BRB No. 03-0397

RUSHA MEADE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SCOTTS BRANCH COAL COMPANY	)	
	)	DATE ISSUED: 12/08/2003
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas P. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-BLA-0421) of Administrative Law Judge Thomas F. Phalen, Jr., denying benefits on a petition for modification 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).[1] This is the fourth time this case has come before the Board.[2] The administrative law judge found the newly submitted evidence insufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge also determined that the prior denial of benefits did not contain a mistake in a determination of fact. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally argues that the clinical laboratory tests and the medical opinion evidence is sufficient to establish total disability and that the administrative law judge failed to accord proper weight to the opinions of claimant's treating physicians. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a brief in response to claimant's 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates Inc.*, 380 U.S. 359 (1965).

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[1] 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 (2001).

[2] In a Decision and Order denying modification, issued on December 20, 1999, Administrative Law Judge Robert L. Hillyard found that claimant failed to establish total disability or a change in conditions and that there was no mistake in a determination of fact in the prior denial. Director's Exhibit 165. Claimant appealed to the Board, but subsequently asked the Board to remand the claim to the district director for further modification proceedings. Director's Exhibit 170. On March 7, 2000, the Board dismissed the appeal and remanded the case to the district director. *Meade v. Scotts Branch Coal Co.*, BRB No. 00-0444 BLA (March 7, 2000) (unpublished Order). The district director as well as the administrative law judge denied claimant's request for modification. Director's Exhibit 191. The prior procedural history is set forth in the Board's Decision and Order of December 17, 1996. *Meade v. Scotts Branch Co.*, BRB No. 96-0724 BLA (Dec. 17, 1996) (unpublished), slip opinion at 1-2.

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 disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2001); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the evidence of record and the issues on appeal, we conclude that the Decision and Order of the administrative law judge denying benefits is supported by substantial evidence. We reject claimant's contention that the administrative law judge erred in failing to accord greatest weight to the opinions of claimant's treating physicians and in crediting the opinions of Drs. Branscomb, Broudy, and Dahhan. Contrary to claimant's contentions, the administrative law judge is not required to accord more weight to the opinions of Drs. Sundaram and Johnson solely because they are claimant's treating physicians. *Eastover Mining Co. v. Williams*, 338 F.3d 501, --- BLR --- (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, BLR (6th Cir. 2002); *Wolfe Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002).

In the present case, the administrative law judge acted within his discretion in according greater weight to the opinions of Drs Branscomb, Broudy and Dahhan, that claimant maintains the respiratory capacity to perform the work of an underground coal miner, based upon their superior qualifications.[3] Decision and Order at 17. In addition, claimant has not challenged the administrative law judge's rational determination that Dr. Sundaram's opinion was entitled to less weight because he relied on a pulmonary function study that was invalidated by Board-certified pulmonologists while Drs. Branscomb, Broudy and Dahhan opined that the objective evidence did not support a finding that claimant was totally disabled. Decision and Order at 16, 17. Claimant also does not allege any error in the administrative law judge's determination that Dr. Johnson did not provide treatment to claimant and, therefore, did not possess any special knowledge of claimant's condition which would justify according his opinion greater weight. Decision and Order at 16. Thus, we affirm the administrative law judge's

[3] Dr. Branscomb is Board-certified in Internal Medicine. Employer's Exhibit 1. Drs. Dahhan and Broudy are Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibits 1, 26. The qualifications of Drs. Sundaram and Johnson are not of record.

finding that the opinions of Drs. Johnson and Sundaram were not entitled to additional weight based upon their status as treating physicians. *See Johnson v. Jeddo Highland Coal Co.*, 12 BLR 1-53 (1988).

In addition, contrary to claimant's contention, Drs. Branscomb, Broudy and Dahhan considered claimant's exertional requirements in concluding that claimant maintained the pulmonary capacity to perform his usual coal mine work as a section foreman and general laborer because they assumed that claimant's work required "repetitive bending, lifting, stooping, pushing and pulling." Employer's Exhibits 3, 26, 28. Therefore, the administrative law judge acted within his discretion as trier-of-fact in according greater weight to the opinions of Drs. Branscomb, Broudy and Dahhan and in finding that the newly submitted medical opinion evidence is insufficient to establish total disability under Section 718.204(b)(2)(iv). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Because claimant has not identified any specific legal or factual errors in the administrative law judge's weighing of the medical evidence pursuant to Section 718.204(b)(2)(i)-(iii), we also affirm his finding that this evidence is insufficient to establish total disability. We affirm, therefore, the administrative law judge's determination that the newly submitted evidence does not support a finding of total disability under Section 718.204(b)(2) and, thus, that claimant has failed to establish a change in conditions pursuant to Section 725.310 (2000). Decision and Order at 17; *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We also affirm the administrative law judge's finding that the prior denial of benefits does not contain a mistake in a determination of fact pursuant to Section 725.310 (2000), as claimant has not challenged this finding on appeal. *Id.*

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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PETER A. GABAUER, JR.
Administrative Appeals Judge