

BRB No. 02-0533 BLA

CLIFFORD WRIGHT)		
)		
Claimant-Petitioner)		
)		
v.)		
)	DATE	ISSUED:
_____)	RUSSELL COAL COMPANY, INC.)
)		
and)		
)		
AMERICAN RESOURCES INSURANCE)		
COMPANY)		
)		
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Jonathan C. Sapp (Warren & Sapp, L.L.C.), Jasper, Alabama, for claimant.

Dana C. Hulbert (Ferreri & Fogle), Louisville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-603) of Administrative Law Judge Gerald M. Tierney 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 found, and the parties stipulated to, forty-two

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

years of coal mine employment. Decision and Order at 2; Hearing Transcript at 6. The administrative law judge further noted that employer did not contest that claimant was suffering from pneumoconiosis arising out of coal mine employment and that he had a totally disabling respiratory or pulmonary impairment. Decision and Order at 3; Director's Exhibit 30. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge, after reviewing all of the relevant evidence of record, concluded that claimant failed to establish that his totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).² Decision and Order at 3-5. 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 according greater weight to the opinion of Dr. Goldstein. 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 disturbed. 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).

²Claimant filed his claim for benefits on August 14, 2000, in which the district director awarded benefits on February 20, 2001. Director's Exhibits 1, 27. Employer requested a hearing and the case was referred to the Office of Administrative Law Judges on March 29, 2001. Director's Exhibits 28, 30.

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

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*); *Lollar v. Alabama By-Products*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).⁴ 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 disability causation pursuant to 20 C.F.R. §718.204(c). See *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

⁴This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit as the miner was employed in the coal mine industry in the State of Alabama. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

Claimant argues that the administrative law judge erred in according greater weight to the opinion of Dr. Goldstein because his assumptions are contrary to or in conflict with the spirit and purpose of the Act. Claimant's Brief at 6. We do not find merit in claimant's argument. The administrative law judge fully considered claimant's contention, and in a proper exercise of his discretion, concluded that the physician's opinion was probative evidence and entitled to substantial weight. Decision and Order at 5; *Perry, supra*; *Lyon v. Pittsburg & Midway Coal Co.*, 7 BLR 1-199 (1984). The Board has held that a medical opinion is deemed to be contrary to the spirit of the Act if the physician forecloses all possibility that simple pneumoconiosis can be totally disabling. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). Claimant refers to a comment made by Dr. Goldstein that simple coal workers' pneumoconiosis does not usually lead to any significant impairment, Director's Exhibit 25; Employer's Exhibit 2, and asserts that this statement implies a medical assumption contrary to the spirit and purpose of the Act. We disagree.⁵ A review of Dr. Goldstein's deposition testimony establishes that substantial evidence supports the administrative law judge's determination that the physician has not specifically foreclosed all possibility that simple pneumoconiosis can be totally disabling.⁶ *See Black Diamond Coal Mining Co. v. Benefits Review Board [Raines]*, 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985); *Searls, supra*; *Cunningham v. Pittsburg & Midway Coal Co.*, 7 BLR 1-93 (1984); Employer's Exhibit 2 at 13-14, 21, 27-32. We therefore affirm the administrative law judge's determination that the opinion of Dr. Goldstein was not hostile to the Act. *See Raines, supra*; *Chester, supra*; *Searls, supra*.

With respect to disability causation pursuant to 20 C.F.R. §718.204(c), claimant asserts that substantial evidence does not support the administrative law judge's findings. Claimant's Brief at 4-5. Claimant's contention constitutes a request that the Board reweigh

⁵The United States Court of Appeals for the Eleventh Circuit has held that a physician's statement, that simple pneumoconiosis is usually not disabling, is not hostile to the Act. *See Guy v. United States Steel Corp.*, No. 83-7691 (11th Cir. September 12, 1985)(unpublished), *rev'g* 6 BLR 1-556 (1983).

⁶Dr. Goldstein opined that "*usually* simple coal workers' pneumoconiosis does not cause any significant pulmonary function abnormality or symptoms." Employer's Exhibit 2 at 13 (emphasis supplied). The physician stated that coal workers' pneumoconiosis did not cause the miner's impairment, in this instance, based on his spirometry, his lung volumes and his cardiac history, but concluded that without this information he could not rule out pneumoconiosis as the cause of the miner's impairment. Employer's Exhibit 2 at 27-28. Dr. Goldstein further agreed with the statement that, "*in general*, coal workers' pneumoconiosis does not lead to any significant impairment" and acknowledged that there have been some cases where people have had simple coal workers' pneumoconiosis and a significant impairment arose therefrom. Employer's Exhibit 2 at 32 (emphasis supplied).

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). The administrative law judge, in the instant case, considered the relevant evidence, the opinions of Drs. Hasson and Goldstein⁷, to determine if disability causation was established, and permissibly found that the evidence was insufficient to meet claimant's burden of proof. Decision and Order at 3-5; Director's Exhibits 11, 16, 25; Employer's Exhibits 2, 3; *Lollar, supra*; *Kuchwara, supra*. The administrative law judge rationally concluded that Dr. Goldstein's opinion was entitled to the greatest weight as it was more thorough, based upon more extensive data and supported by medical literature as well as the uncontradicted objective evidence. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara, supra*; Decision and Order at 5; Director's Exhibits 25, 26; Employer's Exhibits 2, 3.

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, as claimant makes no other specific challenge to the administrative law judge's findings with respect to Dr. Goldstein, we affirm the administrative law judge's credibility determination and his denial of benefits as it is supported by substantial evidence and is in accordance with law. *See Lollar supra*; *Searls, supra*; *Trent, supra*; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Mabe, supra*; *Perry, supra*; *Kuchwara, supra*; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

⁷Dr. Hasson opined that claimant suffered from coal workers' pneumoconiosis and that the disease rendered him severely impaired. Director's Exhibits 11, 16. Dr. Goldstein opined that claimant suffered from pneumoconiosis and was totally disabled but concluded that claimant's disability was due to his cardiac problems in light of his normal lung volumes. Director's Exhibit 25; Employer's Exhibits 2, 3.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge