

BRB No. 05-0110 BLA

I.D. BAKER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LUTTRELL MINING INCORPORATED)	DATE ISSUED: 05/25/2005
)	
and)	
)	
KENTUCKY COAL PRODUCERS)	
SELF-INSURANCE FUND)	
)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Leroy Lewis (Law Office of Phillip Lewis), Hyden, Kentucky, for claimant.

David H. Neeley (Neeley & Reynolds, P.S.C.), Prestonsburg, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-6001) of Administrative Law Judge Daniel J. Roketenetz 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, and the parties stipulated to, at

least twenty-five 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 2, 4-5; Hearing Transcript at 7-8; Director's Exhibit 1. After determining that the instant claim was a subsequent claim,¹ the administrative law judge noted the proper standard and found that he would address the merits of this subsequent claim since the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and thus a material change in conditions pursuant to 20 C.F.R. §725.309. Decision and Order at 4-10. The administrative law judge concluded that the evidence established that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203 and that claimant suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 10-13. The administrative law judge further found, however, that the disability was not due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 13-14. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find that the total disability was due to pneumoconiosis based on the medical opinion evidence pursuant to 20 C.F.R. §718.204(c).² Employer responds urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to the instant appeal.³

¹ Claimant filed his initial claim for benefits on March 3, 1973, which was finally denied by the Department of Labor on October 10, 1975. Director's Exhibit 1. Claimant filed his second application for benefits on October 5, 1987, which was finally denied on June 10, 1994. *Id.* Claimant requested modification on October 24, 1994, which was denied by Administrative Law Judge Donald B. Jarvis on September 14, 1995, as claimant failed to establish the existence of pneumoconiosis or total disability. *Id.* The Benefits Review Board affirmed the denial of modification on July 18, 1996. *Id.* Claimant filed the instant claim on October 24, 2001, which was finally denied by the district director on March 7, 2003. Director's Exhibits 3, 19. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 20.

² Claimant also asserts, in his brief, that the evidence is sufficient to establish the existence of pneumoconiosis arising out of coal mine employment. Claimant's Brief at 2-3. The administrative law judge found that these two elements of entitlement were established in claimant's favor and thus the Board will not further address these findings. Decision and Order at 8-11.

³ The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§725.309, 718.202(a), 718.203 and 718.204(b)(2),

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*).

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 contains no reversible error.⁴ The administrative law judge acted within his discretion, as fact-finder, in concluding that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c). See *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Claimant specifically contends that the administrative law judge failed to accord appropriate weight to the opinion of Dr. Alam as it is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). 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); see also *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last 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 1, 6, 7.

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed the opinions of Drs. Westerfield and Alam with respect to total disability causation and permissibly concluded that the medical opinion evidence fails to carry claimant's burden pursuant to Section 718.204(c). Claimant's Brief at 3-4; Decision and Order at 13-14; Director's Exhibits 11, 12; *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). While the administrative law judge found that Dr. Alam's opinion was well reasoned and documented on the issues of the existence of pneumoconiosis and totally disabling respiratory impairment, the administrative law judge permissibly found that on the issue of causation, the report by Dr. Alam did not offer a reasoned diagnosis because the physician failed to indicate what objective and clinical findings he used to determine that claimant's impairment was caused by his coal mine employment. See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *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*, 12 BLR 1-149; Decision and Order at 14; Director's Exhibit 11.

Furthermore, the administrative law judge, in a proper exercise of his discretion, rationally accorded greater weight to the contrary opinion of Dr. Westerfield, than to the opinion of Dr. Alam, because he found the physician offered a well reasoned and documented opinion which is supported by the objective medical evidence of record. See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry*, 9 BLR 1-1; *Hutchens*, 8 BLR 1-16; Decision and Order at 14; Director's Exhibit 12. Therefore, the administrative law judge permissibly found that the report of Dr. Alam was insufficient to establish that claimant's total disability was due to pneumoconiosis. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).

Claimant's assertion that he has met the requirements of Section 718.204(b)(2)(iv) and can be considered totally disabled by pneumoconiosis lacks merit. Claimant's Brief at 4. Claimant is not entitled to a presumption of disability as the record contains no evidence of complicated pneumoconiosis and the claim was filed after January 1, 1982. 20 C.F.R. §§718.304, 718.305(e); Director's Exhibit 3; Decision and Order at 8, 11, 13; *Kabachka v. Windsor Power House Coal Corp.*, 11 BLR 1-171 (1988); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Rather, claimant must establish each element of entitlement by a preponderance of the evidence. See *Trent*, 11 BLR 1-26; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1. Therefore, contrary to claimant's assertion, the administrative law judge, in a proper exercise of his discretion, fully addressed the medical opinion evidence, including the opinion of Dr. Alam, and rationally found that this evidence could not carry claimant's burden of proof. See

Williams, 338 F.3d 501, 22 BLR 2-623; *Stephens*, 298 F.3d 511, 22 BLR 2-495; *Collins*, 21 BLR 1-181; *Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Fields*, 10 BLR 1-19; *Perry*, 9 BLR 1-1; *Hutchens*, 8 BLR 1-16; Decision and Order at 13-14; Director's Exhibits 11, 12. Consequently, as claimant makes no other specific challenge to the administrative law judge's findings with respect to total disability causation, 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; *Perry*, 9 BLR 1-1; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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). 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). Inasmuch as the administrative law judge's finding that the evidence is insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c) is supported by substantial evidence and in accordance with law, we affirm the denial of benefits. *See* 20 C.F.R. §718.204(c); *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