

BRB No. 99-0332 BLA

HARRISON FOSTER CAMPBELL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

James M. Moore (Moore and Smith, P.C.), Knoxville, Tennessee, for claimant.

Dorothy L. Page (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1956) of Administrative Law Judge Thomas M. Burke 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, after determining that the instant case was a duplicate claim and noting the proper standard, found a material change in conditions established pursuant to 20 C.F.R. §725.309 based upon the concession by the Director, Office of Workers' Compensation Programs (the Director), that the evidence of record now establishes the existence of pneumoconiosis.¹ Decision and Order at 3. The administrative law judge found, and the parties stipulated to, fourteen years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3. The administrative law judge determined that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203 but concluded that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Decision and Order at 4-7. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find total disability established based upon Dr. Seargeant's opinion. The Director responds, urging affirmance of the denial of benefits.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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 pursuant to

¹The record indicates that claimant filed his initial claim for benefits on September 18, 1989, which was dismissed as abandoned on April 2, 1990. Director's Exhibit 49. Claimant filed a second claim on August 21, 1991. Director's Exhibit 48. The claim was denied on February 26, 1992. Director's Exhibit 48. Claimant took no further action until he filed the present claim on April 29, 1994. Director's Exhibit 1. Consequently, the present claim constitutes a duplicate claim pursuant to 20 C.F.R. §725.309. See *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

²The administrative law judge's findings pursuant to 20 C.F.R. §§725.309, 718.202(a), 718.203 and 718.204(c)(1)-(3) are unchallenged on appeal, and therefore are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any 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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge considered the three relevant medical opinions of record and reasonably determined that the medical opinion evidence was insufficient to establish total disability based on his conclusion that the opinion of Dr. Seargeant, that claimant was totally disabled from a respiratory standpoint as a result of coal mine employment, was outweighed by the opinions of Drs. Pharaoh and Broudy, that claimant did not have a totally disabling respiratory impairment. See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Perry, supra*; Decision and Order at 6-7; Director's Exhibits 9, 44, 45, 48, 61, 68, 75, 82. The administrative law judge acted within his discretion, as factfinder, when he accorded greater weight to the opinion by Dr. Pharaoh, that claimant has no significant respiratory impairment, as it is supported by the objective evidence of record and the consultative opinion of Dr. Broudy. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); *Piccin, supra*; Decision and Order at 6-7; Director's Exhibits 9, 44, 45, 48, 61, 68, 75, 82.

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 *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly found the only opinion diagnosing a totally disabling respiratory impairment outweighed by the

remaining contrary medical opinions, claimant has not met his burden of proof on all the elements of entitlement. *Id.* The administrative law judge is empowered to weigh the medical opinion evidence of record 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, supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *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 total disability pursuant to Section 718.204(c)(4) as it is supported by substantial evidence and is in accordance with law.

Inasmuch as claimant has failed to establish total disability, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge