

BRB No. 05-0292 BLA

CHARLES B. DAVIDSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR OFFICE OF WORKERS'	)	DATE ISSUED: 07/15/2005
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Jo Ann Nixon (Glenda M. August and Associates), New Iberia, Louisiana, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2004-BLA-5871) of Administrative Law Judge Clement J. Kennington 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 one year of qualifying coal mine employment and, based on the date of filing, adjudicated this claim pursuant to 20 C.F.R. Part 718.<sup>1</sup> Decision and Order at 1, 3-5. The administrative law judge, after considering all

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<sup>1</sup> Claimant filed his claim for benefits on April 16, 2002, which was denied by the district director on October 18, 2003, as claimant failed to establish any element of entitlement. Director's Exhibits 2, 18. Claimant subsequently requested a hearing before the

the evidence of record, concluded that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that the miner's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 5-8. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in his length of coal mine employment determination and in failing to find the existence of totally disabling pneumoconiosis due to coal mine employment. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge's denial of benefits is supported by substantial evidence.<sup>2</sup>

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'Keefe 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*).

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.<sup>3</sup> In addressing the length of coal mine employment, the administrative law

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Office of Administrative Law Judges. Director's Exhibit 19.

<sup>2</sup> In his brief, claimant concedes that, with the issue of augmentation of benefits, he is the only person entitled to benefits based on the evidence in the file. Decision and Order at 7-8; Claimant's Brief at 10.

<sup>3</sup> 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 4.

judge rationally concluded that claimant established only one year of qualifying coal mine employment. Decision and Order at 3-5. Claimant bears the burden of proof to establish the number of years he actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983). Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith*, 7 BLR 1-803; *Miller*, 7 BLR 1-693; *Maggard*, 6 BLR 1-285. The administrative law judge, in the instant case, relied upon the Social Security Administration records, after concluding that claimant's testimony was not credible due to the inconsistencies in his statements and written assertions, in determining the length of qualifying coal mine employment. Decision and Order at 3-5. We, therefore, affirm the administrative law judge's finding of one year of coal mine employment as it is reasonable and supported by substantial evidence. *Clark v. Barnwell Coal Co.*, 22 BLR 1-275 (2003); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Vickery*, 8 BLR 1-430; *Hutnick v. Director, OWCP*, 7 BLR 1-326 (1984); *Niccoli v. Director, OWCP*, 6 BLR 1-910 (1984).

With respect to the merits, the administrative law judge permissibly determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Initially, we reject claimant's contention, that his due process rights were violated because there was no B reader interpretation provided. The record indicates that claimant was given a full opportunity to substantiate his case before the administrative law judge. Additionally, the x-ray dated October 31, 2002 was interpreted by a Board-certified radiologist and re-read for quality by a Board-certified radiologist and B reader. Director's Exhibits 14, 15. The regulations do not require or entitle claimant to an x-ray interpretation by a B-reader. See 20 C.F.R. §§718.102, 718.202(a)(1). Therefore, as claimant was provided an x-ray interpretation by a Board-certified radiologist, we hold that there has been no violation of claimant's due process rights. See *Johnson v. Director, OWCP*, 9 BLR 1-218 (1986); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); see also *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Although not specifically addressed by the administrative law judge, the record is also insufficient to establish the existence of pneumoconiosis pursuant to 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.<sup>4</sup> See 20 C.F.R. §§718.202(a)(2)-(3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to 20 C.F.R. §718.202(a)(4), claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis as he failed to give adequate consideration to the medical opinion evidence of record. Claimant's Brief at 6-7. Claimant specifically contends that since Dr. Friedman diagnosed a respiratory condition, pneumoconiosis has been established. Claimant's Brief at 7. 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 (1989). 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).

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed the opinion of Dr. Friedman with respect to the existence of pneumoconiosis and permissibly concluded that the medical opinion evidence fails to carry claimant's burden pursuant to Section 718.202(a)(4). Claimant's Brief at 6-7; Decision and Order at 7-8; Director's Exhibit 9; *Lafferty v. Cannerton 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, in the instant case, properly considered the only medical opinion in the record and permissibly found that the report by Dr. Friedman was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) because the physician did not indicate that the miner suffered from pneumoconiosis or that any diagnosed respiratory or pulmonary condition was related to claimant's coal dust exposure.<sup>5</sup> See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002);

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<sup>4</sup> 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 a claim filed prior to June 30, 1982; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

<sup>5</sup> Dr. Friedman diagnosed atherosclerotic heart disease, chronic obstructive pulmonary disease due to smoking, pleural effusion by history and hypertension. Director's Exhibit 9. The physician concluded that these conditions preclude claimant from performing his mining duties but Dr. Friedman did not opine that any of these conditions were related to coal dust exposure. Director's Exhibit 9.

*Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty*, 12 BLR 1-190; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson*, 12 BLR 1-111; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *see also Rowe*, 710 F.2d 251, 5 BLR 2-99; Decision and Order at 7-8; Director's Exhibit 9.

Claimant further asserts, with respect to 20 C.F.R. §718.202(a)(4), that the Director has not carried his burden because Dr. Friedman did not see the x-ray ordered in the case and the x-ray was not interpreted by a B reader. Claimant's Brief at 7. We disagree. Initially, we note that claimant bears the burden of proving his entitlement to benefits under the applicable regulations and cannot rely on the Director to establish claimant's affirmative case. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983).

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The Director fails to meet this duty where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *see also Newman v. Director, OWCP*, 745 F. 2d 1162, 7 BLR 2-25 (8th Cir. 1984).

The record reflects that Dr. Friedman conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 9. The administrative law judge did not find nor does claimant allege that Dr. Friedman's report was incomplete. Although Dr. Friedman did not personally interpret the October 31, 2002 x-ray, he was provided with the reading by Dr. Medellin. Further, the administrative law judge properly determined that Dr. Friedman did not diagnose pneumoconiosis, or identify any connection between claimant's diagnosed conditions and coal mine employment, and thus rationally found his opinion is insufficient to establish clinical or legal pneumoconiosis. *See* 20 C.F.R. §718.201; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Perry*, 9 BLR 1-1; *Moore v. Dixie Pine Coal Co.*, 8 BLR 1-334 (1985); Decision and Order at 7; Director's Exhibit 9. Because Dr. Friedman's report was complete and the administrative law judge did not find the opinion incredible, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *See Hodges*, 18 BLR 1-84; *Petry v. Director, OWCP*, 14 BLR 1-98

(1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990); *see also Newman*, 745 F. 2d 1162, 7 BLR 2-25. Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.202(a)(4), we affirm the administrative law judge's findings as they are supported by substantial evidence and are in accordance with law. *See Williams*, 338 F.3d 501, 22 BLR 2-623; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Trent*, 11 BLR 1-26; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Perry*, 9 BLR 1-1; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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*, 7 BLR 1-860; *White*, 6 BLR 1-368. As the administrative law judge permissibly concluded that the evidence of record does not establish the existence of pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *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 finding that the evidence of record is insufficient to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address the administrative law judge's additional findings pursuant to 20 C.F.R. §718.204 or claimant's contentions thereunder. *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.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge