BRB Nos. 04-0325 BLA
and 04-0325 BLA-A

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| CHARLES D. DANIELS | ) | |
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| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| FOREST COAL COMPANY/LONG BRANCH ENERGY | ) | DATE ISSUED: 09/30/2004 |
| | ) | |
| 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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

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

Anthony J. Cicconi (Shaffer & Shaffer, PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (2003-BLA-158) of Administrative Law Judge Daniel L. Leland 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 found, and the parties stipulated to, thirty-two years of coal mine employment and to the existence of pneumoconiosis arising out of coal mine employment. Decision and Order at 2; Hearing Transcript at 5-6. The administrative law judge concluded that employer was the properly identified responsible operator and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 2, 5. The administrative law judge determined that the evidence of record was insufficient to establish that claimant was totally disabled or that any disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Decision and Order at 5-6. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the medical opinion evidence sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment and disability causation. Employer responds, urging affirmance of the denial of benefits as supported by substantial evidence, and cross-appeals, asserting that the administrative law judge erred in failing to dismiss it as the responsible operator. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in claimant's appeal but asserting that the administrative law judge did not err in refusing to dismiss employer as the responsible operator.[2]

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,

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[1]Claimant filed his initial claim for benefits with the Department of Labor on November 3, 1993, which was finally denied on April 13, 1994, as claimant failed to establish any element of entitlement. Director's Exhibit 37. Claimant took no further action until filing the instant claim on April 13, 1995. Director's Exhibit 1. Following remand to the district director for further proceedings to identify the proper responsible operator, benefits were awarded on April 13, 1999. Director's Exhibits 51, 62. Employer requested a formal hearing and the case was forwarded to the Office of Administrative Law Judges on April 9, 2003. Director's Exhibit 82.

[2]The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202, 718.203, 718.204(b)(2)(i)-(iii) and 718.304 are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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*).

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.[3] Claimant specifically contends that the administrative law judge erred in according determinative weight to the unreasoned and undocumented report of Dr. Zaldivar. Claimant also generally asserts that the administrative law judge erred in concluding that claimant's usual coal mine employment involved infrequent heavy manual labor.

Contrary to claimant's contention, the administrative law judge reviewed the exertional requirements of claimant's last coal mine employment. Decision and Order at 2-3, 5. The administrative law judge found that claimant's usual coal mine work was as a section and general mine foreman in which most of claimant's work was supervisory and that he helped the other miners with heavier tasks only on infrequent occasions.[4] Decision and Order at 2-3, 5; Director's Exhibit 39; Hearing Transcript at 12-14; *Fagg v. Amax Co.*, 12 BLR 1-77 (1988); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Turner v. Director, OWCP*, 7 BLR 1-419

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[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See* Director's Exhibits 2, 37; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4]An individual's usual coal mine work is "the most recent job the miner performed regularly and over a substantial period of time," *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982), unless he changed jobs because of respiratory inability to do his usual coal mine work. *Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984).

(1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). In determining if the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge properly noted the entirety of the medical opinion evidence of record and rationally determined that the opinions of Drs. Ranavaya, Vaseduvan, Rasmussen and Zaldivar, as well as the determination by the West Virginia Occupational Pneumoconiosis Board, were insufficient to meet claimant's burden of proof.[5] *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 3-5. Thus, the administrative law judge, within his discretion as fact-finder, reasonably found that the medical opinion evidence was insufficient to establish total disability to 20 C.F.R. §718.204(b)(2)(iv) in light of his exertional requirement determination and the physicians' assessment of claimant's respiratory impairment. Decision and Order at 4-5; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *McMath*, 12 BLR 1-6; *Justice v. Director, OWCP*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Claimant further contends that the administrative law judge erred in relying upon Dr. Zaldivar's opinion to find the evidence insufficient to establish disability causation. We disagree. The administrative law judge, rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained.[6] *See Collins*, 21 BLR 1-181; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Lucostic*, 8 BLR 1-46; Decision and Order at 6. The administrative law judge permissibly accorded less weight to Dr. Rasmussen's opinion, that the miner's

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[5]The West Virginia Occupational Pneumoconiosis Board found that claimant has a thirty percent pulmonary impairment. Director's Exhibit 44. Dr. Ranavaya stated that the miner has a mild pulmonary impairment. Director's Exhibit 37. Dr. Vaseduvan diagnosed a mild to moderate pulmonary impairment. Director's Exhibit 12. Dr. Rasmussen opined that claimant has a minimal to moderate respiratory impairment which disables him from performing heavy and very heavy manual labor. Director's Exhibit 43. Dr. Zaldivar found that claimant is capable of doing his usual coal mine work as a foreman and may intermittently help his fellow workers but that he cannot perform heavy manual labor on a continuous basis. Director's Exhibit 71; Employer's Exhibit 1.

[6]The administrative law judge's credibility determinations with respect to the opinions of Drs. Ranavaya and Vaseduvan, as well as the findings of the West Virginia Occupational Pneumoconiosis Board, are unchallenged on appeal and are therefore affirmed. *See Skrack*, 6 BLR 1-710.

pneumoconiosis is a substantially contributing factor in his respiratory impairment, because the physician based his opinion on medical studies showing that exposure to coal dust can cause obstructive pulmonary disease rather than on any factors specifically related to claimant. *See Collins*, 21 BLR 1-181; *Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Lucostic*, 8 BLR 1-46; *Hutchens*, 8 BLR 1-16; Decision and Order at 6; Director's Exhibits 37, 43. The administrative law judge found that Dr. Zaldivar opined that claimant did not have any pulmonary impairment due to pneumoconiosis but rather had a restrictive pulmonary impairment due to asthma aggravated by smoking. Decision and Order at 6. He reasonably found the opinion of Dr. Zaldivar more persuasive because after examining claimant and reviewing the medical records of record, Dr. Zaldivar provided provided a well reasoned and detailed opinion based on claimant's symptoms, prior reversibility of the miner's pulmonary function studies and claimant's normal diffusing capacity. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Anderson*, 12 BLR 1-111 (1989); *Lucostic*, 8 BLR 1-46; *Hutchens*, 8 BLR 1-16; Decision and Order at 6; Director's Exhibit 71; Employer's Exhibits 1, 2.

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 evidence of record does not establish that claimant is totally disabled by a respiratory or pulmonary impairment due to pneumoconiosis, claimant has not met his burden of proof on all of the elements of entitlement. *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 findings that the medical opinion evidence of record is insufficient to establish total disability and disability causation pursuant to Section 718.204(b)(2)(iv), (c) as they are supported by substantial evidence and is in accordance with law.

Because claimant has failed to establish the existence of total disability and disability causation, requisite elements of entitlement pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. We need not address the arguments made by employer on cross-appeal challenging the administrative law judge's responsible operator findings since we have affirmed the denial of benefits and, thus, this case no longer presents any real case or controversy for adjudication.

*Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge