

BRB No. 02-0695 BLA

RONALD K. BAKER)
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 Claimant-Petitioner)
)
 v.)
) DATE ISSUED:
 IBOLD, INCORPORATED)
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 and)
)
 EMPLOYERS' INSURANCE OF WAUSAU)
)
 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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

Bonnie Hoskins (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-0999) of Administrative Law Judge Joseph E. Kane 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 employer withdrew its controversion to

¹The 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

being named the responsible operator and further found that claimant established twenty-two years of coal mine employment. Decision and Order at 2-5; Hearing Transcript at 22. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that claimant was suffering from pneumoconiosis arising out of coal mine employment.² Decision and Order at 9-11. The administrative law judge, after reviewing all of the relevant evidence of record, further concluded, however, that claimant failed to establish that he had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Decision and Order at 11-14. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge's decision is not supported by substantial evidence as the administrative law judge erred in failing to consider the opinion of Dr. Sikder pursuant to Section 718.204(b)(2)(iv). Employer responds that substantial evidence supports the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to this appeal.³

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

citations to the regulations, unless otherwise noted, refer to the amended regulations.

²Claimant filed his claim for benefits on July 13, 2000, which was denied by the district director on May 15, 2001. Director's Exhibits 1, 10-12. Claimant requested a hearing and the case was referred to the Office of Administrative Law Judges on July 12, 2001. Director's Exhibit 24.

³The administrative law judge's responsible operator and length of coal mine employment determinations as well as his findings pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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 law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Considering the relevant evidence of record, the administrative law judge rationally found that claimant failed to establish that he had a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv).⁴ See *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Claimant argues that the administrative law judge erred in failing to find claimant totally disabled as he failed to give adequate consideration to the opinion of Dr. Sikder. Claimant's Brief at 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 (1989). 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).

⁴This 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 Exhibits 2, 4; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant evidence of record as it relates to total disability and permissibly concluded that the medical opinion evidence fails to carry claimant's burden pursuant to Section 718.204(b)(2)(iv). Claimant's Brief at 4; Decision and Order at 13-14; Director's Exhibits 8, 20, 23; *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, supra*. The administrative law judge, in the instant case, properly considered this evidence and permissibly found that the reports by Drs. Sikder, Baker and Dahhan were insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) as none of the physicians opined that claimant was suffering from a totally disabling respiratory or pulmonary impairment.⁵ Director's Exhibits 8, 20, 23; Decision and Order at 13-14; *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *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*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Kuchwara, supra*. Therefore, contrary to claimant's assertion, the administrative law judge, in a proper exercise of his discretion, addressed the opinions of Dr. Sikder and rationally found that the physician did not address claimant's impairment level. Decision and Order at 14; Director's Exhibits 20, 23

Moreover, the determination that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) does not automatically result in the conclusion that claimant is also suffering from a respiratory or pulmonary impairment pursuant to Section 718.204(b). *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); Claimant's Brief at 4. Consequently, as claimant makes no other specific challenge to the administrative law judge's findings with

⁵Dr. Baker diagnosed coal workers' pneumoconiosis and opined that claimant's respiratory impairment is mild and that he retained the respiratory capacity to perform the work of a coal miner or work in a comparable dust free environment. Director's Exhibit 8. Dr. Dahhan opined that claimant is not suffering from pneumoconiosis and concluded that claimant showed no evidence of any pulmonary impairment or disability and retained the physiological capacity to continue his previous coal mine work or comparable work. Director's Exhibit 20. Dr. Sikder submitted two opinions stating that the miner suffered from silicosis and coal workers' pneumoconiosis, but the physician did not offer any opinion with respect to the miner's disability. Director's Exhibits 20, 23.

respect to total disability, we affirm the administrative law judge's credibility determinations as they are supported by substantial evidence and are in accordance with law. *See Trent, supra; Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Mabe, supra; Budash, supra; Perry, supra; Kuchwara, supra; Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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, supra; 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 total disability pursuant to Section 718.204(b) as it is supported by substantial evidence and is in accordance with law.

Because claimant has failed to establish that he has a totally disabling respiratory or pulmonary impairment, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *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

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge