BRB No. 05-0829 BLA

BOBBY CHILDERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BOB CHILDERS TRUCKING	)	
	)	DATE ISSUED: 05/23/2006
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams and Rutherford), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5126) of Administrative Law Judge Daniel F. Solomon 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 noted that the instant claim was a request for modification of a duplicate claim and that the parties had stipulated to twenty years of qualifying coal mine employment. Decision and Order at 2-4, 15-16; Hearing Transcript at 6. The administrative law judge further determined that employer was the properly designated responsible operator. Decision and Order at 14. The administrative law judge, based on the date of filing, considered entitlement in this living miner's claim

pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 3. The administrative law judge, noting the proper standard and that the claim had been denied as claimant failed to establish the existence of pneumoconiosis or disability causation, reviewed the prior denial of benefits and then considered the newly submitted evidence of record and concluded that this evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) as claimant failed to establish either a mistake in fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[2] Decision and Order at 17-21. 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 (a)(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 (the Director), has filed a letter indicating that he will not respond to the merits of this case.[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

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[1] Claimant filed his initial claim for benefits on May 20, 1993, which was finally denied by Administrative Law Judge Clement J. Kichuk on November 24, 1997 as claimant failed to establish the existence of pneumoconiosis or disability causation. Director's Exhibit 28. The Board affirmed the denial of benefits on March 15, 1999. Director's Exhibit 28. Claimant took no further action until he filed a second application for benefits on September 20, 2000. Director's Exhibit 1. The district director awarded benefits on June 13, 2001. Director's Exhibit 22. Employer requested a hearing and Administrative Law Judge Stuart A. Levin denied benefits on November 21, 2002. Director's Exhibits 29, 41. Claimant appealed to the Board but subsequently requested modification, the subject of the instant appeal, on January 15, 2003, which was denied by the district director on June 24, 2003. Director's Exhibits 47, 48, 52. Claimant requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 53.

[2] Because this claim was pending on January 19, 2001, the effective date of revisions to the regulations, the former versions of 20 C.F.R. §§725.309 and 725.310 apply to this claim. 20 C.F.R. §725.2(c); Decision and Order at 3.

[3] The administrative law judge's length of coal mine employment and responsible operator determinations, his findings pursuant to 20 C.F.R. §718.202(a)(2)-(3), and his finding that there was no mistake in fact in the prior denial of benefits, are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. 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. This case involves a request for modification of a duplicate claim. Director's Exhibit 41.

After considering the newly submitted evidence on modification, the administrative law judge rationally determined that the newly submitted evidence of record was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) and therefore insufficient to establish modification.[4] *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

The administrative law judge permissibly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Kuchwara*, 7 BLR 1-167. Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge erred by failing to give an adequate rationale for according greater weight to the negative x-ray interpretation by Dr. Scott and by failing to accord greater weight to the positive x-ray interpretation by Dr. Castle. Claimant's Brief at 3-4. We disagree. The administrative law judge considered the April 2, 2004 x-ray and concluded that the positive and negative readings were equally probative. Decision and Order at 17. The administrative law judge, however, found the September 10, 2003 film interpreted by Dr. Castle as positive. Decision and Order at 18. The administrative law judge considered the newly submitted x-ray evidence of record and properly noted that the x-ray interpretations dated April 2, 2004 and December 4, 2001 were interpreted as

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was employed in the coal mine industry in Kentucky. *See* Director's Exhibits 3, 28; Decision and Order at 14; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

both positive and negative for the existence of pneumoconiosis by equally qualified physicians. Decision and Order at 17-18; Director's Exhibits 49, 54; Claimant's Exhibit 1; Employer's Exhibit 14.

Contrary to claimant's contention, the administrative law judge permissibly accorded greater weight to the negative interpretations by the physicians with superior qualifications and concluded that the preponderance of the evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 18. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *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*); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Contrary to claimant's assertions, a review of the record reflects that the administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 17-18; Director's Exhibits 12-14, 18, 21, 26, 33-35, 39, 49, 54; Claimant's Exhibits 1, 2; Employer's Exhibits 3, 7, 14; *Staton v. Norfolk & Western Ry. 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). Moreover, the administrative law judge need not accord determinative weight to a medical opinion or x-ray that was prepared at employer's request and is adverse to its position, as the administrative law judge must weigh all the evidence and draw his own conclusions and inferences. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Stanford v. Valley Camp Coal Co.*, 7 BLR 1-906 (1985). Consequently, the administrative law judge permissibly concluded that claimant failed to carry his burden of proof to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) by a preponderance of the x-rays. *Ondecko*, 512 U.S. 267, 18 BLR 2A-1.

Claimant further asserts that the administrative law judge failed to find the existence of pneumoconiosis established based upon the medical opinion evidence. Claimant specifically contends that the administrative law judge erred in failing to accord appropriate weight to the opinions of Drs. Castle and Rasmussen 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 (1988). 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); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

In determining if the medical opinion evidence established the existence of pneumoconiosis 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); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara*, 7 BLR 1-167; Decision and Order at 18-21. The administrative law judge noted that Drs. Forehand, Rasmussen, and Robinette relied upon a positive x-ray reading that had been reread as negative in reaching their decision that claimant suffered from pneumoconiosis. Decision and Order at 19; Director's Exhibits 9, 35, 49. The administrative law judge further noted that the opinion of Dr. Castle was more thoroughly explained and supported by the underlying documentation as well as by the opinions of Drs. Fino and Dahhan and the CT scan interpretations of record. Decision and Order at 20; Director's Exhibits 21, 33, 37, 38; Employer's Exhibits 1, 2, 4, 7, 9-12. The administrative law judge concluded that the opinions by Dr. Castle are at the least equally probative with the medical opinions offered in support of this claim and therefore the medical opinion evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Decision and Order at 20.

The administrative law judge, within his discretion as fact-finder, rationally determined that the medical opinion evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) as the conflicting medical opinions were equally probative. Decision and Order at 20; *Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Worhach*, 17 BLR 1-105; *Edmiston*, 14 BLR 1-65; *Clark*, 12 BLR 1-149. Contrary to claimant's assertion, Dr. Castle's opinion that the 1/0 x-ray interpretation was not indicative of coal workers' pneumoconiosis is not contrary to the spirit of the Act, since he did not foreclose all possibility that simple pneumoconiosis can be totally disabling.[5] *Anderson*, 12 BLR 1-111; *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Butela v. United States Steel Corp.*, 8 BLR 1-48 (1985). Inasmuch as the administrative law judge relied on Dr. Castle's conclusions regarding the existence of

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[5] Dr. Castle stated:

> Even if one were to conclude that Mr. Childers does have radiographic evidence of simple coal workers' pneumoconiosis, my opinion concerning his lack of disability due to that process would remain unchanged. My opinion is not predicated upon his having a normal or negative chest x-ray. It is, however, contingent upon his not having the physiologic findings indicating disability due to that process.

Employer's Exhibit 7.

pneumoconiosis, claimant's contentions are without merit. *See e.g., Aimone v. Morrison Knudson Co.,* 8 BLR 1-32 (1985); *Capers v. The Youghiogheny and Ohio Coal Co.,* 6 BLR 1-1234 (1984). Moreover, the administrative law judge acted within his discretion, as fact-finder, in concluding that the opinion of Dr. Rasmussen was insufficient to meet claimant's burden of proof as he questioned the reliability of the physician's opinion since his diagnosis of pneumoconiosis is based upon his positive x-ray reading, which was reread as negative. *See Eastover Mining Co. v. Williams,* 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Hutchens*, 8 BLR 1-16; Decision and Order at 19-20; Director's Exhibit 49. Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.202(a)(4), we affirm the administrative law judge's findings as they are supported by substantial evidence and are in accordance with law. *See Stephens,* 298 F.3d 511, 22 BLR 2-495; *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Trent,* 11 BLR 1-26*; Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *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 newly submitted evidence of record does not establish the existence of pneumoconiosis and thus fails to establish a material change in conditions, claimant has not met his burden of proof on all the elements of entitlement.[6] *See Hess*, 21 BLR 1-141; *Ross*, 42 F.3d 993, 19 BLR 2-10; *Worrell*, 27 F.3d 227, 18 BLR 2-290; *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

[6] As the administrative law judge properly determined that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), this finding precludes a finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*).

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 denial of benefits in this subsequent claim as it is supported by substantial evidence and is in accordance with law. *See Hess*, 21 BLR 1-141; *Ross*, 42 F.3d 993, 19 BLR 2-10; *Worrell*, 27 F.3d 227, 18 BLR 2-290; *Clark*, 12 BLR 1-149; *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