BRB Nos. 04-0690 BLA
and 04-0690 BLA-A

JOHN PAUL SKEENS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WINDSOR COAL COMPANY	)	DATE ISSUED: 04/20/2005
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John Paul Skeens, Bridgeport, Ohio, *pro se*.

Ashley M. Harman (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals, and employer cross-appeals, the Decision and Order (2003-BLA-5810) of Administrative Law Judge Michael P. Lesniak 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). The administrative law judge found at least thirty-seven years of coal mine employment and that employer stipulated that it was the proper responsible operator. Decision and Order at 10-11; Director's Exhibits 1, 4, 27. Based on the date of filing, the administrative law judge

adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3. After determining that the instant claim was a subsequent claim,[1] the administrative law judge noted the proper standard and found that the newly submitted evidence of record was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). Decision and Order at 12-14. The administrative law judge therefore concluded that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 15. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to find the evidence sufficient to establish total disability. Employer responds, urging affirmance of the denial of benefits as supported by substantial evidence, and cross-appeals, asserting that the administrative law judge erred in his weighing of the medical opinions of Drs. Altmeyer and Lenkey. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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'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

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[1] Claimant filed his initial claim for benefits on April 26, 1991, which was denied by Administrative Law Judge Thomas M. Burke on February 28, 1994 as claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. This denial was affirmed by the Benefits Review Board on March 22, 1995. Director's Exhibit 1. Claimant filed a second application for benefits on July 8, 1996, which was denied by Administrative Law Judge George P. Morin on February 12, 1999 because claimant failed to establish total disability and a material change in conditions. Director's Exhibit 1. Claimant took no further action until he filed the instant claim on April 26, 2002, in which the district director denied benefits on February 24, 2003. Director's Exhibits 3, 21. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 23.

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*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2),(3); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).[2]

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. Considering the newly submitted evidence, the administrative law judge properly found that claimant failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *Rutter*, 86 F.3d 1358, 20 BLR 2-227; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 11-15. The administrative law judge correctly noted that the prior claim for benefits was denied because claimant did not establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1; Decision and Order at 3, 11-12.

In considering the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), the administrative law judge properly determined that the presumption at 20 C.F.R. §718.304 is not applicable in this case as the record contains no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.204(b)(1); Decision and Order at 12. The administrative law judge further correctly found that all of the newly submitted

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[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in the State of West Virginia. Director's Exhibits 1, 4; *Kopp v. Director, OWCP* 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

pulmonary function and blood gas studies of record were non-qualifying.[3] *See* 20 C.F.R. §718.204(b)(2)(i), (ii); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Director's Exhibits 7, 8; Employer's Exhibit 4; Decision and Order at 6, 12. Although not specifically discussed by the administrative law judge, total disability can not be established pursuant to Section 718.204(b)(2)(iii) as the record contains no evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989).

With respect to Section 718.204(b)(2)(iv), claimant and employer contend that the administrative law judge erred in his method of weighing the medical opinion evidence to determine the existence of a totally disabling respiratory or pulmonary impairment. These contentions constitute a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See 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).

In determining if the newly submitted evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge properly noted the entirety of the medical opinion evidence of record and rationally considered the quality of the evidence in determining whether the opinions of record were supported by the underlying documentation and adequately explained. *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara*, 7 BLR 1-167; Decision and Order at 13-15. The administrative law judge noted that of the five newly submitted conflicting medical opinions, Dr. Wayt, claimant's treating physician, did not demonstrate possession of exceptional qualifications in diagnosing pulmonary disability, while Drs. Saludes, Rosenberg, Lenkey, and Altmeyer were all highly qualified to render an opinion in this matter.[4] Decision and Order at 13; Director's Exhibit 6;

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[3] A "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).

[4] The record indicates that Drs. Saludes and Altmeyer are board-certified in internal and pulmonary medicine. Employer's Exhibits 4, 7, 13. Dr. Rosenberg is board-certified in internal medicine, pulmonary disease, and occupational medicine. Employer's Exhibits 8, 12. Dr. Lenkey is board-certified in internal medicine, pulmonary disease, and sleep medicine. Claimant's Exhibit 6. The credentials of Dr. Wayt are not in the record, although his letterhead indicates that his practice is in family medicine. Claimant's Exhibit 5.

Employer's Exhibits 4, 7, 8, 12, 13; Claimant's Exhibits 5, 6. The administrative law judge concluded that at best the better reasoned medical opinion evidence was in equipoise and therefore insufficient to meet claimant's burden of proof. Decision and Order at 14.

The administrative law judge, within his discretion as fact-finder, rationally determined that the medical opinion evidence of record was insufficient to establish the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), as the conflicting medical opinions by physicians with similar qualifications were in equipoise. Decision and Order at 13-14; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Worhach v. Director,* OWCP, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kuchwara*, 7 BLR 1-167.

In considering the medical opinion evidence of record, the administrative law judge rationally concluded that the opinion of Dr. Wayt, that claimant is disabled from performing his last coal mine employment due to his breathing problems which are the result of coal workers' pneumoconiosis, was "conclusory" and lacked clear documentation and reasoning. Decision and Order at 13; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR 1-149; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens*, 8 BLR 1-16; Claimant's Exhibit 5. Contrary to claimant's assertion, although Dr. Wayt is claimant's treating physician, the administrative law judge was not required to accord determinative weight to his opinion solely on this basis. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Tedesco v. Director,* OWCP, 18 BLR 1-103 (1994); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 13; Claimant's Exhibit 5. Although an administrative law judge may give a treating physician's opinion controlling weight, the weight that is to be given to the treating physician must also be based on the credibility of the physician's opinion in light of its reasoning and documentation. 20 C.F.R. §718.104(d)(5); *see Sparks*, 213 F.3d 186, 22 BLR 2-251; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Collins*, 21 BLR 1-181; *Clark*, 12 BLR 1-149. In the instant case, the administrative law judge provided valid reasons for finding Dr. Wayt's opinion entitled to little weight. *See Sparks*, 213 F.3d 186, 22 BLR 2-251; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Tedesco*, 18 BLR 1-103; *Grizzle*, 994 F.2d 1093, 17 BLR 2-123; *Lafferty*, 12 BLR 1-190; *Lucostic*, 8 BLR 1-46; Decision and Order at 13; Claimant's Exhibit 5.

The administrative law judge's analysis of Dr. Lenkey's opinion that claimant is totally disabled likewise comports with 20 C.F.R. §718.104(d). The administrative law judge

noted Dr. Lenkey's position as claimant's pulmonary treating doctor, Decision and Order at 4, 8, but permissibly found that Dr. Lenkey's opinion, while "reasoned and sufficiently documented to be given more weight," nevertheless lacked "testimony from Dr. Lenkey to explain and support his conclusions [that] would have been helpful to me in my analysis." Decision and Order at 14; *see* 20 C.F.R. §718.104(d)(5); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335.

The administrative law judge permissibly concluded that the opinion of Dr. Saludes, that claimant is not disabled from his last coal mine job from a pulmonary standpoint, but has a ten percent impairment due to dust disease, was entitled to less weight because Dr. Saludes did not explain how the pulmonary function study value he cited supported his impairment rating. *Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Fagg*, 12 BLR 1-77; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic*, 8 BLR 1-46; *Hutchens*, 8 BLR 1-16; Decision and Order at 13; Director's Exhibit 6; Employer's Exhibit 7. Additionally, the administrative law judge rationally concluded that the opinion of Dr. Altmeyer, that from a pulmonary standpoint claimant has sufficient pulmonary function to perform his job in the coal mine or jobs requiring a similar degree of exertion, was entitled to less weight because the physician's report contained discrepancies which indicated that Dr. Altmeyer did not have entirely accurate information before him when preparing his medical report. *See Sparks*, 213 F.3d 186, 22 BLR 2-251; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Collins*, 21 BLR 1-181; *Clark*, 12 BLR 1-149; *Hutchens*, 8 BLR 1-16; Decision and Order at 13-14; Employer's Exhibits 4, 13. Further, contrary to employer's contention, the administrative law judge permissibly concluded that the opinion of Dr. Lenkey was sufficiently reasoned and documented. *See Collins*, 21 BLR 1-181; *Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields*, 10 BLR 1-19; *Perry*, 9 BLR 1-1; *Lucostic*, 8 BLR 1-46; *Kuchwara*, 7 BLR 1-167; Decision and Order at 14; Claimant's Exhibit 6. Contrary to employer's assertions, the administrative law judge acted within his discretion in considering the reliability of the opinions of Drs. Altmeyer and Lenkey as it is within the administrative law judge's scope of authority as fact-finder to assess the credibility of the evidence of record. *See Collins*, 21 BLR 1-181; *Trumbo*, 17 BLR 1-85; *Mabe*, 9 BLR 1-67.

Moreover, the administrative law judge rationally concluded that the opinion of Dr. Rosenberg, that from a pulmonary standpoint claimant could perform his last coal mine job or similar arduous types of labor, was entitled to a "greater weight" because the physician offered "more satisfactory reasoning" that was supported by the objective testing. Decision and Order at 13; s*ee Collins*, 21 BLR 1-181; *Trumbo*, 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Fagg*, 12 BLR 1-77; *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Kuchwara*, 7 BLR 1-167; Employer's Exhibits 8, 12. Claimant's contention that Dr. Rosenberg's opinion should be rejected because the physician demonstrated his bias in favor

of employer in this case, is without merit. Claimant's allegation of bias is not supported by the evidence of record as Dr. Rosenberg reviewed extensive medical records including hospital and clinical records as well as a significant portion of claimant's testing results from the past eighteen years in determining whether claimant was totally disabled. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Zamora v. C.F.&I. Steel Corp.*, 7 BLR 1-568 (1984); Employer's Exhibits 8, 12.

Because the administrative law judge's findings are supported by substantial evidence and are in accordance with law, we affirm the administrative law judge's credibility determinations with respect to the newly submitted medical opinion evidence, and his conclusion that "no objective testing supports a finding of disability and the better reasoned medical reports are, at best, in equipoise on the issue." Decision and Order at 14; *Ondecko,* 512 U.S. 267, 18 BLR 2A-1.

Furthermore, in determining whether total disability was established, the administrative law judge noted the existence of contrary probative evidence in the record and permissibly concluded that this evidence was sufficient to outweigh the evidence supportive of a total disability finding. *See Fields*, 10 BLR 1-19; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); Decision and Order at 14. Consequently, inasmuch as the administrative law judge permissibly found that the newly submitted objective study evidence and the medical opinions of record did not establish total disability by a preponderance of the evidence upon weighing all of the relevant evidence, we affirm the administrative law judge's finding that the weight of the newly submitted evidence of record is insufficient to support a finding of total disability. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999); *Fields*, 10 BLR 1-19; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock*, 9 BLR 1-195; *Gee*, 9 BLR 1-4.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish that claimant is totally disabled by a respiratory or pulmonary impairment, claimant has not met his burden of proof on all the elements of entitlement. *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. 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* 12 BLR 1-149; *Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Additionally, total disability can not be established solely on the lay testimony of record in a living miner's case and therefore, in the

instant case, it could not satisfy claimant's burden of proof on this issue. *See* 20 C.F.R. §718.204(d)(5); *Madden v. Gopher Mining Co.*, 21 BLR 1-122 (1999); *Salyers v. Director, OWCP*, 12 BLR 1-193 (1989); *Trent*, 11 BLR 1-26; *Fields*, 10 BLR 1-19; *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985); *Centak v. Director, OWCP*, 6 BLR 1-1072 (1984). Because the administrative law judge's finding that the newly submitted evidence does not establish total disability pursuant to Section 718.204(b) is supported by substantial evidence and is in accordance with law, claimant has failed to establish any element of entitlement previously adjudicated against him. *See* 20 C.F.R. §725.309(d); *Rutter*, 86 F.3d 1358, 20 BLR 2-227; *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1. Consequently, we affirm the denial of benefits. *See Rutter*, 86 F.3d 1358, 20 BLR 2-227.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge