BRB No. 99-0354 BLA

WILLIAM RUBENDALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Jill M. Otte (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1471) of Administrative Law Judge Ralph A. Romano 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 twelve and one-quarter years of coal mine employment. Decision and Order at 3-4. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203.[1] Decision and Order at 4-7. The

[1]Claimant filed the instant claim for benefits on August 30, 1996. Director's

administrative law judge concluded, however, that the evidence of record was insufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Decision and Order at 7-12. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that claimant is totally disabled due to pneumoconiosis. 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.[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 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*).

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. §§718.202, 718.203 and 718.204(c)(2), (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. Claimant contends that the administrative law judge erred in according greater weight to the opinion of Dr. Rashid, who examined the miner twice and based his opinion on limited data, over the opinion of Dr. Kraynak, the miner's treating physician. Claimant's Brief at 4-5. We disagree. Claimant's contentions constitute 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). Moreover, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician.[3] *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, a physician's opinion based upon his own tests and observations, or the review of other objective test results, may be substantial evidence in support of an administrative law judge's findings. *Evosevich v. Consolidation Coal* Co., 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *see also Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel, supra*. The administrative law judge, in the instant case, properly considered the entirety of the medical opinion evidence of record and permissibly accorded greater weight to the opinion of Dr. Rashid, opining that claimant's pulmonary impairment is due to his long term smoking as well as the resection of two-thirds of his right lung, than to the opinion of Dr. Kraynak, that claimant is totally disabled due to coal workers' pneumoconiosis, in light of Dr. Rashid's superior qualifications.[4] Decision and Order at 9-12; Director's

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4]Dr. Rashid is Board-certified in internal medicine and examined the miner on two occasions, performing three pulmonary function studies, two blood gas studies and reading two x-rays. Director's Exhibits 8, 9, 23. The physician opined that based on the fact that claimant has had a lung resection and a thirty-five year smoking history, claimant was not disabled as a result of working in the mines with the development of anthracosilicosis. Director's Exhibit 23. Dr. Kraynak, who is the miner's treating physician and is Board-eligible in family medicine, opined that claimant is totally and

Exhibits 8, 9, 23; Claimant's Exhibits 7, 11; *Clark, supra*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel, supra*. The administrative law judge further acted within his discretion, as fact-finder, in according less weight to the opinion of Dr. Kraynak as his opinion is not supported by the objective evidence of record, the pulmonary function study upon which the physician relied was invalidated and as Dr. Kraynak relied on inaccurate smoking and employment histories.[5] Decision and Order at 4, 9-11; Claimant's Exhibits 7, 11; Director's Exhibit 20; Hearing Transcript at 52-53; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *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*; *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Piccin, supra*.

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, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly accorded greater weight to the opinion of Dr. Rashid based upon his superior credentials, claimant has not met his burden of proof on all the elements of entitlement. *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 evidence of record is insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) as it is supported by substantial

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permanently disabled due to coal workers' pneumoconiosis contracted during his employment in the anthracite industry. Claimant's Exhibits 7, 11.

[5]Contrary to claimant's contention, the administrative law judge rationally accepted Dr. Sahillioglu's invalidation of Dr. Kraynak's November 4, 1997 pulmonary function study due to less than optimal effort, cooperation, comprehension, the lack of inspiratory effort demonstrated, inconsistent effort relating to the FVC's and MVV's and because there was no measurement of total lung capacity. Decision and Order at 8, 10; Claimant's Exhibit 2; Director's Exhibit 20; *Gorzalka v. Big Horn Coal Co*., 16 BLR 1-48 (1990); Trent *v. Director, OWCP*, 11 BLR 1-26 (1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985).

evidence and is in accordance with law.[6] Decision and Order at 11-12; *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *Trent, supra*; *Perry, supra*.

Inasmuch as claimant has failed to establish that his total disability was due to pneumoconiosis, a requisite element of entitlement in a living miner's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address claimant's remaining contentions on appeal. *See Trent, supra; Perry, supra.*

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[6]The administrative law judge fails to specifically cite 20 C.F.R. §718.204(b), but makes findings which are clearly indicative of that section. *See* Decision and Order at 11-12; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Tucker v. Director, OWCP,* 10 BLR 1-35 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge