

BRB No. 01-0281 BLA

EUGENE TURNER )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 L. B. J. ENERGY, INCORPORATED ) DATE ISSUED:  
 )  
 and )  
 )  
 LIBERTY MUTUAL INSURANCE, )  
 COMPANY )  
 )  
 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 On Remand - Denying Benefits of  
Clement J. Kichuk, Administrative Law Judge, United States  
Department of Labor.

Eugene Turner, Vasant, Virginia, pro se.

Melissa Amos Young (Gentry, Locke, Rakes & Moore), Roanoke,  
Virginia, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel,<sup>1</sup> appeals the Decision and Order

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<sup>1</sup> Ron Carson, a benefits counselor with Stone Mountain Health Services of St.

on Remand (98-BLA-0163) of Administrative Law Judge Clement J. Kichuk 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).<sup>2</sup>

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Charles Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

<sup>2</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 65 Fed. Reg. 80,107 (2000) to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On

Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. This case is on appeal to the Board for the second time. Pursuant to the prior appeal by employer, the Board affirmed the administrative law judge's finding that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)(2000), but vacated the administrative law judge's finding that total disability due to pneumoconiosis was established pursuant to Section 718.204(b)(2000) and remanded the case for reconsideration of the evidence on that issue. *Turner v. L. B. J. Energy, Inc.*, BRB No. 99-0536 BLA (Oct. 31, 2000) (unpub.). On remand, the administrative law judge concluded that the evidence of record was insufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000), and denied benefits.

On appeal, claimant contends generally that he is entitled to benefits. Employer responds, urging affirmance of the denial. The Director, OWCP, Office of Workers' Compensation Programs (the Director), has filed a response letter indicating that he would 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 supported by substantial evidence, rational, and in accordance with 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 prove that he suffers from 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.*

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August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Association v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

*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. The administrative law judge considered the reports of Dr. Robinette and Dr. Hippensteel in considering whether claimant had met his burden that pneumoconiosis contributed to his totally disabling respiratory impairment. In considering Dr. Robinette's opinion, the administrative law judge found it not to be well-reasoned because, other than referring to a positive x-ray, the physician failed to explain his diagnosis that claimant's total respiratory disability was due to coal workers' pneumoconiosis and did not address the impact of claimant's smoking history on his respiratory disability. The administrative law judge accorded greater weight to Dr. Hippensteel's opinion that claimant's total respiratory disability was due to his long-term smoking habit because he found it more reasoned, thorough, and supported by the objective evidence of record, and because Dr. Hippensteel possessed superior credentials.<sup>3</sup> This was rational. Decision and Order on Remand at 6-8; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-306, 2-315 (4th Cir. 1995); *Onderko v. Director, OWCP*, 14 BLR 1-2(1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

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<sup>3</sup> Dr. Robinette is Board-certified in internal medicine and Board-eligible in pulmonary disease. Claimant's Exhibit 1. Dr. Hippensteel is Board certified in internal medicine, pulmonary medicine, and critical care medicine. Employer's Exhibit 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 *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark, supra*. We therefore affirm the administrative law judge's finding that the evidence is insufficient to establish total disability due to pneumoconiosis as supported by substantial evidence and in accordance with law. 20 C.F.R. §718.204(c); see *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).<sup>4</sup>

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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<sup>4</sup> Because we affirm the administrative law judge's finding that claimant failed to establish causation, a necessary element of entitlement at 20 C.F.R. Part 718, we need not revisit the issue of the existence of pneumoconiosis pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).