

BRB No. 01-0152 BLA

RAYMOND H. HOOPER)		
)		
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 of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (Howard M. Radzely, Acting Solicitor of Labor; 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-1046) of Administrative Law Judge Ainsworth H. Brown 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). This case is before the Board for the fifth time. Previously, in a

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 July 16, 1976, which was denied by the district director on October 12, 1979, Director's Exhibit 22. Claimant filed a duplicate claim on April 7, 1982, which was ultimately denied in a Decision and Order issued on April 29, 1987, by Administrative Law Judge Thomas Schneider, who found that claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment, Director's Exhibit 22.

Claimant filed another duplicate claim on January 24, 1989, Director's Exhibit 23. Ultimately, in a Decision and Order issued on April 22, 1992, the administrative law judge found 9.23 years of coal mine employment established, but found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4), Director's Exhibit 31. Accordingly, benefits were denied. Claimant appealed, without the aid of counsel, and the Board initially held that claimant's duplicate claim filed on January 24, 1989, constituted the viable claim in the instant case, Director's Exhibit 32. *Hooper v. Director, OWCP*, BRB No. 92-1624 BLA (Apr. 26, 1994)(unpub.). The Board vacated the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to Section 718.202(a), however, and remanded the case for reconsideration of that issue and for reconsideration of the evidence relevant to the length of claimant's coal mine employment. On remand, the administrative law judge again found 9.23 years of coal mine employment established, but that the existence of pneumoconiosis was not established pursuant to Section 718.202(a), Director's Exhibit 33. Accordingly, benefits were denied. Claimant appealed, without the aid of counsel, and the Board affirmed the administrative law judge's finding that 9.23 years of coal mine employment was established, but vacated the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4) and remanded the case for reconsideration, Director's Exhibit 34. *Hooper v. Director, OWCP*, BRB No. 92-1624 BLA (June 29, 1995)(unpub.). On remand, the administrative law judge again found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a), Director's Exhibit 35. Claimant appealed and the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a) and, therefore, affirmed the denial of benefits, Director's Exhibit 36. *Hooper v. Director, OWCP*, BRB No. 92-1624 BLA (Dec. 20, 1996) (unpub.).

Claimant subsequently filed a timely request for modification on July 28, 1997, Director's Exhibit 37, which was initially denied by the district director, Director's Exhibits 42, 47. The case was referred to the Office of Administrative Law Judges and Judge Brown issued a decision on March 31, 1999.

Decision and Order issued on March 31, 1999, the administrative law judge found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) and, therefore, that claimant failed to establish a basis for modification of the instant, duplicate claim. Accordingly, benefits were denied. Claimant appealed and the Board initially noted that, pursuant to the holding in *Hess v. Director, OWCP*, 21 BLR 1-141 (1998), where a district director has denied modification of a duplicate claim, the administrative law judge should consider whether the newly submitted evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000), *see* 20 C.F.R. §725.2(c), rather than determining whether claimant has established a basis for modification of the district director's denial of his duplicate claim. *Hooper v. Director, OWCP*, BRB No. 99-0749 BLA (June 9, 2000)(unpub.). However, inasmuch as the Director, Office of Workers' Compensation Programs (the Director), conceded that a material change in conditions was established, the Board vacated the administrative law judge's denial of benefits and remanded the case for the administrative law judge to determine whether claimant established the elements of entitlement pursuant to 20 C.F.R. Part 718 on the merits.

On remand, at issue herein, the administrative law judge found that total respiratory disability was not established, *see* 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find the pulmonary function study and medical opinion evidence sufficient to establish total respiratory disability. The Director responds, urging the Board to affirm the administrative law judge's Decision and Order denying benefits.

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 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 Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines*

Corp., 9 BLR 1-195 (1986).

The administrative law judge considered the most recently submitted evidence of record, which consisted of conflicting medical opinions and objective study results from Drs. Kraynak and Sahillioglu. Dr. Kraynak, a board-eligible physician in family osteopathic medicine, found that claimant was totally disabled due to coal workers' pneumoconiosis arising from his coal mine employment, Director's Exhibit 45; Claimant's Exhibit 9. Dr. Kraynak, who had treated claimant since February, 1997, *see* Claimant's Exhibit 9 at 5, based his opinion on examination results, the results of three pulmonary function studies and a review of the evidence of record. However, the results of pulmonary function studies administered by Dr. Kraynak in February, 1997, and June, 1998, were invalidated by Dr. Sahillioglu, a board-eligible physician in internal medicine and pulmonary diseases, *see* Director's Exhibits 39, 57; Claimant's Exhibit 5. Dr. Sahillioglu indicated that the pulmonary function studies were invalid due to less than optimal effort, cooperation and comprehension by claimant and because the studies were improperly performed. Specifically, Dr. Sahillioglu stated that there was no demonstration of claimant's inspiratory effort, there were inconsistent efforts in the FVC and MVV parameters and the restrictive defect indicated by the studies needed to be verified by a total lung capacity determination. Similarly, the result of a pulmonary function study administered by Dr. Kraynak in February, 1998, was invalidated by Dr. Ranavaya due to less than optimal effort, cooperation and comprehension by claimant and because the studies were improperly performed, *see* Director's Exhibits 44, 55. Dr. Ranavaya is a B-reader and board-certified medical examiner, as well as a board-certified physician in occupational and preventive medicine with NIOSH certification in spirometry, *see* Director's Exhibit 56. The administrative law judge found that Dr. Kraynak's pulmonary function study results had been invalidated by physicians with "better credentials," Decision and Order at 3.

Dr. Sahillioglu also provided an opinion in which he found that claimant did not have any clinically significant respiratory impairment that would prevent him from performing his last coal mine job, Director's Exhibits 50, 58. Dr. Sahillioglu based his opinion on examination, pulmonary function study, non-qualifying blood gas study and EKG results, *see* Director's Exhibits 22, 25, 53-54. Inasmuch as the administrative law judge found Dr. Sahillioglu's opinion, that claimant was not totally disabled, was better supported by the objective evidence of record, including the valid and non-qualifying pulmonary function study and blood gas study evidence, as well as EKG results, and in light of his "greater medical credentials," the administrative law judge found that Dr. Sahillioglu's opinion was "entitled to greater probative value" than Dr. Kraynak's opinion. Finally, the administrative

³ Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to the instant claim filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 23.

law judge found that the older, previously submitted evidence of record could not credibly contradict or undermine his finding regarding the most recently submitted evidence of record, since coal workers' pneumoconiosis is considered a progressive disease. *See Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *Klouser v. Hegins Mining Co.*, 6 BLR 1-110 (1983); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982); *see also Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Freeman United Coal Co. v. Benefits Review Board*, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990); *Zettler v. Director, OWCP*, 886 F.2d 831 (7th Cir. 1989).

Claimant contends that the administrative law judge rejected Dr. Kraynak's opinion without providing an appropriate rationale. Specifically, claimant contends that the administrative law judge improperly credited Dr. Sahillioglu's opinion, that the studies were invalid, because there was no demonstration of claimant's inspiratory effort indicated, although the applicable quality standards allow for inspiration to be taken from the open atmosphere. While the administrative law judge noted that the applicable quality standards allow for inspiration to be taken from the open atmosphere, the administrative law judge also noted that they require the test subject "to reach full inspiration before forced expiration," which the administrative law judge determined "is not judged merely by a subjective observation, but by an objective means," Decision and Order at 3.

Contrary to the administrative law judge's determination, the quality standards at Appendix B (2000), *see* 20 C.F.R. §718.101(b), do not require that a patient's inspiration be recorded on the tracings. Part 718, Appendix B (2)(ii)(2000) specifically states that the "patient shall be instructed to make a full inspiration, either from the spirometer or the open atmosphere, using a normal breathing pattern, and then blow into the apparatus," and that "the patient shall be observed for compliance," that the "expirations shall be checked visually" from the tracings, and that the "effort shall be judged unacceptable when" the patient has "not reached full inspiration preceding the forced expiration," *see* 20 C.F.R. Part 718, Appendix B (2)(ii)(A)(2000). Thus, the quality standards specifically provide that inspiration may be taken prior to even blowing into the apparatus or spirometer, which could measure the level of inspiration, and that a patient's inspiration effort will be judged based on the observations of the administrator of the pulmonary function study. In addition, Appendix B (1)(vii) (2000) states that "the instrument used shall provide a tracing... during the entire forced expiration," *see* 20 C.F.R. Part 718, Appendix B (1)(vii), but does not state that a tracing shall be provided during the inspiration.

⁴ The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that the quality standards at 20 C.F.R. §718.103 (2000), *see* 20 C.F.R. §718.101(b), are mandatory but where the pulmonary function studies do not strictly conform to the applicable standard, the administrative law judge may, nevertheless, consider the pulmonary function study if it is found to be in substantial compliance with the quality

However, the administrative law judge also noted that Drs. Sahillioglu and Ranavaya found the results of the pulmonary function studies administered by Dr. Kraynak invalid for reasons other than the fact that there was no demonstration of claimant's inspiratory effort indicated on the tracings, and claimant has not challenged those other reasons, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, contrary to claimant's contention that the administrative law judge rejected Dr. Kraynak's pulmonary function study results without providing an appropriate rationale, the administrative law judge properly gave greater weight to the opinions of Drs. Ranavaya and Sahillioglu in light of their superior qualifications. Thus, as the administrative law judge, within his discretion, provided a valid, alternative reason for his finding regarding the validity of the results of the pulmonary function studies administered by Dr. Kraynak, any error by the administrative law judge in also crediting Dr. Sahillioglu's opinion that the results were invalid because there was no demonstration of claimant's inspiratory effort indicated on the tracings 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).

Claimant contends, however, that the administrative law judge is not required to defer to the opinions of physicians in light of their superior qualifications. Specifically, claimant contends that the administrative law judge improperly discredited the opinion of Dr. Kraynak without considering that Dr. Kraynak was claimant's treating physician, that he personally administered the pulmonary function studies he relied on and had reviewed all of the evidence of record.

We find no error in the administrative law judge's weighing of the medical opinion evidence. While a treating physician's opinion merits consideration, an administrative law judge may nevertheless disregard a treating physician's opinion which the administrative law judge finds is not adequately reasoned, *see Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20, 2021 (3d Cir. 1997); *Schaaf v. Matthews*, 574 F.2d 160 (3d Cir. 1978); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In this case, the administrative law judge, within his discretion, gave greater weight to the opinion of Dr. Sahillioglu in light of his superior qualifications, *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and because the administrative law judge found that his opinion was better supported by the objective evidence, *see Wetzel, supra*. 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

standard, *see Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990).

(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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge if supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2), formerly 20 C.F.R. §718.204(c)(2000), *see Budash, supra; Fields, supra; Rafferty, supra; Mazgaj, supra; Shedlock, supra*, as supported by substantial evidence. Consequently, inasmuch as we affirm the administrative law judge's finding that claimant failed to establish total disability, a requisite element of entitlement, we affirm the administrative law judge's finding that entitlement under Part 718 is precluded, *see Trent, supra; Perry, supra*.

5 Inasmuch as the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2) is affirmed, we need not address the administrative law judge's assertion that the Director's concession that the existence of pneumoconiosis was established by the x-ray evidence of record pursuant to Section 718.202(a)(1) and, therefore, that a material change in conditions was established pursuant to Section 725.309(d)(2000), *see* 20 C.F.R. §725.2(c), is not in accord with the holding of the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997)("all types of relevant evidence must be weighed together" in determining whether claimant has met his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202), *see Trent, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge