BRB No. 99-0832 BLA

THOMAS H. WILLIAMS	)	
	)	
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 - Denial of Benefits on Remand from the Benefits Review Board of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Debra A. Smith (Krasno, Krasno & Quinn), Pottsville, Pennsylvania, for claimant.

Jennifer U. Toth (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: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (95-BLA-2421) 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). This case is before the Board for the third time. In the original Decision and Order dated May 6, 1996, the administrative law judge noted that claimant's previous claim, filed on June 2, 1986, was finally denied and that the present claim, which claimant filed on June 27, 1994, was a duplicate claim subject to the provisions of 20 C.F.R. §725.309. The

administrative law judge, based on a stipulation by the parties and a review of the record, credited claimant with seventeen years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge, relying on *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992) and without weighing all of the evidence, found that claimant established a material change in conditions pursuant to Section 725.309 based on a medical opinion diagnosing total disability. The administrative law judge further found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), but sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also determined that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge next found that the evidence was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Claimant appealed the denial of benefits to the Board and in *Williams v. Director, OWCP*, BRB No. 96-1101 BLA (Oct. 10, 1996)(unpub.), the Board, as a preliminary matter, vacated the administrative law judge's finding of a material change in conditions pursuant to Section 725.309 under the *Shupink* standard based on intervening case law. The Board instructed the administrative law judge to determine, on remand, whether claimant had established a material change in conditions pursuant to the standard enunciated by the United States Court of Appeals for the Third Circuit in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The Board affirmed the administrative law judge's finding that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to Sections 718.202(a)(4) and 718.203(b) and declined to address the parties' arguments with respect to the administrative law judge's weighing of the x-ray evidence pursuant to Section 718.202(a)(1). The Board affirmed the administrative law judge's finding that total disability was not established pursuant to Section 718.204(c)(1), but vacated the administrative law judge's findings with respect to Section 718.204(c)(4) and remanded the case to the administrative law judge for further consideration thereunder. The Board noted that, in addition to Dr. Ahluwalia's notation that claimant suffers from a mild impairment, claimant's physical limitations provided by the physicians, when compared to the exertional requirements of claimant's usual coal mine employment, if credited, may be sufficient to demonstrate total respiratory disability pursuant to Section 718.204(c)(4). The Board stated that if, on remand, the administrative law judge were to find total disability established at Section 718.204(c)(4), he must then weigh the contrary probative evidence and determine whether total disability is established pursuant to Section 718.204(c) overall and if established, the administrative law judge should determine whether the evidence establishes that pneumoconiosis is a substantial contributor to the total disability, citing *Bonessa v. U.S. Steel Corp.*, 884

F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

On remand, the administrative law judge again found that the evidence was sufficient to establish a material change in conditions pursuant to Section 725.309(d) under the standard in *Swarrow*. The administrative law judge, however, also found that the weight of the medical opinion evidence was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(4). Accordingly, benefits were denied. Claimant appealed and in *Williams v. Director, OWCP*, BRB No. 97-1410 BLA (June 26, 1998)(unpub.), the Board noted that the United States Court of Appeals for the Third Circuit had recently issued *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), holding that under 20 C.F.R. §718.202(a), the methods of establishing the existence of pneumoconiosis are not alternative, but that all of the evidence under each subsection must be weighed together before a finding of the existence of pneumoconiosis could be made.

Based on this intervening case law, the Board vacated its previous affirmance of the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4). In addition, the Board vacated the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309 in light of the fact that the administrative law judge based his finding solely upon the Board's affirmance of his finding that the existence of pneumoconiosis was established pursuant to Section 718.204(a)(4). The Board instructed the administrative law judge, on remand, to consider whether claimant established a material change in conditions under Section 725.309 in accordance with *Swarrow* and to apply the court's decision in *Williams* to determine whether claimant established the existence of pneumoconiosis. Additionally, the Board vacated the administrative law judge's finding that total disability was not established pursuant to Section 718.204(c)(4) noting, *inter alia*, that the administrative law judge had failed to follow the Board's instruction to determine, by a comparison with claimant's usual coal mine employment, whether Dr. Ahluwalia's diagnosis of a "mild impairment" could qualify as an opinion of total disability. The Board stated that if, on remand, the administrative law judge found the medical opinion evidence sufficient to establish total disability under Section 718.204(c)(4), he must then weigh all of the evidence relevant to the issue of total disability under Section 718.204(c)(1)-(4) together before finding the existence of total disability established, citing *Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Further, if the administrative law judge found total disability established, he was also instructed to determine whether claimant's total disability was caused by his pneumoconiosis pursuant to Section 718.204(b). *Bonessa*, *supra*.

On remand, as instructed by the Board, the administrative law judge reconsidered the evidence relevant to the existence of pneumoconiosis in accordance with the holding in *Williams*. With respect to the x-ray evidence, the administrative law judge adopted the findings set forth in his May 1996 decision wherein he found the x-ray evidence to be equally probative, but contradictory, and thus that claimant failed to meet his burden of proof pursuant to Section 718.202(a)(1). The administrative law judge reconsidered the medical opinion evidence and gave greater weight to the opinion of Dr. Ahluwalia, that pneumoconiosis was not present, than to the contrary opinions of Drs. Kraynak and Cali, who diagnosed pneumoconiosis, and concluded that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge further found that upon weighing all of the evidence pursuant to Section 718.202(a)(1)-(4) together, it was insufficient to establish the existence of pneumoconiosis.

With respect to total disability, the administrative law judge initially found that the evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1)-(3). The administrative law judge then discussed the medical opinion evidence pursuant to Section 718.204(c)(4) and gave diminished weight to the opinions of Drs. Cali and Kraynak, who diagnosed total disability. The administrative law judge next, as instructed by the Board, attempted to discern the exertional requirements of claimant's usual coal mine employment in conjunction with Dr. Ahluwalia's diagnosis of a mild impairment, but concluded that the available evidence was insufficient to make such a determination. Nonetheless, the administrative law judge, based on the opinion of Dr. Ahluwalia, whose report the administrative law judge found to be the most probative and entitled to the greatest weight, concluded that claimant failed to establish total disability due to pneumoconiosis. The administrative law judge thus found that claimant failed to establish a material change in conditions, *see* 20 C.F.R. §725.309. Accordingly, benefits were denied.

In the instant appeal, claimant contends that the administrative law judge erred in finding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), erred in failing to make a specific finding on the issue of total disability pursuant to Section 718.204(c)(4) and erred in failing to find total disability due to pneumoconiosis pursuant to Section 718.204(b). The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge erred in assessing the x-ray evidence pursuant to Section 718.202(a)(1), in failing to conclusively determine whether Dr. Ahluwalia's opinion established total disability pursuant to Section

718.204(c)(4) and in finding that the evidence was insufficient to establish total disability due to pneumoconiosis, *see* 20 C.F.R. §718.204(b), in light of the standard in *Bonessa*, *supra*.

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 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 of claimant 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).

After consideration of the administrative law judge's Decision and Order on Remand, 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. In addressing whether the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge, in his May 1996 decision, weighed all of the newly submitted x-ray evidence while rejecting the unanimously negative x-ray evidence from the prior claims. In his consideration of the recent x-ray evidence, the administrative law judge reasonably gave diminished weight to the June 6, 1994, x-ray since four of the five readers found that it was of inferior diagnostic quality. May 1996 Decision and Order at 5; Director's Exhibits 14, 16-17; Claimant's Exhibits 1-2. With respect to the readings of the July 12, 1994, October 12, 1995 and October 21, 1995, x-rays, the administrative law judge gave greatest weight to the six interpretations by physicians who were both B readers and Board-certified radiologists. The administrative law judge found that since three interpretations were read as positive and three were read as negative, the x-ray evidence was in equipoise and thus claimant failed to carry his burden of proof in establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). As the administrative law judge properly considered both the quality and quantity of the x-ray evidence, we reject claimant's contention that the administrative law judge was required to defer to the numerical superiority of the positive x-ray readings. *Wilt v.*

Wolverine Mining Co., 14 BLR 1-70 (1990). Further, the Director, while asserting that the administrative law judge should have considered each individual x-ray on its own merit and then weighed the conflicting x-rays together, fails to explain how this method of weighing the x-rays would change the result in this case. The July 12, 1994, x-ray was read by two B readers and Board-certified radiologists as negative and one B reader and Board-certified radiologist as positive. The October 12, 1995, x-ray was read by one B reader and Board-certified radiologist as positive and by one B reader and Board-certified radiologist as negative. The October 21, 1995, x-ray was read by one B reader and Board-certified radiologist as positive. If these x-rays are weighed together, as the Director suggests, they still appear to be in equipoise, as the administrative law judge found. We, therefore, affirm the administrative law judge's finding that the x-ray evidence was in equipoise and thus insufficient to establish the existence of pneumoconiosis by a preponderance of the x-ray evidence pursuant to Section 718.202(a)(1) as it is supported by substantial evidence. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

In addition, the administrative law judge permissibly concluded that with respect to the newly submitted physicians' opinions, the opinions of Drs. Cali and Kraynak, who stated that claimant suffered from pneumoconiosis, were outweighed by the contrary medical opinion of Dr. Ahluwalia, who found that claimant's condition was unrelated to coal mine employment, after finding that his opinion was well-documented and supported by the credible objective evidence. *Clark*, *supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order on Remand at 3-6; Director's Exhibits 8, 23, 31; Claimant's Exhibits 7, 13. We therefore affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[1] Inasmuch as the administrative law judge reconsidered the x-ray and medical opinion evidence as instructed, weighed all of the newly submitted x-ray and medical opinion evidence on remand and rationally concluded that the preponderance of the evidence did not establish the existence of

[1]Contrary to claimant's assertion, the administrative law judge's additional evidentiary analysis of the medical opinion evidence on remand is consistent with the Board's instructions to the administrative law judge to reconsider all of the evidence relevant to the existence of pneumoconiosis in accordance with the holding in *Williams*, *supra*, as we vacated our prior affirmance of the administrative law judge's findings pursuant to Section 718.202(a)(4).

pneumoconiosis, we affirm his findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a).[2] *See Clark*, *supra*; *Wetzel*, *supra*; *Lucostic*, *supra*.

[2] The administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(2)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant next contends that the administrative law judge erred in failing to make a specific finding of whether or not the medical opinion evidence was sufficient to establish total disability pursuant to Section 718.204(c)(4) and recites the evidence favorable to his claim.[3] In his reconsideration of the evidence at Section 718.204(c)(4), the administrative law judge attempted to discern the exertional requirements of claimant's usual coal mine employment in order to determine, as instructed by the Board, whether the exertional requirements of claimant's usual coal mine employment, considered in conjunction with Dr. Ahluwalia's diagnosis of a mild impairment, were sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment. Decision and Order on Remand at 7. The administrative law judge, after discussing the scant evidence of record regarding the miner's duties and job requirements, concluded that the available evidence was insufficient to make such a determination. Decision and Order on Remand at 7. It is claimant's burden to establish the exertional requirements of his usual coal mine employment to provide a basis of comparison for the administrative law judge to evaluate a medical assessment of disability and reach a conclusion regarding total disability. *See McMath*, *supra*; *Cregger v. U. S. Steel Corp.*, 6 BLR 1-1219 (1984). The administrative law judge herein engaged in an analysis of the available evidence of claimant's job duties and rationally found, as fact-finder, that the evidence of record regarding the exertional requirements was insufficient to determine whether or not Dr. Ahluwalia's diagnosis of a mild impairment could support a finding of total disability. While the administrative law judge may not have made an explicit finding of whether or not total disability was established pursuant to Section 718.204(c)(4), it is implicit upon a review of his evidentiary analysis that the evidence of record was insufficient to reach a conclusion that claimant could not perform his usual coal mine employment from a respiratory standpoint. As the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987), we affirm the administrative law judge's findings regarding the credibility of the opinions of Drs. Kraynak, Cali and Ahluwalia. Consequently, we affirm the administrative law judge's implicit finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(c)(4) as it is supported by substantial evidence. As the administrative law judge weighed all of the newly submitted medical evidence and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability

[3] The administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(1)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack*, *supra*.

pursuant to Section 718.204(c), we affirm his findings that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to Section 725.309. *See Swarrow*, *supra*; *Clark*, *supra*; *Wetzel*, *supra*; *Lucostic*, *supra*. Furthermore, in light of our affirmance of these issues, it is unnecessary to address the administrative law judge's finding pursuant to Section 718.204(b).

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge