BRB No. 98-0353 BLA

FRANK BELCHER	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	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 of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Eugene Pecora, Beckley, West Virginia, for claimant.

W. William Prochot (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (87-BLA-3391) of Administrative Law Judge Clement J. Kichuk 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 involves a duplicate claim and is before the Board for the fourth time.[1] On remand, the

[1] In its most recent decision in this case, the Board granted employer's motion for reconsideration and remanded the case to the administrative law judge to consider whether a material change in conditions had been established pursuant to 20 C.F.R.§725.309 in light of *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). *See Belcher v. Eastern Associated Coal Corp.*, BRB No. 95-2154 BLA (Dec. 4, 1996)(unpub.).

administrative law judge reopened the record to permit the parties to submit additional medical evidence. Employer submitted the medical report of Dr. Tuteur, dated May 22, 1997 and claimant submitted no additional evidence. The administrative law judge determined that claimant established a material change in conditions pursuant to 20 C.F.R. §718.203(b), an element of entitlement previously adjudicated against claimant. Turning to the merits of the claim, the administrative law judge found that the only issues for resolution were whether claimant is totally disabled, and if so, whether the disability was due to pneumoconiosis. After consideration of all of the evidence of record, the administrative law judge concluded that claimant did not establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in according determinative weight to Dr. Tuteur's opinion. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not participate in this appeal.[2]

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 applicable 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 of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

[2] The administrative law judge's findings that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309, that claimant suffered from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204 (c)(1)-(3) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 that there is no reversible error contained therein. Claimant's only arguments on appeal are that the administrative law judge erred in failing to accord dispositive weight to Dr. Rasmussen's opinions as the physician examined claimant and possessed qualifications which matched Dr. Tuteur's credentials. These arguments are without merit. Contrary to claimant's contention, the administrative law judge is required to consider all of the medical evidence and may not automatically credit a physician's report because the physician examined claimant. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Moreover, the administrative law judge rationally concluded that Dr. Tuteur possessed superior qualifications to Dr. Rasmussen, a board-certified internist, in that Dr. Tuteur is board-certified in internal medicine and pulmonary disease, is an associate professor in medicine and is the Director of the Pulmonary Function Laboratory at the University of Washington. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). As claimant raises no other allegation of error, and the administrative law judge acted within his discretion in determining that Dr. Tuteur's opinion was consistent with the objective data and was well reasoned and based on a thorough analysis of the medical evidence of record, and thus entitled to the greatest weight, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disablity due to pneumoconiosis. 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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Inasmuch as the administrative law judge's findings are supported by substantial evidence, we affirm his determination pursuant to Section 718.204.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge