



Claimant appeals the Decision and Order - Denying Benefits (2002-BLA-5330) of Administrative Law Judge Michael P. Lesniak rendered 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 credited claimant with thirty-seven years of qualifying coal mine employment and adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718.<sup>1</sup> The administrative law judge noted the parties' concession that the new evidence established the existence of pneumoconiosis and thus found that the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge then considered the merits based on the whole record and found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).<sup>2</sup> Employer responds, urging affirmance of the denial of benefits. Employer also cross-appeals, asserting that the administrative law judge erred in his application of Section 725.414 to exclude from consideration the supplemental medical opinion of Dr. Altmeyer. The Director, Office of Workers' Compensation Programs, has filed a response to employer's cross-appeal, asserting that the administrative law judge properly excluded Dr. Altmeyer's medical report.

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).

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<sup>1</sup> Claimant filed his initial claim for black lung benefits on June 13, 1983, which was denied by the district director on September 20, 1983. Decision and Order at 2; Director's Exhibit 1. Claimant filed a modification request which was denied by Administrative Law Judge Robert L. Cox in a Decision and Order issued August 26, 1988, finding that the evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 2; Director's Exhibit 1. Claimant took no further action on that claim and filed the current claim on May 14, 2001. Decision and Order at 3; Director's Exhibit 3. Claimant died on March 6, 2003, while the claim was pending. Decision and Order at 3.

<sup>2</sup> We affirm the administrative law judge's findings that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) as these findings are not challenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. 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 of claimant 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).

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 Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.

In considering whether total disability was established under Section 718.204(b)(2)(iv), the administrative law judge permissibly credited as well-reasoned and persuasive the opinions of Drs. Altmeyer, Branscomb, and Rosenberg, which stated that claimant was not totally disabled from a respiratory standpoint and was capable of resuming his prior coal mine employment. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-291 (1984); Decision and Order at 18; Director's Exhibit 1; Employer's Exhibits 3, 7, 10-11, 13. With respect to the administrative law judge's evaluation of the remaining relevant medical opinions on the issue of total disability, the administrative law judge adequately examined and discussed all of the relevant evidence of record as it relates to total disability and permissibly concluded that the medical opinion evidence fails to carry claimant's burden pursuant to Section 718.204(b)(2)(iv). Contrary to claimant's assertion that the administrative law judge did not consider Dr. Cohen's qualifications, the administrative law judge noted that Dr. Cohen is Board-certified in Internal Medicine, Critical Care Medicine and Pulmonary Disease and diagnosed a pulmonary impairment which would preclude claimant's performance of his coal mine employment. Decision and Order at 10; Claimant's Exhibits 1, 4, 6; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). The administrative law judge permissibly gave "less weight" to Dr. Cohen's opinion, because Dr. Cohen did not convincingly explain why claimant's normal pulmonary function study did not reflect that claimant's lung function is normal, as Drs. Branscomb and Rosenberg indicated. Decision and Order at 19; *see Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields*, 10 BLR 1-19. Further, although Drs. Ritz, McGonigal, Blatt, and Auchenbach were the miner's treating physicians, the administrative law judge provided rational reasons for finding their opinions insufficiently reasoned and documented, and in Dr. Blatt's case, equivocal. *See* 20 C.F.R. §718.104(d); *Clark*, 12 BLR at 1-155; Decision and Order at 16-18. We therefore affirm the administrative law judge's credibility determinations and his finding that the medical opinion

evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) as they are supported by substantial evidence and are in accordance with law. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR at 1-27; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, 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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987). 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. *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Since we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability, *see* 20 C.F.R. §718.204(b), a requisite element of entitlement under Part 718, *see Trent*, 11 BLR at 1-2; *Perry*, 9 BLR at 1-2, we also affirm the administrative law judge's denial of benefits. We therefore need not address the arguments raised in employer's cross-appeal regarding the administrative law judge's application of 20 C.F.R. §725.414.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge