

BRB No. 01-0896 BLA

ANDREW E. KUZLINSKI)
)
 Claimant-Respondent)
)
 v.)
)
 GATEWAY COAL COMPANY)
) DATE ISSUED:
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Clement J. Kichuk,
Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Raymond F. Keisling (Keisling, Schmitt & Coletta, P.C.), Carnegie, Pennsylvania, **6**
employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.
PER CURIAM:

Employer appeals the Decision and Order on Second Remand (97-BLA-0125) of
Administrative Law Judge Clement J. Kichuk 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 has been before the Board previously.
In the original decision, with respect to the instant claim, Administrative Law Judge George
P. Morin found, and the parties stipulated to, thirty-four and one-half years of coal mine
employment. Decision and Order dated June 6, 1997 at 2; Hearing Transcript at 6.

¹The 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 (2001). All
citations to the regulations, unless otherwise noted, refer to the amended regulations.

Considering entitlement, in this duplicate claim, pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the record evidence was insufficient to establish that claimant suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000) and thus claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).² Decision and Order dated June 6, 1997 at 4-7. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000). The Board vacated, however, the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(c)(4) and 725.309 (2000) and remanded the case for further consideration of the relevant evidence of record. *Kuzlinski v. Gateway Coal Co.*, BRB No. 97-1392 BLA (July 2, 1998)(unpublished).

On remand, the case was reassigned to Administrative Law Judge Clement J. Kichuk who considered the relevant evidence and concluded that it was sufficient to establish a material change in conditions and entitlement to benefits. Decision and Order on Remand dated May 27, 1999 at 10-20. Employer appealed and the Board affirmed the administrative law judge's finding that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment. The Board, however, vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(c)(4) and 725.309 (2000) and remanded the case for additional findings. *Kuzlinski v. Gateway Coal Co.*, BRB No. 99-0940 BLA (September 29, 2000)(unpublished).

On second remand, the administrative law judge found that the newly submitted evidence established a material change in conditions and that upon complete review of the record, claimant established entitlement to benefits. Decision and Order on Second Remand at 4-13. Accordingly, benefits were awarded. In the instant appeal, employer contends that the administrative law judge erred in finding that claimant established a material change in conditions pursuant to Section 725.309 (2000). Claimant responds urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence. The

²Claimant, Andrew E. Kuzlinski, filed his initial claim for benefits on January 12, 1983, which was finally denied on April 22, 1988, as claimant failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204 (2000). Director's Exhibit 31. Claimant took no further action until he filed the instant duplicate claim on July 31, 1995. Director's Exhibit 1.

Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order on Second Remand, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The United States Court of Appeals for the Third Circuit has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.³ *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). Employer initially argues that the administrative law judge erred in evaluating the medical opinion evidence pursuant to 20 C.F.R. §725.309 (2000) as he failed to give proper weight to the evidence in finding a material change in conditions established. Employer's Brief at 2-3. We do not find merit in employer's argument. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See*

³This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Employer contends that the administrative law judge erred in failing to consider all the evidence, both old and new, in determining whether a material change in conditions was established. Employer's Brief at 2. We disagree. As this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, the administrative law judge properly applied the standard enunciated in *Swarrow* for deciding whether claimant demonstrated a material change in conditions pursuant to Section 725.309 (2000). In *Swarrow*, the court held that in ascertaining whether a claimant established a material change in conditions, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. Thus, contrary to employer's argument, the administrative law judge properly reviewed only the evidence submitted following the denial of claimant's prior claim in determining whether claimant established a material change in conditions. *Swarrow, supra*. Moreover, the standard enunciated by the Third Circuit in *Swarrow* does not require the administrative law judge to explain how the newly submitted evidence is qualitatively different from the previously submitted evidence, *i.e.*, that it establishes that claimant's condition has worsened, in addition to determining whether the newly submitted evidence establishes one new element of entitlement. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-20 (1999). Thus, we reject employer's contention that the administrative law judge erred in not addressing the previous objective study evidence in determining whether the newly submitted evidence establishes a material change in conditions pursuant to Section 725.309 (2000).

Employer further contends that the administrative law judge erred in failing to reconcile his finding of total disability with the normal objective studies. Specifically, employer contends that the administrative law judge failed to explain why he accorded greater weight to the medical opinions of Drs. Levine, Cho and Garson, diagnosing a totally disabling respiratory impairment, in light of the physicians reliance on non-qualifying pulmonary function and arterial blood gas study results.⁴ We find no merit in employer's argument. A physician may diagnose total disability despite the non-qualifying results of his objective tests, and non-qualifying test results alone, do not establish the absence of a

⁴A "qualifying" pulmonary function study or 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, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(I), (ii).

respiratory impairment. *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984). Moreover, the determination of whether a medical report is reasoned is within the discretion of the administrative law judge as the finder-of-fact, and the administrative law judge may not independently evaluate claimant's objective test results. *Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Estep v. Director, OWCP*, 7 BLR 1-904 (1985); *Sabett, supra*; *Fuller, supra*.

In weighing the evidence on the presence or absence of a disabling pulmonary impairment at Section 718.204(c)(4) (2000), the administrative law judge, in the instant case, acted within his discretion when he found it sufficient to support claimant's burden of proof. In finding the opinions of Drs. Cho, Levine and Garson reasoned and documented, the administrative law judge permissibly found that their opinions were supported by objective studies and the physical examinations they performed, as well as claimant's credible complaints of shortness of breath, his length of coal mine employment and his absence of a smoking history. See *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order on Second Remand at 7-9; Claimant's Exhibits 1, 2; Director's Exhibits 9, 10, 17, 31. Furthermore, the administrative law judge did not err when he accorded determinative weight to these opinions as the administrative law judge may credit medical opinions of total disability when, as in the instant case, the physician explains how he diagnosed total disability despite non-qualifying objective tests, and his report is supported by other underlying documentation. See *Smith v. Director, OWCP*, 8 BLR 1-258; *Sabett, supra*; *Fuller, supra*. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Clark, supra*; *Anderson, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the finding of the administrative law judge that the newly submitted evidence was sufficient to establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4) (2000), and thus, a material change in conditions pursuant to Section 725.309 (2000) as it is supported by substantial evidence and is in accordance with law. As employer does not challenge the administrative law judge's additional findings that claimant is entitled to benefits and the commencement date for the payment of benefits, we therefore affirm these findings as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order on Second Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge