BRB No. 03-0412 BLA

JUNIOR WOOSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHISOLM MINE,	)	
d/b/a PIKEVILLE COAL COMPANY	)	DATE ISSUED: 11/25/2003
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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.

Zaring P. Robertson (Morgan, Madden, Brashear & Collins), Richmond, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig, LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-01029) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a duplicate 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 found, and the parties stipulated to, thirty-one years of coal mine employment. Decision and Order at 2, 4; Hearing Transcript at 11. The administrative law judge further noted that at the hearing, employer accepted its designation as the proper responsible operator. Decision and Order at 2; Hearing Transcript at 10-11. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that the instant claim was a duplicate claim,[2] noted the proper standard and found that the newly submitted evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 4-12. Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Decision and Order at 12. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge's decision is not supported by substantial evidence as the administrative law judge is biased since the evidence is sufficient to establish disability causation. Employer responds that substantial evidence supports the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not responded to this appeal.[4]

The Board's scope of review is defined by statute. We must affirm the administrative

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[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.

[2]Claimant filed his initial claim for benefits on September 17, 1991, which was denied by the district director on March 6, 1992, as claimant failed to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 27. Claimant filed the instant claim on November 27, 2000, and the district director awarded benefits on June 27, 2001. Director's Exhibits 1, 24. Employer requested a formal hearing and the case was transferred to the Office of Administrative Law Judges on July 23, 2001. Director's Exhibit 28.

[3]The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

[4]The administrative law judge's length of coal mine employment and responsible operator determinations are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

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*). The instant claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

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. The administrative law judge correctly noted that the previous claim was denied as claimant did not establish that he was totally disabled due to pneumoconiosis. *See Caudill v. Arch of Kentucky, Inc.*, 22 BLR 1-97 (2000)(*en banc*); Decision and Order at 6; Director's Exhibit 27.

Considering whether a material change in conditions was established, the administrative law judge permissibly found that the newly submitted evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant, newly submitted evidence of record as it relates to 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 11-12; Director's Exhibits 11, 12, 23; Employer's Exhibits 4-6; *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *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).

Further, claimant's contention that the administrative law judge's reliance on the opinion of Dr. Branscomb demonstrates bias in favor of employer in this case is without merit. Claimant's Brief at 3. Claimant's allegation of bias is not supported by the analysis reflected in the Decision and Order as the administrative law judge properly discharged his duty as fact-finder and adequately explained the basis for his findings. *See Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-233 (6th Cir. 1995); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Clark*, 12 BLR 1-149; *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Zamora v. C.F.&I. Steel Corp.*, 7 BLR 1-568 (1984); Decision and Order at 11-12. Claimant also argues that Dr. Branscomb's opinion is not credible since he rules out coal mine employment as the cause of claimant's disability but can not identify an alternative cause. Claimant's Brief at 3. Contrary to claimant's contention, Dr. Branscomb's opinion need not establish a specific cause of claimant's disability to be credible. *Smith*, 127 F.3d 818; *Adams*, 886 F.2d 818. Moreover, the administrative law judge rationally chose to credit Dr. Branscomb's opinion due to his detailed explanation regarding claimant's respiratory conditions, his qualifications and his thorough examination and review of the evidence of record. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark*, 12 BLR 1-149; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields*, 10 BLR 1-19; *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Budash*, 9 BLR 1-48; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge, in the instant case, rationally reviewed the opinion of Dr. Branscomb and acted within his discretion, as fact-finder, in finding this opinion to be well reasoned and documented. *See Collins*, 21 BLR 1-181; *Clark*, 12 BLR 1-149; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Mabe*, 9 BLR 1-67; *Gee*, 9 BLR 1-4; *Perry*, 9 BLR 1-1; *Lucostic*, 8 BLR 1-46; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 11; Employer's Exhibits 4-6.

Claimant further contends that the administrative law judge erred in failing to award benefits as the opinion of Dr. Broudy, when considered with the opinion of Dr. Westerfield, outweighs the opinion of Dr. Branscomb. Claimant's Brief at 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 (1989). 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).

Moreover, the administrative law judge permissibly found that the report by Dr.

Broudy was insufficient to establish disability causation pursuant to Section 718.204(c) as the opinion was equivocal and, therefore, entitled to diminished weight.[5] *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984); Decision and Order at 11-12; Director's Exhibit 23.

Further, claimant asserts that Dr. Westerfield's opinion should be given more weight as no physician has attributed claimant's impairment to smoking and as the credibility of the report is bolstered by the fact that his findings were adverse to the party that retained him. We disagree. The administrative law judge rationally gave less weight to Dr. Westerfield's opinion because this physician failed to adequately explain what factors or test results led him to his ultimate conclusion of total disability due to pneumoconiosis, and thus, the administrative law judge properly questioned the reliability of the medical opinion. *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *see also Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Additionally, a medical opinion that is adverse to the party that retained the physician is entitled to no special deference in determining if a party has met its burden of proof. Collins, 21 BLR 1-181; Melnick, 16 BLR 1-31; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Lucostic*, 8 BLR 1-46. Therefore, contrary to claimant's assertion, the administrative law judge, in a proper exercise of his discretion, fully addressed the opinions of Drs. Broudy and Westerfield and rationally found that their opinions were insufficient to establish that claimant's total disability was due to pneumoconiosis. Decision and Order at 11-12; Director's Exhibits 11, 23. Consequently, as claimant makes no other specific challenge to the administrative law judge's findings, we affirm the administrative law judge's credibility determinations as they are supported by substantial evidence and are in accordance with law.[6] *See Trent*, 11 BLR 1-

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[5]Dr. Broudy diagnosed radiographic changes suggesting bilateral interstitial fibrosis which could be due to coal workers' pneumoconiosis and restrictive ventilatory defect secondary to the interstitial fibrotic changes. The physician further stated that the findings were nonspecific and could also represent usual interstitial pulmonary fibrosis or idiopathic fibrosing alveolitis. Director's Exhibit 23. Dr. Broudy further opined, after reviewing additional medical evidence, that the most likely explanation of this man's clinical status was idiopathic fibrosis with progression between 1991 and 2001. Director's Exhibit 23.

[6]Claimant is not entitled to a presumption of disability causation as the record is devoid of any evidence of complicated pneumoconiosis and the instant claim was filed after January 1, 1982. 20 C.F.R. §§718.304, 718.305(e); Director's Exhibit 1; Decision and Order at 4, 11; *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. *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *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 that claimant is totally disabled due to pneumoconiosis, claimant has not met his burden of proof on all the elements of entitlement. *Ross*, 42 F.3d 993; *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 medical opinion evidence of record is insufficient to establish disability causation pursuant to Section 718.204(c) as it is supported by substantial evidence and is in accordance with law. *See Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. Since claimant has failed to establish that his total disability is due to pneumoconiosis, the administrative law judge properly denied benefits as the newly submitted evidence is insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *See Ross*, 42 F.3d 993.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge