BRB Nos. 04-0428 BLA
and 04-0428 BLA-A

GERALD SMITH	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
PITTSBURG & MIDWAY COAL MINING	)	DATE ISSUED: 11/30/2004
	)	
and	)	
	)	
PACIFIC EMPLOYERS INSURANCE CO.	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

Philip J. Reverman, Jr. (Boehl, Stopher & Graves), Louisville, Kentucky, for employer.

Rita Roppolo (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, McGRANERY and

BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (2002-BLA-5252) of Administrative Law Judge Joseph E. Kane 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 found, in accordance with the parties' stipulation, that the miner had thirty-three years of coal mine employment. Decision and Order at 2; Director's Exhibit 29; Hearing Transcript at 10. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 1-2. After determining that the instant claim was a subsequent claim,[1] the administrative law judge noted the proper standard and found that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Decision and Order at 6-10. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the medical opinion evidence sufficient to establish the existence of pneumoconiosis. Employer responds, urging affirmance of the denial of benefits as supported by substantial evidence, and cross-appeals, asserting that the administrative law judge erred in excluding the opinion of Dr. Fino pursuant to 20 C.F.R. §725.414. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in claimant's appeal but agreeing with employer that the administrative law judge erred in excluding the opinion of Dr. Fino.[2]

The Board's scope of review is defined by statute. If the administrative law judge's

---

[1]Claimant filed his initial claim for benefits on July 27, 1988 and the claim was administratively closed due to abandonment on March 22, 1989. Director's Exhibit 1. Claimant filed a second application for benefits on February 12, 1991 and withdrew the claim on August 12, 1992. Director's Exhibit 1. Claimant again filed a claim for benefits on March 4, 1997, which was finally denied by the district director on July 7, 1997, as claimant failed to establish any element of entitlement. Director's Exhibit 2. Claimant filed the instant claim on March 9, 2001, in which benefits were awarded by the district director on February 22, 2002. Director's Exhibits 4, 21. Employer subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 24.

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

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 disturbed. 33 U.S.C. §921(b)(3), as incorporated 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*). The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which has held that in assessing whether the subsequent claim can be adjudicated pursuant to 20 C.F.R. §725.309, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.[3] *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The Court has further held that the administrative law judge must compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence is substantially more supportive of claimant. *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001).

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. Claimant argues that the administrative law judge erred in his consideration of the medical opinions of record. Claimant specifically contends that the administrative law judge erred in failing to accord appropriate weight to the opinions of Dr. Buchanan, claimant's treating physician, and Dr. Simpao, as they are sufficient to establish that claimant suffers from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant's Brief at 3-6. 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 Director, OWCP v.*

---

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 2, 5.

Rowe, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the newly submitted medical opinion evidence of record relevant to the existence of pneumoconiosis and he permissibly concluded that the medical opinion evidence fails to carry claimant's burden pursuant to Section 718.202(a)(4). Claimant's Brief at 3-6; Decision and Order at 8-10; Director's Exhibits 7, 12; Claimant's Exhibit 1; Employer's Exhibits 2, 4; *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). The administrative law judge permissibly found that the report by Dr. Simpao was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) because his diagnosis of pneumoconiosis was drawn into question by subsequent testing showing improved results and suggesting a temporary, not an irreversible condition. Director's Exhibit 12, 13; Decision and Order at 9; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Lafferty*, 12 BLR 1-190; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Claimant asserts that the administrative law judge erred in failing to accord greater weight to Dr. Simpao's opinion, diagnosing coal workers' pneumoconiosis, as the doctor was a Department of Labor examining physician. We disagree. Although Dr. Simpao examined claimant on behalf of the Department of Labor, the administrative law judge is not required to accord any additional or determinative weight to the physician's opinion on this basis. Decision and Order at 9; Director's Exhibit 12; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

Claimant also contends that the opinion of Dr. Buchanan is sufficient to establish the existence of pneumoconiosis because he is claimant's treating physician and the new regulations require the administrative law judge to give additional weight and credibility to this opinion. Claimant's Brief at 5. We disagree. The administrative law judge noted that Dr. Buchanan treated claimant but the administrative law judge was not required to accord determinative weight to the opinion solely because it was offered by a treating physician. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Tedesco v. Director*, OWCP, 18 BLR 1-103 (1994); *Clark*, 12 BLR 1-149; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 4, 9; Claimant's Exhibit 1. Claimant's reliance upon the new regulation set forth at 20 C.F.R. §718.104(d) is misplaced. Although an administrative law judge may give a treating physician's opinion controlling weight, the weight that is to be given to the treating physician's opinion must also be based on the credibility of the physician's opinion in light of its reasoning and documentation. *See* 20 C.F.R. §718.104(d)(5); *Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Collins*, 21 BLR 1-181; *Clark*, 12 BLR 1-149. The administrative law judge found that Dr. Buchanan's diagnosis of pneumoconiosis was equivocal: although his report

listed a diagnosis of pneumoconiosis, he testified that he was not sure if claimant's breathing problems were caused by coal mine employment and that subsequent testing had not confirmed his diagnosis of pneumoconiosis. Decision and order at 9. Thus, the administrative law judge reasonably discredited Dr. Buchanan's opinion. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984); Decision and Order at 9; Claimant's Exhibit 1; Employer's Exhibit 4.

Moreover, the administrative law judge permissibly accorded greater weight to the opinion of Dr. O'Bryan, than to the contrary opinions of Drs. Simpao and Buchanan, as the physician offered a well-reasoned and documented opinion which is supported by the objective medical evidence of record. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; Decision and Order at 9; Employer's Exhibit 2. We note that claimant raises no allegation of error with respect to the administrative law judge's crediting of this opinion. Consequently we affirm the administrative law judge's credibility determinations as they are supported by substantial evidence and are in accordance with law.[4] *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).

Employer contends on cross-appeal, and the Director agrees in his response brief, that the administrative law judge erred in excluding Dr. Fino's opinion. The administrative law judge noted that Dr. Fino had considered the medical evidence from the prior claims in forming his opinion.[5] Decision and Order at 5. The administrative law judge concluded that the new regulation promulgated at 20 C.F.R. §725.414(a)(1) barred admission of Dr. Fino's

---

[4]Claimant asserts that the administrative law judge's two references to claimant by other names raise doubt as to whether the administrative law judge was looking at the correct record. Claimant's Brief at 5. Our review of the decision indicates that although the administrative law judge referred to claimant as "Mr. Brock" and "Mr. Adams," these mistakes do not constitute a substantive error since the administrative law judge discussed the relevant evidence in the record. Decision and Order at 2-10; *Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-233 (6th Cir. 1995); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990).

[5]Dr. Fino reviewed and discussed the various medical reports and test results submitted in the prior claims by claimant as well as the medical opinions submitted in the current claim by Drs. Simpao and O'Bryan. Employer's Exhibit 3.

report which was based in part upon evidence inadmissible in the instant claim.[6] Decision and Order at 5-6. Contrary to the administrative law judge's finding, the evidence relied upon by Dr. Fino was admissible in the instant case, as Section 725.309(d)(1) provides that any evidence "submitted in connection with any prior claim shall be made" part of the record. *See* 20 C.F.R. §725.309(d)(1). Therefore, the evidence submitted in the prior claims is properly part of the record. The administrative law judge thus incorrectly found that Dr. Fino's opinion was based upon inadmissible evidence pursuant to 20 C.F.R. §725.414. *See Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004)(*en banc*)(published); Decision and Order at 5-6. However, based on the circumstances of this case, this error is harmless since Dr. Fino's opinion does not support claimant's entitlement to benefits and the administrative law judge has found that the remaining evidence is insufficient to establish the existence of pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Employer's Exhibit 3; Decision and Order at 5-10.

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 Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *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 Kirk*, 264 F.3d 602, 22 BLR 2-228; *Ross*, 42 F.3d 993, 19 BLR 2-10; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

[6]Revised 20 C.F.R. §725.414 applies to this claim which was filed on March 9, 2001, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge