BRB No. 98-1188 BLA

ORVILLE BRADLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY)		DATE ISSUED:
	)	
Employer-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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Robert Lee White, Madison, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (92-BLA-0778) of Administrative Law Judge Paul H. Teitler awarding benefits in 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). This case is before the Board for a second time. In the initial Decision and Order, Administrative Law Judge Robert J. Feldman determined that claimant filed his initial application for benefits with the Social Security Administration on May 10, 1971, and that this claim was finally denied on January 20, 1983.[1]

[1] Claimant filed his initial claim with the Social Security Administration (SSA) on May 10, 1971. Director's Exhibit 30. SSA denied the claim on June 28, 1971 and again on June 14, 1973 because claimant was still working. *Id.* Following a hearing before an administrative law judge, the claim was again denied on April 15, 1974.

Based on the filing date of May 22, 1991, Judge Feldman adjudicated this duplicate claim pursuant to the provisions of 20 C.F.R. Part 718. Judge Feldman credited claimant with more than forty years of coal mine employment. He then determined that claimant's last coal mine employment was as a mining inspector for the state of West Virginia, and that this job required periodic, moderately strenuous exertion by claimant when performing his duties. Judge Feldman reviewed the newly submitted evidence and found this evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Judge Feldman also concluded that assuming that claimant had established the existence of pneumoconiosis, the newly submitted evidence was insufficient to demonstrate the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1)-(4). Judge Feldman thus concluded that the evidence was insufficient to establish a material change in conditions under 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, the Board applied the standard enunciated in *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992) and found the newly submitted evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 as a matter of law. Thus, the Board vacated the finding of no material change in conditions by the administrative law judge and remanded this case to the administrative law judge to conduct a *de novo* review of all the medical evidence of record pursuant to 20 C.F.R. Part 718. The Board also affirmed Judge Feldman's findings that claimant established forty years of coal mine employment and that employer was the properly designated responsible operator as unchallenged on appeal. *See Bradley v. Westmoreland Coal Company,* BRB No. 94-0346 BLA (Jan. 10, 1995).

Id. Claimant filed a second application for benefits with the district director on January 4, 1978. *Id.* On April 12, 1978, claimant elected review of his denied SSA claim by the United States Department of Labor. *Id.* The district director denied the second claim on July 25, 1979 on the ground that the evidence of record failed to establish a totally disabling respiratory impairment due to pneumoconiosis. *Id.* By letter dated February 14, 1980, claimant requested reconsideration of his claim. *Id.* The district director advised claimant by letter dated January 20, 1983 that his claim had been administratively closed as he had not submitted additional medical evidence for more than one year after his request for reconsideration. *Id.*

In his Decision and Order on Remand, Judge Teitler[2] (the administrative law judge) found the evidence of record insufficient to establish the existence of pneumoconiosis at Sections 718.202(a)(1)-(3); however, he found the medical opinion of Dr. Rasmussen sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). The administrative law judge found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b), and that rebuttal was not established. The administrative law judge found the evidence of record insufficient to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c)(1)-(3). The administrative law judge, further, found the medical opinion of Dr. Rasmussen sufficient to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c)(4) and that the weight of the evidence at Section 718.204(c) demonstrated the presence of a totally disabling respiratory impairment. The administrative law judge also found the evidence of record sufficient to establish that claimant's pneumoconiosis was a significant contributing factor to his disability. Accordingly, benefits were awarded.

[2] On remand, this case was reassigned to Administrative Law Judge Paul H. Teitler without objection by either party as Judge Feldman was no longer with the Office of Administrative Law Judges. *See* Order of Associate Chief Judge James Guill, dated May 3, 1995. Employer's Motion to Reopen the Record for the submission of new evidence was granted on June 17, 1997. *See* Order of Administrative Law Judge Joan Huddy Rosenzweig dated June 17, 1997. Employer submitted additional evidence. *See* Employer's Exhibits 5-16. At the hearing, claimant's counsel objected to the admission of employer's exhibits 13-16 as not in compliance with the 20-day rule. Judge Teitler overruled these objections, but allowed claimant the opportunity to respond with new medical evidence. Claimant did not submit any additional evidence.

In the instant appeal, employer challenges the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(4) and his finding of a totally disabling respiratory impairment due to pneumoconiosis at Sections 718.204(c)(4) and (b). Employer also asserts that since the standard for determining a material change in conditions pursuant to Section 725.309 has changed, this case must be remanded for the administrative law judge to make a new finding on a material change in conditions under *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). Claimant responds, urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond 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 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 pursuant to 20 C.F.R. Part 718, claimant must prove 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 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*).

At Section 718.202(a)(4), employer argues that the administrative law judge erred when he found the medical opinion evidence sufficient to establish the existence of

[3] We affirm the administrative law judge's findings that the evidence of record was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), that claimant was entitled to the presumption at 20 C.F.R. §718.203(b), and that the evidence of record failed to demonstrate the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1)-(3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis. Specifically, employer contends that the administrative law judge cannot mechanically disregard the opinions of non-examining, consulting physicians; rather, he must consider all relevant evidence in light of the decisions of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

In *Akers* and *Hicks*, the Fourth Circuit held that an administrative law judge should not automatically credit the testimony of a treating or an examining physician merely because the physician treated or personally examined the miner; rather, the administrative law judge should also consider the qualifications of the physicians, the explanations of their medical opinions and the documentation underlying their opinions. *Hicks*, *supra*; *Akers*, *supra*. The administrative law judge identified and reviewed in detail the medical opinions of Drs. Jarboe, Loudon, and Castle, each of whom provided consultative opinions after reviewing all evidence of record.[4] *See Hicks*, *supra*; *Akers*, *supra*. The administrative law judge permissibly accorded less weight to each of these physicians' opinions that claimant did not suffer from clinical or legal pneumoconiosis because they did not evaluate claimant firsthand and because their reports were based on their review of each other's opinions and mainly on Dr. Zaldivar's opinion, which the administrative law judge found not credible. *See Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996). In so doing, the administrative law judge implicitly found that the medical opinions of Drs. Jarboe, Loudon, and Castle were based on inadequate documentation and insufficient explanation. *Hicks*, *supra*; *Akers*, *supra*. We, therefore, affirm the administrative law judge's weighing of the medical opinions of Drs.

[4] Dr. Jarboe provided three medical reports dated May 27, 1992, June 4, 1996, and November 13, 1997 based on the medical evidence submitted to him by employer. *See* Employer's Exhibits 3, 8, 14. Dr. Jarboe also provided additional testimony in a deposition taken on November 25, 1997. *See* Employer's Exhibit 16. In each report, Dr. Jarboe opined that the x-ray evidence was negative for pneumoconiosis and that while claimant had a mild ventilatory impairment, the impairment was not related to his many years of coal mine employment. *Id.* Dr. Loudon rendered two medical opinions dated June 4, 1996 and November 13, 1997. *See* Employer's Exhibits 8, 13. Dr. Loudon also opined that the x-ray evidence was negative for pneumoconiosis and that claimant suffered from a minimal pulmonary or respiratory impairment which was not related to his years of coal mine employment. *Id.* Dr. Castle reviewed all the evidence of record and submitted a report dated November 13, 1997. *See* Employer's Exhibit 13. He also found that the x-ray evidence was negative for pneumoconiosis and that claimant had a mild to moderate obstructive airways disease which he did not relate to claimant's many years of coal mine employment. *Id.*

Jarboe, Castle, and Loudon at Section 718.202(a)(4) as it is supported by substantial evidence.

Employer next argues that the administrative law judge irrationally rejected Dr. Zaldivar's report. Employer argues that the administrative law judge substituted his opinion for that of Dr. Zaldivar and selectively analyzed his medical opinion. After reviewing all the reports and deposition testimony of Dr. Zaldivar, the administrative law judge declined to give any weight to his medical opinion as the administrative law judge did not find his report credible because, in his final deposition in 1997,[5] Dr. Zaldivar attempted to link gastro-esophagel reflux with nocturnal awakenings to claimant's pulmonary condition, a problem noted by Dr. Rasmussen in 1991. Decision and Order at 12. The administrative law judge opined that although Dr. Zaldivar reviewed the report of Dr. Rasmussen, he did not mention this problem until his third deposition. *Id*. The administrative law judge found that neither Dr. Rasmussen nor any other physician of record made findings regarding a relationship between claimant's heartburn and his pulmonary symptoms. *Id*. Thus, the administrative law judge found that this rationale used by Dr. Zaldivar to explain claimant's pulmonary symptoms strained the bounds of credibility. *Id*.

Contrary to employer's assertion, the administrative law judge did not selectively analyze the medical opinion of Dr. Zaldivar; rather, the administrative law judge reviewed his opinion in its entirety, *see* Decision and Order at 8-10, and permissibly declined to accord any weight to this opinion because he found the rationale provided by Dr. Zaldivar was not supported by the underlying documentation, the medical evidence of record and the opinions of Drs. Rasmussen, Lesaca, and Caitnier [Carbonel]. *See Pershina v. Consolidation Coal Co.*, 14 BLR 1- 55 (1990)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). Likewise, the administrative law judge did not substitute his opinion for that of Dr. Zaldivar concerning the relationship between claimant's gastro-esophagel reflux with nocturnal awakenings to claimant's pulmonary condition; instead, the administrative law judge acted within his discretion when he found the reliability of Dr. Zaldivar's rationale undermined by the opinions of the other physicians of

[5] Dr. Zaldivar examined claimant in April 1992, provided a report on his examination, and testified in a deposition in June 1992. *See* Employer's Exhibits 1, 4. Dr. Zaldivar examined claimant a second time in May 1996, provided a report on this examination, and testified in a deposition in June 1996. *See* Employer's Exhibits 5, 9. Dr. Zaldivar examined claimant a third time in November 1997, provided a report on his examination, and testified in a third deposition in November 1997. *See* Employer's Exhibit 13, 15. Dr. Zaldivar also reviewed all the medical treatment records available on claimant prior to writing his report on claimant's condition. This review included the report of Dr. Rasmussen. *See* Employer's Exhibits 1, 4.

record. *See Hicks, supra*; *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). The administrative law judge need not accept the opinion of any particular medical expert; he must, however, weigh all the evidence and draw his own conclusions and inferences. *See Carson v. Westmoreland Coal Company*, 19 BLR 1-18 (1994); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). In the instant case, after weighing all of Dr. Zaldivar's reports, the administrative acted within his discretion when he found this report not credible. *Id.* We, therefore, affirm the decision of the administrative law judge not to credit the report of Dr. Zaldivar.[6]

Employer also argues that the administrative law judge has not provided a valid reason for crediting Dr. Rasmussen's report. Specifically, employer contends that the administrative law judge failed to consider the fact that Dr. Zaldivar had the most complete picture of claimant's health as he examined claimant three times after Dr. Rasmussen's single examination of claimant in 1991 and that the administrative law judge irrationally credited Dr. Rasmussen's finding of pneumoconiosis because the Act permits a finding of pneumoconiosis in the absence of a positive x-ray.

In considering Dr. Rasmussen's report, the administrative law judge stated that:

> Dr. Rasmussen's report is given the greatest weight. He obtained a complete and accurate history, conducted a thorough examination, and obtained objective testing. His report is consistent with all of the testing he conducted and he stated that his diagnosis of pneumoconiosis would not change despite reviewing x-ray re-readings which were negative. This is consistent with the Act which provides that pneumoconiosis may be diagnosed

[6] As we affirm the administrative law judge's primary rationale for rejecting the report of Dr. Zaldivar, we need not address employer's contention that the administrative law judge found the credibility of Dr. Zaldivar's report diminished because he diagnosed asthma when claimant was sixty-five years old and because no other physician had previously diagnosed asthma, as the administrative law judge has provide a proper rationale for discrediting Dr. Zaldivar's report. *See Mathies v. Carpeta Coal Co.*, 7 BLR 1-145 (1984).

> without a positive x-ray. His findings were well-reasoned and considered other possible causes for Claimant's symptoms. Accordingly, his report is entitled to the greatest weight.

Decision and Order at 12. Dr. Rasmussen diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease, which he defined as emphysema, related to coal mine dust exposure and cigarette smoking. Director's Exhibit 10. Dr. Rasmussen also found that claimant suffered from a pulmonary impairment which would prevent claimant from doing heavy manual labor. *Id*. Dr. Rasmussen based his diagnoses on a positive x-ray, forty-four years of coal mine employment and an abnormal pulmonary function study. *Id*. As Dr. Rasmussen's diagnosis is supported by his underlying documentation, the administrative law judge properly found the report of Dr. Rasmussen documented and reasoned. *See Carson*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Furthermore, the administrative law judge rationally found that Dr. Rasmussen's overall opinion supported a finding of legal pneumoconiosis as defined at 20 C.F.R. §718.201 because in a supplemental report, Dr. Rasmussen stated that negative x-ray evidence would not alter his opinion on the existence of pneumoconiosis or the impact of coal dust exposure on an abnormal pulmonary function study since the damage may well occur without producing x-ray evidence of pneumoconiosis. *See* 20 C.F.R. §718.201; Director's Exhibits 10, 17. We, therefore, affirm the administrative law judge's decision to accord determinative weight to the report of Dr. Rasmussen as it is supported by substantial evidence.

Employer also asserts that it was irrational for the administrative law judge to find the opinions of Drs. Lesaca and Caitnier [Carbonel], which diagnose pneumoconiosis related to coal mine employment, supportive of Dr. Rasmussen's diagnosis as these opinions are extremely old, have little value, and were refuted by four physicians [Drs. Zaldivar, Castle, Jarboe, and Loudon].[7] While the administrative law judge found these opinions of little value because they were twenty-seven years old, he accorded the opinions slightly more weight than the weight accorded the opinions of Drs. Jones and Hayes as the former physicians diagnosed pneumoconiosis which is irreversible once acquired by the miner.[8] The administrative law judge permissibly found that the physical examinations contained adequate findings to support the diagnosis of pneumoconiosis in these reports. *See Carson*, *supra*; *Fields*, *supra*. We, therefore, affirm the administrative law judge's weighing and

[7] Since we affirmed the decision of the administrative law judge not to rely on the opinions of the physicians who refuted these reports, this argument is without merit.

[8] We affirm the administrative law judge's weighing of the medical opinion of Drs. Jones and Haynes as unchallenged on appeal. *Skrack*, *supra*.

crediting of the medical opinion evidence at Section 718.202(a)(4) and his finding that the evidence of record was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) as it is supported by substantial evidence and is in accordance with law.[9]

At Section 718.204(c)(4), employer asserts that the administrative law judge inconsistently weighed the medical opinion evidence when he accepted the findings of Drs. Jarboe, Castle and Loudon that claimant had some pulmonary impairment, but nevertheless, rejected the conclusions of these physicians that claimant's impairment was not totally disabling. Employer contends that the most egregious error committed by the administrative law judge occurred as a result of the administrative law judge's efforts to compare the exertional requirements of claimant's usual coal mine employment with the physicians' assessment of the impairment. Specifically, employer asserts that the administrative law judge mischaracterized Dr. Zaldivar's understanding of claimant's work requirements and substituted his opinion for Dr. Zaldivar's opinion regarding claimant's ability to perform his

[9] Further, contrary to employer's argument, as this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit which has followed the Board's construction that Section 718.202(a) provides independent, alternative methods by which a claimant may establish the existence of pneumoconiosis, *see e.g. Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), the administrative law judge is not required to weigh together x-ray and medical opinion evidence under Section 718.202(a) pursuant to the holding by the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989). Rather, the administrative law judge properly weighed each type of evidence under the relevant alternative methods by which the existence of pneumoconiosis may be established pursuant to Section 718.202(a)(1)-(4). *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

usual coal mine employment.

The administrative law judge found that the medical opinions were uncontradicted in finding that claimant suffered from a mild to moderate pulmonary impairment after concluding that each physician of record addressed the issue of pulmonary impairment except, Drs. Jones and Hayes.[10] Decision and Order at 15. The administrative law judge then noted that the physicians differed as to whether claimant's impairment would prevent him from performing his usual coal mine employment. Because of this difference, the administrative law judge compared the exertional requirements of claimant's last coal mine employment as a mine inspector with the physicians' assessment of claimant's ability to perform his regular duties. *Id.* In finding that claimant's usual coal mine employment was moderately strenuous, the administrative law judge credited claimant's testimony that his job as a mine inspector was strenuous and required him to walk and crawl in low coal for eight hours a day, causing him to sweat a lot. *Id.* The administrative law judge found that claimant's mild to moderate impairment prevented him from performing his moderately strenuous employment as a mine inspector. *Id.* In light of this determination, the administrative law judge accorded little weight to Dr. Zaldivar's finding that claimant's coal mine employment was light or sedentary as the doctor underestimated the true exertional requirements of claimant's job. As an additional reason for according little weight to Dr. Zaldivar's report, the administrative law judge also found that Dr. Zaldivar's statement that claimant could perform very arduous manual labor intermittently was inconsistent with a mild to moderate impairment. *Id.* The administrative law judge thus found the medical opinion evidence sufficient to establish a totally disabling respiratory impairment.

[10] In finding the medical opinions sufficient to demonstrate the presence of a mild to moderate pulmonary impairment, the administrative law judge implicitly found these medical opinions documented and reasoned. *See generally Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996).

Contrary to employer's assertion, the administrative law judge did not inconsistently weigh the medical opinions at Section 718.204(c)(4). The administrative law judge correctly concluded that this evidence demonstrated the presence of a mild to moderate impairment. *See Schetroma*, *supra*; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 13 BLR 1-46 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Fields*, *supra*; Director's Exhibits 10, 17, 30; Employer's Exhibits 1, 3-5, 8, 9, 13-16. The administrative law judge also properly concluded that in order to resolve the conflict in the medical opinion evidence, he must assess the exertional requirements of claimant's usual coal mine employment and then compare this assessment with a physician's impairment rating. *See Schetroma*, *supra*; *Budash*, *supra*; *Fields*, *supra*. Acting within his discretion, the administrative law judge permissibly found that claimant's job as a mine inspector was moderately strenuous. *Id*. The administrative law judge also permissibly found that Dr. Zaldivar's 1992 classification of claimant's mine inspector job as light work, *see* Employer's Exhibit 4 at p. 13-14, underestimated the true exertional requirements of this job. *Id.* The administrative law judge also permissibly concluded that Dr. Zaldivar's statement in his November 13, 1997 report that claimant could do arduous manual labor intermittently was inconsistent with claimant's mild to moderate impairment.[11] *Id.*; *see* Employer's Exhibit 13. Thus, the administrative law judge acted within his discretion when he accorded less weight to Dr. Zaldivar's opinion that claimant could perform his usual coal mine employment. *Id.* Furthermore, since the administrative law judge conducted the proper legal analysis to resolve the conflict in the medical opinion evidence concerning claimant's ability to perform his usual coal mine employment with a mild to moderate impairment, the administrative law judge did not substitute his own opinion on the issue for that of the physicians. *See Hicks*, *supra*; *Schetroma*, *supra*; *Marcum*, *supra*. Thus, the administrative law judge properly concluded that the evidence of record established the presence of a totally disabling respiratory impairment at Section 718.204(c).[12] *See Trent*, *supra*. Finally, the administrative law judge properly weighed the probative and contrary probative evidence at Section 718.204(c) and permissibly concluded that the weight of this evidence established the presence of a totally disabling respiratory impairment. *See Fields*, *supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *aff'd on recon.*, 9 BLR 1-236 (19897)(*en banc*). We, therefore, affirm the administrative law judge's finding that the credible evidence of record was sufficient to establish the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(c) as it is supported by substantial evidence and is in accordance with law.

---

[11] In 1997, Dr. Zaldivar stated that claimant's usual coal mine employment involved moderate work. *See* Employer's Exhibit 15.

[12] Contrary to employer's assertion, the medical opinion of Dr. Rasmussen is not defective because the physician did not consider testing administered subsequent to his examination of claimant.

At Section 718.204(b), employer argues that the administrative law judge erred when he did not credit the medical opinions of Drs. Zaldivar, Castle, Jarboe, and Loudon, which state that claimant's pulmonary impairment is not related to his coal mine employment, as it is clear that these opinions are not based on the physicians' finding of no pneumoconiosis. Employer asserts that the administrative law judge erred in finding the report of Dr. Rasmussen to be well-reasoned simply because he examined claimant and diagnosed pneumoconiosis as Dr. Zaldivar also examined claimant, and Drs. Castle, Jarboe, and Loudon examined all evidence concerning claimant's medical condition. Employer also contends that Dr. Rasmussen relied simply on years of coal mine employment to find pneumoconiosis, a reliance which cannot compel the conclusion that claimant's pulmonary impairment is due to coal dust exposure. Finally, employer asserts that the administrative law judge failed to consider the qualifications of the physicians.

The administrative law judge noted that Drs. Zaldivar, Jarboe, Castle, and Loudon did not diagnose pneumoconiosis, but that each physician opined that even if claimant had pneumoconiosis, it would not have caused claimant's respiratory impairment.[13] Decision and Order at 16. The administrative law judge then stated that he did not find the report of Dr. Zaldivar credible for the reasons stated earlier. *Id.* The administrative law judge determined that since Drs. Zaldivar, Jarboe, Castle and Loudon did not explain why their opinions on disability causation would not change if claimant had pneumoconiosis, their reports would not outweigh the well-reasoned report of Dr. Rasmussen who had examined claimant, diagnosed pneumoconiosis and persuasively explained that claimant's disability was caused both by pneumoconiosis and cigarette smoking, with pneumoconiosis being a significant contributor.

[13] Each physician stated that even if claimant had pneumoconiosis, it would not have contributed to his pulmonary impairment. *See* Employer's Exhibits 1, 3-5, 8, 9, 13-16.

Contrary to employer's assertion, the administrative law judge did not discredit the reports of Drs. Jarboe, Castle, and Loudon because they did not diagnose pneumoconiosis; rather, he permissibly found that these reports were insufficient to outweigh the credible opinion of Dr. Rasmussen because the physicians failed to provide an explanation as to why their opinion on the issue of causation would not change if claimant had pneumoconiosis. *See Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). Likewise, the administrative law judge found the report of Dr. Rasmussen well-reasoned and documented because the physician obtained a complete and accurate history, conducted a thorough examination, obtained objective testing, and rendered an opinion consistent with his testing. Decision and Order at 12; *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996). Furthermore, since the administrative law judge found the report of Dr. Rasmussen well-reasoned, he properly accorded determinative weight to the doctor's finding on the issue of causation.[14] *See Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Finally, the administrative law judge noted, and therefore, implicitly considered the qualifications of the physicians of record. Decision and Order at 7-11. Since the administrative law judge is not required to automatically accord greatest weight to the better qualified physicians, the administrative law judge did not err when he declined to accord determinative weight to the opinions of the physicians with the superior qualifications. *See Hicks*, *supra*; *Church*, *supra*. We, therefore, affirm the credibility findings of the administrative law judge and his determination that the evidence of record was sufficient to meet claimant's burden of proof at 20 C.F.R. §718.204(b) as it is supported by substantial evidence and is in accordance with law.

Finally, employer argues for remand of the case for the administrative law judge to make a new finding of material change in conditions at Section 725.309 in light of *Rutter*. Subsequent to the issuance of our prior Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, issued its decision in *Rutter*. The court held that claimant must prove, in light of all of the probative evidence of his condition after the prior denial, at least one of the elements previously adjudicated against

[14] The administrative law judge properly found that the medical reports of Drs. Jones, Hayes, Lesaca, and Caitnier [Carbonel] were not entitled to any weight at Section 718.204(b) as none of these physicians discussed the cause of claimant's pulmonary impairment. *Robinson v. Pickands Mathur and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir.1990).

him. In finding the evidence sufficient to establish all the elements of entitlement, the administrative law judge accorded greatest weight to the newly submitted medical evidence. Director's Exhibits 9-11. We, therefore, hold that claimant has demonstrated a material change in conditions pursuant to Section 725.309 as a matter of law because claimant had failed to establish any of the elements of entitlement in his prior claim. *See* 20 C.F.R. §725.309; *Rutter, supra*.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge