BRB No. 01-0754 BLA

ROBERT L. SPIVEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED)		DATE ISSUED:
	)	
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 On Remand of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

S. Parker Boggs (Buttermore & Boggs), Harlan, Kentucky, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig), Washington, D.C., for employer.

Edward Waldman (Eugene Scalia, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand (99-BLA-0749) of Administrative Law Judge Linda S. Chapman awarding 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] This case is before the Board for the second time.[2] The administrative law judge found the existence of pneumoconiosis established by

[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.

[2] Claimant originally filed a claim on May 13, 1991, which was denied by the Department of Labor on October 16, 1991, as claimant failed to establish the existence of pneumoconiosis, pneumoconiosis caused by his coal mine employment or that claimant was totally disabled by pneumoconiosis, Director's Exhibit 34. No further action was taken by claimant on this claim.

Claimant filed the instant, duplicate claim on April 14, 1998, Director's Exhibit 1. In a Decision and Order issued on September 29, 1999, the administrative law judge found at least thirty years of coal mine employment established, noted that claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), *see* 20 C.F.R. §725.2(c), and adjudicated this duplicate claim pursuant to the regulations contained at 20 C.F.R. Part 718. Although the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), she found the existence of pneumoconiosis established by the newly submitted medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) and, therefore, found that claimant established a material change in conditions pursuant to Section 725.309 (2000). On the merits, the administrative law judge found pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.203(b). Finally, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), and total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204(b) (2000), as revised at 20 C.F.R. §718.204(c)(1). Accordingly, benefits were awarded.

Claimant appealed and the Board initially affirmed the administrative law judge's findings as to the length of claimant's coal mine employment and under Section 718.202(a)(1)-(3) as unchallenged, *Spivey v. Mountain Clay, Inc.*, BRB No. 00-0210 BLA (Dec. 28, 2000)(unpub.). The Board vacated the administrative law judge's finding that the newly submitted medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and, therefore, a material change in conditions pursuant to Section 725.30(d) (2000), however, and remanded the case for further consideration of the relevant, newly submitted evidence. In addition, inasmuch as the administrative law judge's reconsideration of the newly submitted evidence at Section 718.202(a)(4) on remand could

the newly submitted medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) and, therefore, found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), *see* 20 C.F.R. §725.2(c). On the merits, the administrative law judge found pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.203(b). Finally, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), and total disability due to pneumoconiosis established, *see* 20 C.F.R. §718.204(c)(1). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) and, therefore, in finding a material change in conditions established pursuant to Section 725.309(d) (2000), as well as in finding total disability established pursuant to Section 718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), and total disability due to pneumoconiosis established, *see* 20 C.F.R.§718.204(c)(1). Claimant responds, urging that the administrative law judge's Decision and Order On Remand awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, also responds, urging the Board to reject employer's contentions that the administrative law judge did not apply the proper standard in determining whether a material change in conditions was established pursuant to Section 725.309(d) (2000) and erred in determining whether relevant pulmonary function study evidence was qualifying under the regulations.

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).

---

affect her prior findings on the merits at Sections 718.203(b), 718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), and 718.204(b) (2000), as revised at 20 C.F.R. §718.204(c), if reached, the Board vacated these findings and remanded the case for reconsideration of these findings on remand, if necessary, as well.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in order to determine whether a material change in conditions is established under Section 725.309(d) (2000), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him, *see Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994). If claimant establishes the existence of that element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits, *id*.[3] 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 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 Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *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).

---

[3] In *Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000) (*en banc*), the Board held that if the administrative law judge finds that the newly submitted evidence demonstrates at least one of the elements of entitlement that was the basis of the prior denial, in determining whether a material change in conditions is established in accordance with the standard enunciated in *Ross, supra*, the administrative law judge must then analyze whether the new evidence differs qualitatively from the evidence submitted with the previously denied claim, or was merely cumulative of, or similar to, the earlier evidence, and if the administrative law judge finds this qualitative difference, it follows that claimant has established a material change in conditions.

The administrative law judge considered the newly submitted medical opinion evidence pursuant to Section 718.202(a)(4). In the Board's prior Decision and Order, the Board held that the administrative law judge had permissibly discredited the opinion of Dr. Younes, who had found that claimant had an occupational lung disease caused by his coal mine employment, Director's Exhibit 30, because the administrative law judge found it to be not well reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields*, *supra*; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The Board also upheld the administrative law judge's discrediting of the opinions of Drs. Broudy, Chandler and Wheeler, Director's Exhibits 31, 34; Employer's Exhibits 2, 9-10, on the ground that their opinions, that claimant does not suffer from pneumoconiosis, were no more than restatements of x-ray readings, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *see generally Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). *Spivey*, BRB No. 00-0210 BLA at 4. Employer reiterates the same contention that it advanced in its previous appeal, that the opinions of Drs. Broudy and Chandler took into consideration more than simply x-ray readings. The Board addressed employer's contention in its previous Decision and Order, however, and employer does not support its argument with reference to any relevant case law issued since the Board's previous Decision and Order. Thus, inasmuch as the Board's previous holding stands as law of the case on this issue, and no exception to that doctrine has been demonstrated by employer, *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(2-1 opinion: with Brown, J., dissenting), we reject employer's contention in this regard.[4]

The remaining relevant medical opinion evidence consisted of the opinions of Drs. Kiser and Baker, who examined claimant and diagnosed pneumoconiosis, Claimant's Exhibits 1-3; Director's Exhibits 9, 20, and the contrary opinions of Dr. Branscomb, who reviewed the evidence, and Dr. Fino, who examined claimant, who both opined that claimant does not have coal workers' pneumoconiosis, Director's Exhibit 29; Employer's Exhibit 1. In the Board's prior Decision and Order, the Board held that the administrative law judge

[4] The law of the case doctrine is a discretionary rule of practice, based on the policy that when an issue is litigated and decided, that decision should be the end of the matter. Thus, it is the practice of courts generally to refuse to reopen in a later action what has been previously decided in the same case, *see Brinkley*, *supra*; *see also Consolidation Coal Co. v. McMahon*, 77 F.3d 898, 905 n. 5, 20 BLR 2-152, 2-165 n. 5 (6th Cir. 1996).

erred in discrediting Dr. Branscomb's opinion because she found that it was based solely on x-ray evidence, as the record reflected that Dr. Branscomb based his opinion on a review of medical evidence; the Board also held that the administrative law judge erred by not providing an explanation for her rejection of Dr. Fino's opinion. *Spivey*, BRB No. 00-0210 BLA at 6-7. On remand, the administrative law judge again discredited Dr. Branscomb's opinion, as she found that it was based on an incomplete review of the relevant evidence of record. Decision and Order On Remand at 6-7. Specifically, the administrative law judge found that Dr. Branscomb's 1999 review of the medical evidence did not include positive readings of three x-rays from 1998. In addition, while Dr. Branscomb stated that none of the three pulmonary function studies he reviewed from May, 1996, through November, 1998, provided valid results upon which he could rely to find a pulmonary impairment, the administrative law judge noted that Dr. Branscomb, by the same token, had no valid pulmonary function studies upon which he could rely to find that claimant did not have a pulmonary impairment. Moreover, the administrative law judge found that Dr. Branscomb had not reviewed a valid June, 1998, pulmonary function study from Dr. Baker, which yielded qualifying results and that Dr. Baker had stated that the study revealed a moderate, obstructive defect. Finally, although Dr. Branscomb based his opinion, in part, on the assumption that claimant had sufficient coal dust exposure to produce at least minimal coal workers' pneumoconiosis, the administrative law judge noted that as Dr. Branscomb stated that he was unable to ascertain the length of claimant's coal mine employment history from the record, Dr. Branscomb was not aware of claimant's thirty-year coal mine employment history, which was an important factor to take into account.

Employer contends that as the administrative law judge found the x-ray evidence did not establish pneumoconiosis and as Dr. Branscomb assumed claimant had sufficient coal dust exposure to produce at least minimal coal workers' pneumoconiosis, the fact that Dr. Branscomb did not review positive x-ray readings and was unable to determine the length of claimant's coal mine employment history from the record are not reasons for discrediting his record. In addition, employer contends that Dr. Branscomb considered contemporaneous pulmonary function studies before and after the June, 1998, pulmonary function study, which Dr. Branscomb found to have yielded normal results and ruled out significant restrictive pulmonary disease.

The administrative law judge found, however, that none of the pulmonary function studies reviewed by Dr. Branscomb was a valid study upon which he could rely to find that claimant did not have a pulmonary impairment, and Dr. Branscomb did not review the June, 1998, pulmonary function study, which was the only valid pulmonary function study of record and which Dr. Baker found revealed a moderate obstructive defect. Thus, the administrative law judge, within her discretion, gave less weight to Dr. Branscomb's opinion because it was based 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). As the

administrative law judge provided a valid, alternative reason for discrediting Dr. Branscomb's opinion under Section 718.202(a)(4), any possible error by the administrative law judge in also discrediting Dr. Branscomb's opinion because he did not review positive x-ray readings and was unable to determine the length of claimant's coal mine employment history from the record 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).

In regard to Dr. Fino's opinion, the administrative law judge stated that Dr. Fino found no evidence of pneumoconiosis, because claimant's objective test results ruled out the presence of restrictive lung disease and "significant" pulmonary fibrosis. Decision and Order On Remand at 7-8. The administrative law judge noted, however, that Dr. Fino did not address: first, whether claimant nevertheless had pulmonary fibrosis (albeit not "significant"); second, that the results of the pulmonary function study Dr. Fino administered were invalid; and third, whether claimant's coal dust exposure had caused or contributed to his obstructive lung disease, which Dr. Baker found was revealed by the valid June, 1998, pulmonary function study. Thus, the administrative law judge found that Dr. Fino's opinion was not well reasoned or supported by objective evidence and, therefore, accorded it little weight.

Employer contends that the administrative law judge merely utilized semantics and speculation to find that Dr. Fino's opinion, that claimant had no "significant" pulmonary fibrosis, did not address whether claimant nevertheless had pulmonary fibrosis. In any event, it is for the administrative law judge to determine whether an opinion is documented and reasoned, *see Clark, supra*; *Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the administrative law judge, within her discretion, gave less weight to Dr. Fino's opinion because it was based on an incomplete picture of the miner's health condition, *i.e.*, Dr. Fino did not address claimant's obstructive lung disease revealed by the valid June, 1998, pulmonary function study from Dr. Baker, *see Fagg, supra*; *Stark, supra*. Thus, as the administrative law judge, within her discretion, provided a valid, alternative reason for discrediting Dr. Fino's opinion under Section 718.202(a)(4), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge if rational and supported by substantial evidence, *see Anderson*, *supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), any possible error by the administrative law judge in also discrediting Dr. Fino's opinion because he did not address whether claimant nonetheless had pulmonary fibrosis, albeit not "significant," is harmless, *see Searls, supra*; *Kozele, supra*; *see also Larioni, supra*.

Next, in the Board's prior Decision and Order, the Board rejected employer's contentions that the administrative law judge erred in relying on Dr. Kiser's opinion because it was based solely on an x-ray reading and because the administrative law judge

mechanically accorded greater weight Dr. Kiser's opinion based on his status as claimant's treating physician. The Board held that the administrative law judge rationally found that Dr. Kiser's diagnosis was based on the May 28, 1998, x-ray as well as the June, 1998, pulmonary function study and, within her discretion, provided a reasoned basis for crediting his opinion which indicates that she reflected on her determination to accord greater weight to the treating physician's opinion than to some of the other medical opinions of record, *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey*, *supra*; *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). *Spivey*, BRB No. 00-0210 BLA at 5. In addition, the Board rejected employer's contention that the administrative law judge erred in relying on Dr. Baker's opinion as it was based on a positive x-ray reading which the administrative law judge found to be outweighed by the contrary x-ray evidence of record, as the Board held that an administrative law judge must consider a medical report as a whole, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984), and may not discredit an opinion merely because it is based on an x-ray interpretation which is outweighed by the other x-ray interpretations of record, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Taylor*, *supra*; *cf. Anderson*, *supra*. Moreover, the Board rejected employer's contention, that Dr. Baker's opinion is not a reasoned opinion because he based his diagnosis on claimant's coal mine employment history; to the contrary, the record showed that Dr. Baker's opinion was based on a physical examination and x-ray evidence, as well as claimant's coal mine employment history. *Spivey*, BRB No. 00-0210 BLA at 5-6.

Employer reiterates the same contentions that it advanced in its previous appeal regarding Dr. Kiser's opinion under Section 718.202(a)(4) and that Dr. Baker's opinion is based on a positive x-ray reading which the administrative law judge found to be outweighed by the contrary x-ray evidence of record. Inasmuch as the Board addressed employer's contentions in its previous Decision and Order and employer does not support its argument with reference to any relevant Sixth Circuit or Board decision issued since the Board's previous Decision and Order, the Board's previous holdings stand as law of the case on these issues, and no exception to that doctrine has been demonstrated by employer herein, *see Brinkley*, *supra*; *Williams*, *supra*, we reject employer's contentions.[5]

[5] Although employer also contends that Dr. Baker relied on invalid pulmonary function studies, the record reflects that Dr. Baker's opinion was also based, in part, on the valid June, 1998, pulmonary function study, which Dr. Baker found revealed a moderate obstructive defect, *see* Claimant's Exhibit 1; Director's Exhibit 9.

Finally, employer contends that Drs. Kiser and Baker did not provide a reasoned explanation for their diagnoses of pneumoconiosis and that the administrative law judge provided no explanation for crediting their opinions, other than that she found that they were well-reasoned and consistent with the objective evidence. Specifically, employer contends that the administrative law judge inconsistently discredited the opinions of Drs. Fino and Branscomb, as being based on an incomplete picture of the miner's health condition, *see Fagg, supra*; *Stark, supra*, even though Dr. Branscomb's opinion was based on a review of many x-ray readings in addition to pulmonary function study and blood gas study results, whereas she credited Dr. Kiser's opinion, which was based only on the results of one x-ray and one pulmonary function study. The administrative law judge, however, credited the opinions of Drs. Kiser and Baker, that claimant suffered from pneumoconiosis, as she found, within her discretion, that they were better supported by the objective evidence, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and better reasoned and documented than the contrary opinions of Drs. Fino and Branscomb. 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, supra*; *Lucostic, supra*. The administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and draw her own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark, supra*, and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, if rational and supported by substantial evidence, *see Anderson, supra*; *Worley, supra*. We affirm the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4), as rational and supported by substantial evidence.[6]

[6] We also reject employer's contention that the administrative law judge erred, in this case arising within the jurisdiction of the Sixth Circuit, in failing to weigh all like and unlike evidence together under Section 718.202(a), including the x-ray and medical opinion evidence. Establishing pneumoconiosis under one of the four methods pursuant to Section 718.202(a)(1)-(4) obviates the need to do so under any of the other methods, *see* 20 C.F.R.

Employer also contends that the administrative law judge erred in failing to consider whether a material change in conditions was established pursuant to Section 725.309(d) (2000), *see* 20 C.F.R. §725.2(c), in accordance with the standard enunciated in *Ross*, *supra*, by the Sixth Circuit, and discussed by the Board in *Stewart*, *supra* note 3, at 4. The administrative law judge found that, because the newly submitted evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), which was one of the elements of entitlement previously adjudicated against claimant in his prior claim, a material change in conditions was established pursuant to Section 725.309(d) (2000), Decision and Order On Remand at 8. Subsequent to the holdings in *Ross*, *supra*, and *Stewart*, *supra*, the Sixth Circuit held in *Tennessee Consolidated Coal Co. v. Kirk*, F.3d , 22 BLR 2- , 2001 WL 1012089, No. 00-3316 at 5 (6th Cir., Sep. 6, 2001), that in order to measure a "change in conditions," the administrative law judge must compare the sum of the new evidence with the sum of the earlier evidence on which the denial of the claim had been premised and that a "material change" exists only if the new evidence both establishes the element of entitlement that was the basis of the prior denial and is substantially more supportive of claimant. The Sixth Circuit noted that the "change" is the actual difference between the bodies of evidence presented at different times; the "materiality" of the change is marked by the fact that this difference has the capability of converting an issue determined against the claimant into one determined in his favor and explained that this standard requires only a substantial difference in the bodies of evidence, not a complete absence of evidence at the earlier time; if this difference can alter one of the legal bases of the prior claim denial, it is material, *id*.

A review of the record in this case reveals that the earlier evidence on which the denial of claimant's prior claim was premised contains no evidence of pneumoconiosis or disability, *see* Director's Exhibit 34. The evidence submitted with claimant's prior claim consists of four negative readings of two x-rays, two non-qualifying pulmonary function studies and two non-qualifying blood gas studies, as well as medical opinions from Drs. Dahhan and Broudy, neither of whom diagnosed pneumoconiosis or found that claimant was totally disabled, *id*. Thus, as there was no evidence of pneumoconiosis in the earlier claim, any error by the administrative law judge in failing to compare the sum of the new evidence,

---

§718.202(a)(1)-(4); *e.g.*, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 575, 22 BLR 2-107, 2-119 (6th Cir. 2000); *contra Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

which the administrative law judge found established the existence of pneumoconiosis, with the earlier evidence, on which the denial of claimant's prior claim had been premised, in accordance with the Sixth Circuit's holdings in *Kirk*, *supra*, and *Ross*, *supra*, was harmless, *see Larioni*, *supra*. Consequently, we affirm the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d) (2000).

In the alternative, employer contends that in considering whether all of the evidence of record established the elements of entitlement on the merits, the administrative law judge erred in failing to consider the 1991 opinions of Drs. Dahhan and Broudy that were submitted with claimant's prior claim, neither of whom diagnosed pneumoconiosis or found that claimant was totally disabled, *see* Director's Exhibit 34. Both the Sixth Circuit and the regulations recognize that pneumoconiosis is a progressive disease, which may first become detectable only after the cessation of coal mine dust exposure, *see Ross*, 42 F.3d at 997, 19 BLR at 2-17; *see* definition of pneumoconiosis set forth at 20 C.F.R. §718.201(c), and that the date of the hearing, which in this case was held on July 13, 1999, is the date upon which the extent of disability is assessed by the administrative law judge in a living miner's case, *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Thus, any error by the administrative law judge in failing to consider evidence dating from 1991, that was submitted with claimant's prior claim, *see* Director's Exhibit 34, in determining whether the elements of entitlement were established on the merits in the instant claim, is harmless, *see Larioni*, *supra*.[7]

Pursuant to Section 718.204(c), as revised at 20 C.F.R. §718.204(b)(2), the administrative law judge initially considered the medical opinions of Dr. Branscomb, who reviewed the evidence, and Dr. Fino, who examined claimant, who both found no evidence of a respiratory or pulmonary impairment or disability, Director's Exhibit 29; Employer's Exhibit 1. Decision and Order On Remand at 9. The administrative law judge found that their opinions were not based on objective medical evidence, as neither physician was provided with all of the relevant objective evidence. Specifically, the administrative law judge found that all of the newly submitted pulmonary function study evidence was qualifying, Decision and Order On Remand at 9, and that neither Dr. Fino nor Dr. Branscomb

[7] In addition, inasmuch as the administrative law judge's finding that pneumoconiosis arising out of coal mine employment was established pursuant to Section 718.203(b), Decision and Order On Remand at 9, has not been challenged by any party on appeal, it is affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

had reviewed or considered the valid June, 1998, pulmonary function study from Dr. Baker which yielded "qualifying" results. The administrative law judge stated that Dr. Baker has interpreted the study as showing a moderate obstructive defect and had relied upon the study to find that claimant was totally disabled, Claimant's Exhibit 1; Director's Exhibit 9. Decision and Order On Remand at 6-9. On the other hand, the administrative law judge found that as the results of the only pulmonary function study conducted and reviewed by Dr. Fino were invalid, there was no objective basis for his conclusion that claimant did not have a respiratory or pulmonary impairment or disability. Similarly, the administrative law judge found that none of the three pulmonary function studies from May, 1996, through November, 1998, which Dr. Branscomb reviewed, provided valid results upon which he could rely to determine whether or not claimant had a pulmonary impairment. Thus, the administrative law judge found that the opinions of Drs. Branscomb and Fino unreliable and gave them little weight. Ultimately, the administrative law judge found total disability established by the opinions of Drs. Kiser, Baker and Younes, Director's Exhibit 30, as their opinions were based on the valid, qualifying, June, 1998, pulmonary function study results, as well as the other medical evidence of record.

Employer contends that, contrary to the administrative law judge's finding, the opinions of Drs. Fino and Branscomb were based on normal blood gas study and normal, albeit invalid, pulmonary function study results. However, because none of the pulmonary function studies reviewed by Drs. Fino and Branscomb was valid and neither physician reviewed the June, 1998, pulmonary function study, which was the only valid pulmonary function study of record and which Dr. Baker found revealed a moderate obstructive defect, the administrative law judge, within her discretion, gave less weight to their opinions regarding disability, as they were based on an incomplete picture of the miner's health condition, *see Fagg, supra*; *Stark, supra*.[8]

[8] In addition, although employer contends that the administrative law judge erred in not considering the two non-qualifying pulmonary function studies and two non-qualifying blood gas studies from 1991 that were submitted with claimant's prior claim, *see* Director's Exhibit 34, the date of the hearing, which in this case was held on July 13, 1999, is the date upon which the extent of disability is assessed by the administrative law judge in a living miner's case, *see Cooley*, *supra*; *Parsons*, *supra*. Thus, any error by the administrative law

judge in failing to consider on the merits under Section 718.204 evidence dating from 1991 that was submitted with claimant's prior claim is harmless, *see Larioni*, *supra*.

Employer further notes, however, that while the only valid pulmonary function study of record is the June, 1998, pulmonary function study from Dr. Baker, Director's Exhibit 9, and that while the administrative law judge found that it was "qualifying," it was administered when claimant was 73 years of age. Because the regulations do not specify qualifying pulmonary function study values for a miner beyond the age of 71,[9] employer contends that a pulmonary function study administered on a miner over age 71 cannot be qualifying. Moreover, citing *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987), employer contends that the administrative law judge cannot extrapolate additional values from those set forth in the regulations, as the regulations thereby presume that a miner over the age of 71 lacks the capacity to perform coal mine employment. In addition, employer contends that the administrative law judge did not weigh all of the relevant evidence under Section 718.204, as the administrative law judge did not consider the non-qualifying blood gas study evidence. In response, claimant contends that because the results of the June,1998, pulmonary function study would be qualifying if claimant were 71 years of age, he also would be impaired beyond age 71.[10]

The Director contends that employer did not raise before the administrative law judge the issue of whether the June, 1998, pulmonary function study is qualifying and asserts that employer conceded that the June, 1998, pulmonary function study was qualifying, in its September 21, 1999, post-hearing brief to the administrative law judge. Specifically, the Director contends that because employer listed the results of the June, 1998, pulmonary function study alongside the corresponding qualifying table values at Appendix B for a 71

[9]A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[10] The results of the June, 1998, pulmonary function study would be qualifying for a miner who was age 71, Director's Exhibit 9, for any of the heights that were listed for the miner in the pulmonary function study evidence of record, ranging from 67.75 to 69 inches, *see* Director's Exhibits 9, 20, 22, 29, 34; 20 C.F.R. Part 718, Appendix B; 20 C.F.R. §718.204(b)(2)(i); *see generally Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983).

year old, employer thereby conceded that the qualifying table values for a 71 year old applied to the June, 1998, pulmonary function study. Alternatively, the Director contends that the Board need not reach this issue, as the Director asserts that a single, valid, qualifying pulmonary function study cannot be dispositive on the issue of disability, as all relevant evidence must be weighed in determining whether total disability is established.

We reject the Director's suggestion that the Board need not reach this issue because the June, 1998, pulmonary function study, alone, cannot be dispositive on the issue of total disability. Contrary to the Director's suggestion, the June, 1998, pulmonary function study is the only objective evidence of record, relied on, in part, by Drs. Baker, Kiser and Younes, that the administrative law judge found yielded valid and qualifying results. We also reject the Director's contention that the Board need not decide whether the administrative law judge correctly determined that the June, 1998, pulmonary function study is qualifying because employer either did not raise the issue below or conceded it. The administrative law judge found that the results of the June, 1998, pulmonary function study were "qualifying," but did not state how she came to that conclusion or that employer had conceded the issue. In any event, whether such evidence is qualifying under the regulations is a question of law for the Board to determine and concessions or stipulations of law are not controlling on courts, *see Estate of Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 51 (1939); *see also Nippes v. Florence Mining Co.*, 12 BLR 1-108, 1-110 (1985).

We similarly reject employer's contention that an administrative law judge may not extrapolate additional values from those set forth in the regulations in light of the Board's holding in *Tucker*, *supra*, as *Tucker* stands for the proposition that it is improper for an administrative law judge to round blood gas study values prior to determining whether they are qualifying values[11] under the table for establishing total disability by blood gas study and, therefore, is inapplicable to pulmonary function study evidence. Although the regulations only provide table values for miners up to 71 years of age, the regulations do not prohibit an administrative law judge from finding by extrapolation appropriate table values for miners older than 71 years of age, but the administrative law judge should explain her process for finding the pulmonary function study qualifying under the regulations, *see Hubbell v. Peabody Coal Co.*, BRB No. 95-2233 BLA at 7, n. 7 (Dec. 20, 1996)(unpub.). Thus, inasmuch as the administrative law judge merely found that the results of the June, 1998, pulmonary function study were "qualifying," but did not explain how she came to that conclusion, and the June, 1998, pulmonary function study is the only objective evidence of record that the administrative law judge found yielded valid and qualifying results and it was

[11] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

relied on, in part, by Drs. Baker, Kiser and Younes, we vacate the administrative law judge's finding that total disability was established under Section 718.204 and remand the case for the administrative law judge to explain her process for finding the pulmonary function study qualifying under the regulations, *see Hubbell*, *supra*. Moreover, because there are differences in the heights recorded in pulmonary function studies of record, the administrative law judge should make a factual finding of the miner's actual height and use that height in determining whether the June, 1998, pulmonary function study is qualifying under the regulations, *see Protopappas*, *supra*. In addition, as the administrative law judge must weigh all relevant evidence, like and unlike, under Section 718.204, the administrative law judge also should consider the non-qualifying blood gas study evidence of record on remand, *see Tussey*, *supra*; *Budash*, *supra*; *Fields*, *supra*; *Rafferty*, *supra*; *Shedlock*, *supra*.[12]

[12] Whether or not the administrative law judge finds the June, 1998, pulmonary function study is qualifying on remand, the significance of even non-qualifying objective tests is for a physician to determine and a physician may nevertheless find that such test results indicate that a claimant would be unable to perform his last coal mine employment, *see McMath v. Director,* OWCP, 12 BLR 1-6 (1989); *Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985), as the interpretation of medical data is for the medical experts, *see Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Moreover, a medical opinion of no respiratory or pulmonary impairment based only on blood gas study results does not necessarily rule out the existence of a respiratory or pulmonary impairment and non-qualifying blood gas study results cannot be seen as being a direct offset to "contrary" pulmonary function study results, because a

Employer also correctly notes that the administrative law judge's consideration of Dr. Younes's opinion, Director's Exhibit 30, under Section 718.204 in her original Decision and Order is inconsistent with her consideration of Dr. Younes's opinion under Section 718.204 in her Decision and Order On Remand, both in her analysis and in her credibility determinations, *see Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see also Wike v. Bethlehem Mines Corp.*, 7 BLR 1-593 (1984). In her original Decision and Order, the administrative law judge discredited Dr. Younes's opinion under Section 718.204, but the administrative law judge credited Dr. Younes's opinion as supporting a finding of total disability in her Decision and Order On Remand. Inasmuch as the administrative law judge also credited the opinions of Drs. Baker and Kiser as supporting a finding of total disability under Section 718.204, in her Decision and Order On Remand the administrative law judge provided an alternative reason for her finding under Section 718.204, *see Searls, supra*; *Kozele, supra*. Employer contends, however, that the administrative law judge did not account for the fact that Drs. Baker and Kiser did not consider the functional demands of claimant's last coal mine employment when rendering their opinions on disability.

Specifically, employer contends that Dr. Baker's opinion, that claimant could do only sedentary work due to his respiratory impairment, is insufficient to establish that claimant is totally disabled to perform his last usual coal mine employment because claimant described his last coal mine employment as entailing only sedentary work. Claimant described his last coal mine employment as working as a coal truck driver and heavy equipment operator, that entailed sitting for ten hours a day, with no crawling and "not much lifting," *see* Director's Exhibit 4; Hearing Transcript at 33, 39, of more than fifty pounds, Hearing Transcript at 36. Dr. Baker noted claimant's last coal mine employment was as a coal truck and equipment driver and, in response to a question asking whether claimant had the respiratory capacity to perform the work of a coal miner, the doctor indicated that claimant did not, Director's Exhibit 9, and that claimant was totally disabled for "work in the coal mining industry," Claimant's Exhibit 1, but could do a job which only required him to be sedentary, due to his

---

non-qualifying blood gas study does not absolutely rule out the existence of a totally disabling respiratory or pulmonary impairment inasmuch as blood gas studies and pulmonary function studies measure different types of impairment, *see Tussey, supra*; *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797 (1984); *see also Estep v. Director, OWCP*, 7 BLR 1-904 (1985); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller, supra*.

respiratory impairment, Director's Exhibit 20; Claimant's Exhibit 1. Dr. Kiser listed claimant's occupation as "retired," Claimant's Exhibit 2, and in response to a question asking whether claimant had a pulmonary impairment that would prevent him from doing his past coal mine work, answered "yes", Claimant's Exhibit 3.

The ultimate finding regarding total disability is a legal determination to be made by the administrative law judge, not the physician, through consideration of the exertional requirements of the miner's usual coal mine employment in conjunction with the physician's opinion regarding the miner's physical abilities, *see Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *see also Aleshire v. Central Coal Corp.*, 8 BLR 1-70 (1985). Where the record contains an opinion providing an assessment of physical limitations due to pulmonary disease or an assessment of a miner's impairment, as well as evidence of the exertional requirements of the miner's usual coal mine employment , such an opinion may be sufficient to allow the administrative law judge to deduce a finding on the issue of total disability, by comparing the physician's opinion as to the miner's physical limitations or extent of impairment to the exertional requirements of the miner's usual coal mine employment, *see McMath*, *supra*; *Parsons*, *supra*; *see also Aleshire*, *supra*; *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1987); *Ridings v. C & C Coal Co.*, 6 BLR 1-227 (1983). Inasmuch as the administrative law judge did not compare the exertional requirements of claimant's usual coal mine employment with the opinions of Drs. Baker and Kiser regarding the extent of claimant's impairment, we remand the case for reconsideration and for the administrative law judge to determine whether the opinions of Drs. Baker and Kiser are sufficient to establish total disability as defined under Section 718.204. In addition, the administrative law judge should resolve the inconsistency in her weighing of the opinion of Dr. Younes under Section 718.204 when reconsidering the medical opinion evidence under Section 718.204 on remand, *see Revnack*, *supra*.

Finally, employer also contends that the administrative law judge erred in finding total disability due pneumoconiosis established, *see* 20 C.F.R. §718.204(c)(1), formerly 20 C.F.R. §718.204(b) (2000). Pursuant to 20 C.F.R. §718.204(c)(1), a miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis as defined in Section 718.201 is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1). Thus, the Sixth Circuit held that even if a miner has a totally disabling respiratory or pulmonary impairment due to non-coal related disease and exposure, the miner may nonetheless possess a compensable injury if his pneumoconiosis "materially worsens" this condition pursuant to Section 718.204(c)(1), *see Kirk*, No. 00-3316 at 6 (6th Cir., Sep. 6, 2001).

The administrative law judge credited the opinions of Drs. Kiser and Baker as persuasive, well-reasoned and documented in finding total disability due to pneumoconiosis established. Employer contends that Drs. Kiser and Baker did not adequately explain their opinions and that the administrative law judge did not adequately explain why she found their opinions were documented and reasoned. It is for the administrative law judge to determine whether an opinion is documented and reasoned, *see Clark, supra*; *Fields, supra*; *Lucostic, supra*, and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge if rational and supported by substantial evidence, *see Anderson, supra*; *Worley, supra*.

Nevertheless, employer correctly contends that the administrative law judge did not consider the relevant opinion of Dr. Branscomb, who stated that even if he assumed that claimant had pneumoconiosis, there is no indication of any impairment caused or aggravated by coal workers' pneumoconiosis, Employer's Exhibit 1. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Thus, we vacate the administrative law judge's finding that total disability due to pneumoconiosis was established, *see* 20 C.F.R. §718.204(c)(1), and remand the case for reconsideration of all of the relevant evidence in accordance with the relevant standard under 20 C.F.R. §718.204(c)(1), formerly 20 C.F.R. §718.204(b), if necessary. In addition, as employer contends, the administrative law judge must provide a full detailed opinion which complies with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(a), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), and which fully explains the specific bases for her decision under Section 718.204(c)(1), the weight assigned to the evidence and the relationship she finds between the evidence and her legal and factual conclusions, *see Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

Employer's other contentions regarding the administrative law judge's findings under Section 718.204(c)(1) are without merit. Employer contends that the administrative law judge erred in discrediting the opinions of Drs. Broudy and Chandler and in failing to consider Dr. Fino's opinion that claimant did not suffer from an occupationally acquired pulmonary condition. The administrative law judge stated that she did not accord significant weight to the opinions of Drs. Broudy and Chandler on this issue for the reasons she discussed in her original Decision and Order, Decision and Order On Remand at 9. In her original Decision and Order, the administrative law judge gave little weight to the opinions of

Drs. Chandler and Broudy because neither physician provided reasoning or support for his finding of no pneumoconiosis, other than, apparently, the absence of any x-ray evidence of pneumoconiosis and because Dr. Chandler did not offer any explanation or etiology for claimant's respiratory impairment, 1999 Decision and Order at 18-19, 21. Thus, because the administrative law judge's finding that the existence of pneumoconiosis was established is affirmed under Section 718.202(a)(4), whereas Drs. Broudy, Chandler and Fino found no evidence of pneumoconiosis, the administrative law judge, within her discretion, gave little weight to Dr. Broudy's and Dr. Chandler's opinions on causation as they did not diagnose pneumoconiosis, *see Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams, supra*; *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986), and, therefore, any error by the administrative law judge in not considering Dr. Fino's opinion on causation was harmless, *see Larioni, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge