BRB Nos. 92-1287 BLA
and 92-1287 BLA-A

PAUL R. PYLES, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Frank J. Marcellino, Administrative Law Judge, United States Department of Labor.

Paul R. Pyles, Sr., Grafton, West Virginia, *pro se*.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Anne Swiatek (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, without legal representation, appeals and employer cross-appeals the Decision and Order (91-BLA-2784) of Administrative Law Judge Frank J. Marcellino denying benefits on 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). [The administrative law judge determined that the evidence established a material change in conditions pursuant to 20 C.F.R. §725.309, and thus he considered the merits of this duplicate claim pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge credited the miner with more than ten years of qualifying coal mine employment, as stipulated by the parties and supported by the record, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) and 718.302, but further found that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were denied. On appeal, claimant generally challenges the administrative law judge's denial of benefits. In a cross-appeal, employer urges affirmance of the administrative law judge's findings pursuant to Section 718.204 and his denial of benefits, but challenges the administrative law judge's finding of a material change in conditions at Section 725.309, and his application of the "true doubt" rule at Section 718.202(a)(1). The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments concerning the issues of material change and applicability of the "true doubt" rule.

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 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 pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989); *Trent v. Director, OWCP,* 11 BLR 1-26 (1987).

Turning first to the procedural issue, employer contends that the administrative law judge erred in finding that claimant established a material change in conditions pursuant to Section 725.309. We disagree. The administrative law judge properly determined that new evidence submitted subsequent to the denial of claimant's original claim was sufficient, if fully credited, to change the prior administrative result.[1] Decision and Order at 8;

[1] The administrative law judge determined that the relevant and probative new evidence supportive of a material change in conditions consisted of subsequent coal mine employment, positive x-ray readings and the opinion of Dr. Lee, claimant's treating

see Shupink v. LTV Steel Co., 17 BLR 1-24 (1992); *Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19 (1990)(*en banc*); *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988). Contrary to employer's arguments, in making said determination, the administrative law judge was not required to weigh the new evidence supportive of a finding of a material change against all contrary evidence. *Shupink, supra.* As the administrative law judge's findings pursuant to Section 725.309 are supported by substantial evidence and comport with applicable law, we affirm his finding that claimant established a material change in conditions thereunder.

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physician, who diagnosed total disability due to pneumoconiosis. Decision and Order at 8; Director's Exhibits 2, 22, 47; Claimant's Exhibit 1.

Turning to the merits, in finding that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204, the administrative law judge accurately determined that all of the pulmonary function study and blood gas study results of record were non-qualifying,[2] and that the record contained no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 9. In evaluating the medical opinions of record, the administrative law judge reasonably gave little weight to the earlier reports, issued between 1979 and 1982, finding no significant pulmonary impairment, as claimant worked in coal mine employment until 1984.[3] Decision and Order at 6, 7, 10; Director's Exhibits 35, 51, 52; Employer's Exhibits 20, 21; *see generally Bates v. Director, OWCP,* 7 BLR 1-113 (1984). The administrative law judge permissibly discounted the opinions of Drs. Lee and Woolery, which were supportive of a finding of total disability due to pneumoconiosis, *see* Director's Exhibits 22, 41, 47, Claimant's Exhibit 1, since claimant provided these physicians with a grossly inaccurate smoking history,[4] *see generally Sellards v. Director, OWCP,* 17 BLR 1-77 (1993); *Maypray v. Island Creek Coal*

[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 yields values that exceed those values.

[3] The administrative law judge acknowledged the findings of the West Virginia Occupational Pneumoconiosis Board that claimant had a 15% functional pulmonary impairment due to pneumoconiosis, *see* Decision and Order at 7, Director's Exhibits 6, 51, but did not address this evidence in his analysis pursuant to Section 718.204(b) and (c)(4). Any error is harmless, however, *see Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984), as the record does not reflect the medical and legal criteria the state board relied upon. *See Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*).

[4] The record reflects that claimant provided Drs. Lee and Woolery with a minimal smoking history, *see* Director's Exhibits 22, 41, 47, Claimant's Exhibit 1, whereas Dr. Goheen reported a heavy smoking history. Director's Exhibit 36. Although claimant denied smoking at his 1991 examination, Dr. Goheen suspected that claimant was still smoking based on the objective tests he performed. Decision and Order at 10; Employer's Exhibit 23. At the hearing on May 20, 1991, claimant testified that he was smoking approximately two cigarettes per day before he stopped smoking entirely in October of 1989. Hearing Transcript at 19. Employer, however, produced a rebuttal witness, William Gulick, who observed claimant smoking three cigarettes within a one-half hour period on May 15, 1991. Hearing Transcript at 29-36. The administrative law judge found that claimant's testimony was not credible, and credited Dr. Goheen's opinion that claimant was a heavy smoker. Decision and Order at 10, 11.

Co., 7 BLR 1-683 (1985); and acted within his discretion as trier-of-fact in according determinative weight to Dr. Goheen's opinion that claimant was not totally disabled and that his mild pulmonary impairment was due to smoking and recurrent respiratory infections but not coal mine employment exposure, as he found the opinion well-reasoned and consistent with the objective evidence. Decision and Order at 10, 11; Director's Exhibit 52; Employer's Exhibit 14; *see generally Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We therefore affirm the administrative law judge's findings pursuant to Section 718.204, as supported by substantial evidence.

Inasmuch as claimant has failed to establish a requisite element of entitlement under Part 718, *i.e.*, total disability due to pneumoconiosis, claimant is precluded from entitlement to benefits, and thus we need not address employer's remaining arguments on appeal regarding the administrative law judge's weighing of the x-ray evidence of record pursuant to Section 718.202(a)(1) and the validity of the "true doubt" rule. *Trent, supra.*]

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge