BRB No. 99-0246 BLA

DUDLEY STEWART	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WAMPLER BROTHERS COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	*EN BANC*

Appeal of the Second Decision and Order On Remand and Order Denying Motion for Reconsideration of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass (Douglass Law Office), Harlan, Kentucky, for claimant.

Mark E. Solomons, Laura Metcoff Klaus and Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

Jill M. Otte and Timothy S. Williams (Henry L. Solano, 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.

Mary Lou Smith (Howe, Anderson & Steyer), Washington, D.C., for Association of Bituminous Contractors, Incorporated, as *amicus curiae*.

Before: HALL, Chief Administrative Appeals Judge, SMITH, BROWN, McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

SMITH, Administrative Appeals Judge:

Employer appeals the Second Decision and Order On Remand and Order Denying Motion for Reconsideration (95-BLA-0599) of Administrative Law Judge Daniel L. Leland 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). This case is before the Board for the third time. Pursuant to the Board's Order dated February 25, 2000, oral argument was held in Bristol, Virginia on April 25, 2000.

Originally, in a Decision and Order issued on February 14, 1996, the administrative law judge found eighteen years and ten months of coal mine employment established and determined that, inasmuch as the instant claim was a duplicate claim,[1] claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) in accordance with the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR

[1] Claimant originally filed a claim on March 15, 1973, which was ultimately referred to the Department of Labor for review, Director's Exhibit 35. In a Decision and Order issued on March 23, 1990, Administrative Law Judge Donald W. Mosser found over fifteen years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. §727.203. Judge Mosser found that invocation of the interim presumption was not established pursuant to 20 C.F.R. §727.203(a)(1)-(4). Judge Mosser further found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4), that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(4) and that entitlement was not established pursuant to 20 C.F.R. Part 410. Accordingly, benefits were denied. Subsequently, on July 3, 1990, Judge Mosser denied a motion for reconsideration filed by claimant. Claimant took no further action on this claim.

Claimant filed the instant, duplicate claim on August 13, 1993, Director's Exhibit 1.

2-10 (6th Cir. 1994). The administrative law judge found that the existence of pneumoconiosis was established by the newly submitted medical opinion evidence, *see* 20 C.F.R. §718.202(a)(4). Thus, the administrative law judge found a material change in conditions established pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.203(b) and total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

Employer appealed and the Board initially affirmed the administrative law judge's findings that pneumoconiosis arising out of coal mine employment was established pursuant to Section 718.203(b) and that total disability was not demonstrated pursuant to 20 C.F.R. §718.204(c)(1)-(3), as unchallenged on appeal. *Stewart v. Wampler Brothers Coal Co.*, BRB No. 96-0757 BLA (Feb. 13, 1997)(unpub.). The Board also affirmed the administrative law judge's finding that a material change in conditions was established by the newly submitted evidence pursuant to Section 725.309(d) in accordance with the standard enunciated by the court in *Ross*. In relevant part, the Board held that the administrative law judge properly determined that the newly submitted medical opinion evidence established a material change in conditions by demonstrating the existence of pneumoconiosis subsequent to the denial of the original claim. *See Stewart*, BRB No. 96-0757 BLA at 6. The Board, however, vacated the administrative law judge's finding that the existence of pneumoconiosis was established on the merits pursuant to Section 718.202, because the administrative law judge found the existence of pneumoconiosis established and had proceeded to consideration of the remaining elements of entitlement, without first weighing both the old and new evidence on the issue of pneumoconiosis. The Board also vacated the administrative law judge's findings pursuant to Sections 718.204(c)(4) and 718.204(b) and remanded the case for the administrative law judge to weigh all relevant evidence pursuant to Sections 718.202 and 718.204(b), (c).

In a Decision and Order On Remand issued on May 20, 1997, the administrative law judge found the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis established pursuant to Section 718.204(b), (c). Accordingly, benefits were awarded. Employer appealed and the Board initially rejected employer's contention that the Board erred in previously affirming the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d) in accordance with the court's standard in *Ross*. *Stewart v. Wampler Brothers Coal Co.*, BRB No. 97-1295 BLA (May 27, 1998)(unpub.). The Board affirmed the administrative law judge's findings, on the merits of entitlement, that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) and that total disability was established pursuant to Section 718.204(c). The Board, however, vacated the administrative law judge's finding pursuant to Section 718.204(b) and remanded the case for reconsideration thereunder.

In the Second Decision and Order On Remand, which is at issue herein, the administrative law judge found total disability due to pneumoconiosis established pursuant to Section 718.204(b). Accordingly, benefits were awarded. The administrative law judge also denied employer's subsequent motion for reconsideration.

On appeal, employer contends that the administrative law judge erred in finding total disability due to pneumoconiosis established pursuant to Section 718.204(b). Alternatively, employer contends that the Board erred in previously affirming the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d) in accordance with the court's standard enunciated in *Ross*. Claimant responds, urging that the award of benefits by the administrative law judge 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 contention that the Board previously erred in affirming the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d). Employer has filed a reply brief, reiterating its contentions. Both the Director and employer filed oral argument briefs in response to the Board's order. In addition, the Association of Bituminous Contractors, Inc., (ABC) filed a brief as *amicus curiae*.

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).

Initially, employer contends that the Board erred in previously affirming the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d) in accordance with the court's standard enunciated in *Ross*. In *Ross*, the court held that in order to determine whether a material change in conditions is established under 20 C.F.R. §725.309(d), 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 Ross*, 42 F.3d at 997-998, 19 BLR at 2-19. 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 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*.

In *Ross*, the administrative law judge found that the x-ray evidence submitted in the original claim failed to establish the existence of pneumoconiosis, but subsequently found a material change in conditions established in the duplicate claim based on newly submitted x-ray evidence demonstrating the existence of pneumoconiosis, *see Ross*, 42 F.3d at 997, 19

BLR at 2-16-17. In applying the one-element standard to the facts in *Ross*, however, the court noted that both the x-ray evidence that was submitted with claimant's original, "1979" claim and with his subsequent, "1985" duplicate claim consisted of positive and negative readings by B-readers and non-B-readers, *see Ross*, 42 F.3d at 999, 19 BLR at 2-21. Thus, because "[t]he ALJ never discusses how the later x-rays differ qualitatively from those submitted in 1985 [*sic*?]," the court held that "we are unable to discern on the record before us whether the ALJ merely disagreed with the previous characterization of the strength of the evidence or whether the miner indeed had shown the existence of a material change in his condition since the earlier denial," *id*. Consequently, the court vacated the administrative law judge's finding under Section 725.309(d) in *Ross* and remanded the case for reconsideration.

In light of the standard enunciated by the court in *Ross*, the Board held that an administrative law judge must analyze whether the new evidence submitted with a duplicate claim differs qualitatively from the evidence submitted with the previously denied claim in determining whether the newly submitted evidence establishes a material change in conditions under Section 725.309(d), *see Flynn v. Grundy Mining Co.*, 21 BLR 1-41 (1997). The Director contends, however, that the court's holding in *Ross* does not require the administrative law judge to compare the evidence in the previously denied claim with the evidence in the duplicate claim to determine whether a material change in conditions has been established under Section 725.309(d); the court simply required the administrative law judge to conduct a qualitative evaluation or weighing of all of the x-ray evidence submitted with the duplicate claim. In the Director's view, the nature of the evidence behind the prior denial is irrelevant to determining whether a material change in conditions was established in a subsequent, duplicate claim because the denial of the prior claim is final as a matter of law pursuant to Section 725.309, regardless of whether the character of the evidence submitted with the previously denied claim is similar to the newly submitted evidence.

Thus, the Director characterizes the court's statement in *Ross* that "[t]he ALJ never discusses how the later x-rays differ qualitatively from those submitted in 1985" as only an instruction for the administrative law judge to conduct a qualitative evaluation or weighing of all of the x-ray evidence submitted with the duplicate claim. Although the Director admits that the court could have meant to state "1979" in order to refer to those x-rays submitted with the previously denied claim when it wrote "1985," the Director contends that the only logical conclusion is that when the court referred to "later x-rays," it meant those x-rays developed and submitted after the x-rays submitted with the 1985 filing of the duplicate claim in *Ross*. In support for his position that the court was instructing the administrative law judge to conduct a qualitative evaluation or weighing of only the "later" or newly submitted x-ray evidence, the Director relies on the court's holding in *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993)[2] and unpublished decisions where the court

[2] In *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), the

affirmed findings that a material change in conditions was not established in duplicate claims after only the new evidence submitted with the duplicate claim was weighed by the administrative law judge in accordance with the court's holding in *Woodward*.

The Director has selectively analyzed the court's holding in *Ross* in asserting that the court's reference to "later x-rays" necessarily refers to those x-rays developed and submitted after the x-rays submitted with the 1985 filing of the duplicate claim. A complete review of the court's holding in *Ross* does not support the Director's assertion that the court was requiring the administrative law judge to conduct a qualitative evaluation or weighing of only the x-ray evidence submitted with the duplicate claim.

The court's statement in *Ross* that the administrative law judge never discussed "how the later x-rays differ qualitatively from those submitted in 1985"is clarified when read in conjunction with the court's subsequent statement that it was unable to discern whether the administrative law judge "merely disagreed with the *previous characterization* of the strength of the evidence" or whether the claimant "had shown the existence of a material change in his condition since the earlier denial," *see Ross*, 42 F.3d at 999, 19 BLR at 2-21 (emphasis added). The court specifically noted that the earlier x-ray evidence submitted with the original claim had been previously characterized, but that the administrative law judge had

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court held that an administrative law judge had irrationally applied the "later evidence" rule in resolving a conflict in x-ray evidence by crediting later negative x-ray readings over earlier positive x-ray readings without having weighed the results of the "earlier against the later x-rays," *see Woodward*, 991 F.2d at 320, 17 BLR at 2-85. The court noted that the administrative law judge's mechanical crediting of the later negative x-ray readings was inconsistent with the rationale underlying the "later evidence" rule, *i.e.*, that pneumoconiosis is a progressive and degenerative disease, as the later x-ray readings did not illustrate the expected deterioration in condition, but rather improvement, and, therefore, the administrative law judge did not reconcile the earlier positive x-ray readings with the later negative x-ray readings, *id.*

not weighed or characterized the later x-ray evidence submitted with the duplicate claim in finding a material change in conditions established, *see Ross*, 42 F.3d at 997, 19 BLR at 2-16-17. Consequently, even if the later x-ray evidence was sufficient to demonstrate the existence of pneumoconiosis, the court was unable to discern whether the administrative law judge had determined that the later x-ray evidence differed qualitatively from the earlier x-ray evidence or whether the later evidence did not differ qualitatively from, but was merely cumulative of, or similar to, the earlier x-ray evidence. Thus, a determination as to whether the newly submitted evidence establishes a material change in conditions under Section 725.309(d) pursuant to *Ross* requires the administrative law judge to analyze whether new evidence submitted with a duplicate claim differs qualitatively from evidence submitted with the previously denied claim, *see Flynn*, *supra*. If the trier-of-fact finds this qualitative difference, it follows that claimant's condition has worsened in accordance with the court's requirement that claimant show there has been a "worsening" in his physical condition. Furthermore, this interpretation of *Ross*, not the Director's, is shared by both the Eighth and Fourth Circuits, *see Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 454 n. 7, 21 BLR 2-50, 2-68 n. 7 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1385 (1998); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1363 n. 11, 20 BLR 2-227, 2-237 n. 11 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

In addition, contrary to the Director's characterization, the court's holding in *Woodward* supports the court's holding in *Ross* that the administrative law judge must analyze whether the new evidence submitted with a duplicate claim differs qualitatively from the evidence submitted with the previously denied claim, *see Flynn*, *supra*. The court emphasized in *Woodward* that earlier x-ray results must be reconciled with later x-ray results in determining whether the existence of pneumoconiosis is established, *see Woodward*, 991 F.2d at 320, 17 BLR at 2-85. Moreover, the Director's reliance on unpublished decisions of the court as support for his position that *Ross* requires the administrative law judge to conduct a qualitative evaluation or weighing of only the "later" or newly submitted x-ray evidence is misplaced. In all of the unpublished court decisions cited by the Director, the court affirmed findings that the new evidence submitted with the duplicate claim did not establish the element of entitlement that was the basis of the prior denial and, therefore, did not establish a material change in conditions. Thus, the circumstances in those cases were different from *Ross*, where the new evidence submitted with the duplicate claim was found to establish a material change in conditions, but was potentially only cumulative of the evidence that had been considered in the previously denied claim. Consequently, because the new evidence submitted with the duplicate claims in the unpublished court decisions relied on by the Director did not establish a material change in conditions, the court never reached the second part of the material change test provided by the court in *Ross* whereby an administrative law judge checks the validity of his material change determination by comparing the new evidence in the duplicate claim with the evidence in the previously

denied claim.[3]

Employer contends that a one-element standard under Section 725.309(d) creates an improper burden shifting presumption in violation of Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), 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), as well as the United States Supreme Court's holding in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and the Sixth Circuit Court's holding in *Glen Coal Co. v. Seals*, 147 F.3d 502, 21 BLR 2-398 (6th Cir. 1998)(Boggs, J., concurring; Moore, J., concurring and dissenting), *reversing and remanding Seals v. Glen Coal Co.*, 19 BLR 1-82 (1995)(*en banc*)(Brown, J., concurring). Employer contends that under a one-element standard, once a claimant proves, with new evidence in a duplicate claim, an element of entitlement that was the basis of the prior denial, the claimant benefits from an irrebuttable presumption that a material change in conditions has been established and employer is unfairly precluded from proving that the newly submitted evidence merely establishes that the original denial was wrongly decided and not a material change in conditions since the prior denial.

Contrary to employer's contention, the check provided by the court in *Ross* to verify

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[3] The Director contends that once new evidence demonstrates a material change in conditions by establishing an element of entitlement which had not been previously found, that element of entitlement is established and need not be considered again when considering all of the evidence on entitlement. Old and new evidence should only be weighed together, the Director asserts, in determining whether other elements of entitlement have been established, *i.e.*, those which were not the basis for finding a material change in conditions established. Because the administrative law judge's finding that the existence of pneumoconiosis was established on the merits pursuant to Section 718.202(a)(4) has been previously affirmed, however, *see Stewart*, BRB No. 97-1295 BLA, we need not address this argument.

the correctness of the material change determination based upon the one-element test precludes application of a presumption that a material change in conditions has been established by the newly submitted evidence, *see Ross*, *supra*. Thus, the one-element standard enunciated by the court in *Ross* did not create an irrebuttable presumption that a claimant, who has established an element of entitlement which was the basis of a prior denial, has also proven a material change in conditions. Moreover, the burden of proof with respect to establishing a material change in conditions pursuant to the one-element standard in *Ross* continues to be on claimant, *see also Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-20 (1999). While the one-element standard enunciated in *Ross* imposes an increased burden on claimant to prove a material change in conditions, it does not change employer's evidentiary burden or the type of evidence relevant to the issue, *see Troup*, 22 BLR at 1-20, 1-21.

Alternatively, employer contends that all judicial precedents interpreting the standard for establishing a material change in conditions pursuant Section 725.309(d) are of questionable force and effect because Section 725.309(d) was not properly promulgated and, therefore, is an invalid regulation. Employer contends that Section 725.309(d) was issued and published without providing for any prior notice and comment regarding whether pneumoconiosis is a latent and progressive disease, which is the underlying basis for permitting the filing of duplicate claims after the denial of a prior claim. Moreover, employer contends that Section 725.309 does not contain any language resembling the one-element standard adopted by the court in *Ross*. In light of the opportunity for notice and comment provided by the publication of the Department of Labor's new proposed Section 725.309 regulations, however, employer contends that the current Section 725.309 should be interpreted in accordance with the record of comments submitted in response to the new proposed Section 725.309 regulation. Employer contends that the uncontradicted comments submitted in response to the new proposed Section 725.309 regulations do not support the underlying basis for duplicate claims and the one-element standard, *i.e.*, that pneumoconiosis is a latent and progressive disease. Consequently, employer contends that duplicate claims filed under Section 725.309 are invalid. Employer also contends that whether pneumoconiosis is a progressive disease is a subject for proof and, therefore, the administrative law judge erred in deciding this case before providing employer an opportunity to submit evidence regarding whether pneumoconiosis is a progressive disease.

Contrary to employer's contentions, the comments submitted in response to the new proposed Section 725.309 regulations are not unanimously against the position that pneumoconiosis is a latent and progressive disease, *see* 62 Fed. Reg. 3344 (Jan. 22, 1997); *see also Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314-315, 20 BLR 2-76, 2-88-91 (3d Cir. 1995). Moreover, as the Board previously held, the court has accepted the Department of Labor's view that pneumoconiosis is progressive, *see Ross*,42 F.3d at 997; 19 BLR at 2-17; *Woodward*, 991 F.2d at 319-20, 17 BLR at 2-84-85, and the Board previously

held that employer did not submit evidence into the record before the administrative law judge to support its contention that pneumoconiosis is not progressive, *Stewart*, BRB No. 97-1295 BLA at 4-5. *See also Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 21 BLR 2-391 (7th Cir. 1998); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1010, 21 BLR 2-113, 2-129 (7th Cir. 1997)(*en banc rehearing*), *modifying* 94 F.3d 369 (7th Cir. 1996), *and affirming* 19 BLR 1-45 (1995). Consequently, our previous holding stands as the law of the case on this issue, and no exception to that doctrine has been demonstrated by employer herein, *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).[4] Moreover, as noted *supra*, the one-element standard enunciated in *Ross* does not change employer's evidentiary burden or the type of evidence relevant to the issue and, therefore, does not compel the reopening of the record, *see Troup*, 22 BLR at 1-20, 1-21. Thus, we reject employer's contentions.[5]

Turning to the facts in this case, we reject employer's contention that the Board previously erred in affirming the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d) in accordance with the court's standard enunciated in *Ross*. The Board previously affirmed the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) on the merits of entitlement. *See Stewart*, BRB No. 97-1295 BLA. Pursuant to Section 718.202(a)(4), the administrative law judge weighed together both the new evidence submitted with the duplicate claim and the evidence submitted with the prior claim and properly found that the existence of pneumoconiosis, the element of entitlement that was the basis of the prior denial, was established. Moreover, the Board previously held that the newly submitted evidence credited by the administrative law judge under Sections 718.202(a)(4) and 725.309(d) was not merely cumulative of the previously considered evidence, *see Stewart*, BRB No. 97-1295 BLA at 4, n. 1. Consequently, the administrative law judge's findings under Sections 718.202(a)(4) and 725.309(d) are sufficient to satisfy the

[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, such that 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*; *Williams*, *supra*.

[5] Employer again raises the same contentions that it advanced in its previous appeals. Those contentions were already addressed by the Board in its prior Decisions and Orders regarding the administrative law judge's findings on the merits under Sections 718.202(a)(4) and 718.204(c). *See Stewart*, BRB No. 97-1295 BLA. Inasmuch as our previous holdings stand as the 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 in this regard.

standard for establishing a material change in conditions under Section 725.309(d) enunciated in *Ross*, *see also Flynn*, *supra*.

Finally, employer contends that the administrative law judge erred in finding total disability due to pneumoconiosis established pursuant to Section 718.204(b). Pursuant to Section 718.204(b), claimant must prove that his totally disabling respiratory impairment is due "at least in part" to his pneumoconiosis, *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge gave most weight to Dr. Sundaram's opinion that claimant was totally disabled due to pneumoconiosis, Director's Exhibit 28; Claimant's Exhibit 4, as he is claimant's treating physician, performed the most recent examination of claimant, and had evaluated other potential causative factors for claimant's pulmonary condition in making his diagnosis, *i.e.*, noting that claimant was a non-smoker and had a negative cardiogram, Second Decision and Order On Remand at 1-2. The administrative law judge also found Dr. Sundaram's opinion supported by the opinions of Drs. Judge and Nash, Director's Exhibit 35, whom the administrative law judge noted had found that claimant's pulmonary limitations were caused by his coal dust exposure.

The administrative law judge gave less weight to the opinions of Dr. Wicker, Director's Exhibit 12, and Dr. Mettu, Director's Exhibit 35, who did not directly address the issue of disability causation, because they found no evidence of pneumoconiosis or total respiratory or pulmonary disability, which the administrative law judge found was established. The administrative law judge also gave less weight to the opinion of Dr. Dahhan, who reviewed the evidence, Employer's Exhibit 1, because he also found no evidence of pneumoconiosis or total respiratory or pulmonary disability. In addition, although Dr. Dahhan opined that even if pulmonary impairment were present, it would not be due to pneumoconiosis, the administrative law judge gave Dr. Dahhan's opinion less weight because he did not offer any explanation as to what could be the cause of claimant's pulmonary impairment. Finally, the administrative law judge gave less weight to the opinion of Dr. Williams, who found evidence of pneumoconiosis, because he found no evidence of total respiratory or pulmonary disability and did not offer an opinion as to the etiology of claimant's impairment.

Employer contends that the administrative law judge erred by mechanically according greater weight to Dr. Sundaram's opinion as claimant's treating physician. As the Board held previously, however, regarding the administrative law judge's findings under Section 718.202(a)(4), *see Stewart*, BRB No. 97-1295 BLA at 5; *Stewart*, BRB No. 96-0757 BLA at 4; *see also Brinkley*, *supra*; *Williams*, *supra*, the administrative law judge's reliance on Dr. Sundaram's opinion as claimant's treating physician was reasonable. The record indicates that Dr. Sundaram, who is board-certified in internal medicine, has been treating claimant for shortness of breath since June, 1994, and sees claimant every two to three months, Claimant's Exhibit 4 at 7. Dr. Sundaram explained how his diagnosis was based on his examination of claimant, claimant's coal mine employment history, symptoms, chest x-ray, non-smoking history and objective study results. Under these circumstances, the administrative law judge permissibly accorded greater weight to Dr. Sundaram's opinion as

claimant's treating physician, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Berta v. Peabody Coal Co.*, 16 BLR 1-69 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Moreover, we reject employer's contention that the administrative law judge should have discredited the opinion of Dr. Sundaram because he relied, in part, on a positive x-ray when the administrative law judge found the x-ray evidence negative. As the Board previously held, *see Stewart*, BRB No. 97-1295 BLA at 5; *see also Brinkley, supra*; *Williams, supra*, an administrative law judge may not discredit a medical opinion merely because it relies, in part, on a positive x-ray that conflicts with the weight of the x-ray evidence, *see Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *see also Taylor v. Director, OWCP*, 9 BLR 1-22 (1986).

Employer also contends that the administrative law judge erred in discrediting Dr. Dahhan's opinion because he did not offer any explanation as to what could be the cause of claimant's pulmonary impairment, contending that there is no requirement for a physician to state the cause of a disabling impairment he did not find. Similarly, employer contends that the administrative law judge erred in rejecting the opinions of Drs. Mettu and Wicker because they did not diagnose pneumoconiosis, as their findings that pneumoconiosis was not established by x-ray evidence do not conflict with the administrative law judge's finding.

However, as the Board previously noted, *see Stewart*, BRB No. 96-0757 BLA at 8, n. 7, Drs. Mettu and Wicker do not specifically address the issue of disability causation. Moreover, the administrative law judge gave their opinions, as well as Dr. Dahhan's opinion, less weight because they found no evidence of total respiratory or pulmonary disability, which the administrative law judge found was established, *see generally Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Thus, inasmuch as the administrative law judge, within his discretion, provided other valid, alternative reasons for giving less weight to the opinions of Drs. Mettu, Wicker and Dahhan, any potential error by the administrative law judge in giving their opinions less weight under Section 718.204(b) because they did not diagnose pneumoconiosis 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 addition, while the administrative law judge gave greater weight to Dr. Sundaram's opinion because he evaluated other potential causative factors for claimant's pulmonary condition in making his diagnosis, including the fact that claimant was a non-smoker and had a negative cardiogram, he gave less weight to Dr. Dahhan's opinion because he did not adequately explain his opinion regarding the causative factors for claimant's pulmonary condition. 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

assess the evidence of record and draw his 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 v. Director, OWCP*, 9 BLR 1-36 (1986). Thus, as it is within the administrative law judge's discretion to determine whether an opinion is 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 when his findings are 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), we reject employer's contentions. Consequently, we affirm the administrative law judge's finding that total disability due to pneumoconiosis was established pursuant to Section 718.204(b) as supported by substantial evidence, *see Adams, supra*.

Accordingly, the Second Decision and Order On Remand and Order Denying Motion for Reconsideration of the administrative law judge awarding benefits are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

We concur:

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

NELSON, Acting Administrative Appeals Judge, concurring in part and dissenting in part:

I fully concur in the decision of my colleagues to affirm the administrative law judge's award of benefits. However, while I would affirm the administrative law judge's finding that claimant has established a material change in conditions, I do not join with my colleagues in their interpretation of the United States Court of Appeals for the Sixth Circuit's decision in

Sharondale Corp. v. Ross, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). More specifically, I would hold that in *Ross*, the court adopted the Director's interpretation of the standard by which to establish a material change in conditions pursuant to 20 C.F.R. §725.309.

In *Ross*, the Director argued that in order to assess whether a material change in conditions is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change in conditions.[6] *See Ross*, 42 F.3d at 997-998, 19 BLR at 2-18. The court reviewed the Director's interpretation and ultimately found it to be reasonable in light of the purpose of the statute and the language included in Section 725.309(d). *See Ross*, 42 F.3d at 998, 19 BLR 2-20.

The court, however, did not end its discussion upon finding the Director's interpretation to be reasonable. Rather, the court continued its discussion in *Ross* with the observation that the administrative law judge:

> never discusses how the later x-rays differ qualitatively from those submitted in 1985. Thus, we are unable to discern on the record before us whether the ALJ merely disagreed with the previous characterization of the strength of the evidence or whether Ross indeed has shown the existence of a material change in his condition since the earlier denial.

See Ross, 42 F.3d at 999, 19 BLR at 2-21. It is this caveat which is the cause of the instant controversy.

On appeal, employer contends that in *Ross* the court did not fully endorse the Director's one-element standard, but rather established a standard whereby there must be an affirmative determination that the new evidence differs qualitatively from the evidence that

[6] Once claimant establishes a material change in conditions, the administrative law judge must then consider whether all of the evidence of record, including that submitted with the previous claim, supports a finding of entitlement to benefits. *See Ross*, 42 F.3d at 997-998, 19 BLR at 2-18, 2-19.

was insufficient to support an award of benefits in the earlier claim. The Director, on the other hand, argues that the court in *Ross* fully adopted his one-element standard.

My colleagues reject the Director's assertion that the court in *Ross* fully endorsed his one-element standard. Rather, my colleagues hold that in determining whether a material change in conditions has been established, the fact finder must do more than simply consider the new evidence, both favorable and unfavorable. According to my colleagues, the fact-finder must also analyze whether the new evidence submitted with a duplicate claim differs qualitatively from the evidence submitted with the previously denied claim.

In support of their interpretation, my colleagues cite to the corresponding passage in the *Ross* decision. Moreover, as my colleagues note, two circuits have specifically indicated their belief that in *Ross*, the court did not simply embrace the Director's interpretation. *See Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1385 (1998), and *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir.1996), *rev'g en banc* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Nevertheless, after careful review of the court's decision, I believe that in *Ross*, the court adopted the Director's interpretation of the standard for establishing a material change in conditions.

In addressing the proper standard by which to measure the existence of a material change in conditions, the court in *Ross* recognized that there were three possible constructions before it: the construction relied upon by the Board; the construction enunciated by the United States Court of Appeals for the Seventh Circuit in *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 556 (7th Cir. 1991); and the construction advocated by the Department of Labor. After discussing each of these three possible constructions, the court observed that since Congress failed to include a definition of "material change" in the Act, the Secretary of Labor's interpretation of the provisions of the Black Lung Act is entitled to deference. However, citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845, 104 S.Ct. 2778, 2783, 81 L.Ed.2d 694 (1984), the court held that its deference is conditioned on the reasonableness of the agency interpretation, and thus, it may not substitute its own construction of the regulation for the Director's unless the Director's is unreasonable. The court ultimately found that the Director's interpretation took into account the statutory distinction between a request for modification and a request for benefits based on a material change in conditions, and thus found the Director's interpretation to be reasonable in light of the purpose of the statute and the language included in Section 725.309(d). *See Ross*, 42 F.3d at 998, 19 BLR at 2-20.

Because the court in *Ross* found the Director's interpretation to be reasonable, I cannot find a basis for concluding that it nevertheless substituted its interpretation for that of the Director. This is especially true since the court indicated that the Director's interpretation

was entitled to deference and that the court should not substitute its own construction of the regulation for the Director's unless the Director's interpretation was found to be unreasonable.

In addition, attached to the Director's oral argument brief are a number of cases, including four unpublished cases by the court. In none of the four unpublished cases does the court articulate the standard now advanced by my colleagues, and in two of the cases, the court cites to a standard identical to the Director's interpretation when it articulates the standard for a material change in conditions.[7]

Nevertheless, while I would hold that the court, in *Ross*, adopted the Director's interpretation for establishing a material change in conditions, I still believe that the court's reference to "qualitative" differences has significance. However, rather than attempting to modify or revise the Director's interpretation, I believe the court was simply reminding us that a material change in conditions is not established simply on the basis of new evidence. For example, a "new" reading of an x-ray submitted with the previous claim does not establish a material change in conditions. Likewise, a "new" medical report based on an examination and/or testing conducted prior to the previous denial does not establish a material change. Rather, a material change in conditions is established by new evidence which shows that the miner's condition has worsened since the earlier denial of benefits. This is not a revision of the Director's interpretation, nor a departure from it. This is the underlying basis for any finding of a material change in conditions. Moreover, rendering such a determination does not require a specific weighing of the "old" evidence against the

[7] In *Rhodes v. Karst Robbins Machine Shop*, No. 97-3903 (6th Cir., March 12, 1998) (unpub.), citing *Ross*, the court states that "[t]o assess whether a 'material change' is established, the ALJ must consider all the new medical evidence obtained after the previous denial and determine whether the miner has proven at least one of the elements previously adjudicated against him." Similarly, in *Roop v. C & A Trucking*, No. 95-3544 (6th Cir., Oct. 12, 1995)(unpub.), citing to *Ross*, the court states, "[t]he ALJ was required only to consider the 'new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him."

"new." Rather, as the Director contends, this finding can be made based upon a qualitative evaluation or weighing of all of the new evidence submitted with the duplicate claim.

Consequently, in this case, I would hold that the court in *Ross* adopted the Director's interpretation of the standard for establishing a material change in conditions. Applying this standard, I would affirm the administrative law judge's finding that claimant established a material change in conditions.[8]

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

I concur.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[8] In his oral argument brief, the Director contends that the last paragraph of the *Ross* decision has been misconstrued and applied in a fashion not in accord with the court's intent and not consistent with the language and purpose of the duplicate claims regulation. At oral argument, however, the Director could not cite to any case where he had sought to have the court address this paragraph.

To be clear, while I agree that in *Ross*, the court adopted the Director's one-element standard, I do not join with the Director in his construction of this paragraph.

Black Lung Deskbook - Part III. F. 2. - Merger of Claims/Duplicate Claims

CCO Updates - Part II. E. 2. Merger of Claims/Duplicate Claims
b. Material Change of Conditions

Stewart v. Wampler Brothers Coal Co., 22 BLR 1- , BRB No. 99-0246 BLA (2000).

The Board held that in determining whether the newly submitted evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) in accordance with the standard enunciated by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the administrative law judge must determine:

> 1) whether the newly submitted evidence demonstrates at least one of the elements of entitlement that was the basis of the prior denial, and,
> 2) if the administrative law judge determines that it does, 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.

If the trier-of-fact finds this qualitative difference, it follows that claimant's condition has worsened in accordance with the Court's requirement that claimant show there has been a "worsening" in his physical condition. ***Stewart v. Wampler Brothers Coal Co.***, 22 BLR 1- (2000).