denial but subsequently filed a second claim on July 18, 1988, which was finally denied by

newly submitted evidence was insufficient to establish 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 newly submitted evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this 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 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 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)(*en banc*).

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Administrative Law Judge Frederick D. Neusner on August 20, 1992, because claimant failed to establish that he was totally disabled. Director's Exhibit 19. Claimant filed his most recent claim, the subject of the instant appeal, on January 29, 1998. Director's Exhibit 1.

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

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 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 that he was totally disabled. Decision and Order at 3-4, 7; Director's Exhibit 19. 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.[3] *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

[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 state of Kentucky. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 that claimant was totally disabled pursuant to Section 718.204(c). *Piccin, supra*. Claimant contends that the administrative law judge erred in failing to accept Dr. Simpao's opinion as credible and in according greater weight to the opinion of Dr. O'Bryan. 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). 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 Coal Co.*, 12 BLR 1-111 (1988). In the instant case, the administrative law judge considered the relevant evidence of record and permissibly accorded the opinion of Dr. O'Bryan, that claimant suffers no impairment and could perform his last coal mining job, greater weight as it was better supported by the objective evidence of record. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *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 v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *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 7-8; Director's Exhibit 7; Claimant's Exhibit 3; Employer's Exhibit 1. In addition, the administrative law judge also acted within his discretion in according less weight to the opinion of Dr. Simpao as the physician's opinion is not well reasoned since Dr. Simpao's opinion, that claimant is totally disabled, is not supported by any underlying documentation as all of the newly submitted objective studies produced non-qualifying results.[4] *See Clark, supra; Dillon, supra*; *Fields, supra; Minnich, supra*; *Budash, supra*; *Gee, supra*; *Perry, supra*; *King, supra*; *Wetzel, supra; Lucostic, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Piccin, supra*; Decision and Order at 7-8; Director's Exhibit 7; Claimant's Exhibit 3; Employer's Exhibit 1.

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*,

[4]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, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

*OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the newly submitted medical opinion evidence does not establish that claimant 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). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish total disability pursuant to Section 718.204(c) 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

JAMES F. BROWN
Administrative Appeals Judge