

BRB No. 97-1296 BLA

ROLAND WEIKEL)
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand of Paul A. Mapes,
Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Jennifer U. Toth (Marvin Krislov, Deputy Solicitor for National
Operations; 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 the Director, Office of Workers' Compensation
Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (94-BLA-193) of
Administrative Law Judge Paul A. Mapes denying 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). Claimant filed a request for
modification of his previously denied claim on July 1, 1993.¹ After noting that

¹The relevant procedural history of this case is as follows: Claimant filed his claim
for benefits with the Department of Labor on May 15, 1986. Director's Exhibit 1.
The claim was finally denied by the Board on July 28, 1992. Director's Exhibit 93.
Claimant requested modification of the denial on July 1, 1993. Director's Exhibit 94.

claimant was credited with seventeen years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment was undisputed, the administrative law judge found that the evidence of record failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 20 C.F.R. §718.204(c). The administrative law judge therefore also found no change in conditions established and no mistake of fact under 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant argues that the administrative law judge erred in his weighing of the pulmonary function study and medical opinion evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge's decision is supported by substantial evidence and should be affirmed.²

Claimant's modification request was denied by the district director on September 27, 1993. Director's Exhibit 101. On October 5, 1993, claimant requested a hearing before the Office of Administrative Law Judges. Administrative Law Judge Frank D. Marden conducted a hearing on the claim in Wyomissing, Pennsylvania on March 8, 1994. Judge Marden issued his Decision and Order denying benefits on December 19, 1994. Claimant appealed the denial of benefits to the Board and in *Weikel v. Director, OWCP*, BRB No. 95-0859 BLA (Oct. 24, 1995) (unpub.), the Board affirmed in part, vacated in part and remanded the case for further consideration pursuant to 20 C.F.R. §718.204(c)(1), (4). Decision and Order on Remand at 1-3.

²The administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(2), (3) and that a mistake of fact was not established pursuant to 20 C.F.R. §725.310 are unchallenged on appeal and therefore are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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 under Part 718 in a living miner's claim, 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. Failure to prove 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 Remand, 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 therein. Initially, claimant contends that the administrative law judge erred in failing to find the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1) based on the pulmonary function study evidence. We disagree. The administrative law judge, relying on the three non-qualifying pulmonary function studies,³ which he found were the only credible pulmonary function studies of record, concluded that the pulmonary function study evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1). Decision and Order at 4-9; Director's Exhibits 25, 38, 105. The administrative law judge relied on these non-qualifying pulmonary function studies in finding that claimant failed to meet his burden of proof as the other eight pulmonary function studies submitted into evidence were either inconclusive or had been invalidated. Decision and Order on Remand at 4-9; Director's Exhibits 59, 64, 94; Claimant's Exhibit 1. In making this determination, the administrative law judge permissibly credited the opinions of the reviewing physicians, who found the various qualifying tests unreliable based on the fact that they were performed with inadequate effort, over the physicians who administered the individual tests.⁴ See *Siegel v. Director, OWCP*, 8 BLR 1-156

³A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values delineated in the tables at 20 C.F.R. 718, Appendix B, C, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2).

⁴The administrative law judge credited the opinions of Drs. Burki, Cander, Cable

(1985); *Bolyard v. Peabody Coal Co.*, 6 BLR 1-767 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1).

In considering whether total disability was established under Section 718.204(c)(4), the administrative law judge permissibly credited the opinions of Drs. Cable and Green, which found that claimant was not totally disabled from a respiratory standpoint, based on their superior qualifications. *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and because their conclusions were better reasoned as they were supported by the credible objective medical evidence. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-291 (1984); Decision and Order on Remand at 13; Director's Exhibits 38, 105. Furthermore, contrary to claimant's assertion, although Drs. Cable and Green examined claimant only one time, the administrative law judge was not required to disregard their opinions on this basis alone and defer to claimant's treating physician's opinion. *Onderko v. Director, OWCP*, 14 BLR 1-2 (1988); *Piccin, supra*. Furthermore, the administrative law judge properly accorded less weight to the opinions of Drs. Kraynak and Kruk in light of their reliance on invalidated pulmonary function studies. See *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Trent, supra*; *Piccin, supra*; Decision and Order on Remand at 12. Accordingly, the administrative law judge properly found that the medical reports of record failed to establish total disability pursuant to Section 718.204(c)(4). In addition, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c)(1)-(4), lay testimony alone cannot alter the administrative law judge's finding. See 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields, supra*; *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Thus, we affirm the administrative law judge's finding that the evidence of record was insufficient to establish total disability in accordance with the provisions of Section 718.204(c) and we affirm the administrative law judge's finding that the evidence was insufficient to establish a change in conditions pursuant to Section 725.310. Consequently, we affirm the administrative law judge's denial of modification and benefits as supported by substantial evidence. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Trent, supra*; *Perry, supra*.

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed.

and Michos based on their credentials. Decision and Order on Remand at 5-9.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge