BRB No. 05-0310 BLA

EMMIT H. HUTTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ITMAN COAL COMPANY	)	DATE ISSUED: 07/28/2005
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-6138) of Administrative Law Judge Michael P. Lesniak 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, fifteen years of coal mine employment and that employer was the proper responsible operator. Decision and Order at 2-3; Hearing Transcript at 7-8. 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 7. After determining that the claim was a subsequent claim,[1] he noted the proper standard and found that the newly submitted evidence was sufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b) and thus established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 9-11. Considering the record *de novo*, the administrative law judge 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 total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 11-15. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the medical opinion evidence sufficient to establish the existence of pneumoconiosis and disability causation. 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.[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 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

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[1] Claimant filed his initial claim for benefits with the Department of Labor on March 25, 1996, which was finally denied by the district director on June 19, 1996 as claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until he filed the instant claim on March 20, 2002, which was denied by the district director on April 10, 2003. Director's Exhibits 3, 29. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 30.

[2] As the administrative law judge's length of coal mine employment and responsible operator determinations, as well as his findings pursuant to 20 C.F.R. §§725.309, 718.202(a)(1)-(3) and 718.204(b)(2)(i)-(iv) are unchallenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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] Claimant argues, with respect to Section 718.202(a)(4), that the administrative law judge erred in failing to give adequate consideration to the medical opinion evidence of record. Claimant's Brief at 4. Claimant specifically contends that Dr. Porterfield's opinion is sufficient to establish the existence of pneumoconiosis. Claimant's Brief at 4. 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).

The administrative law judge properly considered the opinions of Drs. Ranavaya, Porterfield, Crisalli, and Zaldivar and permissibly found that the reports by Drs. Ranavaya and Porterfield, diagnosing pneumoconiosis, were insufficient to meet claimant's burden of proof. *See Mabe*, 9 BLR 1-67; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 13. The administrative law judge acted within his discretion, as fact-finder, in according less weight to the opinions of Dr. Porterfield, who he found did not offer any other explanation for his diagnosis of pneumoconiosis other than his own x-ray interpretation, and of Dr. Ranavaya, because he found his diagnosis was solely based on claimant's work history and x-ray interpretation. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach v. Director*, OWCP, 17 BLR 1-105 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Anderson*, 12 BLR 1-111; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 13; Director's Exhibits 1, 9.

The administrative law judge also rationally accorded little weight to the opinion of

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in West Virginia. *See* Director's Exhibits 1, 4; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Dr. Zaldivar, stating that claimant does not have pneumoconiosis, because he found the physician's findings were poorly explained and insufficiently reasoned. Decision and Order at 13. *See Trumbo*, 17 BLR 1-85; *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). *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens*, 8 BLR 1-16; *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 13-14; Director's Exhibits 16, 17; Employer's Exhibits 7, 8. The administrative law judge permissibly accorded great weight to the opinion of Dr. Crisalli as he found the examining physician offered a well reasoned and documented opinion including his review of the other medical evidence in the record, and in light of his superior credentials in the field of pulmonary medicine.[4] *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Tedesco v. Director,* OWCP, 18 BLR 1-103 (1994); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 14; Director's Exhibit 16; Employer's Exhibit 8.

Claimant also contends generally that the administrative law judge erred in finding that claimant did not suffer from pneumoconiosis because employer's physicians were predisposed based on the number of negative x-rays employer was able to generate. We disagree. Claimant's allegation of bias is not supported by the evidence of record. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Zamora v. C.F.&I. Steel Corp.*, 7 BLR 1-568 (1984). The administrative law judge found that Dr. Crisalli reviewed extensive medical records, examined claimant, and relied upon his own objective test results as well as a portion of claimant's objective testing results from the other physicians of record in determining if claimant suffered from pneumoconiosis. Director's Exhibit 16; Employer's Exhibit 8. Because claimant has failed to establish the existence of pneumoconiosis by either x-ray or medical opinion evidence, and after weighing together both types of evidence already found to be insufficient to establish the existence of pneumoconiosis the administrative law judge found that pneumoconiosis was not established, we conclude that the administrative law judge properly found the evidence insufficient to establish the existence of pneumoconiosis.

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[4] The record indicates that Dr. Crisalli is board-certified in internal medicine and pulmonary disease. Employer's Exhibit 8. Dr. Zaldivar is board-certified in internal medicine, pulmonary disease, sleep disorder medicine, and critical care medicine. Employer's Exhibit 7. The credentials of Drs. Ranavaya and Porterfield are not in the record. Director's Exhibits 1, 9.

See Compton, 211 F.3d 203, 22 BLR 2-162. 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 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 pursuant to 20 C.F.R. §§718.202(a) 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(c) or claimant's contentions thereunder.[5] *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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[5] We note, however, claimant's reliance on *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994) is misplaced. Claimant's Brief at 4-5. In *Grigg* and *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 18 BLR 1-59 (4th Cir. 1994), the United States Court of Appeals for the Fourth Circuit held that medical opinions premised on the erroneous assumption that the miner did not have pneumoconiosis are entitled to little weight. *See also Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Contrary to claimant's contention, however, the holding in *Grigg* is not applicable in the instant case as the physician's opinions are not based on an erroneous assumption since the administrative law judge rationally concluded that the evidence of record failed to establish the existence of pneumoconiosis. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Perry v. Director, OWCP*, 9 BLR 1-1; (1986) (*en banc*); Decision and Order at 13-15.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge