BRB No. 02-0711

ODBER CLYDE BELCHER, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOBERT MINING INCORPORATED	)	
	)	DATE
Employer-Respondent	)	ISSUED:_____
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
		DECISION and ORDER

Appeal of the Decision and Order on Modification of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

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

Mary Rich Maloy (Jackson & Kelly, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Modification (2001-BLA-46) of Administrative Law Judge Robert J. Lesnick 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

[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.

judge, after determining that the instant case was a modification request, noted that employer was the proper responsible operator. Decision and Order on Modification at 4. The administrative law judge found, and the parties stipulated to, at least seventeen years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order on Modification at 3, 17; Hearing Transcript at 19. The administrative law judge determined that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order on Modification at 5, 17-19. The administrative law judge further concluded that the relevant medical evidence was insufficient to establish total disability causation pursuant to 20 C.F.R. §718.204 and therefore claimant failed to establish modification pursuant to 20 C.F.R. §725.310 (2000). Decision and Order on Modification at 19.

Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed his initial claim for benefits with the Department of Labor on March 25, 1999, which was denied by the district director on June 24, 1999 as claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibits 1, 16. Claimant took no further action thereafter until filing the instant request for modification on June 21, 2000, which was denied by the district director on July 6, 2000. Director's Exhibits 17, 21. Claimant requested a formal hearing and the case was forwarded to the Office of Administrative Law Judges on October 10, 2000. Director's Exhibits 22, 29.

Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis and total disability due to pneumoconiosis established. Employer responds, urging affirmance of the Decision and Order on Modification as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[3]

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 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*).

[3]The administrative law judge's responsible operator and length of coal mine employment determinations are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After considering the administrative law judge's Decision and Order on Modification, 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.[4] The administrative law judge properly determined that the initial claim for benefits was denied because claimant did not establish the existence of pneumoconiosis or that his total disability was due to pneumoconiosis. Director's Exhibits 16, 21; Decision and Order on Modification at 2, 19. Considering the relevant evidence of record, the administrative law judge rationally found that claimant failed to establish the existence of pneumoconiosis or that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204(c). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Claimant initially contends that the administrative law judge erred in his method of weighing the evidence to determine the presence of pneumoconiosis. Claimant's Brief at 5-6. 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).

[4]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 State of West Virginia. *See* Director's Exhibit 2; *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*).

Claimant argues that the administrative law judge erred in considering whether the existence of pneumoconiosis was established as he failed to weigh together all of the evidence relevant to the existence of pneumoconiosis, rather than separately at each subsection of the regulation set forth at 20 C.F.R. § 718.202(a)(1)-(4). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[5] In the instant case, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis by x-ray evidence, 20 C.F.R. §718.202(a)(1), and also failed to establish the existence of pneumoconiosis through the medical opinion evidence, 20 C.F.R. §718.202(a)(4).[6] Decision and Order on Modification at 5, 18-19. Because claimant failed to establish the existence of pneumoconiosis by either x-ray or medical opinion evidence, weighing both types of evidence already found to be insufficient to establish the existence of pneumoconiosis would not avail claimant of any further opportunity to establish benefits. Thus, because the administrative law judge permissibly found the evidence insufficient to establish the existence of pneumoconiosis at each subsection of Section 718.202(a), consideration of all of the evidence together was not necessary. *See Compton, supra*; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[5]The United States Court of Appeals for the Fourth Circuit held that although 20 C.F.R. §718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

[6]The administrative law judge also found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), (3) as there is no biopsy evidence in the record and none of the enumerated presumptions are applicable. *See* 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order on Modification at 18; Director's Exhibit 1; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Claimant also contends generally that the administrative law judge erred in finding that claimant did not suffer from pneumoconiosis primarily on the "usual number of negative x-ray reports the employer generated in this claim" upon which employer's physicians based their opinions. Claimant's Brief at 6. Specifically, claimant argues that the regulations prohibit denial of a claim based solely on negative x-ray readings and a physician's opinion which relies primarily on those readings cannot be credited. Contrary to claimant's argument, however, as the administrative law judge noted, Drs. Zaldivar, Dahhan, Repsher, Castle and Branscomb did not rely solely on negative x-rays, but also the absence of other data supportive of a finding of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); Decision and Order on Modification at 18-19; Employer's Exhibits 6-8, 11, 12, 14-17, 19. Moreover, the burden rests on claimant to establish the elements of entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom*. *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We, therefore, affirm the finding of the administrative law judge that claimant failed to establish the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law.

Claimant further contends, citing *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), that given the evidence of record, employer's physicians can be accorded little weight on the issue of disability causation as they did not diagnose the presence of pneumoconiosis. Claimant's Brief at 7. 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 has 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 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. *Mabe, supra; Perry, supra*; *Kuchwara, supra*; Decision and Order on Modification at 5, 17-19. Consequently, as claimant makes no other specific challenge to the administrative law judge's findings with respect to the existence of pneumoconiosis or total disability causation, we affirm the administrative law judge's credibility determinations as they are supported by substantial evidence and are in accordance with law. *See Trent, supra; Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Mabe, supra; Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Perry, supra*; *Kuchwara, supra*; *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 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 the existence of pneumoconiosis or 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 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 as the evidence of record is insufficient to establish the existence of pneumoconiosis or that the miner's total disability was due to pneumoconiosis, claimant has failed to establish modification pursuant to 20 C.F.R. §725.310 (2000) as it is supported by substantial evidence and is in accordance with law.[7] *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Motichak v. Beth Energy Mines, Inc*, 17 BLR 1-14 (1992); *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[7]In light of the administrative law judge's finding that claimant failed to establish modification, we need not address claimant's argument concerning total disability. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

BETTY JEAN HALL
Administrative Appeals Judge