BRB No. 97-1850 BLA

JAMES FAZENBAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MORAN COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
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 of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Lawrence E. Sherman, Jr., Romney, West Virginia, for claimant.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH and MCGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (92-BLA-1798) of Administrative Law Judge Samuel J. Smith 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).[2] The parties stipulated that

[1] Claimant is the miner, James Fazenbaker, who filed his initial application for benefits on June 22, 1973, which was denied by the district director on August 4, 1983. Director's Exhibit 45. The present duplicate claim was filed on September 6, 1991. Director's Exhibit 1.

[2] The instant duplicate claim was initially assigned to Administrative Law Judge

claimant had established at least eighteen years of coal mine employment, and the administrative law judge considered the claim pursuant to the provisions of 20 C.F.R. Part 718. The administrative law judge found however, that claimant had failed to

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Julius A. Johnson who denied benefits finding that although claimant had established a material change in condition based on the Board's holding in *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988), the evidence was insufficient to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Claimant appealed the denial to the Board who affirmed the findings that the presence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3), that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(3), and that Dr. Hamilton's report was not relevant to the aforementioned issues. The Board vacated the administrative law judge's finding that claimant had established a material change in condition pursuant to 20 C.F.R. §725.309, based on the newly issued holding in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), and vacated the findings made pursuant to Sections 718.202(a)(4) and 718.204(c)(4). The Board remanded the case with instructions for the administrative law judge to consider whether the report of Dr. Ambroz was sufficient to establish the existence of pneumoconiosis by medical opinion evidence or total respiratory disability due to pneumoconiosis when considered in conjunction with the exertional requirements of claimant's former coal mine employment. On remand, the claim was assigned to Administrative Law Judge Smith.

establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), or a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.

In the instant appeal, claimant argues that the administrative law judge erred by failing to credit the report of Dr. Ambroz, and by crediting the reports of employer's physicians, which claimant asserts are biased in employer's favor. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has not participated in this appeal.

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 applicable law. 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement. *Trent, supra; Perry, supra*.

After consideration of the administrative law judge's Decision and Order on Remand, 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 there is no reversible error contained therein. Pursuant to Sections 718.202(a)(4) and 718.204(b), (c)(4), the administrative law judge rationally rejected Dr. Ambroz' opinion since this physician relied on a smoking history substantially less than that provided by claimant at the hearing, and did not indicate that he was familiar with the requirements of claimant's position as a truck driver in the mines, which the administrative law judge reasonably determined did not require heavy labor, based on claimant's hearing testimony. *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *DeBusk v. Pittsburg & Midway Coal Co.*, 12 BLR 1-15 (1988); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *see also Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991). Furthermore, we reject claimant's argument that employer's physicians are biased, since claimant has failed to provide any evidence to substantiate his allegations of bias. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). We also find no merit in claimant's allegation that the administrative law judge erred by failing to credit the opinion of Dr. Fadi, who diagnosed pneumoconiosis in 1982, since this evidence was submitted in support of the earlier claim, and is not new evidence which may establish a material change in condition. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). As we find that the administrative law judge has provided a rational basis for his findings, we conclude that substantial evidence supports the administrative law judge's determination.

The administrative law judge is empowered to weigh and draw inferences from the medical evidence, *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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's findings that claimant has not established the presence of pneumoconiosis, a totally disabling respiratory impairment, or a material change in condition, as they are supported by substantial evidence and in accordance with law.

Accordingly, the Decision and Order on Remand of the administrative law judge 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