BRB No. 01-0133 BLA

JOHNNY B. PACK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
WHEELWRIGHT MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
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 - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2000-BLA-0364) of Administrative Law Judge Joseph E. Kane 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 has been before the Board previously. The administrative law judge accepted the parties' stipulation that claimant established twenty-six years of qualifying coal mine employment. Considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204 (2000). Therefore, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge's consideration of the evidence pursuant to Section 718.204(c)(4)(2000) is erroneous. Employer/carrier

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[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, 725, 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao,* No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001).

[2]Claimant filed his first application for benefits on August 26, 1992. Director's Exhibit 31. Administrative Law Judge Joel Williams determined that claimant established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish a totally disabling respiratory impairment. Claimant appealed to the Board, which affirmed the administrative law judge's findings. *Pack v. Wheelwright Industries, Inc.*, BRB No. 94-3931 BLA (May 26, 1995)(unpub.). On October 6, 1998, claimant filed the instant claim. Director's Exhibit 1.

[3]The administrative law judge's findings pursuant to Section 718.204(c)(1)

responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not participate in this appeal.

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 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*). The United States Court of Appeals for the Sixth Circuit has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to Section 725.309 (2000), 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. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

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 therein. In considering the medical opinion evidence at Section 718.204(c)(4)(2000), the administrative law judge found that Dr. Sundaram submitted two opinions, dated November 10, 1998 and September 7, 1999. Decision and

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- (3) (2000) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

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

5On both occasions, Dr. Sundaram completed a "Medical History and Examination for Coal Workers' Pneumoconiosis" form by the U.S. Department of Labor. In 1998, the physician noted that claimant stopped smoking in 1993 and had smoked ½ pack, but did not indicate whether this was per day or week. Dr. Sundaram diagnosed a moderate impairment, but indicated that it is difficult to

Order at 7; Director's Exhibits 8, 28. The administrative law judge also found that Dr. Broudy examined claimant and submitted his medical opinion on April 21, 1999. Decision and Order at 8; Director's Exhibit 22. The administrative law judge acknowledged Dr. Sundaram's status as the miner's treating physician, but noted that he was not required to accord weight to the physician's opinion without additionally considering how long the physician had treated claimant and whether the physician's opinion is well-documented and well-reasoned. Decision and Order at 10. The administrative law judge found that Dr. Sundaram first saw claimant in November 1998, the date of his first report, and had seen the claimant for less than a year at the time of his second report in September 1999. *Id.* The administrative law judge then found that Dr. Sundaram's opinion, that claimant suffered from a totally disabling pulmonary impairment in 1998, was based on a non-qualifying arterial blood gas study, pulmonary function study and the fact that claimant experiences shortness of breath with limited activity. The administrative law judge found that Dr. Sundaram rendered the same opinion in 1999, based upon a non-qualifying pulmonary function study and claimant's shortness of breath. The administrative law judge found that Dr. Broudy's contrary opinion, based upon claimant's shortness of breath and non-qualifying arterial blood gas and pulmonary function studies, was better documented and reasoned than Dr. Sundaram's opinion, and was better supported by the objective evidence as a whole. Decision and Order at 10-11. Thus, the administrative law judge concluded that the medical opinion evidence in conjunction with the arterial blood gas and pulmonary function studies fails to establish that claimant is now totally disabled .

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separate the causes of coal dust versus smoking. Director's Exhibit 8. In 1999, the physician listed "car dropper general" as claimant's job title, but did not include a list of the job's physical requirements. Dr. Sundaram noted a smoking history from 1970 to 1989 of one-half pack, but did not indicate whether this was per day or week. The physician again opined that claimant has a moderate pulmonary impairment, but that it was difficult to determine whether the impairment is due to coal dust or smoking.

6Dr. Broudy examined claimant on April 21, 1999. At that time, he observed that claimant's carboxyhemoglobin was elevated, and claimant admitted smoking an occasional cigarette but not more than ½ pack per week. Dr. Broudy noted that claimant was last employed as a car trimmer which involved loading railroad cars by mechanical means. After listing claimant's symptoms, medical history, physical examination results, objective testing results and his review of additional medical evidence, Dr. Broudy opined that claimant suffers from chronic bronchitis due to cigarette smoking. Dr. Broudy further opined that claimant does not suffer from coal workers' pneumoconiosis nor any significant pulmonary impairment arising out his employment. Dr. Broudy concluded that claimant retains the capacity to do the work of an underground coal miner or to do similarly arduous manual labor.

Contrary to claimant's contentions, Dr. Broudy discussed claimant's past coal mine employment as a repairman, electrician and welder in his 1999 report as well as his last coal mine employment as a car trimmer, which the doctor determined was "much easier than [claimant's] previous work." Director's Exhibit 22. Dr. Broudy also noted that claimant's employment as a car trimmer entailed loading railroad cars by mechanical means and found that claimant "retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor." *Id*. Dr. Broudy's opinion indicates that he was aware of the exertional requirements of claimant's usual coal mine employment, and on the basis of his opinion that claimant was capable of performing even arduous manual labor, concluded that claimant was not totally disabled from performing his employment as a car trimmer. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

We also reject claimant's contention that the administrative law judge "failed to give proper weight" to Dr. Sundaram's opinion as he was claimant's treating physician. Although the United States Court of Appeals for the Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of nontreating physicians, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the Sixth Circuit has also indicated that this principle does not alter the administrative law judge's duty, as trier of fact, to evaluate the credibility of the treating physician's opinion, *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). In the instant case, the administrative law judge acknowledged that Dr. Sundaram had been treating claimant for less than one year at the time of his September 1999 medical opinion. Decision and Order at 10. Moreover, the administrative law judge permissibly found that Dr. Broudy's opinion was better supported by the objective medical evidence as a whole than Dr. Sundaram's opinion regarding whether claimant suffered from a totally disabling pulmonary impairment. 20 C.F.R. §718.204(c)(4)(2000). *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90, n. 1 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985); Decision and Order at 10 -11. Thus, the administrative law judge acted within his discretion in declining to accord greater weight to Dr. Sundaram's opinion. *See Griffith*, *supra*.

Claimant's contention that the administrative law judge erred by failing to consider Dr. DeGuzman's opinion is also without merit. In the instant case, Dr. Guzman's January 19, 1991 medical opinion was submitted with the initial claim in this

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7The administrative law judge applied the total disability regulation set forth at 20 C.F.R. 718.204(c)(2000). After revision of the regulations, the total disability regulation is now set forth at Section 718.204(b)(2)(2001).

case and was not a part of the newly submitted evidence considered by the administrative law judge to determine whether claimant established a material change in conditions pursuant to Section 725.309 (2000). *See Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1- 81, BRB No. 99-0246 BLA (2000); *Ross*, *supra*. Therefore, we reject claimant's contention that the administrative law judge erred by failing to consider Dr. DeGuzman's opinion. *Id.*

Lastly, we reject claimant's contention that the administrative law judge erred in relying on Dr. Broudy's opinion because the physician relied upon an inaccurate smoking history. The issue of claimant's smoking history, relevant to the cause of claimant's total disability, was not considered by the administrative law judge inasmuch as the evidence failed to establish claimant was totally disabled pursuant to Section 718.204(c)(2000). *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 B LR 1-36 (1986).

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 newly submitted evidence does not establish that claimant is totally disabled, claimant has not met his burden of proof on all the elements of entitlement. *Ross, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988) *supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish claimant suffers from a total respiratory disability as it is supported by substantial evidence and is in accordance with law. Inasmuch as claimant has failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), we affirm the denial of benefits. *Ross, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge