

BRB No. 00-0561 BLA

RICHARD L. McCALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HAWK COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
H & G COAL and CLAY COMPANY	)	
	)	
Employer	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Phillip L. Wein, Clarion, Pennsylvania, for claimant.

D. Scott Newman (Burns, White & Hickton), Pittsburgh, Pennsylvania, for employer, Hawk Coal Company.

Dorothy L. Page (Judith E. Kramer, 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: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (96-BLA-1143) of Administrative Law Judge Clement J. Kichuk 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> This case has been before the Board previously. In the original decision, Administrative Law Judge George P. Morin found twenty-six years and forty-seven days of coal mine employment and determined that Hawk Coal Company was the responsible operator. Decision and Order dated January 30, 1998 at 1, 3-6. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge 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) (2000), 718.203(b) (2000) but further found, however, that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), (b) (2000).<sup>2</sup> Decision and Order dated January 30, 1998 at 4, 6-17. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's length of coal mine employment and responsible operator determinations as well as his weighing of the medical evidence pursuant to 20 C.F.R. §§718.202(a) (2000), 718.203 (2000) and 718.204(c)(1)-(4) (2000). The Board vacated, however, the administrative law judge's ultimate finding that claimant established total disability and remanded the case for further consideration of the lay evidence of record. *McCall v. Hawk Coal Co.*, BRB No. 98-0694 BLA (July 28, 1999)(unpublished).

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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 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.

<sup>2</sup>Claimant, Richard L. McCall, filed his claim for benefits on April 21, 1995. Director's Exhibit 1.

On remand, the case was assigned to Administrative Law Judge Clement J. Kichuk as Judge Morin was no longer with the Office of Administrative Law Judges. The administrative law judge set forth the relevant testimony of claimant and his wife but concluded that as the opinions finding no pulmonary or respiratory impairment were more reliable and persuasive, the lay testimony was therefore uncorroborated and thus insufficient to establish entitlement. Decision and Order on Remand at 10-12. In the instant appeal, claimant contends that the administrative law judge erred in failing to consider the lay testimony of record. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that she will not respond to this appeal.<sup>3</sup>

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which the parties have responded.<sup>4</sup> Based on the briefs submitted by the parties, and our review, we hold that

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<sup>3</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>4</sup>The Director's brief, dated March 7, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer's brief, dated March 16, 2001, asserted that the changes contained in the new regulations will not affect the outcome of this case. In a brief dated March 15, 2001, claimant asserted that it was impossible to determine if the regulations at issue in the lawsuit "would" affect the outcome of this case. Claimant's Brief at 2. Contrary to claimant's statement, however, our review of the pertinent revised regulation with respect to total disability and the use of lay evidence pursuant to 20 C.F.R. §718.204(b), (d), and our review of the evidence of record on the issue reveals that the ultimate disposition of this case would not be affected by the revised regulation.

the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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 (2000); *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 on Remand, 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. The administrative law judge, in the instant case, considered the entirety of the relevant medical opinion evidence and acted within his discretion in concluding that claimant failed to establish the existence of a totally disabling respiratory impairment. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Contrary to claimant's contention, the administrative law judge properly reviewed the evidence of record in accordance with the Board's remand instructions and concluded that the evidence was insufficient to establish total disability. See Black Lung Benefits Amendments, 65 Fed. Reg. 80,049(2000), to be codified at 20 C.F.R. §718.204(b); Decision and Order on Remand at 11-12. The administrative law judge rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained, and acted within his discretion, as fact-finder, in finding the opinions of Drs. Paul, Strother, Fino and Solic, opining that claimant is not totally disabled by a pulmonary or respiratory condition, to be more reliable and much more persuasive as they are fully documented and based upon objective medical data. See *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order on Remand at 11-12; Director's Exhibits 39, 45, 46, 48, 59; Claimant's Exhibits 1, 2, 4-6; Employer's Exhibits 2-4. Since the administrative law judge's credibility determinations are supported by substantial evidence, the administrative law judge properly concluded that the lay testimony of record was uncorroborated and therefore could not satisfy claimant's burden of proof on this issue.<sup>5</sup> See Black Lung Benefits Amendments, 65 Fed.

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<sup>5</sup>As the administrative law judge, in the instant case, properly determined that the lay

Reg. 80,049(2000), to be codified at 20 C.F.R. §718.204(d)(5); *Salyers v. Director, OWCP*, 12 BLR 1-193 (1989); *Trent, supra*; *Fields, supra*; *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985).

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 rationally concluded that the reasoned medical opinions of record fail to corroborate the lay testimony, claimant has not met his burden of proof on all the elements of entitlement. *Id.* The administrative law judge is empowered to weigh the 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, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *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 finding that the evidence of record is insufficient to establish total disability as it is supported by substantial evidence and is in accordance with law. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Inasmuch as 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 Black Lung Benefits Amendments*, 65 Fed. Reg. 80,049(2000), to be codified at 20 C.F.R. §718.204(b); *Anderson, supra*; *Trent, supra*; *Perry, supra*.

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

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testimony of record was uncorroborated, claimant's assertion that a remand may be necessary for the substituted administrative law judge to personally observe the testimony of claimant and his wife is without merit since the fact-finder never reached the issue of the credibility of the testimony. *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *White v. Director, OWCP*, 7 BLR 1-348 (1984). Additionally, the administrative law judge is not required to accept the testimony of any witness merely because it is uncontradicted. *See Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985), *aff'd on recon.*, 8 BLR 1-296 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985).

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge