BRB No. 04-0294 BLA

LARRY DEAN COLLETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANDALEX RESOURCES, INCORPORATED	)	DATE ISSUED: 08/30/2004
	)	
and	)	
	)	
OLD REPUBLIC 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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-5171) of Administrative Law Judge Thomas F. Phalen, Jr. 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 found, and the parties stipulated to, twenty-one and one-half years of coal mine employment and that employer was the proper responsible operator. Decision and Order at 2-4; Director's Exhibit 31; Hearing Transcript at

9. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 7. After determining that the current claim is a subsequent claim,[1] the administrative law judge noted the proper standard and found that the newly submitted evidence is 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 3, 7-11. Consequently, the administrative law judge concluded that claimant failed to establish any element of entitlement previously adjudicated against him and denied the subsequent claim pursuant to 20 C.F.R. §725.309. Decision and Order at 11. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 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

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[1]Claimant filed his initial claim for benefits on May 31, 1994, which was finally denied on May 23, 1997, as claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Claimant filed the current claim on April 4, 2001, which was denied by the district director on August 13, 2002. Director's Exhibits 2, 16. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 17.

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

BLR 1-1 (1986)(*en banc*). The United States Court of Appeals for the Sixth Circuit has held that in assessing whether the subsequent claim can be adjudicated pursuant to 20 C.F.R. §725.309, 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.[3] *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *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 Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge correctly noted that the previous claim was denied because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment. Decision and Order at 3, 7-9; Director's Exhibit 1. Considering the newly submitted evidence, the administrative law judge acted within his discretion, as fact-finder, in concluding that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Claimant argues that the administrative law judge failed to give adequate consideration to the medical opinions of record on the issue of total disability. Claimant specifically contends that the administrative law judge failed to accord appropriate weight to the opinion of Dr. Baker 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 3. 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); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

In addressing the medical opinions of record, the administrative law judge permissibly concluded that the newly submitted evidence was insufficient to establish claimant's burden of proof pursuant to Section 718.204(b)(2)(iv) as no physician opined that claimant was totally disabled.[4] Decision and Order at 10-11; Director's Exhibits 12, 14; *Lafferty v.*

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[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

[4]Dr. Baker opined that claimant had no pulmonary impairment and had the respiratory

Cannelton Industries, Inc., 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *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. Moreover, contrary to claimant's contention, opinions finding no significant or compensable impairment need not be discussed by the administrative law judge in terms of claimant's former job duties. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Further, opinions stating that claimant should not be exposed further to coal mine dust are insufficient to establish total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gamble Co., Inc.*, 12 BLR 1-83 (1988).

Additionally, contrary to claimant's argument, the administrative law judge was not required to consider claimant's age, education or work experience in relation to his ability to work outside of the coal mine industry. *See Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985)(holding that the test for total disability is solely a medical test, not a vocational test); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-6-7 (2004); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); 20 C.F.R. §718.204(b).

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 sub nom. 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). 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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b) is supported by substantial evidence and in accordance with law, claimant has failed to establish any element of entitlement previously adjudicated against him. *See* 20 C.F.R. §725.309; *Ross*, 42 F.3d 993, 19 BLR 2-10; *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. Consequently, we affirm the denial

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capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 12. Dr. Lockey opined, based on the objective evidence, that there is no evidence of any pulmonary impairment and that claimant should have no further dust exposure and could perform a similar type job task in a dust free environment. Director's Exhibit 14.

of benefits. *See* 20 C.F.R. §725.309; *Kirk*, 264 F.3d 602, 22 BLR 2-228; *Ross*, 42 F.3d 993, 19 BLR 2-10.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge