BRB No. 00-1192 BLA

JOHN KOSICK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Modification (00-BLA-00308) of Administrative Law Judge Paul H. Teitler 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] The administrative law judge noted that the instant claim

[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 (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

was a modification request and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 2-3. The administrative law judge found, and the parties stipulated to, twenty-seven years of qualifying coal mine employment and the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203 (2000). Decision and Order at 3, 5; Hearing Transcript at 6-7. The administrative law judge concluded that the evidence of record was insufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) (2000) and thus insufficient to establish modification pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 6-7. Accordingly, benefits were denied. On appeal, claimant contends that the opinion of Dr. Kraynak is sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(4) (2000). The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge's denial of benefits is supported by substantial evidence.[3]

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). The Board subsequently issued an order requesting supplemental briefing in the instant case. 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). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]Claimant filed his initial claim for benefits on January 2, 1974, which was denied on November 28, 1980. Director's Exhibit 26. Claimant took no further action on that claim. Claimant filed a second claim on October 10, 1984, which was finally denied on March 17, 1988 as claimant failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 26. Claimant filed the present claim on December 2, 1994, which was denied on May 24, 1995. Director's Exhibits 1, 13. Claimant submitted additional medical evidence on March 26, 1996 and the Department of Labor accepted the submission as a petition for modification. Director's Exhibits 14, 16. The modification request was finally denied on September 22, 1998 as claimant failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibits 22, 24, 32, 33, 37, 39. Claimant filed the instant modification request on March 29, 1999. Director's Exhibit 40.

[3]The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204(c)(1)-(3) are affirmed

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 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*).

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

After consideration of the administrative law judge's Decision and Order on Modification, 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. With respect to 20 C.F.R. §718.204(c)(4) (2000), claimant contends that the administrative law judge erred in failing to accord proper weight to the opinion of Dr. Kraynak. 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). Moreover, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating or attending physician.[4] *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, a physician's opinion based upon his own tests and observations, or the review of other objective test results, may be substantial evidence in support of an administrative law judge's findings. *Evosevich v. Consolidation Coal* Co., 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *see also Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel, supra*.

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant evidence as it relates to total disability and permissibly concluded that the weight of the credible evidence fails to carry claimant's burden pursuant to Section 718.204(c)(4) (2000). Decision and Order at 7; Director's Exhibits 7, 28, 31, 46; Claimant's Exhibit 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); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge, in the instant case, properly considered the relevant evidence of record and permissibly accorded the opinions, that claimant suffers no respiratory or pulmonary impairment due to coal dust exposure and could perform his last coal mining job, greater weight as the administrative law judge found they were better reasoned, documented and supported by the objective evidence of record. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal*

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

Co., 10 BLR 1-19 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Wetzel, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); Decision and Order at 7; Director's Exhibits 7, 28, 31, 46; Claimant's Exhibit 2. Moreover, the administrative law judge, in a proper exercise of his discretion, rationally found that the only opinion supportive of claimant's burden, that of Dr. Kraynak, was unreliable and thus insufficient to meet claimant's burden of proof as the physician relied upon invalid or non-qualifying objective medical evidence and his conclusions are not supported by the objective evidence of record.[5] *Worhach, supra*; *Lafferty, supra*; *Clark, supra*; *Dillon, supra*; *Fields, supra*; *Perry, supra*; *Wetzel, supra*; *Lucostic, supra; Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara, supra*; *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); Decision and Order at 7; Director's Exhibit 31; Claimant's Exhibit 2.

[5]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

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 only evidence of record indicating that claimant is totally disabled is unreliable, claimant has not met his burden of proof on all the elements of entitlement. *See* 20 C.F.R. Part 718; *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, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Furthermore, since the determination of whether claimant has a totally disabling respiratory impairment is primarily a medical determination, claimant's testimony alone, under the circumstances of this case, could not alter the administrative law judge's finding. *Anderson, supra*. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability and thus insufficient to establish modification pursuant to 20 C.F.R. §725.310 (2000) as it is supported by substantial evidence and is in accordance with law.[6] *See Clark, supra*; *Piccin, supra*.

[6]We note that the administrative law judge did not make a separate mistake of fact or change in condition determination in this modification request. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). A remand, however, is not required as these determinations are subsumed into the administrative law judge's decision on the merits. *See Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge