BRB Nos. 98-1491 BLA
and 98-1491 BLA-A

ANDREW BIZAK	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	DATE ISSUED:
	)	
	)	
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.

Robert J. Bilonick (Pawlowski, Tulowitzki & Bilonick), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (97-BLA-1837) of Administrative Law Judge Michael P. Lesniak denying benefits on a duplicate 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 twenty-eight years of coal mine employment and adjudicated this duplicate claim[1] pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found the newly submitted evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. 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)-(4). Consequently, the administrative law judge concluded that the newly submitted evidence is insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

[1]Claimant filed his first claim on April 19, 1979. Director's Exhibit 28. Although the Department of Labor found that claimant was entitled to benefits on August 30, 1979, Administrative Law Judge Reid C. Tait issued a Decision and Order denying benefits on May 19, 1981 based on claimant's failure to establish total disability. *Id*. The Board affirmed Judge Tait's denial of benefits. *Bizak v. Bethlehem Mines Corp.*, BRB No. 81-1170 BLA (Apr. 11, 1984)(unpub.). Claimant filed his second claim on September 9, 1986. Director's Exhibit 27. On May 20, 1991, Administrative Law Judge Daniel L. Leland issued a Decision and Order denying benefits based on claimant's failure to establish total disability. *Id*. Claimant filed his most recent claim on April 14, 1997. Director's Exhibit 1.

[2]The parties stipulated that claimant suffers from pneumoconiosis arising out of coal mine employment.

On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Employer responds, urging affirmance of the administrative law judge's Decision and Order. On cross-appeal, employer contends that the standard adopted by the United States Court of Appeals for the Third Circuit in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), is not an appropriate standard for establishing a material change in conditions. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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).

[3]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.304 and 718.204(c)(1)-(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The previous claim was denied because claimant failed to establish total disability. Director's Exhibits 27, 28. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises,[4] has adopted the standard that 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 in assessing whether the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309(d). *Swarrow, supra*.

Initially, we will address employer's contention on cross-appeal that the standard adopted by the United States Court of Appeals for the Third Circuit in *Swarrow* is not an appropriate standard for establishing a material change in conditions. Specifically, employer asserts that the standard adopted by the United States Court of Appeals for the Third Circuit is contradictory to the United States Supreme Court's decision in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and is otherwise inconsistent with the Act as determined by the United States Court of Appeals for the Sixth Circuit in *Glen Coal Co. v. Director, OWCP* [*Seals*], 147 F.3d 502, 21 BLR 2-398 (6th Cir. 1998). As previously noted, the instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. An inferior court has no power or authority to deviate from the mandate issued by an appellate court. *See Briggs v. Pennsylvania R.R.*, 334 U.S. 304 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993). Thus, inasmuch as the Board, in the case at hand, is bound by the case law of the United States Court of Appeals for the Third Circuit, we do not have authority to consider the validity of the material change in conditions standard adopted by the United States Court of Appeals for the Third Circuit in *Swarrow*.

[4]Inasmuch as claimant performed his most recent coal mine employment in Pennsylvania, we will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Next, we will address claimant's contention that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). We hold that claimant's contention is without merit. The administrative law judge considered the newly submitted medical opinions of Drs. Cox, Ignacio, Malhotra, Schaaf, Solic, Srivastava and Strother. Whereas Drs. Malhotra, Schaaf and Srivastava opined that claimant suffers from a totally disabling respiratory impairment, Director's Exhibit 15; Claimant's Exhibits 2, 5, Drs. Cox, Solic and Strother opined that claimant does not suffer from a totally disabling respiratory impairment, Director's Exhibit 26; Employer's Exhibits 1, 3, 7-9. Dr. Ignacio did not render an opinion with respect to the issue of total disability. Director's Exhibit 10. The administrative law judge properly accorded greater weight to the opinions of Drs. Cox, Solic and Strother than to the contrary opinions of Drs. Malhotra, Schaaf and Srivastava because he found their opinions to be better supported by the objective evidence of record.[5] *See Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985). In addition, the administrative law judge properly accorded greater weight to the opinions of Drs. Cox, Solic and Strother than to the contrary opinions of Drs. Malhotra and Srivastava because of their superior qualifications.[6] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel, supra*. Thus, we reject claimant's assertion that the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), 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), by failing to provide an adequate explanation for his weighing of the newly submitted medical opinions of

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[5]The administrative law judge stated that "[n]one of the seven [newly submitted pulmonary function] studies produced qualifying values to show disability according to the Regulations." Decision and Order at 9. The administrative law judge also stated that "[n]one of the [newly submitted] blood gas studies produced qualifying values to show disability according to the Regulations." *Id*.

[6]The administrative law judge stated that "Drs. Solic, Strother,...and Cox are [B]oard certified in pulmonary disease." Decision and Order at 9. The administrative law judge observed that "[e]ach of these physicians is highly qualified to determine whether the Claimant is totally disabled due to pneumoconiosis." *Id*. In contrast, the administrative law judge stated that "Dr. Srivastava specializes in cardiology and internal medicine." *Id*. The administrative law judge observed that "[t]here is no evidence that [Dr. Srivastava] is experienced in the field of pulmonary disease." *Id*. Similarly, the administrative law judge stated that "Dr. Malhotra is a [B]oard certified internist." *Id*. The administrative law judge observed that "there is no evidence of [Dr. Malhotra's] expertise in the field of pulmonary disease." *Id*.

record. Moreover, 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(c)(4).

Since the administrative law judge properly found that the newly submitted evidence did not establish total disability at 20 C.F.R. §718.204(c), we hold that the administrative law judge properly concluded that the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309. *See Swarrow, supra*. Therefore, we affirm the administrative law judge's denial of benefits. *Id*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge