**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0310 BLA

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| CHARLES R. WORKMAN, SR. | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| CATENARY COAL COMPANY/ MAGNUM COAL COMPANY | ) | |
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| | ) | |
| and | ) | DATE ISSUED: 05/26/2016 |
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| ARCH COAL, INCORPORATED | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (2010-BLA-5009) of Administrative Law Judge Drew A. Swank denying benefits on a claim filed on February 13, 2009, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[2] The administrative law judge credited the miner with twenty-two years of qualifying coal mine employment,[3] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). The administrative law judge also found that claimant did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and, consequently, failed to establish invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) was not established. Claimant specifically contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).[4] The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.[5]

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[1] The miner died on January 7, 2015. Claimant's Brief at 4. The widow of the miner is pursuing the claim on his behalf.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 15 or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

[3] The administrative law judge determined that "[the miner] was a coal miner (in conditions substantially similar to underground mining) … for 22 years." Decision and Order at 5.

[4] By letter dated November 10, 2015, Ann B. Rembrandt of Jackson Kelley PLLC in Charleston, West Virginia, withdrew as counsel for employer in this claim.

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 applicable law.[6] 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).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Claimant contends that the administrative law judge erred in finding that invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) was not established. Specifically, claimant asserts that the administrative law judge erred in finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Rasmussen and Sood that the miner had a disabling respiratory or pulmonary impairment,[7] and the opinions of Drs. Zaldivar and

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[5] Because the administrative law judge's length of coal mine employment finding and his findings that the x-ray evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The record indicates that the miner was last employed in the coal mining industry in West Virginia. Director's Exhibits 3, 4, 6, 7; Hearing Tr. at 30. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[7] Dr. Rasmussen opined that the miner had a moderate loss of lung function and did not retain the pulmonary capacity to perform heavy manual labor. Director's Exhibit 12; Claimant's Exhibit 6.

Dr. Sood opined that "[the miner] would be able to comfortably perform

Hippensteel that the miner did not have a disabling respiratory or pulmonary impairment.[8] The administrative law judge found that the opinions of Drs. Rasmussen, Sood and Zaldivar[9] were not well-reasoned. By contrast, the administrative law judge found that Dr. Hippensteel's opinion was well-reasoned. Hence, the administrative law judge found that the medical opinion evidence did not establish total respiratory disability.

Claimant asserts that the administrative law judge erred in discounting the opinions of Drs. Rasmussen and Sood. Specifically, claimant argues that the administrative law judge erred in relying on the *Dictionary of Occupational Titles* (DOT) to determine that the miner's last coal mine job required medium labor. We disagree.

The determination of whether a medical opinion is reasoned is within the administrative law judge's discretion. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2- 323 (4th Cir. 1998); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1977). In this case, the administrative law judge noted that the miner described his usual coal mine work in his 2009 application for benefits, his CM-911a form, and his CM-913 form.[10] The administrative law judge also considered the last coal mine job

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prolonged physical work of only light intensity and some but not all work of moderate intensity." Claimant's Exhibits 7. In addition, Dr. Sood opined that "[the miner] would not be able to perform his last coal mining job which included climbing and heavy labor, such as shoveling coal." *Id*. Dr. Sood therefore opined that the miner had a totally disabling obstructive lung impairment. Claimant's Exhibits 7, 12.

[8] Dr. Zaldivar opined that the miner was "fully capable" of performing his usual coal mine work from a pulmonary perspective. Employer's Exhibits 2, 6.

Dr. Hippensteel opined that the miner was able from a pulmonary perspective to perform his usual coal mine employment. Employer's Exhibits 4, 5 at 28.

[9] As no party challenges the administrative law judge's determination that Dr. Zaldivar mischaracterized the miner's work requirements as "very light" in opining that the miner could perform his usual work from a respiratory perspective, that finding is affirmed. *See Skrack*, 6 BLR at 1-711.

[10] In his 2009 application for benefits (Form CM-911), the miner stated, "I was a coal truck driver [and] had to climb about 15 steps to get into my truck." Director's Exhibit 2. In his Employment History (Form CM-911a), the miner listed his occupations as rock truck driver from June 1990 to March 2000 and coal truck driver from April 1997

duties noted in the reports of Drs. Rasmussen, Sood, Zaldivar and Hippensteel.[11] Further, the administrative law judge noted that the DOT provided the job descriptions of a heavy equipment operator, a heavy truck driver and a dump-truck driver. After noting that he took judicial notice of the DOT at the November 17, 2014 hearing,[12] Hearing Tr. at 7, the administrative law judge stated that "[the miner's] jobs in the coal mining industry both as a truck driver and heavy equipment operator are categorized in the DOT as being 'medium' work."[13] Decision and Order at 20 (footnote omitted). The administrative law judge permissibly relied, in part, on the DOT in finding that the miner's last coal mine

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to July 1989. Director's Exhibit 3. Lastly, in his Description of Coal Mine Work and Other Employment (Form CM-913), the miner described his last coal mine job by stating: "I was a rock truck driver. I had to climb up into the truck which was [approximately] 15 steps. I did this about 10 times a day. After I got into my truck[,] I would go to the shovel and get a load [and] then go to the dump [and] dump my load. I did this about 75 times a day[.]" Director's Exhibit 4. The miner also noted that "[he] drove a UK [r]ock hauler," which required sitting for eight hours a day and standing for two hours a day, with no lifting or carrying, and no use of tools, machines or equipment. *Id*.

[11] Dr. Rasmussen noted that the miner's work as a coal truck driver and heavy equipment operator required him to climb in and out of the equipment using ladders and steps. Director's Exhibit 12; Claimant's Exhibit 6.

Dr. Sood noted that the miner's work as a rock truck driver required him to climb about 15 steps on a straight ladder to the cab of the vehicle that was about three stories high, approximately 10 times per day. Claimant's Exhibits 7.

Dr. Zaldivar noted that the most strenuous part of the miner's work as a coal truck driver was climbing up a straight ladder to the cab of the vehicle that was about three stories high. Employer's Exhibits 2, 6.

Dr. Hippensteel noted that the miner's work as a coal truck driver required him to climb about 15 steps to get into his truck, 10 times per day. Employer's Exhibit 4.

[12] The miner did not attend the hearing held by the administrative law judge on November 17, 2014. Although the miner completed several interrogatories after the hearing, the administrative law judge noted that "[t]here were no interrogatories asking him about his duties *with* [*e*]*mployer*." Decision and Order at 21.

[13] The administrative law judge specifically stated, "Not 'light,' 'heavy,' or 'very heavy' work – just 'medium.'" Decision and Order at 20.

job was performed as medium exertional work.[14] *See Ondecko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989). Further, the administrative law judge permissibly found that the disability opinions of Drs. Rasmussen and Sood were not well-reasoned because the doctors mischaracterized the miner's last coal mine work as requiring heavy manual labor.[15] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335. Thus, we reject claimant's

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[14] Claimant asserts that the administrative law judge's reliance on the *Dictionary of Occupational Titles* (DOT) is improper because its three listings for a truck driver and heavy equipment operator "do not include the particular features of the trucks being described or provide information about climbing in or out of the trucks from the ground to the cab." Claimant's Brief at 12. As discussed, *supra*, the administrative law judge noted that the DOT described the job of a heavy equipment operator, a heavy truck driver and a dump-truck driver. In particular, the administrative law judge noted that the DOT provided that a dump-truck driver may be designated as a coal hauler, based on the type of material hauled. Decision and Order at 22. Claimant does not identify any differences in the features of the specific trucks and equipment that the miner operated in his last coal mine job with those of the trucks and heavy equipment noted by the DOT with regard to climbing into the cab of these vehicles. Consequently, we reject claimant's assertion that the administrative law judge's reliance on the DOT was improper because it is not specific to the miner's last coal mine work as a heavy equipment operator.

[15] Claimant also argues that the administrative law judge substituted his opinion for that of the medical experts to the extent that he determined that the miner retained the pulmonary capacity to perform his usual coal mine work. As discussed, *supra*, Drs. Rasmussen and Sood opined that the miner's pulmonary impairment prevented him from doing heavy manual labor. The administrative law judge reasonably determined that, "[a]s [the miner's] past coal mining work, per the DOT, was never more than medium exertional work, Dr. Rasmussen's opinion, as written, would not preclude him, from a pulmonary perspective, of [sic] performing it." Decision and Order at 22-23; *see McMath v. Director, OWCP*, 6 BLR 1-6, 1-10 (1988). In addition, the administrative law judge reasonably determined that Dr. Sood's opinion was not credible because "nowhere in his recitation of [the miner's] coal mine work does he mention any requirement to shovel coal or otherwise perform heavy labor." Decision and Order at 23; *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178 (1984). In addition, the administrative law judge reasonably determined that "[Dr. Sood's] statement that [the miner] could 'be able to comfortably perform prolonged physical work of only light intensity and some but not all work of moderate intensity' does not, by itself, preclude [the miner] from performing his 'medium' work." Decision and Order at 23; *see McMath*, 6 BLR at 1-10. We therefore reject claimant's assertion that the administrative law judge substituted his opinion for that of the medical experts to the extent that he determined that the miner retained the pulmonary capacity to perform his

assertion that the administrative law judge erred in discounting the opinions of Drs. Rasmussen and Sood. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), as supported by substantial evidence.[16]

Furthermore, we affirm the administrative law judge's finding that claimant failed to establish invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).

In light of our affirmance of the administrative law judge's findings that claimant failed to establish invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) and total respiratory disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-112.

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usual coal mine work.

[16] Because the administrative law judge permissibly discounted the opinions of Drs. Rasmussen and Sood, the only medical opinions of record that could support a finding that the miner had a totally disabling respiratory or pulmonary impairment, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2- 323 (4th Cir. 1998), we need not address claimant's contention that the administrative law judge erred in crediting Dr. Hippensteel's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge