BRB Nos. 02-0769 BLA
and 02-0769 BLA-A

		CLEETUS E. DISHMON
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 08/29/2003
	)	
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 on Remand of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, GABAUER and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand (99-BLA-1265) of Administrative Law Judge Robert J. Lesnick denying benefits on a

duplicate claim[1] 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).[2] This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with at least ten years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ''718.202(a)(1), (a)(4) (2000) and 718.203(b) (2000). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. '718.204(c)(1)B(4) (2000).[3] Consequently, the administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. '725.309 (2000).[4] Accordingly, the administrative law judge denied benefits. In response to claimant=s appeal, the Board affirmed the administrative law judge=s findings at 20 C.F.R. ''718.202(a)(1), (a)(4) (2000) and 718.204(c)(1)-(3) (2000). However, the Board vacated the administrative law judge=s findings at 20 C.F.R. ''718.204(c)(4) (2000) and 725.309 (2000). The Board instructed the administrative law judge to reconsider, on remand, the newly submitted medical opinion evidence at 20 C.F.R. '718.204(b)(2)(iv). Further, the Board instructed

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[1]Claimant=s first claim was filed with the Social Security Administration on July 2, 1973. Director=s Exhibit 31. After denials by the Social Security Administration on December 17, 1973 and May 3, 1979, this claim was denied by the Department of Labor on January 2, 1980 because claimant failed to establish total disability. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant=s second claim was filed on May 28, 1987. Director=s Exhibit 30. On April 25, 1990, Administrative Law Judge Charles P. Rippey issued a Decision and Order denying benefits. *Id*. Judge Rippey=s denial was based on claimant=s failure to establish total disability. *Id*. The denial became final because claimant did not pursue this claim any further. Claimant=s most recent claim was filed on September 29, 1998. Director=s Exhibit 1.

[2]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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The provision pertaining to total disability, previously set out at 20 C.F.R. '718.204(c), is now found at 20 C.F.R. '718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. '718.204(b), is now found at 20 C.F.R. '718.204(c).

[4]The revisions to the regulations at 20 C.F.R. '725.309 apply only to claims filed after January 19, 2001.

the administrative law judge to weigh all of the newly submitted, relevant evidence, like and unlike, at 20 C.F.R. ' 718.204(b), if reached. Lastly, the Board instructed the administrative law judge to consider the claim on the merits if he found the newly submitted evidence sufficient to establish total disability, and thus, a material change in conditions. *Dishmon v. Westmoreland Coal Co.*, BRB No. 01-0107 BLA (Nov. 8, 2001)(unpublished).

On remand, the administrative law judge found the newly submitted evidence insufficient to establish total disability at 20 C.F.R. ' 718.204(b)(2)(iv). Consequently, the administrative law judge found the evidence insufficient to establish a material change in conditions at 20 C.F.R. ' 725.309 (2000). Accordingly, the administrative law judge again denied benefits.

On appeal, claimant challenges the administrative law judge=s finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. ' 718.204(b)(2)(iv). Claimant also contends that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. ' 718.204(c). Employer responds, urging affirmance of the administrative law judge=s denial of benefits on remand. On cross-appeal, employer contends that the administrative law judge erred in finding that Drs. Dahhan, Fino and Morgan did not have a sufficient understanding of the exertional requirements of claimant=s last coal mine employment. The Director, Office of Workers= Compensation Programs, has declined to participate in this appeal.

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).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions at 20 C.F.R. ' 725.309(d) (2000). *See 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). In the instant case, the element of entitlement previously adjudicated against claimant was total disability. Director=s Exhibit 30.

Claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability at 20 C.F.R. ' 718.204(b)(2)(iv). Whereas Dr. Rasmussen opined that claimant suffers from a disabling respiratory impairment, Director=s Exhibits 10, 11, Drs. Castle, Dahhan, Fino, Morgan, Spagnolo and Zaldivar opined that claimant does not suffer from a disabling pulmonary or respiratory impairment, Director=s Exhibit 29; Employer=s Exhibits 1-5, 8, 9. Dr. Karam opined that claimant=s disability is due to his overall medical problems.[5] Director=s Exhibit 19. Based upon his reliance on the opinions of Drs. Castle, Spagnolo and Zaldivar, the administrative law judge found that claimant failed to establish a totally disabling pulmonary or respiratory impairment.

Claimant asserts that the administrative law judge erred in discrediting Dr. Rasmussen=s opinion based on his finding that Dr. Rasmussen mischaracterized claimant=s last coal mining work as a truck driver. Claimant=s assertion is based upon the premise that the administrative law judge erred in finding that heavy manual labor was not an integral part of his last coal mining work. In considering the duties required of claimant in his last coal mining work, the administrative law judge stated:

> As specified in the [c]laimant=s testimony before Judge Rippey, the job principally entailed driving a big slate truck, hauling refuse from the plant to a dump at the preparation plant, where they cleaned the coal and got the rock out of it. However, the [c]laimant also testified that he had to walk from the bath house to the shop, a distance of almost 2 mile, straight up a hill. Furthermore, in order to get in and out of the vehicle, [c]laimant had to climb up and down a 19-foot ladder. In addition [c]laimant testified that when the truck was down or there was something wrong with the plant, he would have to walk extensively and climb many stairs in the four-story facility, as well as shovel and clean up. This occurred, on the average, once a week, sometimes more. (DX 30; 2/6/90 Hearing TR 21-25).

Decision and Order on Remand at 4. Dr. Rasmussen, in reports dated November 25, 1998, diagnosed a minimal to moderate obstructive insufficiency and opined that this impairment

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[5]The administrative law judge noted that ADr. Karam cited multiple serious problems >along with coalworker=s (sic) pneumoconiosis= and found that [c]laimant=s >overall medical problem= renders him completely disabled.@ Decision and Order on Remand at 9. The administrative law judge concluded, A[a]s fact-finder, I have determined that Dr. Karam has simply concluded that the [c]laimant is totally disabled as a whole man.@ *Id*. Moreover, the administrative law judge stated that A[Dr. Karam=s] opinion regarding the total disability issue is ambiguous and poorly reasoned.@ *Id*.

would render claimant incapable of performing heavy to very heavy manual labor. Director=s Exhibits 10, 11. In the narrative report, Dr. Rasmussen stated:

> The patient worked in the mines between 1949 and 1951, and returned to the mines in 1955 to 1985 for a total of 35 years of coal mine employment. He worked as a cutting machine operator, continuous miner operator mostly. His last job was that of truck driving refuse from the tipple to the gob pile for the last 1 2 years. He shoveled at the preparation plant to clean up. He last worked underground as a continuous miner operator. Thus, he did some heavy manual labor.

Director=s Exhibit 10. Similarly, in the form report, Dr. Rasmussen listed claimant=s last coal mine employment as follows:

> Truck driver, driving refuse from tipple to gob pile, last 1 2 years. Shoveled at prep. Plant to clean up. Last job underground was continuous miner operator. Some heavy manual labor.

Director=s Exhibit 11.

In considering Dr. Rasmussen=s description of claimant=s last coal mining work, the administrative law judge stated that ADr. Rasmussen did not specify the walking and climbing the ladder aspects of the [c]laimant=s truck driver job, but stated that [c]laimant shoveled at the preparation plant.@ Decision and Order on Remand at 5. Further, the administrative law judge stated that Athe shoveling only occurred about once a week when the truck broke down or there was a problem at the plant, and it was not an integral part of [c]laimant=s normal truck driving duties.@ *Id*. The Board has held that it is for the administrative law judge to compare claimant=s ability to function to the physical requirements of his usual coal mine employment in determining whether claimant is capable of performing that work. *See Heavilin v. Consolidation Coal Co.*, 6 BLR 1-1209 (1984). Moreover, the Board has also held that it is for the administrative law judge to determine the nature of claimant=s usual coal mine employment. *See Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534 (1982).

In *Shortridge*, the Board stated, Aunder Section 727.203(b)(2), >usual coal mine work= should be determined by the miner=s most recent job performed regularly and over a substantial period of time. *Shortridge*, 4 BLR at 1-539. The Board also stated that A[t]his determination must be made on a case by case basis and will vary depending upon the employment history in the individual case.@ *Id*. In the instant case, the administrative law judge, within his discretion as trier-of-fact, determined that shoveling coal at the preparation plant was not an integral part of claimant=s last coal mining work as a truck driver.

[6] Based upon his consideration of claimant=s testimony, the administrative law judge found that Athe shoveling only occurred about once per week when the truck broke down or there was a problem at the plant.@ Decision and Order on Remand at 5. Thus, we reject claimant=s assertion that the administrative law judge erred in discrediting Dr. Rasmussen=s opinion on the basis that Dr. Rasmussen mischaracterized claimant=s last coal mining work.

In addition, the administrative law judge permissibly discredited Dr. Rasmussen=s opinion on the basis that it is not 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); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge stated that ADr. Rasmussen did not adequately explain his rationale for characterizing the [c]laimant=s overall respiratory impairment as >moderate,= while seemingly focusing on the single breath diffusing and the DL/VA results and apparently according less weight to the pulmonary function study and arterial blood gas test results.@ Decision and Order on Remand at 5. The administrative law judge noted that ADr. Rasmussen interpreted the single breath diffusing capacity and the DL/VA as being >moderately reduced,= the pulmonary function studies as showing >minimal to moderate= impairment, and the arterial blood gases as >normal.= @ *Id*. at 6. An administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indication upon which the medical opinion or conclusion is based. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Based upon his consideration of Dr. Rasmussen=s opinion, the administrative law judge rationally determined that Dr. Rasmussen failed to adequately explain how the underlying objective evidence supported his opinion. *Tackett*, 12 BLR at 1-14; *Oggero*, 7 BLR at 1-865.

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[6]In considering Dr. Rasmussen=s report, the administrative law judge stated:

> In summary, I find that the [c]laimant=s primary duty, namely operating the truck, entailed minimal exertion, that the related duties, such as walking and climbing on and off the truck ladder, entailed mild exertion; and, that only those activities which were not integrally related to his last coal mine employment (*i.e.*, when he was not engaged in his truck driving duties) involved some, periodic, moderately heavy exertion. Therefore, Dr. Rasmussen=s opinion that [c]laimant=s respiratory >impairment would render this patient incapable of performing heavy and very heavy manual labor,= does not establish total disability.

Decision and Order on Remand at 5

Since the administrative law judge rationally discredited the only evidence which could support claimant=s burden at 20 C.F.R. ' 718.204(b)(2)(iv), we hold that substantial evidence supports the administrative law judge=s finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. ' 718.204(b)(2)(iv).

Because the administrative law judge properly found the newly submitted evidence insufficient to establish total disability at 20 C.F.R. ' 718.204(b), the element of entitlement previously adjudicated against claimant, we hold that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. ' 725.309 (2000).[7] *Rutter*, 86 F.3d at 1362, 20 BLR at 2-235.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[7]In view of our disposition of this case at 20 C.F.R. ' 718.204(b), we need not reach employer=s contention, on cross-appeal, that that the administrative law judge erred in finding that Drs. Dahhan, Fino and Morgan did not have a sufficient understanding of the exertional requirements of claimant=s last coal mine employment.