

BRB No. 04-0125 BLA

GLEN J. CAHILL)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 05/26/2004
 ANDERSON & ANDERSON CONST. INC.)
)
 and)
)
 WEST VIRGINIA CWP FUND)
)
 Employer/Carrier-Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGR)
 AMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm,
Administrative Law Judge, United States Department of Labor.

J.W. Feuchtenberger (Feuchtenberger & Barringer Legal Corporation),
Princeton, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund),
Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-5181) of Administrative Law
Judge Richard T. Stansell-Gamm 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 After determining that the instant claim was a duplicate claim, the administrative law judge found, based upon stipulation by the parties, that claimant established twenty-one and one-half years of qualifying coal mine employment and that employer was the proper responsible operator.² Decision and Order at 2-3; Hearing Transcript at 8-9. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that although the newly submitted evidence of record was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and thus sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, a *de novo* review of the record found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 4-15. 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). 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 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,

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.

²Claimant filed his initial application for benefits on June 26, 1973 and the Department of Labor denied the claim on November 9, 1979 as claimant failed to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 24. Claimant filed a second application for benefits on August 2, 1983, which was dismissed on June 27, 1988 by Administrative Law Judge John A. Gray for failing to appear at the hearing or to show cause for his absence. Director's Exhibit 23. Claimant filed his most recent application for benefits, the subject of the instant appeal, on January 24, 2001, and the district director awarded benefits on April 22, 2002. Director's Exhibits 1, 21. Employer requested a hearing and the case was transferred to the Office of Administrative Law Judges on May 20, 2002. Director's Exhibits 22, 25.

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

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 reversible error.⁴ The administrative law judge, rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

The administrative law judge considered the x-ray evidence of record and properly noted that the x-ray interpretations dated February 6, 1973, July 26, 1973 and November 14, 2001 were negative for the existence of pneumoconiosis. Decision and Order at 9; Director’s Exhibits 17, 24. He further found that the September 15, 1983 x-ray was read as positive by a Board-certified radiologist and negative by a B reader. Decision and Order at 9; Director’s Exhibit 23. Additionally, the administrative law judge found that the July 16, 2001 x-ray was read as positive by a Board-certified radiologist and B reader and as negative by an equally qualified physician. Decision and Order at 9-10; Director’s Exhibits 10, 16. The administrative law judge concluded that since the September 15, 1983 and July, 2001 films produced inconclusive interpretations, and the remaining three chest x-rays are negative, the evidence is insufficient to meet claimant’s burden of proof establishing the existence of pneumoconiosis. Decision and Order at 9-10.

Claimant specifically contends that the administrative law judge erred in failing to resolve any doubt with respect to the x-ray evidence in claimant’s favor. Claimant’s Brief at 3-4. Contrary to claimant’s contention the United States Supreme Court has held that the resolution of doubt in claimant’s favor violates Section 7 (c) of the Administrative Procedure

⁴This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibit 3.

Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), as it relieves claimants of their burden of proof in establishing entitlement to benefits. *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). Consequently, we affirm the administrative law judge's determination that the x-ray evidence is insufficient to establish claimant's burden of proof. Director's Exhibits 10, 16, 17, 23, 24; Decision and Order at 8-10; *Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *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*).

Claimant further argues that the administrative law judge erred in assessing the weight of the medical opinion evidence in considering whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4). Claimant's Brief at 4-5. 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 Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

In determining if the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge properly noted the entirety of the medical opinion evidence of record and rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *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); Decision and Order at 10-14. Contrary to claimant's assertion, the administrative law judge permissibly weighed the opinion of Dr. Rasmussen and acted within his discretion, as fact-finder, in concluding that the opinion was insufficient to meet claimant's burden of proof as Dr. Rasmussen did not offer any other explanation for his diagnosis of pneumoconiosis other than his own x-ray interpretation and claimant's length of coal dust exposure or indicate how his medical conclusion, that claimant suffered from COPD/emphysema due to coal mine employment and cigarette smoking, was supported by the medical evidence in this case. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Worhach*, 17 BLR 1-105; *Trumbo*, 17 BLR 1-85; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149; *Anderson*, 12 BLR 1-111; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); *Hutchens*, 8 BLR 1-16; Decision and Order at 12-14; Director's Exhibit 8. Consequently, as claimant makes no other specific challenge to the administrative law judge's credibility determination with respect to the medical opinion of

Dr. Rasmussen, we affirm the administrative law judge's credibility determination as it is supported by substantial evidence and is in accordance with law. *See Trent*, 11 BLR 1-26; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Mabe*, 9 BLR 1-67; *Perry*, 9 BLR 1-1; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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 Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *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 the existence of pneumoconiosis, 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). 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.

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

BETTY JEAN HALL
Administrative Appeals Judge