BRB Nos. 04-0497 BLA
and 04-0497 BLA-A

ALBURN SWAFFORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MILBURN COLLIERY COAL COMPANY	)	
	)	DATE ISSUED: 01/31/2005
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 Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Alburn Swafford, Oak Hill, West Virginia, *pro se*.

Dorothea J. Clark (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appears without the assistance of counsel and appeals from the Decision and Order Denying Benefits (2003-BLA-000097) of Administrative Law Judge Linda S. Chapman with respect to 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). Employer has filed a cross-appeal. The administrative law judge found that the claim before her, filed on May 30, 2001, was a subsequent claim pursuant to 20 C.F.R. §725.309.[1] Director's Exhibit 1. The administrative law judge considered the newly submitted evidence of record and determined that it was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), the element of entitlement that was adjudicated against claimant in his prior claims. Accordingly, benefits were denied.

Claimant argues generally that the administrative law judge erred in finding that he is not entitled to benefits. Employer has responded and urges the Board to affirm the denial of benefits. In its cross-appeal, employer contends that the administrative law judge erred in finding that the May 30, 2001 claim was timely filed pursuant to 20 C.F.R. §725.308. Employer also argues that the administrative law judge erred in excluding the medical opinions of Drs. Castle and Jarboe. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a brief in response to claimant's appeal, but has responded to employer's appeal and urges the Board to reject employer's allegations of error.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33

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[1] Claimant filed his first application for benefits on October 9, 1981. Director's Exhibit 34. This claim was denied in a Decision and Order issued by Administrative Law Judge John Allen Gray because claimant failed to establish that he is totally disabled. *Id.* The Board affirmed the denial of benefits. *Swafford v. Milburn Colliery Co.*, BRB No. 87-1942 BLA (Mar. 31, 1989)(unpub.); *Swafford v. Milburn Colliery Co.*, BRB No. 87-1942 BLA (Dec. 21, 1989)(unpub. Order). Claimant filed a second claim on September 21, 1995. Director's Exhibit 2. Administrative Law Judge Edith Barnett denied benefits in a Decision and Order dated October 26, 1997 on the ground that the newly submitted evidence was insufficient to establish total disability. *Id.* Claimant took no further action until filing a third claim on May 30, 2001. Director's Exhibit 4.

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).

The administrative law judge first considered whether the newly submitted evidence supported a determination that claimant is now totally disabled pursuant to Section 718.204(b)(2)(i). The administrative law judge noted that the record contained two newly submitted pulmonary function studies. Dr. Zaldivar obtained nonqualifying pre-bronchodilator and post-bronchodilator values on August 29, 2001. Director's Exhibit 17. Dr. Mullins whose qualifications are not in the record, obtained nonqualifying pre-bronchodilator and qualifying post-bronchodilator studies on August 30, 2001.[2] Director's Exhibit 10. Dr. Renn, who is Board-certified in Internal Medicine and Pulmonary Disease, invalidated Dr. Mullins's qualifying post-bronchodilator study on the grounds that only two FVC maneuvers were performed and the FEV1 result was underestimated because it had not been performed correctly, which rendered the MVV value inaccurate. Director's Exhibit 18.

The administrative law judge credited Dr. Renn's invalidation of the study obtained by Dr. Mullins, based upon Dr. Renn's review using American Thoracic Society Criteria, as well as his superior qualifications and the fact that Dr. Zaldivar's contemporaneous studies produced nonqualifying values. The administrative law judge then determined that the newly submitted evidence is insufficient to establish total disability under Section 718.204(b)(2)(i). Decision and Order at 10. We affirm the administrative law judge's finding regarding the newly submitted pulmonary function study evidence as she acted within her discretion in finding Dr. Renn's opinion invalidating the sole qualifying study persuasive based upon Dr. Renn's review and superior qualifications. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).[3] The administrative law judge therefore also rationally determined that the qualifying results obtained by Dr. Mullins were entitled to less weight than the nonqualifying values obtained by Dr. Zaldivar one day earlier. *Baker v. North American*

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[2] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in the State of West Virginia. Director's Exhibit 34; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Coal Corp., 7 BLR 1-79 (1984); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *see also Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

With respect to Section 718.204(b)(2)(ii), the administrative law judge indicated correctly that the record contained three newly submitted blood gas studies. Dr. Zaldivar obtained nonqualifying at rest and post-exercise values on August 29, 2001. Director's Exhibit 17. Dr. Mullins obtained a qualifying at rest study on August 30, 2001. Director's Exhibit 10. The administrative law judge found that the newly submitted blood gas study evidence was insufficient to establish total disability at Section 718.204(b)(2)(ii), as the evidence is "contradictory" and, "at best, in equipoise." Decision and Order at 10. We affirm the administrative law judge's weighing of the newly submitted blood gas study evidence, as it is rational and within her discretion. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 67, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

The administrative law judge next addressed the newly submitted medical opinions of record pursuant to Section 718.204(b)(2)(iv).[4] Dr. Mullins performed a physical examination of claimant and indicated that he is totally disabled based upon the results of his resting blood gas study. She attributed one-half of this impairment to congestive heart failure and one-half to coal workers' pneumoconiosis. Director's Exhibit 10. Dr. Zaldivar examined claimant and reviewed other medical evidence. He concluded that claimant does not have an intrinsic pulmonary disease and, therefore, is not suffering from a totally disabling pulmonary impairment. Director's Exhibit 17; Employer's Exhibits 4, 11 at 20. Dr. Zaldivar attributed claimant's total disability to his heart disease. *Id*. Dr. Crisalli examined claimant and reviewed other medical opinions and objective evidence. Dr. Crisalli indicated in his report and at a subsequent deposition that Mr. Swafford "does not have intrinsic or primary lung disease which is causing impairment or exertional limitation." Employer's Exhibits 1, 10 at 24, 26. He also identified heart disease as the source of claimant's disability. *Id*.

The administrative law judge noted that Drs. Crisalli and Zaldivar are Board-certified internists and pulmonologists and determined that:

> In sum, I find that the newly submitted evidence does not establish that the Claimant's pulmonary condition has worsened since the denial of his 1995

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[4] The regulation set forth at 20 C.F.R. §718.204(b)(2)(iii) is not applicable in this case as there is no evidence that claimant has cor pulmonale with right-sided congestive heart failure.

> claim, such that he is totally disabled from a pulmonary standpoint. Instead, I find that the well-reasoned and supported medical opinions of Dr. Zaldivar and Dr. Crisalli establish that the Claimant is totally disabled from a cardiac standpoint.

Decision and Order at 11. We affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv). The administrative law judge acted within her discretion in determining that Drs. Zaldivar and Crisalli opined that claimant is not totally disabled from a pulmonary standpoint, *see Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996), and in giving their conclusions more weight than Dr. Mullins's based upon their superior qualifications and her permissible findings that their opinions are well reasoned and well documented, while Dr. Mullins's conclusion is brief and unsupported. *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. We affirm, therefore, the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability under Section 718.204(b)(2).

Because we have affirmed the administrative law judge's finding that claimant has not established the element of entitlement previously adjudicated against him, we must also affirm the denial of benefits. 20 C.F.R. §725.309, s*ee Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *cert. denied*, 117 S.Ct. 763 (1997). In light of our affirmance of the denial of benefits, we need not address the issues raised in employer's cross-appeal, as errors, if any, in the administrative law judge's findings are harmless.[5] *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983).

[5] Although we decline to reach the issue of whether the administrative law judge determined correctly that claimant's most recent claim was timely filed, we note that contrary to employer's argument, the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), does not constitute binding precedent in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe*, 12 BLR 1-200. The Fourth Circuit has not yet issued a published decision with respect to the application of 20 C.F.R. §725.308 to subsequent claims.

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

SO ORDERED.

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NANCY S. DOLDER
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge