BRB No. 02-0308 BLA

JOSEPH G. HROBAK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ABC COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Joseph G. Hrobak, Nanticoke, Pennsylvania, *pro se*.

William E. Wyatt, Jr. and John J. Notarianni (Fine, Wyatt and Carey, P.C.), Scranton, Pennsylvania, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (01-

[1]Claimant is Joseph G. Hrobak, the miner, who filed three claims for benefits. The miner's first claim, filed on January 14, 1983, was finally denied on February 23, 1983. Director's Exhibit 63. The miner's second claim, filed on December 9, 1986, was finally denied by the Board on January 14, 1992. *Id.* Claimant's present claim for benefits, filed in June of 1997, was denied by Administrative Law Judge Ainsworth H. Brown on June 4, 1999. Director's Exhibits 1, 72. On June 2, 2000, claimant requested modification of Judge Brown's denial. Director's Exhibit 73. The district director denied claimant's request for

BLA-0225) of Administrative Law Judge Robert D. Kaplan denying benefits on modification of a miner's duplicate 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).[2] Initially, the administrative law judge noted that the parties stipulated to fifteen years of coal mine employment.[3] 2001 Hearing Transcript at 10; Decision and Order at 2. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b).

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modification and claimant requested a hearing before the Office of Administrative Law Judges. Director's Exhibits 81, 82.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The administrative law judge also noted that employer conceded that it is the responsible operator and that claimant timely filed his claim. Decision and Order at 2.

Decision and Order at 5-11. The administrative law judge, therefore, found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[4] Decision and Order at 19. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits.[5] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this 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).

This case involves a request for modification on the denial of a duplicate

[4]Claimant, who was represented at the hearing, stated that he was not alleging a mistake in fact pursuant to 20 C.F.R. §725.310 (2000). 2001 Hearing Transcript at 8.

[5]Claimant submitted a letter, dated February 2, 2002, in conjunction with his appeal. In his letter, claimant enclosed copies of Hospital Discharge Summaries authored by Dr. Sahillioglu. These hospital records by Dr. Sahillioglu were submitted with claimant's 1997 claim and, therefore, are part of the record. Moreover, because these hospital records were submitted with claimant's 1997 claim, they are not relevant to the inquiry of whether claimant established a material change in conditions since the denial of his prior claim. *See* discussion, *infra*. Additionally, claimant asserts that the administrative law judge should have accorded greater weight to the opinion of Dr. Aquilina inasmuch as he is claimant's treating physician. Claimant's contention has merit. *See* discussion, *infra*.

claim. An administrative law judge, in considering a request for modification of a duplicate claim (which has been denied based upon a failure to establish a material change in conditions), should initially address whether the newly submitted evidence alone is sufficient to support a material change in conditions. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). If it is sufficient to do so, claimant will have established a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge would next be required to address whether all of the evidence submitted since the denial of the previous claim is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). If the evidence is sufficient to establish a material change in conditions, the administrative law judge would proceed to the merits of the duplicate claim.

Therefore, the relevant issue before the administrative law judge in this case was whether the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Administrative Law Judge Ainsworth H. Brown's denial of claimant's 1997 duplicate claim) was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

In order to establish a material change in conditions, the newly submitted evidence must support a finding of the existence of pneumoconiosis or total respiratory disability due to pneumoconiosis.[6] Thus, in order to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000), the newly submitted evidence (*i.e.,* the evidence submitted subsequent to Judge Brown's denial of claimant's 1997 duplicate claim) must support a finding of the existence of pneumoconiosis or total respiratory disability due to pneumoconiosis.

[6]Claimant's 1997 claim was denied because claimant failed to establish the existence of pneumoconiosis or total respiratory disability due to pneumoconiosis. Director's Exhibit 72. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of the existence of pneumoconiosis or total respiratory disability due to pneumoconiosis. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

Pursuant to Section 718.202(a)(1), the administrative law judge noted that all of the newly submitted x-rays have been interpreted as negative for the existence of pneumoconiosis. Decision and Order at 5-6. Therefore, the administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis based on the new x-ray evidence and we affirm his Section 718.202(a)(1) finding. *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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge permissibly found that claimant failed to establish the existence of pneumoconiosis at this subsection inasmuch as the record does not contain any biopsy evidence. Decision and Order at 6. Therefore, we affirm the administrative law judge's Section 718.202(a)(2) finding. Moreover, the administrative law judge properly found that claimant is not entitled to any of the presumptions set out at 20 C.F.R. §718.202(a)(3). *Id.* Because there is no evidence of complicated pneumoconiosis in the record, the presumption found at 20 C.F.R. §718.304 is inapplicable to this claim. *See* 20 C.F.R. §718.304. Additionally, the presumptions found at 20 C.F.R. §§718.305, 718.306 are inapplicable to the instant case which involves a living miner's claim filed after January 1, 1982. *See* 20 C.F.R. §§718.305(e), 718.306. Therefore, we affirm the administrative law judge's Section 718.202(a)(3) finding.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the newly submitted medical opinions contained in the record. The administrative law judge noted that Dr. Aquilina was the only physician who provided a clear opinion that claimant has coal workers' pneumoconiosis. Decision and Order at 8. The administrative law judge additionally noted that Dr. Levinson found that claimant does not have pneumoconiosis. Decision and Order at 9. The administrative law judge accorded greater weight to Dr. Levinson's opinion over the opinion of Dr. Aquilina "because Dr. Levinson's qualifications are superior to those of Dr. Aquilina."[7] *Id.*

[7]The record reveals that Dr. Levinson is Board-certified in internal medicine and pulmonary disease whereas Dr. Aquilina is Board-certified in anesthesia. Director's Exhibit 86; Claimant's Exhibit 6 at 6.

However, the record contains evidence that Dr. Aquilina may qualify as claimant's treating physician. At his July 11, 2001 deposition, Dr. Aquilina testified that he has been seeing claimant for approximately eight or nine years and has seen claimant every month for the past five or six years. Claimant's Exhibit 6 at 15-17. Therefore, we instruct the administrative law judge to consider Dr. Aquilina's testimony on remand and to determine whether or not he should be considered as claimant's treating physician. If the administrative law judge determines that Dr. Aquilina qualifies as claimant's treating physician, then the administrative law judge must determine whether 20 C.F.R. §718.104(d)[8] of the new regulations is applicable to Dr. Aquilina's July 11, 2001 deposition testimony.[9] *See* 20 C.F.R. §718.104(d). Therefore, based on the foregoing, we vacate the administrative law judge's Section 718.202(a)(4) finding and instruct the administrative law judge on remand to reconsider Dr. Aquilina's opinion pursuant to Section 718.202(a)(4).

[8]20 C.F.R §718.104(d) states that "the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record" and that in reviewing the treating physician's opinion, the adjudication officer shall take into consideration the "Nature of [the] relationship," the "Duration of [the] relationship," the "Frequency of [the] relationship," and the "Extent of [the] relationship."

[9]The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has stated in *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997), that a treating physician's opinion may be accorded greater weight than the opinions of other physicians, but that an administrative law judge may permissibly require the treating physician to provide more than a conclusory statement in rendering his findings.

Regarding Dr. Gacad's opinions, the administrative law judge stated that in a handwritten note by this physician dated May 8, 2000, Dr. Gacad diagnosed chronic obstructive pulmonary disease (COPD), but did not mention the presence of pneumoconiosis.[10] *Id*. The administrative law judge further stated that in a longer typewritten report also dated May 8, 2000 Dr. Gacad found that claimant "does not have coal workers' pneumoconiosis because he does not have the chest x-ray criteria that would fit this diagnosis," but that claimant "could still have coal worker related COPD." Claimant's Exhibit 4; Decision and Order at 8. The administrative law judge found Dr. Gacad's diagnosis of pneumoconiosis as defined by the regulations to be "contradictory." *Id*. The administrative law judge noted that Dr. Gacad reported in 2001 that he "still feel[s]" that claimant's coal dust exposure contributed to his COPD, but in a prior opinion Dr. Gacad only noted that claimant *could* still have "coal worker related COPD," Claimant's Exhibit 4. *Id*. Thus, the administrative law judge concluded that Dr. Gacad "did not clearly state that Claimant has pneumoconiosis, and - even if the physician had clearly stated such an opinion - he was not firm in that opinion." *Id*. Therefore, the administrative law judge accorded "diminished weight" to Dr. Gacad's opinions regarding the existence of pneumoconiosis. *Id*. Given Dr. Gacad's varied statements regarding the existence of legal pneumoconiosis in claimant, we hold that the administrative law judge reasonably accorded less weight to Dr. Gacad's opinions because he found this physician's opinions to be unclear and contradictory. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Pursuant to *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir.1997), in considering whether claimant established the existence of pneumoconiosis in this case, the administrative law weighed all of the relevant new evidence together to find that claimant failed to establish the existence of pneumoconiosis. Decision and Order at 9. In light of our above holding at Section 718.202(a)(4) with regard to Dr. Aquilina's report, we instruct the administrative law judge on remand to again consider all the evidence at Section 718.202(a)(1)-(4) to determine if claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a) in accordance with *Williams*, if necessary.

Regarding total respiratory disability, the administrative law judge first considered whether claimant could demonstrate total respiratory disability based on the new pulmonary function study evidence. Initially, the administrative law judge determined claimant's height

[10]In his handwritten note of May 8, 2000, Dr. Gacad found that coal dust exposure could have contributed to claimant's chronic obstructive pulmonary disease. Director's Exhibit 73.

to be seventy inches because his height was most frequently recorded as seventy inches.[11] Decision and Order at 7; *see Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). The administrative law judge noted that the record contains four newly submitted pulmonary function studies dated May 8, 2000, May 24, 2000, August 24, 2000, and May 8, 2001. Decision and Order at 7, 10. The administrative law judge found the one qualifying[12] pulmonary function study performed on August 24, 2000 to be "problematic" for the following reasons. *Id.* at 10. First, the administrative law judge stated that claimant's effort on the August 24, 2000 pulmonary function study was noted as "only 'fair'" and commented that if claimant's "effort had been better, then the values would have been higher." *Id.* Second, the administrative law judge stated that "the values achieved in the three other current ventilatory studies. . .are all higher than those [obtained on] the August 2000 study." *Id.* Accordingly, the administrative law judge found the August 24, 2000 ventilatory study to be entitled to "no probative weight." *Id.*

It was permissible for the administrative law judge to find the reliability of the August 24, 2000 pulmonary function study to be called into question by the contemporaneous results of the May 8, 2000, May 24, 2000, and May 8, 2001 tests which produced higher values, *see Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189 (1984); *see generally Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988), and to note that had claimant's effort been better he would have obtained even higher values, *see Crapp v. U.S. Steel Corp.*, 6 BLR 1-476 (1983); *cf. Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990)(an administrative law judge permissibly found the pulmonary function study which produced the highest results to be more reliable than the studies which produced substantially lower results by reasoning that "[a] patient cannot show substantial[ly] higher test results than his actual capacity"). Therefore, we affirm the administrative law judge's treatment of the August 24, 2000 pulmonary function study and

[11]Three of the four physicians who administered pulmonary function studies recorded claimant's height as seventy inches. Director's Exhibits 73, 84; Claimant's Exhibit 4.

[12]A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values, *i.e.*, Appendix B to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

affirm the administrative law judge's finding that claimant failed to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986).

The administrative law judge next considered the newly submitted blood gas study evidence to determine if claimant could demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge noted that the blood gas study dated August 24, 2000, which was performed "under the aegis of Dr. Levinson," yielded qualifying results, but also noted that "Dr. Levinson stated that this study indicated satisfactory oxygenation."[13] Decision and Order at 10. The administrative law judge then stated that the other two contemporaneous blood gas studies dated May 24, 2000 and December 18, 2000 yielded non-qualifying results. *Id.* Inasmuch as it was permissible for the administrative law judge to find that claimant failed to demonstrate total respiratory disability based on a preponderance of the evidence, we affirm the administrative law judge's Section 718.204(b)(2)(ii) finding. *See Ondecko*; *supra*; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).

Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge permissibly found that claimant failed to demonstrate total respiratory disability inasmuch as the record does not contain any new evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 10. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(iii).

Finally, the administrative law judge considered whether the medical opinion evidence demonstrated total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 11. The administrative law judge first considered the report and deposition testimony of Dr. Aquilina in which this physician found that claimant has a total respiratory disability. *Id.* The administrative law judge stated that Dr. Aquilina "relied on the clinical finding of wheezes, and the ventilatory studies of May 24, 2000, and August 24, 2000, which he stated were 'abnormal.'" *Id.* The administrative law judge dismissed the pulmonary function study evidence relied upon by Dr. Aquilina, by stating that he had:

discounted the ventilatory study of August 24, 2000, because of its disparately

[13]On the August 24, 2000 blood gas study and in his report dated October 1, 2000, Dr. Levinson recorded that the blood gas study revealed arterial oxygenation within satisfactory limits. Director's Exhibit 84.

> low values. And although Dr. Aquilina opined that the ventilatory study of May 24, 2000 is abnormal, I note that the FEV-1 value attained in that study was 80 percent of predicted while the FVC value was 96 percent of predicted. A value of 80 percent or higher is considered to be in the normal range.

Id.

Accordingly, the administrative law judge found that Dr. Aquilina's opinion "is not reasoned and documented." *Id.*

Additionally, the administrative law judge reviewed the opinions of Dr. Gacad and inferred that this physician was of the opinion that claimant was totally disabled. Decision and Order at 11. The administrative law judge stated that although Dr. Gacad did not explicitly find that claimant was totally disabled, he did note in his May 8, 2000 report that claimant could only walk one block on level ground at a slow pace[14] and noted in his May 25, 2001 report that the August 24, 2000 ventilatory study indicated severe airways obstruction. Claimant's Exhibit 4; Decision and Order at 11. The administrative law judge further stated that Dr. Gacad also relied on "Claimant's symptoms, the reports of his functional limitations (such as his difficulty walking, referred to above), and clinical findings of hyper resonant lungs, diminished breath sounds, wheezing, rhonchi, and trace edema." Decision and Order at 11.

[14]It is unclear whether Dr. Gacad's notation that claimant could only walk one block on level ground and at a slow pace or go up one flight of stairs at a slow pace was based on his assessment of claimant or on claimant's reported symptoms.

The administrative law judge found Dr. Gacad's opinion regarding total disability to be "problematic" for several reasons. First, the administrative law judge noted that he had discounted the August 24, 2000 ventilatory study. *Id.* Second, the administrative law judge found that Dr. Gacad relied on laboratory studies that precede the final denial of the 1997 claim on June 4, 1999. *Id.* Third, the administrative law judge found that even though Dr. Gacad reported that claimant might show improvement in functioning post-bronchodilator, this physician did not address whether claimant would continue to be disabled if he were on bronchodilator medication.[15] *Id.*

[15]In his most recent report dated May 25, 2001, Dr. Gacad opined that claimant showed "a slight improvement" post-bronchodilator, but that "it did not revert back to normal." Claimant's Exhibit 4.

While an administrative law judge may discredit a medical opinion that he finds is not adequately supported by its underlying documentation, *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), or is not well reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*), the administrative law judge's rationale for discrediting the opinions of Drs. Aquilina and Gacad in this case raises questions as to whether he impermissibly substituted his judgment for that of the physicians, *see Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984); *see generally Marsiglio v. Director, OWCP*, 8 BLR 1-190, 1-192 (1985). In addition to relying on the discounted August 24, 2000 pulmonary function study, Dr. Aquilina relied on the May 24, 2000 and May 8, 2001 pulmonary function studies which he found to have been abnormal, notwithstanding the non-qualifying results.[16] Claimant's Exhibit 6 at 29, 32. Dr. Levinson found the May 24, 2000 pulmonary function study to be valid. Director's Exhibit 86; *see generally Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990)(a physician's conclusions that are based entirely on pulmonary function evidence that does not comply with the quality standards undermines the reliability of the medical report). In rendering his opinion, Dr. Gacad also did not only rely on the discounted August 24, 2000 study, but considered the May 8, 2000 and May 8, 2001 pulmonary function studies as well. Dr. Gacad found the May 8, 2000 pulmonary function study to have shown a moderate degree of chronic obstructive pulmonary disease and the May 8, 2001 pulmonary function study to have revealed a moderate obstructive pulmonary impairment in spite of these tests' non-qualifying results. Director's Exhibit 73; Claimant's Exhibit 4. Thus, the administrative law judge impermissibly substituted his opinion for that of Drs. Aquilina and Gacad. Accordingly, we vacate the administrative law judge's finding that claimant failed to demonstrate that the miner established a total respiratory disability based on the medical opinion evidence and instruct the administrative law judge to reconsider the opinions of Drs. Aquilina[17] and Gacad on remand.[18]

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[16]Dr. Aquilina also testified that the blood gas studies are "borderline abnormal," but are above the federal standards for disability. Claimant's Exhibit 6 at 34, 59.

[17]If the administrative law judge determines that Dr. Aquilina qualifies as claimant's treating physician at Section 718.202(a)(4), *see* discussion, *supra*, then he must consider Dr. Aquilina's status as claimant's treating physician when reweighing his opinion regarding total respiratory disability pursuant to Section 718.204(b)(2)(iv).

[18]It is unclear, without further elaboration by the administrative law judge, why Dr. Gacad's reliance on objective testing that pre-dates the final denial of the 1997 claim on June 4, 1999 negatively affects the credibility of his opinion. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). Accordingly, we instruct the administrative law judge to explain the rationale underlying his reasoning on remand.

Regarding Dr. Levinson's report, the administrative law judge stated that this physician did not directly address the question of total disability. *Id.* However, the administrative law judge found that Dr. Levinson reported that the August 24, 2000 pulmonary function study revealed a severe degree of airway obstruction with significant improvement post-bronchodilator. *Id.* The administrative law judge appears to have discounted Dr. Levinson's opinion because he relied on the August 24, 2000 pulmonary function study, which the administrative law judge previously found "discounted," and because he "failed to address the question of whether Claimant could function satisfactorily if he regularly took bronchodilator medication." *Id.* Contrary to the administrative law judge's statements, Dr. Levinson directly addressed the question of total disability at his deposition where he testified that claimant has an impairment, but it is not totally disabling. Employer's Exhibit 8 at 22, 28. Moreover, Dr. Levinson discussed the effect of claimant's improvement after being administered bronchodilator medication. At his deposition, Dr. Levinson testified that the reversible obstruction shown on the pulmonary function study indicates bronchial asthma and is not typical of coal workers' pneumoconiosis. Employer's Exhibit 8 at 16-17. Dr. Levinson also stated in his October 1, 2000 report that if claimant had an impairment due to pneumoconiosis, then one would not expect to see any improvement after the inhalation of a bronchodilator. Director's Exhibit 84. Therefore, we vacate the administrative law judge's findings regarding Dr. Levinson's report inasmuch as he mischaracterized this physician's opinion, *see Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), and instruct the administrative law judge to reconsider Dr. Levinson's opinion pursuant to Section 718.204(b)(2)(iv) on remand.

After reconsidering the new medical opinion evidence regarding total respiratory disability on remand, as outlined above, if the administrative law judge finds the newly submitted evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310 (2000), *see* discussion, *supra*, he must then address whether all of the evidence submitted since the denial of the previous claim is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). If the evidence is sufficient to establish a material change in conditions, then the administrative law judge is instructed to proceed to the merits of the duplicate claim.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge