BRB Nos. 99-0591 BLA
and 99-0591 BLA-A

R. K. HOSKINS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NALLY & HAMILTON ENTERPRISES	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

W. Barry Lewis (Lewis & Lewis Law Office), Hazard, Kentucky, for employer.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (1998-BLA-0834) of Administrative Law Judge Thomas F. Phalen, Jr., 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 credited claimant with twenty and three-quarters years of coal mine employment based on a stipulation by the parties and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability pursuant to 20 C.F.R. §718.204(c)(4), but insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. On appeal, claimant initially contends that the administrative law judge erred in failing to find that Dr. Vaezy's medical opinion establishes total disability due to pneumoconiosis.[1] Alternatively, claimant contends that if Dr. Vaezy's opinion regarding the cause of claimant's respiratory impairment is unclear, the Department of Labor has failed to fulfill its statutory obligation to provide claimant with a complete pulmonary evaluation. Employer responds, urging affirmance of the denial of benefits and also cross-appeals, contending that the administrative law judge erred in finding that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability pursuant to 20 C.F.R. §718.204(c)(4). The

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[1] The administrative law judge's findings that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Coal Creek Co.*, 6 BLR 1-710 (1983).

Director, Office of Workers' Compensation Programs (the Director), responded to claimant's appeal by filing a Motion to Remand, requesting the Board to remand this case to the district director to obtain clarification of Dr. Vaezy's opinion regarding the cause of claimant's asthma in order to fulfill the Director's statutory obligation to provide claimant with a complete pulmonary evaluation.[2] The Director also responded to employer's cross-appeal, contesting employer's characterization of Dr. Vaezy's diagnosis of pneumoconiosis and disability.

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 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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant 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).

With regard to employer's arguments on the merits on cross-appeal, employer raises several contentions regarding the administrative law judge's weighing of the medical opinion evidence under Sections 718.202(a)(4) and 718.204(c)(4). Employer's contentions, on the whole, amount to little more than a request to reweigh the evidence of record. The Board however is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We therefore, decline to address, these allegations raised by employer. Nevertheless, employer raises one argument regarding the administrative law judge's finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as well as a contention regarding the administrative law judge's findings under Section 718.204(c)(4), that merit specific consideration.

[2] In footnote 1 of the Director's July 29, 1999, response brief, the Director states that employer filed a response to its motion to remand, dated July 2, 1999, opposing the remand request, but the Board has no record of its receipt.

Employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a)(4). In weighing the medical opinions of record, the administrative law judge noted that Drs. Vaezy, Powell and Burki diagnosed pneumoconiosis while Dr. Brooks did not address the presence or absence of pneumoconiosis. We reject employer's assertion that Dr. Vaezy's diagnosis of pneumoconiosis was based solely on his positive x-ray interpretation. Dr. Vaezy's diagnosis was based on the totality of the medical, smoking and employment histories, symptoms, and his findings on examination and testing of claimant. Although the administrative law judge discounted the probative value of the opinions diagnosing pneumoconiosis, in summary he stated that "[w]hile the evidence in favor of a finding of pneumoconiosis is not strong, it is not contradicted by any other medical opinion evidence of record." Decision and Order at 10. The administrative law judge thus concluded that the existence of pneumoconiosis was established by a "slight preponderance" of the evidence. *Id.* Inasmuch as the administrative law judge weighed all of the medical opinions and no physician contradicted the opinions of record that found pneumoconiosis, the administrative law judge's conclusion that the preponderance of the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) is not patently unreasonable.

Employer also contends that the administrative law judge erred in concluding that total disability was established pursuant to Section 718.204(c)(4), asserting that the administrative law judge improperly gave determinative weight to the medical opinions which found that claimant's impairment was totally disabling and failed to consider the exertional requirements of claimant's usual coal mine employment. In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge reasonably determined that the preponderance of the medical opinion evidence was sufficient to establish total disability based on the opinions of Drs. Burki and Vaezy, that claimant was totally disabled, as well as the opinions of Drs. Powell and Brooks, who found obstructive pulmonary diseases. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Perry, supra*; Decision and Order at 12-13. Contrary to employer's assertion, the administrative law judge is not required to compare the exertional requirements of claimant's usual coal mine employment with the physicians' assessment of claimant's limitations where the physicians opine that claimant is disabled from any and all coal mine employment and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, the administrative law judge acted within his discretion in concluding that the medical opinions of record established total

disability pursuant to Section 718.204(c)(4) and we reject employer's contentions to the contrary. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc)*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985).

Turning to the merits of claimant's appeal, claimant asserts that the administrative law judge erred in evaluating the medical opinion of Dr. Vaezy on the issue of disability causation pursuant to Section 718.204(b), contending that if Dr. Vaezy opined that claimant's pulmonary impairment is "mostly related to asthma" and attributed claimant's asthma to his coal mine employment, then claimant established that pneumoconiosis was a contributing cause of his total disability under *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Alternatively, claimant contends that in the event that Dr. Vaezy's opinion is unclear regarding the cause of claimant's respiratory impairment, then the Director has failed to fulfill its statutory obligation under the Act to provide claimant with a complete pulmonary evaluation. In completing the Form CM-988, Dr. Vaezy diagnosed "COPD/Asthma" and "coal workers' pneumoconiosis," but only listed a single etiology of "22 years of coal dust exposure" instead of a separate etiology for each diagnosis. In addition, Dr. Vaezy stated that claimant had a "moderate obstructive" impairment "mostly related to asthma." Decision and Order at 7; Director's Exhibit 12. We concur that Dr. Vaezy's opinion is ambiguous with respect to whether claimant's asthma is related to coal mine employment. Based on this ambiguity, claimant as well as the Director argue for remand so that the Director's statutory obligation to provide claimant with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim, as required by the Act, may be satisfied. 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990). We find merit in claimant's alternative argument and agree with the Director that his obligation has not been satisfied in this case as Dr. Vaezy failed to specifically address whether claimant's disabling respiratory condition arose out of coal mine employment and thus Dr. Vaezy's opinion is not clear on the issue of whether claimant's total disability is due to pneumoconiosis. As the Director concedes that he has not satisfied his statutory obligation in the instant case, we vacate the administrative law judge's denial of benefits and remand the case to the district director to afford the Director the opportunity to fulfill his statutory obligation. *Newman*, *supra*; *Pettry*, *supra*; *Hall*, *supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part and the case is remanded to the district director to provide for a complete pulmonary examination of claimant and for reconsideration of the merits of this claim in light of the new evidence.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge