BRB No. 01-0787 BLA

OWEN BOLLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INDIAN MOUNTAIN COAL, INCORPORATED	)	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 of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Farmer, Williams & Rutherford), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2000-BLA-760) of Administrative Law Judge Mollie W. Neal 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] The administrative law judge found twenty-one years of coal mine employment

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

and that employer was the responsible operator. Decision and Order at 3. The administrative law judge noted that this was a duplicate claim and found that a material change in conditions was established pursuant to 20 C.F.R. §725.309 (2000) in light of the standard enunciated by *Lisa Lee Mines v. Director, OWCP* [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995) as the newly submitted evidence established that claimant was suffering from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) (2000).[2] Decision and Order at 1, 16-17. 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)(1), (4) and 718.203 (2000).[3] Decision and Order at 19-23. The administrative law judge concluded, however, that the medical opinion evidence of record was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Decision and Order at 23-24. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find the evidence

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Virginia. *See* Director's Exhibit 2-4; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3]Although not specifically cited in the decision, the administrative law judge properly weighed all of the relative evidence together to determine whether claimant suffered from pneumoconiosis as required by the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR 2- (4th Cir. 2000). Decision and Order at 23.

established disability causation. Employer responds, urging affirmance of the denial of benefits, and asserting in the alternative, that the administrative law judge erred in finding the existence of pneumoconiosis arising out of coal mine employment established. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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; *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*).

[4]The administrative law judge's length of coal mine employment and responsible operator determinations, as well as her findings pursuant to 20 C.F.R. §§725.309 and 718.204(c) (2000), 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. The administrative law judge, in the instant case, rationally determined that the evidence of record was insufficient to establish total disability causation pursuant to Section 718.204(b).[5] *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

Claimant contends that the administrative law judge erred in failing to find that the total disability was due to pneumoconiosis pursuant to Section 718.204(c) based upon the medical opinion evidence as it was error to discount the opinions of Drs. Forehand and Robinette. Claimant's Brief at 5-10. 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). Contrary to claimant's contention, the administrative law judge properly reviewed the evidence of record and concluded that the opinions of Drs. Forehand and Robinette were insufficient to establish that pneumoconiosis contributed to claimant's total disability pursuant to Section 718.204(c) as Dr. Forehand's opinion was insufficiently documented since the physician was not aware of claimant's diagnosis of usual interstitial pneumonitis (UIP) and Dr. Robinette's opinion was unreasoned as the physician failed to explain the basis for his conclusion. *See* 20 C.F.R. §718.204(c); Decision and Order at 23-24.

[5]After revision of the regulations, the disability causation regulation is now set forth at 20 C.F.R. §718.204(c) (2001).

Whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge, in this instance, 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, supra*; *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, supra*; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 23-24; Director's Exhibits 7, 10, 32; Claimant's Exhibit 1; Employer's Exhibits 1, 2, 9. Additionally, although Dr. Robinette was the miner's treating/attending physician, the administrative law judge has provided valid reasons for finding his opinion entitled to less weight.[6] *See Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Grizzle v. Pickands Mather*

[6]Claimant's assertion, that Dr. Castle's opinion should be accorded little or no probative weight with respect to disability causation because the physician did not diagnose the existence of pneumoconiosis, lacks merit in this instance, as this reasoning violates the holding of the United States Court of Appeals for the Fourth Circuit in *DeHue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). In *Ballard*, the court held that, even though an administrative law judge has found that a miner suffers from pneumoconiosis, a physician's disability causation opinion which is premised upon an understanding that the miner does not have pneumoconiosis may still have probative value when the opinion acknowledges the miner's pulmonary or respiratory impairment, as does Dr. Castle's opinion in the instant case. *See Ballard, supra;* Employer's Exhibits 1, 2, 9. The court explained that such an opinion is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability. *See Ballard, supra*.

and Co., 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Clark, supra*; *Wetzel, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara, supra*; *Piccin, supra;* Decision and Order at 23-24.

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 concluded that the evidence of record does not establish that claimant is totally disabled due to pneumoconiosis, 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 her 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, as the administrative law judge rationally found that the medical opinions of record failed to establish that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c), we affirm the denial of benefits as it is supported by substantial evidence and in accordance with law. *Clark, supra*; *Lucostic, supra*.

Because claimant has failed to establish that his total disability was due to pneumoconiosis, a necessary element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Trent, supra*; *Perry, supra*. Moreover, we need not address employer's contentions regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) since we affirm the denial of benefits and, thus, this case no longer presents any real case or controversy for adjudication. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990).

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