

BRB No. 91-1895 BLA

MARCELLA LOFTUS)	
(Widow of JOSEPH E. LOFTUS))	
)	
Claimant-Petitioner))
)	
v.)	
)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

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

Thomas E. Johnson (Johnson, Schaaf, Jones & Snelling), Chicago, Illinois, for claimant.

Sarah M. Hurley (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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (90-BLA-2450) of Administrative Law Judge Glenn Robert Lawrence denying benefits on the miner's 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, after determining that the instant case was a duplicate claim, properly found a material change in conditions established pursuant to 20 C.F.R. §725.309 as the newly submitted evidence was sufficient to establish the

existence of pneumoconiosis, an element previously adjudicated against claimant.¹ Decision and Order at 3-6. The administrative law judge found, and the parties stipulated to, ten years of coal mine employment and, based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 6. The administrative law judge determined that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (4) but concluded that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Decision and Order at 7-9. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find the miner's original claim still viable and erred in failing to find total disability established based upon Dr. Hessler's opinion. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the denial of benefits.²

¹The record indicates that the miner filed his initial claim for benefits on January 24, 1980, which was denied by the Department of Labor on March 24, 1981. Director's Exhibits 2, 14. The miner took no further action until he filed the present claim on March 28, 1989. Director's Exhibit 20. The miner died on October 4, 1989, and the administrative law judge denied benefits on January 11, 1991. Director's Exhibit 7; Decision and Order at 1. Claimant, the miner's widow, filed a survivor's claim on February 21, 1991, and was subsequently awarded benefits on her claim. Director's Exhibit 1; *Loftus v. Director, OWCP*, BRB No. 93-0833 BLA (Oct. 28, 1993)(unpub.). Claimant is currently pursuing the appeal of the miner's claim.

²The administrative law judge's findings pursuant to 20 C.F.R. §§725.309, 718.202(a), 718.304, 718.305 and 718.204(c)(1)-(3) are unchallenged on appeal and, therefore, are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis was 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)(*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 therein. Initially, claimant's contention that the miner's original claim should be reopened as the miner intended to appeal the prior denial, is without merit. Claimant contends that they gave papers to their first attorney who did not appeal the case. The administrative law judge considered claimant's contention that the earlier claim should be revived but properly determined that the record was insufficient to establish a basis on which to revive the prior claim. Decision and Order at 3; *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge, who has broad discretion in addressing procedural matters, acted within his discretion, in the instant case, in declining to reopen the original claim as the record indicates that the advice of the miner's representative was to not pursue the claim. Decision and Order at 3; Director's Exhibits 15, 16; *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). The administrative law judge held that he was not prepared to find the advice of counsel to be in error. Under the circumstances of this case, we discern no abuse of discretion in the administrative law judge's refusal to revive the original claim and, therefore, we affirm this determination.

With respect to the merits, the administrative law judge permissibly determined that the evidence of record was insufficient to establish total disability pursuant to Section 718.204(c). *Piccin, supra*. In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge weighed the relevant medical opinions of record and reasonably determined that the medical opinion evidence was insufficient to establish total disability based on his conclusion that the opinion of Dr. Hessel, that claimant was totally disabled due to coronary heart disease and coal workers' pneumoconiosis, was outweighed by the

remaining opinions of record which found that the miner had restrictions due to his cardiac disease but there was no significant aberration of respiratory dynamics or pulmonary mechanics. See *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 8-9; Director's Exhibits 10, 11, 24; Claimant's Exhibits 1, 2. The administrative law judge acted within his discretion, as fact finder, when he concluded that the opinion of Dr. Hessel was outweighed by the other medical evidence of record, as Dr. Hessel did not provide any objective laboratory studies or other medical findings to support his opinion. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (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 v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); *Piccin, supra*; Decision and Order at 8-9; Director's Exhibits 10, 11, 24; Claimant's Exhibits 1, 2.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element.³

See *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly found the only opinion diagnosing a totally disabling respiratory impairment outweighed by the remaining contrary medical evidence, claimant has not met her burden of proof on all

³We reject claimant's contention that as the Director conceded that the miner's death was due to pneumoconiosis in her survivor's claim, the Director cannot defend the miner's claim. It is claimant's burden to establish that the miner was totally disabled and that this disability was due to pneumoconiosis. *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). The Director's concession in the survivor's claim does not relieve claimant's burden to establish, in the miner's claim, that the miner was totally disabled. *Trent, supra*; *Perry, supra*. Additionally, claimant correctly asserts that an opinion that does not diagnose pneumoconiosis may be accorded little or no weight on the issue of disability causation pursuant to 20 C.F.R. §718.204(b), but the opinion may constitute substantial evidence with respect to the issue of the miner's total disability pursuant to 20 C.F.R. §718.204(c)(4). See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

the elements of entitlement. *Id.* The administrative law judge is empowered to weigh the medical opinion evidence of record 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, supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish total disability pursuant to Section 718.204(c)(4) as it is supported by substantial evidence and is in accordance with law.

Inasmuch as claimant has failed to establish total disability, a requisite element of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Trent, supra*; *Perry, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge