BRB No. 99-0643 BLA

JESSE J. EVERSOLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PERRY COUNTY COAL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
SUN COAL COMPANY, INC.	)	
	)	
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-475) 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 twenty-four and one-half years of qualifying coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20

C.F.R. Part 718.[1] Decision and Order at 3-5, 10. The administrative law judge, after noting that the instant case was a duplicate claim and finding a material change in conditions established, concluded that the evidence of record was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Decision and Order at 3-4, 8-10, 14-16. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find that his total disability was due to pneumoconiosis. Employer responds, asserting that the denial of benefits is supported by substantial evidence and further challenging the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1), (4) and his material change in conditions determination pursuant to 20 C.F.R. §725.309. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[2]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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).

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[1]Claimant filed his initial claim for benefits on May 23, 1970, which was finally denied by the Department of Labor on May 15, 1979. Director's Exhibit 26. Claimant filed his second claim on July 12, 1984, which was finally denied on October 16, 1986. Director's Exhibit 27. Claimant took no further action until he filed the instant claim for benefits on March 6, 1997. Director's Exhibit 1.

[2]The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.203 and 718.204(c)(4) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 that there is no reversible error contained therein. The administrative law judge, in the instant case, considered the entirety of the relevant medical opinion evidence and acted within his discretion in concluding that claimant's totally disabling respiratory impairment was not due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge properly reviewed the evidence of record pursuant to the applicable standard enunciated by the United States Court of Appeals for the Sixth Circuit, in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989) and concluded that the evidence was insufficient to establish that pneumoconiosis contributed to claimant's total disability.[3] *See* 20 C.F.R. §718.204(b); Decision and Order at 14-16. The administrative law judge permissibly accorded greatest weight to the opinion of Dr. Dahhan, who attributed claimant's respiratory impairment to cigarette abuse, as it was documented and well-reasoned, more recent then the other opinions and the physician was aware of claimant's smoking history. *See Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-209 (6th Cir. 1989); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal* Co., 11 BLR 1-113 (1988); Martinez *v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 15; Director's Exhibits 19, 27. Additionally, the administrative law judge noted that Dr. Boggs had treated the miner on several occasions, but also provided valid reasons for finding his

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

opinion entitled to less weight. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Trumbo, supra*; *Wetzel, supra*; *Lucostic, supra*; *Piccin, supra*; Decision and Order at 15.

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 rationally relied on the medical opinion of Dr. Dahhan, that claimant's respiratory impairment was due to cigarette abuse, 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, Inc.*, 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 that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b) as it is supported by substantial evidence and is in accordance with law.

Inasmuch as claimant has failed to establish that his total disability was due to pneumoconiosis pursuant to Section 718.204(b), an essential element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address employer's contentions raised in its response brief. *Anderson, supra*; *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge