

BRB No. 97-1012 BLA

ROBERT PETERSON, SR. )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 EASTOVER MINING COMPANY )  
 )  
 Employer-Respondent )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, )  
 UNITED STATES DEPARTMENT OF )  
 LABOR )  
 )  
 Party-in-Interest )

DATE ISSUED: \_\_\_\_\_

DECISION and ORDER

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Robert Peterson, Sr., Georgetown, Florida, *pro se*.

Terri L. Bowman (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (96-BLA-0307) of Administrative Law Judge Edward J. Murty, Jr., denying benefits on a duplicate claim<sup>1</sup> filed

---

<sup>1</sup>The prior claim was filed on August 5, 1986, Director's Exhibit 27-1. The district director denied the claim on January 22, 1987 based on claimant's failure to establish any element of entitlement, and reaffirmed this denial on September 29, 1988. Director's Exhibits 27-17, 27-30. Claimant did not appeal. Claimant filed the instant claim on December 20, 1994, Director's Exhibit 1. The district director denied the claim based on claimant's failure to establish any element of entitlement, Director's Exhibits 13, 24. Claimant appealed, and a hearing was held before the administrative law judge. In his Decision and Order, the administrative law judge denied benefits. Claimant appealed from this denial. As discussed herein, the Board remanded the case for reconsideration of the evidence at 20 C.F.R. §718.202(a)(4). *Peterson v. Eastover Mining Co.*, BRB No. 96-1010 BLA (Sept. 6,

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 is before the Board for the second time. The administrative law judge denied benefits on original consideration based on claimant's failure to establish the existence of pneumoconiosis under 20 C.F.R. §718.202. The Board, in *Peterson v. Eastover Mining Co.*, BRB No. 96-1010 BLA (Sept. 6, 1996)(unpub.), affirmed the administrative law judge's findings that claimant established seven years of coal mine employment and that the evidence failed to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(3). The Board further held that the administrative law judge failed to weigh properly the medical opinions at Section 718.202(a)(4). Specifically, the Board held that the administrative law judge erred in finding that Drs. Myers and Baker were the only examining physicians to diagnose pneumoconiosis, inasmuch as Dr. Wright also examined claimant and diagnosed pneumoconiosis. The Board held that the administrative law judge further erred in discrediting the diagnoses of pneumoconiosis rendered by Drs. Myers and Baker. The Board thus vacated the administrative law judge's finding at Section 718.202(a)(4), remanding the case for reconsideration of the evidence thereunder. The Board also vacated the administrative law judge's cursory statement that "[claimant's] lung ailment is "probably disabling," 1996 Decision and Order at 5. Further, the Board included instructions for the administrative law judge relevant to his determinations on both the merits of the case and the duplicate claims issue.

On remand, the administrative law judge found that claimant failed to prove the existence of pneumoconiosis by medical opinion evidence under Section 718.202(a)(4). Accordingly, benefits were denied.

On appeal, claimant asserts that the evidence shows that he is totally disabled due to coal mine employment-related pneumoconiosis. In response to claimant's *pro se* appeal, employer urges the Board to affirm the administrative law judge's denial of benefits. Claimant has filed a reply brief. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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 law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman*

---

1996)(unpub.) The administrative law judge's denial of benefits on remand is the subject of the instant appeal.

& *Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled by the disease. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

We affirm, as supported by substantial evidence, the administrative law judge's finding on remand that claimant failed to meet his burden to establish the existence of pneumoconiosis under Section 718.202(a)(4). It is a matter within the discretion of the administrative law judge to determine the weight and the credibility of the evidence, *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), and the Board is not empowered to reweigh the evidence, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In the instant case, the administrative law judge on remand properly considered Dr. Wright's medical opinion in addition to the other medical opinions of record. The administrative law judge also provided further explanation of his weighing of this evidence under Section 718.202(a)(4). In this regard, the administrative law judge properly relied on the opinions of the better qualified physicians, *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). The administrative law judge further properly discredited the medical opinions of record that he found were not supported by their underlying evidence. See *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge thus properly determined that claimant failed to carry his burden of proof to establish that he has pneumoconiosis or any lung disease caused by claimant's coal mine employment, and thus failed to establish an essential element of entitlement. 20 C.F.R. §§718.201, 718.202; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 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). We, therefore, affirm the administrative law judge's finding on remand at Section 718.202(a)(4) and the administrative law judge's denial of benefits. *Trent, supra*; *Perry, supra*.<sup>2</sup>

---

<sup>2</sup>We hold harmless the fact that the administrative law judge did not make an initial finding as to whether claimant established a material change in conditions under 20 C.F.R. §725.309. Any finding in this regard cannot affect the outcome of the case, which the administrative law judge properly determined based on his consideration of all the record evidence on the merits of the claim. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

---

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

---

JAMES F. BROWN  
Administrative Appeals Judge

---

NANCY S. DOLDER  
Administrative Appeals Judge