

BRB No. 02-0589 BLA

ELDEN PRESLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Daniel Sachs (Capital Law Centers, P.C.), Arlington, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (96-BLA-1555) of Administrative Law Judge Edward Terhune Miller denying benefits on a duplicate 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).<sup>1</sup> This case is before the Board for the third time. In the original Decision and Order issued on July 17, 1997, the administrative law judge credited claimant with at least seventeen years of coal mine employment and found that claimant established the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1), (4) (2000),<sup>2</sup> which thus established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), under the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997).<sup>3</sup> Director's Exhibit 18. On the merits, the administrative law judge found that claimant established the presence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (2), (4) and 718.203(b) (2000), and total disability, see 20 C.F.R. §718.204(c) (2000), but that claimant failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). In addition, the administrative law judge found that the presumption at 20 C.F.R. §718.304 (2000) was inapplicable. Accordingly, benefits were denied.

Claimant appealed the denial of benefits to the Board and in *Presley v. Clinchfield Coal Co.*, BRB No. 97-1502 BLA (July 28, 1998) (unpub.), the Board affirmed the administrative law judge's findings at Sections 718.202(a)(4) and 718.203(b) (2000) as unchallenged on appeal. The Board vacated, however, the

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<sup>1</sup> The 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).

<sup>2</sup>Claimant initially filed an application for benefits on June 10, 1983. Director's Exhibit 78. Administrative Law Judge John J. Forbes, Jr., in a Decision and Order issued on February 8, 1989, found that claimant established seventeen years of coal mine employment and the presence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203 (2000), but failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) (2000). Decision and Order at 2; Director's Exhibit 78. Accordingly, benefits were denied. Claimant filed the present duplicate claim on December 5, 1994. Decision and Order at 2; Director's Exhibit 1.

<sup>3</sup>The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit inasmuch as claimant's coal mine employment occurred in the Commonwealth of Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Director's Exhibits 2, 78.

administrative law judge's finding at Section 718.304 (2000). The Board also vacated the administrative law judge's finding that total disability was established at Section 718.204(c) (2000) and, thus, vacated the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309 (2000). In addition, the Board vacated the administrative law judge's finding that claimant failed to establish that his disability was due to pneumoconiosis pursuant to Section 718.204(b) (2000) and remanded the case for further consideration.

On remand, the administrative law judge found that the evidence did not establish the presence of complicated pneumoconiosis pursuant to Section 718.304 (2000), but was sufficient to establish total disability pursuant to Section 718.204(c)(4) (2000), which thus established a material change in conditions pursuant to Section 725.309(d) (2000). The administrative law judge further found, on the merits of the claim, that the evidence was sufficient to establish every element necessary for entitlement, and awarded benefits as of December 1, 1994, the date of the filing of the duplicate claim.

Claimant and employer appealed the award of benefits and in *Presley v. Clinchfield Coal Co.*, BRB Nos. 99-0677 BLA/A and 97-1502 BLA (Sept. 29, 2000) (unpub.), the Board affirmed the administrative law judge's findings, pursuant to Section 718.204(c)(1), (2), (4) (2000), that the existence of complicated pneumoconiosis was not established pursuant to Section 718.304 (2000). However, the Board vacated the administrative law judge's findings, pursuant to Section 718.204(b) (2000), that claimant established that his pneumoconiosis contributed to his total disability, and the administrative law judge's finding with respect to the date of onset of claimant's disability. The Board remanded the case for further consideration of the opinions of Drs. Robinette and Forehand and claimant's smoking history. The Board also addressed employer's objections to claimant's counsel's fee petition and awarded a fee, contingent upon successful prosecution of the claim.

On remand for the second time, the subject of the instant appeal, the administrative law judge found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to amended Section 718.204(c)(1). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to grant Dr. Robinette's opinion determinative weight pursuant to 20 C.F.R. §718.104(d) and in finding that claimant failed to establish that his respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(c)(1). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, taking no position on the merits of the claim, but urging the

Board to reject claimant's arguments regarding the applicability of Section 718.104(d).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated 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 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 of claimant 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).

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 on Remand is supported by substantial evidence and contains no reversible error. Initially, we reject claimant's contention that the administrative law judge erred in failing to apply Section 718.104(d). This regulation only applies to evidence developed after January 19, 2001, and Dr. Robinette's medical report was prepared in 1996. 20 C.F.R. §718.101(b).

Pursuant to Section 718.204(c)(1), claimant contends that the administrative law judge erred by failing to find that claimant established that his pneumoconiosis contributed to his total disability, asserting that the administrative law judge improperly discredited the reports of Drs. Forehand and Robinette. Regarding Dr. Forehand's opinion, claimant argues that the administrative law judge erred in discrediting the physician's determination that smoking *and* coal dust exposure caused claimant's respiratory impairment on the ground that Dr. Forehand relied upon an inaccurate smoking history. Claimant reasons that Dr. Forehand's diagnoses were actually made more persuasive by the physician's reliance upon an overstated smoking history, as Dr. Forehand would have determined that coal dust exposure played an even larger role in claimant's totally disabling impairment if he had known that claimant's use of cigarettes was less extensive than reported. Claimant's allegation of error is without merit. Although the administrative law judge acknowledged that the smoking history to which Dr. Forehand referred was inaccurate, the administrative law judge did not rely upon this ground to discredit Dr. Forehand's opinion. Rather, the administrative law judge acted within his discretion in according little

weight to Dr. Forehand's medical report, as the doctor "provided no rationale for determining, as he did, that claimant's coal mine employment history and smoking history had an 'additive' effect in causing claimant's totally disabling respiratory impairment." Decision and Order on Remand at 7; Director's Exhibit 12. We affirm, therefore, the administrative law judge's weighing of Dr. Forehand's opinion. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Dehue Coal Co. v. Ballard*, 65 F.3d, 1189, 19 BLR 2-304 (4th Cir. 1995)(Butzner, J., dissenting); *Robinson v. Pickands Mather & Co.*, 914 F.2d 790, 14 BLR 2-68 (4th Cir. 1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

We also find no merit in claimant's assertion that the administrative law judge irrationally concluded that Dr. Robinette's opinion was not definitive with respect to causation. Dr. Robinette diagnosed a severe restrictive and obstructive lung disease, "probably" associated with black lung disease and pulmonary emphysema, and noted that claimant had a history of smoking three to four cigarettes per day, quitting in 1969. Claimant's Exhibits 1, 3. In its most recent prior decision, the Board held that the administrative law judge erred by crediting Dr. Robinette's report as supportive of claimant's burden to establish that pneumoconiosis is a contributing cause of his totally disabling respiratory impairment without discussing the fact that Dr. Robinette indicated only that claimant's condition was "probably" due to his pneumoconiosis, which was not a definite statement of causation, and because the administrative law judge did not address the inconsistency between Dr. Robinette's smoking history and that testified to by claimant. Slip op. at 7. On remand, the administrative law judge acted within his discretion in finding that Dr. Robinette's opinion did not establish claimant's burden pursuant to Section 718.204(c). The administrative law judge rationally based his determination upon Dr. Robinette's failure to provide a definitive opinion regarding the etiology of claimant's severe obstructive disease, *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988) and the presence of inconsistencies in the smoking histories set forth in the data underlying Dr. Robinette's opinion, without regard to the smoking history to which claimant testified. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). Decision and Order on Remand at 7. As such, the administrative law judge reasonably found that Dr. Robinette's opinion was insufficient to support a finding that claimant's total disability was due to pneumoconiosis and this finding is affirmed.

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 of entitlement. See *Trent, supra*; *White v. Director, OWCP*, 6 BLR 1-368 (1983). 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); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). The administrative law judge permissibly found that the evidence was insufficient to establish total disability due to pneumoconiosis as there were no credible medical opinions linking claimant's totally disabling respiratory impairment to his coal mine employment. *Robinson, supra*; *Clark, supra*. Consequently, we affirm the administrative law judge's finding that the medical opinions of record failed to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.205(c)(1). Inasmuch as claimant has not met his burden of proof on an essential element of entitlement, we affirm the denial of benefits. *Clark, supra*; *Trent, supra*.

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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PETER S. GABAUER, Jr.  
Administrative Appeals Judge