

BRB No. 99-1030 BLA

PAUL W. JAMESON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
SUN COAL COMPANY, INC.	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Paul W. Jameson, Busy, Kentucky, *pro se*.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-0826) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge found sixteen years of coal mine employment and, based

on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.<sup>1</sup> Decision and Order at 3-4, 7. The administrative law judge, after noting that the instant case was a duplicate claim and finding a material change in conditions established, concluded that the evidence of record was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Decision and Order at 6-10. Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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 are 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim 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. Failure to establish any 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*).

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<sup>1</sup>Claimant filed his initial claim for benefits on October 6, 1986, which was finally denied on September 7, 1989. Director's Exhibit 22. Claimant took no further action until he filed the instant claim for benefits on March 13, 1997. Director's Exhibit 1.

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 that there is no reversible error contained therein. The administrative law judge, in the instant case, considered the entirety of the medical opinion evidence and acted within his discretion in concluding that claimant's totally disabling respiratory impairment was not due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge properly reviewed the evidence of record pursuant to the applicable standard enunciated by the United States Court of Appeals for the Sixth Circuit, in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989) and concluded that the evidence was insufficient to establish that pneumoconiosis contributed to claimant's total disability.<sup>2</sup> See 20 C.F.R. §718.204(b); Decision and Order at 9-10. The administrative law judge permissibly accorded greatest weight to the opinion of Dr. Wicker, who attributed claimant's respiratory impairment to cigarette abuse, as it was documented and well-reasoned, considerably more recent than the other opinions, the physician was aware of claimant's extensive smoking history and the opinion was supported by the opinions of Drs. Penman and Broudy. See *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-209 (6th Cir. 1989); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *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 at 9; Director's Exhibits 10, 22.

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<sup>2</sup>This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the State of Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally relied on the medical opinion of Dr. Wicker, that claimant's respiratory impairment was due to cigarette abuse, claimant has not met his burden of proof on all the elements of entitlement. *Id.* The administrative law judge is empowered to weigh the medical opinion 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*, 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 total disability was due to pneumoconiosis pursuant to Section 718.204(b) as it is supported by substantial evidence and is in accordance with law.<sup>3</sup>

Inasmuch as claimant has failed to establish that his total disability was due to pneumoconiosis pursuant to Section 718.204(b), an essential element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address employer's contentions raised in its response brief. *Anderson, supra*; *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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<sup>3</sup>We note claimant's lack of representation by counsel during the proceedings before the administrative law judge. Claimant was specifically informed of his right to have counsel at no charge to him and the issues involved in the case. He was also allowed to testify and present evidence. Hearing Transcript at 2-47. Consequently, the hearing before the administrative law judge was properly adjudicated. See 20 C.F.R. §725.362(b); *Shapell v. Director, OWCP*, 7 BLR 1-703 (1985).

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge