

BRB No. 04-0298 BLA

ROBERT LEE ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL COMPANY	)	DATE ISSUED: 07/15/2004
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John Hunt Morgan, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-5041) of Administrative Law Judge Thomas F. Phalen, Jr., 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). In accordance with the parties' stipulation, the administrative law judge found, both that the miner had thirty five years of qualifying coal mine employment and that employer was the responsible operator. Decision and Order at 3; Hearing Transcript

at 10. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.<sup>1</sup> Decision and Order at 9. The administrative law judge considered all of the evidence of record and concluded that claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.204. Decision and Order at 9-15. Accordingly, benefits were denied.

On appeal, claimant contends 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) and (4) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). 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 to the instant appeal.<sup>2</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*).

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 contains no

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<sup>1</sup> Claimant filed his claim for benefits with the Department of Labor on February 12, 2001, which was denied by the district director on July 24, 2002. Director's Exhibits 2, 28. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 29.

<sup>2</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)-(3) and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

reversible error.<sup>3</sup> Claimant's assertion that the administrative law judge erred in failing to find the existence of pneumoconiosis established lacks merit. The administrative law judge permissibly found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) as the preponderance of x-ray readings by physicians with superior qualifications was negative. Director's Exhibits 14-17; Employer's Exhibits 1, 2, 4; Decision and Order at 10; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Claimant also asserts that the administrative law judge erred in finding that the existence of pneumoconiosis was not established based upon the medical opinions of Drs. Baker and Wicker. Claimant's Brief at 4-5. We disagree. In determining if the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge rationally considered the underlying documentation and explanation of the diagnosis. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Worhach*, 17 BLR 1-105; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara*, 7 BLR 1-167; Decision and Order at 11-13. The administrative law judge acted within his discretion, as fact-finder, in concluding that the opinions of Drs. Baker and Wicker were less reasoned and insufficient to meet claimant's burden of proof because the physicians did not offer any explanation for their diagnosis of pneumoconiosis other than their own x-ray interpretation and claimant's length of coal dust exposure.<sup>4</sup> See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002);

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last 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 3.

<sup>4</sup> In addition to diagnosing clinical pneumoconiosis, Dr. Baker opined that the miner also suffered from chronic bronchitis, which could satisfy the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). Director's Exhibit 15. The administrative law judge, in a proper exercise of his discretion, rationally found that Dr. Baker's diagnosis of chronic bronchitis was unreliable and thus insufficient to establish the existence of pneumoconiosis as the opinion was conclusory, unreasoned, based upon claimant's recitation of his history rather than a physical examination and objective tests, and based on an inaccurate smoking history. See *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Stark v. Director, OWCP*, 9 BLR 1-136 (1986); *Moore v. Dixie Pine Coal Co.*, 8 BLR 1-334 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16

*Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Worhach*, 17 BLR 1-105; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); Decision and Order at 11-13; Director's Exhibits 14, 15. Additionally, the administrative law judge permissibly found Dr. Wicker's opinion on the existence of pneumoconiosis was entitled to less weight because it was contradictory.<sup>5</sup> Decision and Order at 11-12; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

Moreover, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Dahhan, than to the opinions of Drs. Baker and Wicker, because the physician offered a well-reasoned and documented opinion which is supported by the objective medical evidence of record. See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Tussey*, 982 F.2d 1036, 17 BLR 2-16; *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; *Hutchens*, 8 BLR 1-16; Decision and Order at 12-13; Director's Exhibit 16. We therefore affirm the administrative law judge's credibility determinations with respect to the medical opinion evidence as they are supported by substantial evidence and are in accordance with law.

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), *aff=g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *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). Because the administrative law judge permissibly concluded that the evidence of record does not establish the existence of pneumoconiosis, claimant has not met his burden of proof on an essential element 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

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(1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 12; Director's Exhibit 15.

<sup>5</sup> Dr. Wicker, in his May 23, 2001 report, opined that he saw no evidence of pneumoconiosis but on a separate form, the physician marked "yes" in response to the question of whether claimant has an occupational lung disease caused by his coal mine employment and stated that his answer was based upon the chest x-ray. Director's Exhibit 14.

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 the existence of pneumoconiosis as it is supported by substantial evidence and is in accordance with law. *See Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

Because claimant has failed to establish the existence of pneumoconiosis, a requisite element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address the administrative law judge's additional findings pursuant to 20 C.F.R. §718.204. *See 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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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge