BRB No. 03-0632 BLA

DONALD R. MAHON	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 03/11/2004
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Upon Remand of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Alice T. K. Corba (Kepner, Kepner & Corba, P.C.), Berwick, Pennsylvania, for claimant.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Upon Remand (2001-BLA-00079) of Administrative Law Judge Robert D. Kaplan 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).[1] This case has been before the Board

[1]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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

previously.[2] In the prior Decision and Order, the administrative law judge noted that the instant case is a duplicate claim. He further found eight years of qualifying coal mine employment and the existence of pneumoconiosis established based upon the parties' stipulation which was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Decision and Order dated December 7, 2001 at 2-5. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record was insufficient to establish that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203 and denied benefits. Decision and Order dated December 7, 2001 at 5-6. On appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202 and 725.309 (2000) but vacated the administrative law judge's denial of benefits in light of the parties' concession that claimant=s pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. As a result, the Board remanded the case for the administrative law judge to reconsider the length of coal mine employment and to address the remaining issues of entitlement. *See Mahon v. Director, OWCP*, BRB No. 02-0304 BLA (December 24, 2002)(unpublished).

On remand, the administrative law judge found, and the Director, Office of Workers' Compensation Programs (the Director), stipulated to, ten years of coal mine employment. Decision and Order Upon Remand at 2-3. The administrative law judge further concluded that the evidence of record was insufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Decision and Order Upon Remand at 4-7. Accordingly, benefits were denied.

In the instant appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to Section 718.204(b). The Director responds asserting that the administrative law judge's denial of benefits is supported by substantial evidence.[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

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[2]The procedural history of this case has previously been set forth in detail in the Board's prior decision in *Mahon v. Director, OWCP*, BRB No. 02-0304 BLA (December 24, 2002)(unpublished), which is incorporated herein by reference.

[3]The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202, 718.203, 718.204(b)(2)(i)-(iii) and 725.309 (2000) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 Upon Remand, 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. The administrative law judge considered the entirety of the relevant medical evidence and acted within his discretion in concluding that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Claimant argues that the administrative law judge failed to give adequate consideration to the medical opinions of record. He specifically contends that the administrative law judge erred in failing to accord appropriate weight to the opinions of Drs. Pelczar, Aquilina and Raso, the miner's treating physicians, as they are sufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Claimant's Brief at 5-7. We do not find merit in claimant's argument. Claimant's contention constitutes a request that the Board reweigh 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 Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Further, contrary to claimant's contention, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant evidence of record as it relates to total disability and permissibly concluded that the medical opinion evidence fails to carry claimant's burden pursuant to Section 718.204(b)(2)(iv). Claimant's Brief at 6-7; Decision and Order Upon

Remand at 6-7; Director's Exhibits 4, 12-4, 12-11, 12-15, 12-16, 12-23; Claimant's Exhibits A, F; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). Dr. Aquilina opined that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 12-23. Dr. Pelczar diagnosed a very severe respiratory ventilatory defect and opined that claimant was totally disabled due to pneumoconiosis. Director's Exhibits 12-11, 12-15. Dr. Raso stated that claimant has chronic obstructive pulmonary disease and is not capable of working. Claimant's Exhibits A, F. Dr. Talati opined that claimant had no pulmonary impairment. Director's Exhibits 4, 12-4, 12-16. The administrative law judge permissibly accorded determinative weight to the opinion of Dr. Talati over the contrary opinions of Drs. Pelczar, Aquilina and Raso because he found Dr. Talati's is opinion is better reasoned and consistent with the most recent clinical studies of record indicating normal results.[4] *See Clark*, 12 BLR 1-149; *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); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order Upon Remand at 6-7.

The administrative law judge, also rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields*, 10 BLR 1-19; *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46; *Fuller*, 6 BLR 1-1291; Decision and Order at 10-11; Director's Exhibits 8, 29; Claimant's Exhibit 1. Further, although Drs. Pelczar, Aquilina and Raso were the miner's treating physicians, the administrative law judge has provided a rational reason for finding their opinions insufficient to meet claimant's burden of proof. *See* 20 C.F.R. §718.104(d); *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Mancia*, 130 F.3d 579; *Lango*, 104 F.3d 573; *Evosevich v. Consolidation Coal* Co., 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Tedesco*, 18 BLR 1-103; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Hutchens*, 8 BLR 1-16; Decision and Order Upon Remand at 6-7. We, therefore, affirm the administrative law judge's credibility determinations and his finding that the medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) as they are supported by substantial evidence and are in accordance with law. *See Trent*, 11 BLR 1-26*; Mabe*, 9 BLR 1-67*; Perry*, 9 BLR 1-1.

[4] The record contains 10 pulmonary function studies dating from October 10, 1980 to January 9, 2001. The most recent qualifying pulmonary function study was performed in 1984. Director's Exhibit 5. None of the blood gas studies reported qualifying values. Director's Exhibits 5.

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.[5] *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff=g 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). As the administrative law judge permissibly concluded that the evidence of record does not establish that claimant is totally disabled by a respiratory or pulmonary impairment, claimant has not met his burden of proof on all the elements 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 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). Furthermore, since the determination of whether claimant has a totally disabling respiratory impairment is primarily a medical determination, claimant's testimony alone, under the circumstances of this case, could not alter the administrative law judge's finding.[6] *See* 20 C.F.R. §718.204(d)(5); *Salyers v. Director, OWCP*, 12 BLR 1-193 (1989); *Anderson*, 12 BLR 1-111; *Trent*, 11 BLR 1-26; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields*, 10 BLR 1-19; *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985). Consequently, we reject claimant's contentions and affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) as it is supported by substantial evidence and is in accordance with law. *See Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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[5]Contrary to claimant's assertion, the Director is not required to prove that claimant can perform comparable and gainful employment. Claimant's Brief at 7. Rather, claimant bears the burden of proving by a preponderance of the evidence each and every element of entitlement. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[6]Claimant also asserts that the administrative law judge did not discuss the evidence establishing the existence of pneumoconiosis including the x-ray interpretation of Dr. Gaia. Claimant's Brief at 6. Because the administrative law judge accepted the Director concession that the existence of pneumoconiosis arising out of coal mine employment was established, the administrative law judge was not required to consider the x-ray evidence on remand. *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Mahon v. Director, OWCP*, BRB No. 02-0304 BLA (December 24, 2002)(unpublished); Decision and Order Upon Remand at 2-3.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge