

BRB No. 00-0363 BLA

MICHAEL J. SVETICH)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
U.S. STEEL MINING COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Living Miner’s Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman, Denver, Colorado, for claimant.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Living Miner’s Benefits (98-BLA-0660) of Administrative Law Judge Thomas M. Burke 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.* Claimant filed his initial application for benefits on June 24, 1983, which was finally denied on October 11, 1983. Director’s Exhibit 28. On November 17, 1989, claimant filed a second application for benefits which was denied by the district director on May 14, 1990. Claimant requested a formal hearing but later filed a notice withdrawing his claim, which withdrawal was approved by Administrative Law Judge Henry B. Lasky on February 27, 1991. Director’s Exhibit 29. Claimant filed a second duplicate claim on January 21, 1994. Director’s Exhibit 30. This claim was

denied by the district director on May 12, 1994, and January 3, 1995, due to claimant's failure to establish the presence of a totally disabling respiratory impairment, although claimant was able to establish the existence of pneumoconiosis. Director's Exhibit 30. Claimant filed the present duplicate claim on August 4, 1997. Director's Exhibit 1. The parties stipulated that claimant established forty-three and one-half years of coal mine employment, and the administrative law judge considered the claim pursuant to 20 C.F.R. Part 718. Hearing Transcript at 6. The administrative law judge found that the evidence of record was insufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), or a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish total disability due to pneumoconiosis and a material change in conditions. Employer, and the Director, Office of Workers' Compensation Programs, have not participated 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant 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).

When a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Tenth Circuit has held that in determining whether a claimant has established a material change in conditions, the administrative law judge must determine whether the evidence establishes, for each element that was previously decided against claimant, that there has been a material change in that element since the prior claim was denied. *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, BLR 2-302 (10th Cir. 1996).

¹The instant case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, inasmuch as claimant's coal mine employment occurred in the State of Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

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 Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Pursuant to Section 718.204(c)(1), the administrative law judge properly found that claimant failed to demonstrate a totally disabling respiratory impairment as all of the newly submitted pulmonary function studies produced non-qualifying values. Claimant's Exhibit 8; Director's Exhibits 8, 22; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267 (1994). With respect to Section 718.204(c)(2), the administrative law judge rationally determined that the qualifying exercise arterial blood gas study dated September 19, 1997, demonstrated total respiratory disability pursuant to the regulations. The administrative law judge however, also rationally determined that pursuant to Section 718.204(c)(4), none of the newly submitted medical reports supported a finding of total respiratory disability since Drs. Klepper and Farney found that claimant was not totally disabled, and Drs. James and Repsher, although diagnosing total disability due in part to claimant's age, did not find a totally disabling respiratory impairment. Employer's Exhibits 11, 25; Claimant's Exhibits 8, 9; Director's Exhibits 8, 9, 22; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry, supra*. In weighing all the evidence of record relevant to this section, the administrative law judge rationally found that although the single, qualifying, arterial blood gas study demonstrated a slight decline in claimant's pulmonary condition, it was outweighed by the remaining non-qualifying objective test results and the medical reports, all of which fail to diagnose a totally disabling respiratory impairment. Thus, the administrative law judge found that the newly submitted evidence failed to satisfy claimant's burden of proof that a material change in conditions had been demonstrated regarding this issue. Decision and Order at 8-9; *Ondecko, supra*; *Brandolino, supra*. Contrary to claimant's contention, it was within the administrative law judge's discretion to find that Dr. James's statement that claimant's arterial blood gas study results had worsened did not satisfy claimant's burden of proof on this issue since this physician ultimately testified that he was unable to

²A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1),(2).

³We also affirm as unchallenged on appeal, the administrative law judge's implicit finding that total disability was not established pursuant to 20 C.F.R. §718.204(c)(3), since the record contains no evidence of cor pulmonale with right-sided congestive heart failure. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

state with a reasonable degree of medical certainty, that claimant's respiratory impairment was totally disabling. Moreover, we reject claimant's argument that Dr. James's diagnosis of a respiratory impairment based on claimant's arterial blood gas study and his opinion regarding the significance of claimant's 1997 stress test are the equivalent of a finding of a totally disabling respiratory impairment, inasmuch as Dr. James specifically declined to make this diagnosis. Dr. James's Deposition at 22. We further reject claimant's contention that the opinion of Dr. Repsher is unreliable since it was based on an inaccurate smoking history as this physician's January 21, 1998, report accurately noted the smoking histories contained in the medical reports that he reviewed, and also noted that most of the radiologists who interpreted claimant's x-ray readings diagnosed chronic obstructive pulmonary disease, emphysema, and bullae which suggested a lengthy smoking habit. In addition, although claimant's smoking history is relevant to the cause of any respiratory impairment, it is not relevant to the issue of whether a totally disabling respiratory impairment exists. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). We also find no merit in claimant's assertion that this physician incorrectly interpreted claimant's stress test as indicating that claimant could perform heavy work, since the significance of this test is for the doctor to determine, and this physician also found that claimant did not have a totally disabling respiratory impairment under Section 718.204(c) based on claimant's normal pulmonary function and arterial blood gas results, in addition to the stress test which he interpreted as revealing normal values. *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish a material change in conditions pursuant to Section 725.309(d) as it is supported by substantial evidence. *Anderson, supra, Trent, supra*. Therefore, we affirm the administrative law judge's denial of benefits as it is supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge