

BRB No. 98-0378 BLA

TERRY W. FORESTER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NAVISTAR, 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 Upon Remand of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

H. Kent Hendrickson (Rice & Hendrickson), Harlan, Kentucky, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Upon Remand (95-BLA-01256) of Administrative Law Judge Robert D. Kaplan 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 on appeal to the Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with nineteen years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. Claimant appealed and in *Forester v. Navistar, Inc.*, BRB No. 96-1213 BLA (May 27, 1997)(unpub.), the Board affirmed the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R.

§718.202(a)(1)-(3), but vacated in part the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4) and remanded the case for further consideration thereunder.¹ On remand, the administrative law judge again found that the medical opinion evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in his consideration of the medical opinion evidence and failed to consider all of the evidence. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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 the 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 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).

After consideration of the administrative law judge's Decision and Order Upon 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. In weighing the medical opinions of record, the administrative law judge rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4). *Perry, supra*; *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In so finding, the administrative law judge permissibly acted within his discretion as fact-finder in concluding that the opinions of Drs. Baker and Myers, that claimant suffered from pneumoconiosis, were outweighed by the medical opinion of Dr. Dahhan, who found that

¹ The Board affirmed the administrative law judge's finding that Dr. Clarke's opinion was unreasoned, but instructed the administrative law judge to consider the opinions of Drs. Baker, Myers and Dahhan on remand.

claimant's condition was unrelated to coal mine employment, after finding that the physician's opinion was better-reasoned and better-documented and supported by the objective evidence. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *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 Upon Remand at 7; Director's Exhibits 14, 16, 39; Claimant's Exhibit 1. Additionally, the administrative law judge acted within his discretion as trier-of-fact in according the diagnosis of Dr. Baker no weight since the administrative law judge determined that the physician relied solely on his own positive x-ray reading in diagnosing the existence of pneumoconiosis, and the x-ray was unidentified, undated and not in evidence. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark, supra*; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel, supra*; *Lucostic, supra*; *Oggero, supra*; Decision and Order Upon Remand at 5-6; Claimant's Exhibit 1. Contrary to claimant's contention, the administrative law judge was not required to reconsider or reevaluate the x-ray evidence and medical opinion of Dr. Clarke inasmuch as the Board previously affirmed his findings with respect to this evidence. *See Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). 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); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, as the administrative law judge weighed all of the medical opinions and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Clark, supra*; *Perry, supra*; *Lucostic, supra*; *Oggero, supra*. Claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement under 20 C.F.R. Part 718, precludes an award of benefits thereunder. *Anderson, supra*; *Trent, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge