

BRB No. 06-0913 BLA

| | | |
|-------------------------------|---|-------------------------|
| HOWARD LILLY, JR. |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| PERRY & HYLTON, INCORPORATED |) | |
| |) | DATE ISSUED: 04/26/2007 |
| and |) | |
| |) | |
| WEST VIRGINIA COAL WORKERS’ |) | |
| PNEUMOCONIOSIS FUND |) | |
| |) | |
| 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 Denying Living Miner’s Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Howard Lilly, Jr., Mount Hope, West Virginia, *pro se*.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Living Miner's Benefits (04-BLA-5769) of Administrative Law Judge Thomas M. Burke (the administrative law judge) 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). This case involves a subsequent claim filed on October 3, 2002.¹ 20 C.F.R. §725.309. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence submitted since the prior denial was insufficient to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and, thus, failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). In addition, the administrative law judge found that, assuming that a total respiratory disability was established, the evidence of record as a whole, previously submitted and newly submitted, was insufficient to establish that the disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), states that he will not be submitting

¹ Claimant filed his initial application for benefits on January 5, 1987, which was denied by the district director on July 2, 1987. Director's Exhibit 1. The claim was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Melvin Warshaw. Following a formal hearing, Judge Warshaw denied benefits based on his determination that claimant failed to establish total respiratory disability due to pneumoconiosis. Director's Exhibit 1. Claimant appealed to the Board, which affirmed Judge Warshaw's denial of benefits. *Lilly v. Perry & Hylton, Inc.*, BRB No. 90-1132 BLA (Aug. 27, 1991)(unpub.). No further action was taken on this claim.

Claimant filed a second claim for benefits on October 6, 1998, which was denied by the district director on February 16, 1999. Director's Exhibit 2. Following a formal hearing, Administrative Law Judge Daniel L. Leland denied benefits, finding that claimant failed to establish total respiratory disability and, thus, failed to establish a material change in conditions. Director's Exhibit 2. Claimant appealed to the Board, but subsequently requested modification of Judge Leland's denial of benefits. The Board, therefore, remanded the case to the district director for consideration of claimant's request for modification. *Lilly v. Perry & Hylton, Inc.*, BRB No. 01-0496 BLA (May 1, 2001)(Order)(unpub.); Director's Exhibit 2. On August 21, 2001, the district director denied claimant's request for modification. Director's Exhibit 2. No further action was taken on this claim.

a substantive response on the administrative law judge's weighing of the medical evidence. However, the Director does respond, urging affirmance of the administrative law judge's finding that Dr. Ranavaya provided claimant with a complete pulmonary evaluation.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable 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).

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 that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement.² *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 Decision and Order of the administrative law judge is supported by substantial evidence and

² Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish a total respiratory disability. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing this element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); see also *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995)(holding under former provision that claimant must establish, one of the elements of entitlement that was previously adjudicated against him).

contains no reversible error.³ Initially, we affirm the administrative law judge's finding that Dr. Ranavaya, the physician chosen by claimant to provide his Department of Labor evaluation, Director's Exhibit 8, provided claimant with a complete pulmonary evaluation even though it did not include a pulmonary function study or an exercise blood gas study. Director's Exhibit 9. The administrative law judge reasonably exercised his discretion, as fact-finder, in crediting Dr. Ranavaya's explanation that claimant declined to undergo the tests because he gets chest pains easily and is on nitroglycerin from even slight exertion.⁴ Decision and Order at 11. Therefore, the administrative law judge rationally found that, under the circumstances of this case, Dr. Ranavaya provided claimant with a complete pulmonary evaluation. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491, 1-493 (1986).

With respect to Section 718.204(c),⁵ the administrative law judge properly considered all of the relevant medical evidence of record, previously submitted and newly submitted evidence, and permissibly concluded that it was insufficient to establish that pneumoconiosis was a substantially contributing cause of claimant's total respiratory disability. Decision and Order at 19-20. The administrative law judge permissibly found that the opinions that pneumoconiosis contributed to claimant's total disability by Drs. Jafary and Villanueva, although provided by physicians who treated claimant, were not

³ The administrative law judge found that the record indicates that the miner was last employed in the coal mine industry in West Virginia. Decision and Order at 9 n.3; Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴ Within his December 12, 2002 report, Dr. Ranavaya noted that claimant declined from undergoing the pulmonary function study and exercise blood gas study, stating "Mr. Lilly declined from undergoing the ventilatory studies and stated 'I have to take NTG every day for even the slight exertion. I get chest pains easily.'" Director's Exhibits 9, 10, 11.

⁵ In light of the administrative law judge's finding that even if claimant had established total respiratory disability, the element of entitlement previously adjudicated against claimant, entitlement to benefits is precluded because claimant did not establish disability causation pursuant to Section 718.204(c), Decision and Order at 15, we decline to address the administrative law judge's findings pursuant to Sections 718.204(b)(2) and 725.309(d). Therefore, because the administrative law judge weighed all of the relevant evidence of record, old and newly submitted, in finding that claimant failed to establish disability causation pursuant to Section 718.204(c), we hold this issue to be dispositive.

credible because they were undocumented and unreasoned, as the single page letters submitted by these physicians failed to explain their diagnoses and conclusions. Decision and Order at 13, 15-16; Director's Exhibit 2; Claimant's Exhibit A; *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Rather, the administrative law judge reasonably accorded determinative weight to the contrary opinions of Drs. Sobieski, Rasmussen, Ranavaya and Zaldivar, that do not support a finding that claimant's pneumoconiosis is a substantially contributing cause of his total respiratory disability, based on his finding that these opinions were better reasoned and documented, and that their conclusions are better explained in light of the underlying documentation, than the contrary opinions. Decision and Order at 19; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR at 1-155; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). The administrative law judge reasonably found that these opinions outweighed the causation opinions from claimant's experts, because these opinions are better reasoned and documented. *Id.*

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 Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *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 that claimant's pneumoconiosis is a substantially contributing cause of his total respiratory disability pursuant to Section 718.204(c), as it is supported by substantial evidence.

Since claimant has failed to establish disability causation pursuant to Section 718.204(c), a necessary element of entitlement under Part 718, an award of benefits is precluded. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge