BRB Nos. 01-0179 BLA
and 01-0179 BLA-A

DEWEY LEE COMPTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WILLIAM MOUNTAIN COAL COMPANY,	)	DATE ISSUED:
INCORPORATED	)	
	)	
Employer-Respondent Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

S. F. Raymond Smith (Rundle & Rundle), Pineville, West Virginia, for claimant.

Mary Rich Malloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (99-BLA-1379) of Administrative Law Judge Robert J. Lesnick 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).[1] The administrative law judge found that

[1] The Department of Labor has amended the regulations implementing the Federal

claimant established approximately thirty-two years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] While the administrative law judge found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), the administrative law judge found that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). However, the administrative law judge further found that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence under Section 718.204(c)(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging the Board to affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(c)(1)-(4) (2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(iv). Alternatively, on cross-appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4). Claimant has not responded to employer's cross-appeal. Moreover, the Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to either claimant's appeal or employer's cross-appeal.

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 under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis

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Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed a claim on September 22, 1998, Director's Exhibit 1.

arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to Section 718.204, the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

The administrative law judge found that total disability was not demonstrated by the pulmonary function study or blood gas study evidence of record, Director's Exhibits 11, 13, 28; Claimant's Exhibit 1; Employer's Exhibits 3, 10, pursuant to Section 718.204(c)(1)-(2) (2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(ii), and was not demonstrated pursuant to Section 718.204(c)(3)(2000), as revised at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 4-5; 12-13. Inasmuch as the administrative law judge's findings are not challenged by any party on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Next, the administrative law judge considered all of the relevant medical opinion evidence of record and found that total disability was not demonstrated pursuant to Section 718.204(c)(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(iv).[3] The administrative law judge found that Drs. Gaziano and Rasmussen appear to have based their findings, that claimant is totally disabled, on isolated, abnormal blood gas study findings indicating a moderate impairment on exercise, despite having obtained non-qualifying pulmonary

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[3] Drs. Gaziano and Rasmussen both examined claimant and administered non-qualifying pulmonary function studies, but found that claimant's blood gas study results indicated a moderate impairment on exercise and found that claimant was totally disabled from performing his coal mine work, Director's Exhibit 12; Claimant's Exhibit 1. Dr. Rasmussen specifically noted that claimant's last coal mine work required claimant to carry tools weighing between 50 and 70 pounds, a considerable amount of heavy lifting and considerably heavy manual labor, *see* Claimant's Exhibit 1.

Contrary opinions were provided by Drs. Zaldivar and Dahhan, who examined claimant, reviewed the evidence of record, and found that claimant was not totally disabled from a pulmonary and/or respiratory standpoint from performing his last coal mine work, Director's Exhibit 28; Employer's Exhibits 3, 11-12, 15-16. In addition, Drs. Fino, Castle and Morgan reviewed all of the evidence of record and also found that claimant was not totally disabled from a pulmonary and/or respiratory standpoint from performing his last coal mine work, Employer's Exhibits 4-5, 8, 13, 15-16, 18.

function study results and without considering the clinical test results obtained by the other physicians of record. Decision and Order at 13-14. On the other hand, the administrative law judge found the opinions of Drs. Zaldivar and Dahhan were more persuasive, both because their opinions were supported by the opinions of Drs. Fino, Castle and Morgan, who had reviewed all of the evidence of record, and they were more consistent with the pulmonary function study and blood gas study evidence of record, which the administrative law judge found did not demonstrate total disability. In addition, the administrative law judge found that Dr. Rasmussen "appears to have slightly overstated" the exertional requirements of claimant's last usual coal mine job, noting that claimant testified that he ordinarily did not lift more than 40 to 50 pounds at his job and, while he occasionally lifted up to 100 pounds, if an item was too heavy to lift, a scoop would be used to carry the item, *see* Hearing Transcript at 12-13; Decision and Order at 13 n.7.

Claimant contends that the administrative law judge mischaracterized Dr. Rasmussen's opinion as overstating the exertional requirements of claimant's last usual coal mine job. Specifically, claimant contends that the administrative law judge must determine whether claimant can perform "all" aspects of his usual coal mine employment, as opposed to only a portion of that coal mine employment. Claimant also contends that the administrative law judge erred in accepting the opinions of employer's physicians that claimant was not totally disabled from a pulmonary and/or respiratory standpoint from performing his last coal mine work.

Contrary to claimant's contention, an administrative law judge may give less weight to a physician's opinions, such as Drs. Rasmussen's and Gaziano's, when he finds that the physician does not adequately explain his finding, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), or bases his opinion on an incomplete picture of the miner's health condition, *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and may give more weight to physicians' opinions, such as these from Drs. Zaldivar, Dahhan, Fino, Castle and Morgan, which he finds based on a more thorough review of the evidence of record, *see Hall v. Director, OWCP*, 8 BLR 1-193 (1985), and which are better supported by the objective evidence of record, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to determine whether an opinion is documented and reasoned, *see Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge if supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Thus, as the administrative law judge, within his discretion, provided other valid, alternative reasons for his weighing of the medical opinion evidence under Section 718.204(b)(2)(iv), formerly 20 C.F.R. §718.204(c)(4)(2000), any error by the administrative law judge in his characterization of Dr. Rasmussen's opinion regarding the exertional requirements of claimant's last usual coal mine job is harmless, *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co*., 6 BLR 1-378 (1983); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We affirm, therefore, the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2), formerly 20 C.F.R. §718.204(c)(2000), *see Budash*, *supra*; *Fields*, *supra*; *Rafferty*, *supra*; *Mazgaj*, *supra*; *Shedlock*, *supra*, as rational and supported by substantial evidence. Consequently, inasmuch as we affirm the administrative law judge's finding that claimant failed to establish total disability, a requisite element of entitlement, we affirm the administrative law judge's finding that entitlement under Part 718 is precluded, *see Trent*, *supra*; *Perry*, *supra*.[4]

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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[4] Inasmuch as the administrative law judge's finding that claimant failed to establish total disability relevant to Section 718.204(b)(2) is affirmed, we need not address the administrative law judge's findings that the existence of pneumoconiosis was not established by the x-ray evidence of record pursuant to Section 718.202(a)(1), but was established by the medical opinion evidence pursuant to Section 718.202(a)(4), or employer's contention on cross-appeal that the administrative law judge's findings pursuant to Section 718.202(a)(1)-(4) are not in accord with the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000)(all relevant evidence is to be considered together in determining whether claimant has met his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202), *see Trent*, *supra*.

ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge