BRB No. 04-0329 BLA

RONALD PRICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 09/17/2004
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Virginia Murtha Cowley, West Pittston, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-05404) 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). The administrative law judge, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3. The administrative law judge found, and the parties stipulated to, fourteen and one-half 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. Decision and Order at 2; Hearing Transcript at 11-13; Director's Brief at 2. The administrative law judge properly found that

he would address the merits of this subsequent claim[1] since the Director conceded the existence of pneumoconiosis arising out of coal mine employment, elements of entitlement previously adjudicated against claimant. Decision and Order at 2-3; Director's Exhibit 1. Considering the record *de novo*, the administrative law judge found that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 4-6. Accordingly, benefits were denied.

On appeal, claimant contends that the lay testimony and the opinion of Dr. Bobeck, claimant's treating physician, are sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(iii), (iv) and (c). 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.[2]

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*).

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

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[1]Claimant filed his initial claim for benefits on March 3, 1998, which was finally denied by the Department of Labor on May 26, 1998, as claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed this subsequent claim on September 26, 2001, which was finally denied by the district director on June 27, 2002. Director's Exhibits 3, 20. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 21.

[2]The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

law judge's Decision and Order is supported by substantial evidence and contains no reversible error. The administrative law judge considered the entirety of the relevant medical evidence and acted within his discretion in concluding that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iii), (iv). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Claimant initially contends that the administrative law judge erred in failing to find a totally disabling respiratory impairment established pursuant to 20 C.F.R. §718.204(b)(2)(iii) (iv) as he failed to give adequate consideration to the medical opinion and lay evidence of record. Claimant specifically contends that the administrative law judge erred in failing to accord appropriate weight to the opinion of Dr. Bobeck, the miner's treating physician, as it is sufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Claimant's Brief at 2-4. 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 Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Further, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician.[3] *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*, 8 BLR 1-139.

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*, 12 BLR 1-149; *Martinez v.*

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[3]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last 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 Exhibits 1, 4.

Clayton Coal Co., 10 BLR 1-24 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel*, 8 BLR 1-139; Decision and Order at 6; Director's Exhibits 1, 11, 12, 19, 31. Further, although Dr. Bobeck is the miner's treating physician, the administrative law judge considered the factors set forth in 20 C.F.R. §718.104(d) and has provided a rational reason for finding his opinion insufficient to meet claimant's burden of proof. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Mancia*, 130 F.3d 579; *Lango*, 104 F.3d 573; *Evosevich*, 789 F.2d 1021, 9 BLR 2-10; *Tedesco*, 18 BLR 1-103; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; Decision and Order at 6.

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' burden pursuant to Section 718.204(b)(2)(iii), (iv). Decision and Order at 5-6; Director's Exhibits 1, 11, 12, 19, 31; *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). The administrative law judge properly considered the relevant evidence of record and permissibly accorded the opinions of Drs. Sahillioglu and Talati, that claimant does not have a totally disabling respiratory or pulmonary impairment that would prevent him from performing his last coal mining job, greater weight as they were better reasoned and documented and supported by the objective evidence of record. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; *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*, 9 BLR 1-4; *Perry*, 9 BLR 1-1; *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 6; Director's Exhibits 1, 11, 12, 31. 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. Bobeck, was unreliable and thus insufficient to meet claimant's burden of proof as the physician provided no objective basis for his opinion and his conclusions are not supported by the objective evidence of record.[4] *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Worhach*,17 BLR 1-105; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; *Perry*, 9 BLR 1-1; *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46*; Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 6; Director's Exhibit 19.

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[4]In addition to Dr. Bobeck's opinion being unsupported by reference to objective evidence, his diagnosis of cardiomyopathy with congestive heart failure is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii) as the physician failed to affirmatively diagnose cor pulmonale or indicate that the congestive heart failure was right-sided. *See* 20 C.F.R. §718.204(b)(2)(iii); Director's Exhibit 19; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989).

Additionally, although claimant contends that his lay testimony also supports a finding of total disability, lay testimony of record, without credible, corroborating medical evidence, is insufficient to establish a totally disabling respiratory or pulmonary impairment in a living miner's case and therefore could not satisfy claimant's burden of proof on this issue. *See* 20 C.F.R. §718.204(d)(5); *Madden v. Gopher Mining Co.*, 21 BLR 1-122 (1999); *Salyers v. Director, OWCP*, 12 BLR 1-193 (1989); *Trent*, 11 BLR 1-26; *Fields*, 10 BLR 1-19; *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985); *Centak v. Director, OWCP*, 6 BLR 1-1072 (1984).

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 Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *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 by a respiratory or pulmonary impairment, claimant has not met his burden of proof on all the elements of entitlement. *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. 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*, 12 BLR 1-149; *Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, as claimant makes no other specific challenge to the administrative law judge's findings on the merits, we affirm the administrative law judge's determination that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(b)(2) as it is supported by substantial evidence and is in accordance with law. *See Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because claimant has failed to establish the existence of a totally disabling 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 and we need not address claimant's additional contention with respect to disability causation pursuant to 20 C.F.R. §718.204(c). *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Accordingly, the administrative law judge's Decision and Order 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