

BRB No. 98-0287 BLA

JOSEPH VAVRASEK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NO. 1 CONTRACTING COMPANY	)	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 of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Bruce J. Phillips (McHugh, Wetzel, Caverly & Phillips), Wilkes-Barre, Pennsylvania, for claimant.

Maureen E. Calder (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-00164) of Administrative Law Judge Robert D. Kaplan denying benefits 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). Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.<sup>1</sup> The administrative law judge

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<sup>1</sup> Claimant filed his initial claim for benefits on June 26, 1973 which was denied by the Department of Labor in December 1989. Director's Exhibit 37. Claimant filed a second claim on October 7, 1981 and a third claim on April 24, 1984. Director's Exhibit 37. These

concluded that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c), and thus, insufficient to establish 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 total disability was not established pursuant to 20 C.F.R. §718.204(c)(2). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated 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 pursuant to 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 to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

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claims were denied by the district director on September 28, 1992. Director's Exhibit 38. Claimant filed another claim on May 25, 1994, which was denied on August 16, 1994. Director's Exhibit 39. Claimant filed the instant claim on August 29, 1995. Director's Exhibit 1.

<sup>2</sup> The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.204(c)(1), (3) and (4) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-610 (1983).

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 administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The administrative law judge, in the instant case, permissibly determined that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Contrary to claimant's contention, the administrative law judge rationally accorded greater weight to the opinion of Dr. Levinson,<sup>3</sup> invalidating the January 17, 1996 blood gas study, than to Dr. Sahillioglu's opinion that the study was valid, based on Dr. Levinson's detailed opinion and his superior qualifications.<sup>4</sup> *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Piccin, supra*. The administrative law judge is empowered to weigh the medical evidence and 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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) and a material change in conditions pursuant to 20 C.F.R. §725.309 as it is supported by the substantial evidence and is in accordance with law. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

Inasmuch as claimant has failed to establish a material change in conditions, a requisite element of entitlement pursuant to 20 C.F.R. §725.309, entitlement under 20 C.F.R.

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<sup>3</sup> Dr. Levinson noted a "great discrepancy" and "marked difference" between the pre-and post-exercise values and opined that this highly suggests that the resting blood gas was administered with some error in sampling, suggesting venous mixture, and that the study could not be relied upon with any degree of medical certainty. Director's Exhibit 29; Employer's Exhibit 3.

<sup>4</sup> The record indicates that Dr. Levinson is board-certified in internal medicine and pulmonary disease while Dr. Sahillioglu is only board-eligible in internal medicine and pulmonary disease. Director's Exhibits 6, 7; Employer's Exhibits 1, 3.

Part 718 is precluded. *Swarrow, supra.*

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge