BRB No. 01-0124 BLA

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

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Walter E. Cooper, Tazewell, Virginia, *pro se*.

Barry H. Joyner (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: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (99-BLA-1157) of Administrative Law Judge Daniel J. Roketenetz 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).[2] After determining that the instant case

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2]The Department of Labor has amended the regulations implementing the Federal Coal

was a duplicate claim, found a material change in conditions established pursuant to 20 C.F.R. §725.309 (2000) based upon the concession by the Director, Office of Workers' Compensation Programs (the Director), that the evidence of record now establishes the existence of pneumoconiosis.[3] Decision and Order at 3-5, 7. The administrative law judge found that the record supported the Director's concession of thirteen and one-half 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 at 4-5. The administrative law judge determined that claimant was totally disabled from a respiratory impairment pursuant to 20 C.F.R. §718.204(c) (2000), but concluded that the evidence of record was insufficient to establish that the total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Decision and Order at 8-10. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.[4]

Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). 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).

[3]The record indicates that claimant filed his initial claim for benefits on May 22, 1970, which was denied by the Social Security Administration on November 7, 1975 and finally denied by the Department of Labor on February 19, 1987. Director's Exhibit 23. Claimant took no further action until he filed a second claim on March 11, 1996, the subject of the instant appeal. Director's Exhibit 1. Consequently, the present claim constitutes a duplicate claim pursuant to 20 C.F.R.§725.309 (2000). *See 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).

[4]The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§725.309, 718.202(a) and 718.204(c)(1)-(4) (2000) are

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. *McFall v. Jewell Ridge Coal Corp.*, 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*).

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favorable to claimant and unchallenged on appeal, and are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The Director, in his brief, also concedes that claimant's pneumoconiosis arose out of his coal mine employment. Director's Brief at 3.

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 Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein.[5] The administrative law judge, in the instant case, rationally acted within his discretion in concluding that claimant's totally disabling respiratory impairment was not due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge properly reviewed the opinion of Dr. Forehand, who opined that claimant's disability is not due to pneumoconiosis but cigarette smoking, and concluded that the evidence was insufficient to establish that pneumoconiosis contributed to claimant's total disability.[6] *See* 20 C.F.R. §718.204(b) (2000); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225, (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); Decision and Order at 9-10; Director's Exhibits 10, 46.

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 Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally concluded that there is no medical opinion linking claimant's respiratory impairment to pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Id.* The administrative law judge is empowered to weigh the medical opinion evidence of record 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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that claimant's total disability was due to pneumoconiosis as it is supported by substantial evidence and is in accordance with law.[7]

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[5]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 Commonwealth of Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[6]Although the administrative law judge did not discuss the opinions of Drs. Naeye, Baxter, Kanwal, Taylor and Robinette, remand is not necessary as these physicians do not opine that claimant's pneumoconiosis contributes to his pulmonary disability. *See Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibits 23, 44.

[7]The administrative law judge properly found that the presumption at 20 C.F.R.

Inasmuch as claimant has failed to establish that his total disability was due to pneumoconiosis pursuant to Section 718.204(c) (2001),[8] an essential element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Anderson, supra*; *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

§718.304 (2000) is not applicable in this case as the record indicates that there is no evidence of complicated pneumoconiosis contained therein. *See* 20 C.F.R. §718.205(c)(3) (2000); Decision and Order at 8.

[8]The administrative law judge applied disability causation regulation set forth at 20 C.F.R. §718.204(b) (2000). After revision of the regulations, the disability causation regulation is now set forth at 20 C.F.R. §718.204(c) (2001).