

BRB No. 03-0430 BLA

HARLIS R. MINOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 09/29/2003
KENTUCKY PRINCE MINING COMPANY	)	
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY	)	
OF HARTFORD	)	
	)	
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.

John Hunt Morgan, Hyden, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton, PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-5201) 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).<sup>1</sup> The administrative law judge found seventeen years of coal mine employment and that employer was the proper responsible operator. Decision and Order at 3-6. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203.<sup>2</sup> Decision and Order at 9, 11-13. The administrative law judge further found, however, that the evidence was insufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Decision and Order at 14-16. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray and in failing to find the medical opinion evidence sufficient to establish total disability. 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 in this appeal.<sup>3</sup>

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 BLR 1-1 (1986)(*en banc*).

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<sup>1</sup>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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup>Claimant filed his application for benefits on January 22, 2001. Director=s Exhibit 1.

<sup>3</sup>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. §§718.202(a)(2)-(4), 718.204(b)(2)(i)-(iii) are affirmed 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, 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.<sup>4</sup> Claimant argues that the administrative law judge erred in failing to find total disability as he failed to give adequate consideration to the medical opinions of record. Claimant's Brief at 5-7. 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).

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 5-7; Decision and Order at 15-16; Director's Exhibits 13, 15, 16; *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 correctly concluded that the evidence was insufficient to establish total disability as no physician of record opined that claimant was suffering from a totally disabling respiratory or pulmonary impairment.<sup>5</sup> Director's Exhibits 13, 15, 16; Decision and Order at 15-16; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty*, 12 BLR 1-190; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *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*, 9 BLR 1-4; *Perry*, 9 BLR 1-1; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

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

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<sup>4</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was 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 2.

<sup>5</sup>Dr. Baker opined that claimant, at most, suffers from a minimal respiratory impairment, but no pulmonary impairment, and retains the respiratory capacity to perform the work of a coal miner. Director's Exhibit 13. Dr. Broudy opined that claimant has the respiratory capacity to perform the work of an underground coal miner or similarly arduous manual labor. Director's Exhibits 15, 16.

former job duties. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Moreover, we reject claimant's argument that the administrative law judge failed to consider that he is totally disabled for comparable and gainful work because of his age, work experience and education since the medical opinions do not establish the existence of a totally disabling respiratory impairment under Section 718.204(b)(2)(iv).<sup>6</sup> See 20 C.F.R. §718.204(c); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); see also *Ramey v. Kentland v. Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Consequently, as claimant makes no other specific challenge to the administrative law judge's findings with 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*, 11 BLR 1-26; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Mabe*, 9 BLR 1-67; *Budash*, 9 BLR 1-48; *Perry*, 9 BLR 1-1; *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 *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *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, 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)(2)(iv) as it is supported by substantial evidence and is in accordance with law.<sup>7</sup> See *Clark*, 12 BLR 1-149;

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<sup>6</sup>Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding at Section 410.426(a) that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. See also 20 C.F.R. §718.204(b)(1), (b)(2).

<sup>7</sup>Claimant asserts that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1). We need not address this contention as the administrative law judge found that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4). See *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

*Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. Because claimant has failed to establish a totally disabling respiratory or pulmonary impairment, an essential element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. See *Anderson*, 12 BLR 1-111; *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.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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PETER A. GABAUER, Jr.  
Administrative Appeals Judge