

BRB No. 01-0468 BLA

RUSSELL L. GASSERT)	
)	
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Barry H. Joyner (Eugene Scalia, 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 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 the Decision and Order (97-BLA-1288) of Administrative Law Judge Ralph A. Romano (the administrative law judge) denying benefits on remand from the Benefits Review Board on a 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). [\[1\]](#) In remanding the case, the Board vacated the administrative law judge's findings at Section 718.204(c)(1) and (c) (4) (2000).^a [\[2\]](#) The Board also ordered that the record be reopened to address the validity of the pulmonary function study evidence, and for re-examination of certain medical opinions, to the extent that they relied on the pulmonary function study evidence. The Board further ordered that if, on remand, the newly submitted evidence were found to establish a material change in conditions, then the administrative law judge should reconsider the issues of the presence of pneumoconiosis and disability causation pursuant to 20 C.F.R. §§718.202(a)(1) (2000) and 718.204(b) (2000) on the merits.

After evaluating all of the evidence on remand, the administrative law judge found that the pulmonary function study and medical opinion evidence submitted in conjunction with the duplicate claim were insufficient to establish total disability pursuant to 20 C.F.R. §718.202(c)(1) and (c)(4)(2000). Thus, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to Section 725.309 (2000). Accordingly, the administrative law judge denied benefits.

Claimant appeals, asserting that the administrative law judge erred in accepting into evidence Dr. Spagnolo's medical report, which was untimely submitted. Claimant further alleges that the administrative law judge failed to provide adequate rationale for rejecting qualifying pulmonary function studies and the medical opinion evidence diagnosing total disability; failed to recognize that the most recent qualifying pulmonary function study evidence was unchallenged; and selectively analyzed the medical opinion of claimant's treating physician. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the Decision and Order denying benefits as supported by substantial evidence.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 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)(*en banc*). Failure to prove any one of these elements precludes entitlement.

As a preliminary matter, we note that in our September 3, 1999 Decision and Order, the Board held that the administrative law judge did not err in accepting Dr.

Spagnolo's medical report into evidence. *Gassert v. Director*, BRB No. 98-1511 BLA (Sept 3, 1999)(unpublished). This holding constitutes the law of the case and no exceptions apply. *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Therefore, we decline to again address this issue in the instant appeal. Furthermore, claimant acknowledges that he makes this argument again in order to preserve the issue for further appeal. Claimant's Brief at 4.

Turning first to claimant's assertion that the administrative law judge erred in rejecting the qualifying pulmonary function study evidence, we note that all six of the newly submitted pulmonary function studies of record were performed by Dr. Kraynak. The administrative law judge correctly found that neither the pulmonary function study of March 18, 1997, nor that of March 16, 1998, produced qualifying results. Director's Exhibit 12; Claimant's Exhibit 10. Claimant does not contest these findings, and therefore, we affirm them as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711(1983). With respect to the other four newly submitted pulmonary function studies, the administrative law judge found that three of them had been properly invalidated. He noted that Dr. Levinson had invalidated the study of February 13, 1997. Director's Exhibit 10. The administrative law judge accepted Dr. Sahillioglu's invalidation of the July 28, 1997 study and Dr. Ranavaya's invalidation of the August 4, 1997 study. Finally, the administrative law judge found that although the pulmonary function study of March 11, 1998, which noted claimant's effort as "fair", produced qualifying values, see Claimant's Exhibit 10, the more recent pulmonary function study of March 16, 1998, which yielded non-qualifying results, was the most reliable indication of claimant's pulmonary capacity. Decision and Order at 4. Therefore, the administrative law judge concluded that claimant failed to establish total disability pursuant to Section 718.204(c)(1) (2000).

Contrary to claimant's assertions, the administrative law judge properly assessed each pulmonary function study, noting by whom the study was invalidated and providing the credentials of each of the physicians. The administrative law judge credited the invalidations of Drs. Levinson, Sahillioglu, Ranavaya, and Spagnolo over the studies conducted by Dr. Kraynak because the credentials of these invalidating physicians were superior to those of Dr. Kraynak. Decision and Order at 4. It is well established that an administrative law judge may credit the invalidation of a pulmonary function study offered by a physician with superior credentials over the administering physician's opinion as to the validity of the test. *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Bolyard v. Peabody Coal Co.*, 6 BLR 1-767, 1-769 (1984). Inasmuch as the administrative law judge properly discredited all the qualifying pulmonary function studies of record, the administrative law judge properly found that claimant failed to establish total disability pursuant to Section 718.204(c)(1)(2000). 20 C.F.R. §718.204(b)(2)(i).

Considering the evidence at Section 718.204(c)(4)(2000), the administrative

law judge credited Dr. Spagnolo's opinion over that of Dr. Kraynak on the basis that the administrative law judge found Dr. Spagnolo's report to be better reasoned, documented and supported by the objective evidence of record. Decision and Order at 5. In rendering his consulting opinion, Dr. Spagnolo relied upon the reports of claimant's history and examinations issued by Drs. Cubler, Russell and Kraynak, over a period of time spanning from 1981 to 1997. Director's Exhibit 30. He also reviewed results of the numerous pulmonary function and arterial blood gas studies of record and scrutinized the chest x-ray reports of record. *Id.* Dr. Spagnolo specifically addressed each piece of evidence before him and concluded that it showed that claimant neither suffers from pneumoconiosis nor is totally disabled. *Id.* The administrative law judge noted that even if he had not credited Dr. Spagnolo's report, he would not have found Dr. Kraynak's report sufficient to carry claimant's burden of establishing total disability at Section 718.204(c)(4) (2000). *Id.*

We reject claimant's assertion that the administrative law judge erred in failing to credit the medical opinion of Dr. Kraynak over that of Dr. Spagnolo on the basis that Dr. Kraynak was claimant's treating physician. An administrative law judge is not required to credit the opinion of a treating physician over that of a non-treating physician where the administrative law judge finds the treating physician's opinion to be insufficiently reasoned. See *Lango v. Director, OWCP*, 104 F.3d 573, 577 (3d Cir. 1997); see also *Mancia v. Director, OWCP*, 130 F.3d 579, 590 (3d Cir. 1997). Thus, we hold that the administrative law judge provided sound reasoning for his assessment of the medical reports, see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), and we, therefore, affirm his finding that claimant failed to establish total disability pursuant to Section 718.204(c)(4) (2000). 20 C.F.R. §718.204(b)(2)(iv).

Inasmuch as claimant has failed to establish total disability at Section 718.204(c)(1)-(4)(2000) based on the newly submitted evidence, he has failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000). Thus, we affirm the denial of benefits. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308 (3d Cir. 1995).

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 Judgeⁱ

[To Top of Document](#TOPDOC)

Footnotes.

[1](#))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 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.

[Back to Text](#)

[2](#))Claimant filed his original claim on July 2, 1980. Director's Exhibit 23. Administrative Law Judge Ainsworth H. Brown found the evidence sufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000), but insufficient to establish total respiratory disability at 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Upon claimant's *pro se* appeal, the Board affirmed the administrative law judge's finding of the presence of pneumoconiosis and his finding that the evidence failed to establish total disability pursuant to Section 718.204(c)(1)-(3)(2000). However, the Board vacated the administrative law judge's finding at Section 718.204(c)(4) (2000) and remanded the case for reconsideration at this subsection. *Gassert v. Director, OWCP*, BRB No. 87-1629 BLA (Jan. 24,

1989)(unpublished). On remand, Judge Brown found the evidence insufficient to establish total respiratory disability at 20 C.F.R. §718.204(c)(4) (2000). Thus, invocation of the presumption at 20 C.F.R. §718.305 (2000) was precluded and benefits were denied. Director's Exhibit 23. Claimant did not appeal this determination. However, on December 20, 1996, claimant filed another claim. Recognizing this new filing as a duplicate claim pursuant to 20 C.F.R. §725.309 (2000), Administrative Law Judge Ralph A. Romano (the administrative law judge) denied benefits on the basis that claimant had failed to establish a material change in conditions since the previous denial of benefits. This Decision and Order was appealed to the Board. The Director subsequently filed a Motion to Remand the case to the administrative law judge, and on September 3, 1999, the Board issued a Decision and Order remanding the case to the administrative law judge for a re-examination of the evidence pertinent to the issue of whether claimant established a material change in conditions pursuant to Section 725.309 (2000). *Gassert v. Director, OWCP*, BRB No. 98-1511 BLA (Sept. 3, 1999)(unpublished). On January 16, 2001, the administrative law judge issued a Decision and Order again denying benefits. This determination is the subject of the instant appeal.

 Back to Text

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 Back to Text

<HR> 4) The administrative law judge noted that Drs. Levinson and Spagnolo are both Board certified in Internal Medicine and Pulmonary Diseases. Director's Exhibit 30. He also noted that Dr. Sahillioglu is Board eligible in Internal Medicine and Pulmonary Diseases, and that Dr. Ranavaya is Board certified in the specialty of Occupational Medicine. *Id.*; Director's Exhibit 28. The administrative law judge observed that the record indicates that Dr. Kraynak is a Family Practitioner. Claimant's Exhibit 5.

 Back to Text

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 Back to Text

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 Back to Text

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 Back to Text

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 Back to Text