BRB No. 00-0597 BLA

JOHN HENRY GUNTRUM, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CARPENTERTOWN COAL AND COKE 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 on Remand and Decision on Motion for Reconsideration of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James H. Owen (Calarie and Owen), Kittanning, Pennsylvania, for claimant.

William J. Walls (Marshall, Dennehey, Warner, Coleman & Goggin), Pittsburgh, Pennsylvania, for employer.

Barry H. Joyner (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand and Decision on Motion for Reconsideration (97-BLA-1891) 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).[1] This case has been before the Board previously. In the original decision, the administrative law judge found, and the parties stipulated to, twenty-one years of coal mine employment. Decision and Order dated July 24, 1998 at 2; Hearing Transcript at 11. 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)(4) (2000), 718.203(b) (2000) and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), (b) (2000).[2] Decision and Order dated July 24, 1998 at 7-10. Accordingly, benefits were awarded beginning November 1, 1996, the month in which the claim was filed. On appeal, the Board affirmed the administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(4) (2000), 718.203 (2000) and 718.204(c)(1)-(4) (2000). The Board vacated, however, the administrative law judge's finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000) and remanded the case for further consideration of the opinions of Drs. Fenster, Paul and Fino. *Guntrum v. Carpentertown Coal and Coke Co.*, BRB No. 98-1533 BLA (August 17, 1999)(unpublished).

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant, John Henry Guntrum, Jr., filed his claim for benefits on November 13, 1996. Director's Exhibit 1.

On remand, the administrative law judge concluded that the only opinion supportive of claimant's burden was unreasoned and undocumented as Dr. Fenster did not set out his reasons why he concluded that the claimant's lung disease was caused by cigarette smoking and coal mine dust and therefore it was insufficient to establish entitlement. Decision and Order on Remand at 1-2. On reconsideration, the administrative law judge again found that Dr. Fenster's opinion was unreasoned and undocumented and further that the opinion was not unrefuted as Dr. Paul stated that the miner's lung problems were due to his forty pack year smoking history. Decision on Motion for Reconsideration at 1. In the instant appeal, claimant contends that the administrative law judge exceeded the scope of the remand order. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that she will not respond to this appeal.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which claimant, employer and the Director have responded.[4] Based on the briefs submitted by the parties,

[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]The Director's brief, dated March 5, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant's brief, dated March 15, 2001, asserted that the changes contained in the new regulations will not affect the outcome of this case and therefore this matter can proceed to disposition. On March 12, 2001, employer replied asserting that the new regulations do not affect the instant appeal and requests that the

and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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 (2000); *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*).

Board decide the case at the earliest opportunity.

After consideration of the administrative law judge's Decision and Order on Remand and Decision on Motion for Reconsideration, the arguments raised on appeal, and the evidence of record, we conclude that the Decisions and Order of the administrative law judge are supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge, in the instant case, considered the entirety of the relevant medical opinion evidence and acted within his discretion in concluding that claimant's totally disabling respiratory impairment was not due to pneumoconiosis. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Contrary to claimant's contention, the administrative law judge properly reviewed the evidence of record in accordance with the Board's remand instructions and concluded that the evidence was insufficient to establish that pneumoconiosis contributed to claimant's total disability.[5] *See* Black Lung Benefits Amendments, 65 Fed. Reg. 80,049(2000), to be codified at 20 C.F.R. §718.204(c); Decision and Order on Remand at 1-2; Decision on Motion for Reconsideration at 1. The administrative law judge rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal* Co., 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order on Remand at 1-2; Decision on Motion for Reconsideration at 1; Director's Exhibits 8, 22, 23; Claimant's Exhibit 1.

[5]Contrary to claimant's assertion, the administrative law judge was not bound by his prior credibility determinations as the Board had vacated his weighing of the medical evidence and thus returned the parties to the *status quo ante*. *See Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985). Additionally, we note that the administrative law judge, as instructed on remand, only addressed the credibility of the medical evidence regarding the cause of the total disability and did not disturb the findings of pneumoconiosis arising out of coal mine employment and the existence of total disability that were previously found by the administrative law judge and affirmed by the Board.

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 rationally concluded that the medical opinion of Dr. Fenster was not well reasoned and well documented, claimant has not met his burden of proof on all the elements of entitlement. *Id.* The administrative law judge is empowered to weigh the medical opinion evidence of record 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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, as claimant makes no other specific challenge to the administrative law judge's findings on the merits, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that claimant's total disability was due to pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Inasmuch as claimant has failed to establish that his total disability was due to pneumoconiosis, an essential element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Anderson, supra*; *Trent, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand and Decision on Motion for Reconsideration denying benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge