BRB No. 04-0392 BLA

FARRIS COLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN MOUNTAIN CONTRACTORS	)	DATE ISSUED: 11/30/2004
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

David H. Neeley (Neeley & Reynolds, P.S.C.), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-5185) of Administrative Law Judge Daniel J. Roketenetz 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, and the parties stipulated to, at

least sixteen years of coal mine employment. Decision and Order at 2, 4; Director's Exhibit 31; Hearing Transcript at 8. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4. After determining that the instant claim was a subsequent claim,[1] the administrative law judge noted the proper standard and found that the newly submitted evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 4-6, 9-12. The administrative law judge further concluded that claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 12-13. Consequently, the administrative law judge concluded that claimant failed to establish any element of entitlement previously adjudicated against him and denied the subsequent claim pursuant to 20 C.F.R. §725.309. Decision and Order at 13. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (4) and in failing to find total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to the instant appeal.[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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the

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[1]Claimant filed his initial claim for benefits on April 15, 1996, which was finally denied by the district director on August 15, 1996, as claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Claimant filed the instant claim on March 1, 2001, which was denied by the district director on September 5, 2002. Director's Exhibits 2, 26. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 28.

[2]The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.304 and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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*). The United States Court of Appeals for the Sixth Circuit has held that in assessing whether the subsequent claim can be adjudicated pursuant to 20 C.F.R. §725.309, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.[3] *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The Court has further held that the administrative law judge must compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence is substantially more supportive of claimant. *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001).

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 Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge correctly noted that the previous claim was denied as claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment due to pneumoconiosis.[4] Decision and Order at 4-6, 9; Director's Exhibit 1. Considering the newly submitted evidence, the administrative law judge acted within his discretion, as fact-finder, in concluding that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to Section 718.204(b), (c). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Claimant argues that the administrative law judge erred in failing to award benefits as he failed to give adequate consideration to the medical opinions of record. Claimant specifically

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

[4]Contrary to claimant's assertion, the administrative law judge properly declined to address the evidence of record with respect to the existence of pneumoconiosis as this element of entitlement was not adjudicated against claimant in the initial decision and is therefore not relevant to the initial determination of whether claimant established a material change in conditions in this subsequent claim. *See* 20 C.F.R. §725.309; *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

contends that the administrative law judge erred in failing to accord appropriate weight to the opinions of Dr. Baker, claimant's treating physician, and Dr. Hussain as they are sufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Claimant's Brief at 7-8. 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); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant newly submitted evidence of record as it relates to total disability due to pneumoconiosis and permissibly concluded that the medical opinion evidence fails to carry claimant's burden pursuant to Section 718.204(b)(2)(iv) and (c). Claimant's Brief at 7-10; Decision and Order at 6-9, 11-13; Director's Exhibits 11, 14, 15; Claimant's Exhibits 1, 2; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). The administrative law judge, in the instant case, properly considered this evidence and permissibly found that the report by Dr. Baker was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) as the physician's opinion was that it was inadvisability for claimant to be further exposured to coal dust.[5] Director's Exhibit 14; Decision and Order at 11; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Lafferty*, 12 BLR 1-190; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988); *Fagg*, 12 BLR 1-77; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Further, contrary to claimant's assertion, the administrative law judge noted that Dr. Baker treated claimant but was not required to accord determinative weight to the opinion solely because it is offered by a treating physician. *See Jericol Mining , Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP*

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[5]Dr. Baker diagnosed coal workers' pneumoconiosis, chronic bronchitis and chronic obstructive airway disease with mild obstructive defect and noted that the "Guides to the Evaluation of Permanent Impairment" states that persons who develop pneumoconiosis should limit further exposure to the offending agents. He then went on to observe "this would imply that claimant is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations." Director's Exhibit 14.

[Stephens], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Clark*, 12 BLR 1-149; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 8-9; Claimant's Exhibit 1. Claimant's reliance upon 20 C.F.R. §718.104(d) is misplaced in this instance. Although an administrative law judge may give a treating physician's opinion controlling weight, the weight that is to be given to the treating physician must also be based on the credibility of the physician's opinion in light of its reasoning and documentation. *See* 20 C.F.R. §718.104(d)(5); *Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Collins*, 21 BLR 1-181; *Clark*, 12 BLR 1-149. The administrative law judge permissibly determined that the opinion of Dr. Baker did not constitute a finding of total disability, but rather was a statement as to the inadvisability was poorly reasoned as the physician diagnosis of total disability is based upon the need to limit further coal dust exposure. *See Napier*, 301 F.3d 703, 22 BLR 2-537; *Zimmerman*, 871 F.2d 564, 12 BLR 2-254; *Lafferty*, 12 BLR 1-190; *Clark, 12 BLR 1-149; Taylor*, 8 BLR 1-405; *Lucostic*, 8 BLR 1-46; Decision and Order at 11-12; Director's Exhibit 15.

In addressing the opinion of Dr. Hussain, the administrative law judge acted within his discretion, as fact-finder, in concluding that the opinion was entitled to less weight because it was not well reasoned. The physician did not offer any explanation or basis for his diagnosis that claimant does not have the respiratory capacity to perform the work of a coal miner since Dr. Hussain does not indicate what diagnostic evidence he relied upon in forming his conclusion and it appears that his diagnosis is based solely upon claimant's symptomology. *See Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Rowe*, 710 F.2d 251, 5 BLR 2-99; *Collins*, 21 BLR 1-181; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Anderson*, 12 BLR 1-111; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 11-12; Director's Exhibit 11.

Moreover, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Fino, than to the contrary opinions of Drs. Baker and Hussain, as the physician offered a well reasoned and documented opinion which is supported by the objective medical evidence of record. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; Decision and Order at 11; Director's Exhibit 15. Further, contrary to claimant's contention, opinions that are found to be unreliable or find no significant or compensable impairment, need not be discussed by the administrative law judge in terms of claimant's former job duties. *Wetzel*, 8 BLR 1-139.

Claimant's assertion that he is entitled to a presumption of total disability lacks merit. Claimant's Brief at 8. Claimant is not entitled to a presumption of disability as the record is devoid of any evidence of complicated pneumoconiosis and the instant claim was filed after January 1, 1982. 20 C.F.R. §§718.304, 718.305(e); Director's Exhibit 2; Decision and Order

at 4, 9, 12; *Kabachka v. Windsor Power House Coal Corp.*, 11 BLR 1-171 (1988); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Rather, claimant must establish each element of entitlement by a preponderance of the evidence. *See Trent*, 11 BLR 1-26*; Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1. Therefore, contrary to claimant's assertion, the administrative law judge, in a proper exercise of his discretion, fully addressed all of the medical opinion evidence, including the opinions of Drs. Baker and Hussain, and rationally found that this evidence could not carry claimant's burden of proof. Decision and Order at 11-13; Director's Exhibits 11, 14, 15; Claimant's Exhibits 1, 2; *Zimmerman*, 871 F.2d 564, 12 BLR 2-254; *Taylor*, 12 BLR 1-83; *Trent*, 11 BLR 1-26*; Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1.

Finally, claimant, citing the Board's decision in *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), argues that he is totally disabled for comparable and gainful work because of his age, work experience and education. Claimant's argument lacks merit. Initially, the Board's decision in *Bentley* is inapposite.[6] Moreover, under Section 718.204(b), the test for total disability is medical, not vocational. *See* 20 C.F.R. §718.204(b)*; Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *see also Ramey v. Kentland v. Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Thus, claimant's arguments are rejected. Consequently, as claimant makes no other specific challenge to the administrative law judge's credibility determinations with respect to the newly submitted medical opinion evidence, we affirm the administrative law judge's findings as they are supported by substantial evidence and are in accordance with law. *See Trent*, 11 BLR 1-26*; Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Mabe*, 9 BLR 1-67*; Budash*, 9 BLR 1-48; *Perry*, 9 BLR 1-1; *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 Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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); *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). 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*, 12 BLR 1-149; *Anderson*, 12 BLR 1-111;

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[6]In *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), a case decided under the 20 C.F.R. Part 410 regulations, the Board noted that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding at Section 410.426(a) that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(a), (b)(1).

Worley v. Blue Diamond Coal Co., 12 BLR 1-20 (1988). Inasmuch as the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment due to co pneumoconiosis pursuant to Section 718.204 is supported by substantial evidence and in accordance with law, claimant has failed to establish any element of entitlement previously adjudicated against him. *See* 20 C.F.R. §725.309; *Ross*, 42 F.3d 993, 19 BLR 2-10; *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. Consequently, we affirm the denial of benefits in this subsequent claim. *See* 20 C.F.R. §725.309; *Kirk*, 264 F.3d 602, 22 BLR 2-228; *Ross*, 42 F.3d 993, 19 BLR 2-10.

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