BRB No. 02-0384 BLA

HARRY E. MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY	)	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 Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Harry E. Moore, Bluefield, Virginia, *pro se*.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (98-BLA-00585) of Administrative Law Judge Daniel F. Sutton 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] This case has been before

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

the Board previously. In the original decision, the administrative law judge, after determining that the instant case was a duplicate claim, found that a material change in conditions was established pursuant to 20 C.F.R. §725.309 (2000) in light of the standard enunciated by *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)[2] as the newly submitted evidence of record establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000).[3] Decision and Order dated June 26, 2000 at 2, 4-5, 7, 9-10. The administrative law judge found, and the parties stipulated to, thirty-one years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order dated June 26, 2000 at 3, 5; Director's Exhibit 29. Considering the evidence of record *de novo*, the administrative law judge determined that claimant established the existence of totally disabling pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203 and 718.204(b), (c)(4) (2000). Decision and Order dated June 26, 2000 at 10-16. Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's determination that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) and his findings pursuant to 20 C.F.R. §§718.202(a) and 718.203 (2000). The Board vacated, however, the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(4) (2000) and remanded the case for further consideration of the relevant evidence of record. *Moore v. U.S. Steel Mining Co.*, BRB No. 00-0991 BLA (June 27, 2001)(unpublished).

On remand, the administrative law judge, after noting the Board's remand instructions, found that the relevant evidence of record was insufficient to establish total

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[2]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; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3]The procedural history of this case has previously been set forth in detail in the Board's prior decision in *Moore v. U.S. Steel Mining Co.*, BRB No. 00-0991 BLA (June 27, 2001)(unpublished), which is incorporated herein by reference.

disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). Decision and Order on Remand at 4-10. Accordingly, benefits were denied. In the instant appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in the instant appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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*).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The administrative law judge, within his discretion as fact-finder, rationally determined that the evidence of record was insufficient to establish that the miner suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(4) (2000). *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

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). Contrary to claimant's assertion in his *pro se* appeal, the administrative law judge properly reviewed the evidence of record and concluded that the opinion of Dr. Jabour, the only opinion supportive of claimant's burden, was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(4) (2000) as Dr. Jabour's opinion contained inconsistencies and gaps with regard to the extent of the disability and the physician's failure to consider claimant's obesity raises serious questions regarding the thoroughness of his analysis. *See* 20 C.F.R. §718.204(c)(4) (2000); *Hutchens v. Director, OWCP*, 8 BLR 1-16

(1985); *Kuchwara, supra*; Decision and Order on Remand at 10; Director's Exhibits 13, 14; Claimant's Exhibit 1. Additionally, we reject claimant's assertion that the administrative law judge erred in failing to accord less weight to Dr. Hippensteel's opinion, that claimant could perform his usual coal mine employment, as the physician did not diagnose pneumoconiosis. The determination that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000) does not automatically result in the conclusion that claimant is also suffering from a respiratory or pulmonary impairment pursuant to Section 718.204(c) (2000) or that a physician's opinion with respect to total disability is unreasoned. *See Jarrell v. C & H Coal Co.*, 9 BLR 1-52 (1986)(Brown, J., concurring and dissenting); *Sweet v. Jeddo-Highland Coal Co.*, 7 BLR 1-659 (1985); *Webb v. Armco Steel Corp.*, 6 BLR 1-1120 (1984). The administrative law judge, after properly noting that Dr. Hippensteel conducted a physical examination, including a pulmonary function study, blood gas study, x-ray and an electrocardiogram as well as reviewing the other medical evidence of record, permissibly concluded that the physician's opinion constituted contrary evidence that Dr. Jabour's opinion could not overcome. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Hutchens, supra*; *Kuchwara, supra*; Decision and Order on Remand at 8, 10; Director's Exhibit 28.

Whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge, in this instance, rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields, supra*; *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic, supra*; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order on Remand at 4-10; Director's Exhibits 8, 13, 14, 28-31, 33, 36, 38, 41; Claimant's Exhibit 1; Employer's Exhibit 2. Additionally, although Dr. Jabour was the miner's treating physician, the administrative law judge has provided valid reasons for finding his opinion entitled to less weight. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Tedesco v. Director,* OWCP, 18 BLR 1-103 (1994); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Clark, supra*; *Wetzel, supra*; *Hutchens, supra*; *Kuchwara, supra*; Decision and Order on Remand at 10.

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 that claimant is totally disabled, 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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, as the administrative law judge rationally found that the medical opinions of record failed to establish that claimant is totally disabled pursuant to Section 718.204(c)(4) (2000), we affirm the denial of benefits as it is supported by substantial evidence and in accordance with law. *Clark, supra*; *Lucostic, supra*.

Inasmuch as claimant has failed to establish that he is totally disabled by a respiratory or pulmonary impairment, a requisite element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Trent, supra*; *Perry, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand 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