BRB No. 04-0598 BLA

JULIUS JOHN REZNICK, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 03/07/2005
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-00263) of Administrative Law Judge Robert D. Kaplan 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 that the instant case was a modification request of a subsequent claim, noted the proper standard and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 2-5. The

[1] Claimant filed his initial claim for benefits on April 20, 1978, which was finally denied by the Department of Labor on November 15, 1982. Director's Exhibit 25. Claimant

administrative law judge found, and the parties stipulated to, nine years of qualifying coal mine employment. Decision and Order at 9; Hearing Transcript at 11. Considering the newly submitted evidence of record, the administrative law judge concluded that it was insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204 (b)(2). Decision and Order at 6-12. The administrative law judge subsequently found that claimant failed to establish modification pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 12. Accordingly, benefits were denied.

On appeal, claimant contends that the x-ray evidence and the opinion of Dr. Kraynak is sufficient to establish the existence of pneumoconiosis and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge's denial of benefits is supported by substantial evidence.[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 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

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filed a second claim on October 9, 1986, which was finally denied on December 27, 1991. Director's Exhibit 25. Claimant requested modification on August 11, 1992 but subsequently withdrew the request on June 26, 1995. Director's Exhibit 25. Claimant filed a third claim for benefits on March 6, 1997, which was finally denied on August 5, 1999. Director's Exhibits 1, 41. Claimant requested modification on August 2, 2000, which was finally denied on July 19, 2002. Director's Exhibits 42, 72. Claimant filed the present modification request on January 7, 2003, which was denied by the district director on May 6, 2003. Director's Exhibits 73, 81. Claimant subsequently requested a hearing before the Office of Administrative Law Judges.

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

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.

Considering the newly submitted medical opinion evidence to determine if a change in conditions was established, the administrative law judge permissibly found that the evidence was insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b)(2)(iv).[3] *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Claimant argues that the administrative law judge erred in failing to give adequate consideration to the medical opinions of record. Claimant specifically contends that the administrative law judge erred in failing to accord appropriate weight to the opinion of Dr. Kraynak, the miner's treating physician, as it is sufficient to establish that claimant suffers from pneumoconiosis and has a totally disabling respiratory or pulmonary impairment. Claimant's Brief at 2-3. 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 Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Further, although the United States Court of Appeals for the Third Circuit[4] has indicated that treating physicians' opinions are assumed to be more valuable than those of non-examining physicians, *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004)(Roth, J., dissenting), an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997);

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[3] The administrative law judge properly noted that claimant conceded that there had been no mistake of fact in the prior decision and is only asserting that there has been a change in conditions as the basis for his modification request. Decision and Order at 5; Hearing Transcript at 25.

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

Tedesco v. Director, OWCP, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, a physician's opinion based upon his own tests and observations, or the review of other objective test results, may be substantial evidence in support of an administrative law judge's findings. *Evosevich v. Consolidation Coal* Co., 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *see also Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel,* 8 BLR 1-139.

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant newly submitted evidence as it relates to the existence of pneumoconiosis and total disability and permissibly concluded that the evidence fails to carry claimant's burden pursuant to Sections 718.202(a)(4) and 718.204(b)(2)(iv). Decision and Order at 7-9, 12; Director's Exhibits 74, 89; Claimant's Exhibit 2; *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, in a proper exercise of his discretion, rationally found that the only opinion supportive of claimant's burden, that of Dr. Kraynak, was unreliable and thus insufficient to meet claimant's burden of proof as the physician relied upon an inaccurate length of coal mine employment history and invalid objective medical evidence.[5] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Lafferty*, 12 BLR 1-190; *Clark*,12 BLR 1-149; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 9, 12; Director's Exhibit 74; Claimant's Exhibit 2.

The administrative law judge, in this instance, rationally considered the quality of the evidence in determining whether the opinions of record were supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields*, 10 BLR 1-19; *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46; Decision and Order at 9, 12; Director's Exhibits 74, 89; Claimant's

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[5] Dr. Kraynak relied on thirty-one years of coal mine employment but the administrative law judge noted that the parties stipulated to approximately nine years of coal mine employment. Decision and Order at 12. Dr. Kraynak relied on two qualifying pulmonary function studies dated August 21, 2002 and December 11, 2003 but the administrative law judge found the studies invalid based on the reviews by physicians possessing superior qualifications.

Exhibit 2. Additionally, although Dr. Kraynak is the miner's treating physician, the administrative law judge properly concluded that this opinion was not entitled to greater weight pursuant to 20 C.F.R. §718.104(d)(5) as the physician's opinion was not well reasoned or documented. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Mancia*, 130 F.3d 579; *Lango*, 104 F.3d 573; *Evosevich*, 789 F.2d 1021, 9 BLR 2-10; *Tedesco*, 18 BLR 1-103; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Hutchens*, 8 BLR 1-16; Decision and Order at 9, 12.

Claimant further generally contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1). The Board is not empowered to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge as the trier-of-fact, and the Board as the review tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). As we have emphasized previously, the Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order and address why substantial evidence does not support the result reached or why the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b) (2000); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf*, 10 BLR 1-119; *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See Sarf*, 10 BLR 1-119; *Fish*, 6 BLR 1-107.

In the instant case, other than citing favorable evidence and generally asserting that the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis, *see* Claimant's Brief at 2, claimant has failed to identify any errors made by the administrative law judge in the evaluation of the x-ray evidence and applicable law pursuant to Part 718. Thus, as claimant's counsel has failed to adequately raise or brief any issue arising from the administrative law judge's weighing of the x-ray evidence, the Board has no basis upon which to review those findings.

Claimant has the 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 newly submitted evidence of record does not establish the existence of pneumoconiosis or 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 finding that the newly submitted evidence of record is insufficient to establish a basis for modification as it is supported by substantial evidence and is in accordance with law. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Trumbo,* 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge