BRB No. 03-0232 BLA

CURTIS WELLS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 09/29/2003
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

Phillip Lewis, Hyden, Kentucky, for claimant.

Helen H. Cox (Howard M. Radzely, Acting 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, SMITH, and HALL Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-5051) 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).[1] The administrative law judge noted that the Director, Office of Workers'

[1]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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Compensation Programs (the Director), did not challenge that claimant established at least thirty 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, 6; Director's Exhibit 17. The administrative law judge, after determining that this case involved a duplicate claim, noted the proper standard and concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), as the newly submitted evidence of record failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[2] Decision and Order at 3, 6-10. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director responds, asserting that a material change in conditions has been established as he did not contest the issue of the existence of pneumoconiosis, an element of entitlement previously adjudicated against claimant, but urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.[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 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; *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*).

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[2]The record indicates that claimant filed his initial claim for benefits on June 4, 1986, which was finally denied on October 16, 1992, when the Benefits Review Board, without reaching the issue of the existence of pneumoconiosis, affirmed the denial of benefits on the ground that substantial evidence supported Administrative Law Judge Daniel L. Stewart's finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 15. Claimant took no further action until he filed a second application for benefits on February 7, 2001, the subject of the instant appeal. Director's Exhibit 1.

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

Claimant argues that the evidence of record demonstrates that he has pneumoconiosis and has established a material change in conditions. Claimant's Brief at 3. The Director responds, stating that "the issues of pneumoconiosis and material change were withdrawn when the claim was transferred for a hearing before an administrative law judge" and "the administrative law judge erred by addressing material change, which is no longer a contested issue." Director's Brief at 1. We agree. Under the "one-element standard" adopted by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), a miner is provided an opportunity to establish a material change in conditions by proving any element of entitlement *previously adjudicated against him*.[4] Hence, the focus of the material change in conditions standard in *Ross* is on specific findings made against the claimant in the prior claim. Administrative Law Judge Daniel L. Stewart denied the initial claim as claimant failed to establish the existence of pneumoconiosis and total disability, and as the Director no longer contests the issues of pneumoconiosis or material change, we hold that the administrative law judge erred in considering only the newly submitted evidence with respect to the issue of total disability. *See* 20 C.F.R. §725.463; *Ross*, 42 F.3d 993; Director's Exhibits 15, 17.

Claimant further argues that the administrative law judge erred in failing to give adequate consideration to the medical opinions of record in finding the evidence insufficient to establish total disability. Claimant's Brief at 3-4. 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).

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[4]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*); Director's Exhibits 2, 15; Decision and Order at 6.

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed the opinion of Dr. Baker as it relates to total disability and permissibly concluded that the medical opinion failed to carry claimant=s burden pursuant to Section 718.204(b)(2)(iv). Claimant's Brief at 3-4; Decision and Order at 5-6, 9-10; Director's Exhibits 7, 10; *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 properly considered this evidence and permissibly found that the report by Dr. Baker was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) as the physician did not diagnose a totally disabling respiratory impairment.[5] Director's Exhibit 7; Decision and Order at 9-10; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty*, 12 BLR 1-190; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Therefore, contrary to claimant's assertion, the administrative law judge, in a proper exercise of his discretion, fully addressed the opinion of Dr. Baker and rationally found that the physician did not conclude that claimant was totally disabled. Decision and Order at 10; Director's Exhibit 7. Moreover, the determination by Dr. Cornett that claimant suffers from chronic obstructive pulmonary disease and Dr. Baker's diagnosis of pneumoconiosis do not automatically result in the conclusion that claimant is also suffering from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b). *See Jarrell v. C & H Coal Co.*, 9 BLR 1-52 (1986)(Brown, J., concurring and dissenting); *Sweet v. Jeddo-Highland Coal Co.*, 7 BLR 1-659 (1985); *Webb v. Armco Steel Corp.*, 6 BLR 1-1120 (1984); Claimant's Brief at 3-4; Director's Exhibits 7, 10. Consequently, as claimant makes no other specific challenge to the administrative law judge's findings with respect to Dr. Baker's opinion, we affirm the administrative law judge's credibility determinations as they are supported by substantial evidence and are in accordance with law. *See Trent*, 11 BLR 1-26; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Mabe*, 9 BLR 1-67; *Budash*, 9 BLR 1-48; *Perry*, 9 BLR 1-1; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Although we have held that the administrative law judge erred in failing to consider all the evidence of record in determining if total disability was established, this error is harmless, as the evidence submitted in the prior claim was previously found to be insufficient

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[5]Dr. Baker diagnosed coal workers' pneumoconiosis, chronic bronchitis, ischemic heart disease and left ventricular dysfunction, and opined that claimant's medical conditions caused minimal to no impairment and that he retained the respiratory capacity to perform the work of a coal miner or work in a comparable dust free environment. Director's Exhibit 7.

to establish total disability, and substantial evidence supports that determination. Director's Exhibit 15; *see Budash*, 9 BLR 1-48; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). The record indicates that all of the pulmonary function and blood gas studies are non-qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(i)-(iii); *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; *Budash*, 9 BLR 1-48; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1; Director=s Exhibit 15. Moreover, the medical opinion evidence in the prior claim consists of the opinions of Drs. Anderson, Myers, Penman, Williams, Broudy and Cooper, who concluded that claimant did not have a respiratory impairment and retained the respiratory capacity to do the work of a miner, and the opinion of Dr. Wright, who concluded that the miner had normal pulmonary function test results and was not disabled under the federal standards. Director's Exhibit 15. As the evidence submitted in the prior claim is insufficient to meet claimant's burden of proof as a matter of law, a remand is not required. *See* 20 C.F.R. §718.204(b)(2)(iv); *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19; *Budash*, 9 BLR 1-48; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1; Director's Exhibit 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 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 evidence of record does not establish that claimant is totally disabled by a respiratory or pulmonary impairment, 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 denial of benefits as the evidence of record is insufficient to establish total disability pursuant to Section 718.204(b)(2). *See 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