BRB Nos. 01-0717 BLA
and 01-0717 BLA-A

DIONIGI RASI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	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 Second Decision and Order On Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Everette F. Thaxton and W. Brent Hackney (Thaxton & Johnstone), Charleston, West Virginia, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Second Decision and Order On Remand (91-BLA-0405) of Administrative Law Judge Clement J. Kichuk 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).[1] This case is before the

[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

Board for the fourth time. Originally, in a Decision and Order issued on July 31, 1992, Administrative Law Judge Edith Barnett found thirty-seven years of coal mine employment established, as stipulated by the parties, and determined that, inasmuch as the instant claim was a duplicate claim,[2] claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), *see* 20 C.F.R. §725.2(c), in accordance with the standard enunciated by the Board in *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988). Judge Barnett found a material change in conditions established pursuant to Section 725.309(d) (2000) in accordance with the standard enunciated in *Spese* and further found that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a), as stipulated by the parties, as well as pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.203(b). In addition, although Judge Barnett found that total disability was not demonstrated pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(iii), she found that claimant established that pneumoconiosis was a contributing cause of his total disability by the medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(4) (2000), as revised at 20 C.F.R. §718.204(b)(2)(iv). Accordingly, benefits were awarded.

Employer appealed and the Board initially affirmed, as unchallenged, Judge Barnett's findings that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to Sections 718.202(a) and 718.203(b) and that total disability was not demonstrated pursuant to Section 718.204(c)(1)-(3) (2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(iii), *Rasi v. Eastern Associated Coal Corp.*, BRB No. 92-2430 BLA (June

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on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed a claim on July 26, 1983, which was denied by the Department of Labor on December 8, 1983, inasmuch as claimant failed to establish total disability due to pneumoconiosis, Director's Exhibit 29. Claimant's 1983 claim indicates that claimant had previously filed a claim which was denied. Subsequently, claimant filed the instant, duplicate claim on January 21, 1987, Director's Exhibit 1.

17, 1994)(unpub.). The Board also affirmed Judge Barnett's finding that a material change in conditions was established pursuant to Section 725.309(d) (2000) in accordance with the standard enunciated in *Spese*, but vacated Judge Barnett's finding pursuant to Section 718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), and remanded the case for her to consider the contrary probative evidence pursuant to Section 718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(iii), and for consideration of 20 C.F.R. §718.204(b) (2000), as revised at 20 C.F.R. §718.204(c), if necessary.

In a Supplemental Decision and Order On Remand issued on February 13, 1995, Judge Barnett found total disability due to pneumoconiosis established pursuant to Section 718.204(b), (c) (2000), as revised at 20 C.F.R. §718.204(b)(2), (c). Accordingly, benefits were awarded. Employer appealed and the Board remanded the case for reconsideration of whether a material change in conditions was established pursuant to Section 725.309(d) (2000) in accordance with the new standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997). *Rasi v. Eastern Associated Coal Corp.*, BRB No. 95-1117 BLA (June 23, 1997)(Smith, J., concurring and dissenting)(unpub.). In addition, the Board vacated Judge Barnett's finding that total disability was demonstrated by the medical opinion evidence pursuant to Section 718.204(c)(4) (2000), as revised at 20 C.F.R. §718.204(b)(2)(iv), and, therefore, vacated her findings pursuant to Sections 718.204(c) (2000) and 718.204(b) (2000), as revised at 20 C.F.R. §718.204(b)(2), (c), and remanded the case for reconsideration. The Board declined to modify its Decision and Order on reconsideration, *Rasi v. Eastern Associated Coal Corp.*, BRB No. 95-1117 BLA (Jan. 15, 1998)(*on recon.*)(unpub.).

On remand, the case was reassigned without objection to Judge Kichuk (hereinafter, the administrative law judge). In a Decision and Order On Remand issued on January 29, 1999, the administrative law judge found the newly submitted medical opinion evidence insufficient to demonstrate total disability pursuant to Section 718.204(c)(4) (2000), as revised at 20 C.F.R. §718.204(b)(2)(iv), or, therefore, a material change in conditions pursuant to Section 725.309(d) (2000) in accordance with the standard enunciated in *Rutter*. Accordingly, benefits were denied. Claimant appealed and the Board held that claimant was not afforded a fair opportunity to respond to new exhibits submitted by employer on remand, which were admitted into the record by the administrative law judge in his Decision and Order On Remand denying benefits. *Rasi v. Eastern Associated Coal Corp.*, BRB No. 99-0549 BLA (July 7, 2000)(unpub.). Because claimant never received copies of the new exhibits submitted by employer on remand, the Board held that due process requires that the case be remanded to allow the record to be reopened for claimant to be given an opportunity to respond to the new exhibits submitted by employer on remand which were admitted into the record. Consequently, the Board vacated the administrative law judge's findings that

total disability was not established pursuant to Section 718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), and, therefore, that a material change in conditions was not established pursuant to Section 725.309(d) (2000) in accordance with the standard enunciated in *Rutter* and remanded the case for reconsideration in light of all relevant evidence, including claimant's response, if any, to the new exhibits submitted by employer on remand which were admitted into the record.

On remand, in response to the new exhibits submitted by employer, claimant submitted a new medical report from Dr. Gaziano, Remand Claimant's Exhibit 1, and employer submitted medical reports from Drs. Zaldivar and Fino, Employer's Exhibits 13-14, in response to Dr. Gaziano's newly submitted opinion. The administrative law judge considered whether a material change in conditions was established pursuant to Section 725.309(d) (2000) in accordance with the standard enunciated in *Rutter*, *i.e.*, whether the newly submitted evidence established that claimant was totally disabled. The administrative law judge noted that the Board had previously affirmed Judge Barnett's finding that total disability was not demonstrated pursuant to Section 718.204(c)(1)-(3) (2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(iii). The administrative law judge then considered all of the newly submitted medical opinion evidence and found it insufficient to demonstrate total disability pursuant to Section 718.204(c)(4) (2000), as revised at 20 C.F.R. §718.204(b)(2)(iv), or, therefore, a material change in conditions pursuant to Section 725.309(d) (2000) in accordance with the standard enunciated in *Rutter*. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that total disability was not established by the medical opinion evidence, *see* 20 C.F.R. §718.204(b)(2)(iv), and, therefore, erred in finding that a material change in conditions was not established pursuant to Section 725.309(d) (2000). Employer responds, urging that the administrative law judge's Second Decision and Order On Remand denying benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to claimant's appeal. Alternatively, on cross-appeal, employer contends that the administrative law judge erred by not determining the exertional requirements of claimant's last coal mine work, did not address employer's objections to claimant's counsel's previous request for attorney's fees and did not address employer's contention that Congressional interference with the adjudication of this claim and claimant's *ex parte* communications with Judge Barnett violated employer's due process rights. Neither claimant nor the Director, as a party-in-interest, has responded to employer's cross-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 into the Act by 30 U.S.C. §932(a); *O'Keeffe*

v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in order to establish a material change in conditions in a duplicate claim pursuant to Section 725.309(d) (2000), *see* 20 C.F.R. §725.2(c), a claimant must prove "under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him," *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997). In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id.* Pursuant to Section 718.204, the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

The administrative law judge considered the relevant, newly submitted medical opinion evidence from Drs. Zaldivar, Fino, Gaziano and Daniel. Dr. Zaldivar, who both examined claimant and reviewed the evidence of record, and Dr. Fino, who reviewed the evidence of record, found that claimant was not totally disabled from a respiratory or pulmonary standpoint from performing his last, usual coal mine work, Employer's Exhibits 1, 5-6, 9-10; Director's Exhibit 19. On the other hand, Dr. Gaziano, who examined claimant and reviewed the evidence of record, found that claimant was totally disabled from performing his last, usual coal mine work, which he stated entailed medium work, Director's Exhibit 5; Claimant's Exhibits 2, 7; Remand Claimant's Exhibit 1, and Dr. Daniel, who examined claimant, found that claimant was totally disabled from performing the heavy manual labor that claimant's last, usual coal mine work required on a sustained basis, Director's Exhibit 20; Claimant's Exhibit 3.

The administrative law judge gave no weight to Dr. Daniel's opinion, as his opinion was not supported by the normal results of the pulmonary function study and blood gas study that he relied on. Second Decision and Order On Remand at 11-14. The administrative law judge found that Dr. Gaziano's opinion was conclusory, gave no explanation how the objective evidence he relied on supported his opinion and was inconsistent with some of the objective study results that he reviewed. The administrative law judge ultimately found that Dr. Gaziano's opinion was outweighed by the opinions of Drs. Fino and Zaldivar, whose

opinions the administrative law judge found to be documented, reasoned and supported by the objective evidence of record.

Claimant notes that Judge Barnett previously credited the opinions of Drs. Gaziano and Daniel over Dr. Zaldivar's contrary opinion in finding total disability established in her 1992 Decision and Order awarding benefits and contends that Dr. Fino's subsequent medical reports were submitted by employer on remand merely in an attempt to overrule Judge Barnett's findings. Thus, claimant urges the Board to vacate the administrative law judge's Second Decision and Order On Remand denying benefits and reaffirm Judge Barnett's award of benefits. However, inasmuch as Judge Barnett's award of benefits based on her findings under Section 718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), was previously vacated by the Board, *see Rasi*, BRB No. 95-1117 BLA, we reject claimant's contention.

Claimant also contends that the administrative law judge erred in crediting the opinion of Dr. Fino, who only reviewed the evidence of record and never examined claimant, over the opinions of Drs. Gaziano and Daniel, who both examined claimant. Contrary to claimant's contention, the Fourth Circuit has held that an administrative law judge may not discredit a physician's opinion solely because the physician did not examine the claimant, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Moreover, Dr. Zaldivar, whose opinion the administrative law judge credited as well, also examined claimant and Dr. Fino addressed matters which were addressed by the examining physicians of record, such that his opinion may constitute substantial evidence, *see Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Turner v. Director, OWCP*, 927 F.2d 778, 15 BLR 2-6 (4th Cir. 1991); *Johnson v. Old Ben Coal Co.*, 17 BLR 1-5 (1992); *see also Cadwallader v. Director, OWCP*, 7 BLR 1-879 (1985).

The administrative law judge credited the opinions of Drs. Fino and Zaldivar as he found, within his discretion, that they were better supported by the objective evidence, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and better reasoned and documented than the contrary opinions of Drs. Gaziano and Daniel. It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to determine whether an opinion is documented and reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and draw her own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190

(1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, if rational and supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(b)(2), as rational and supported by substantial evidence, *see Budash*, *supra*; *Fields*, *supra*; *Rafferty*, *supra*; *Shedlock*, *supra*. Inasmuch as the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2), which was the element of entitlement previously adjudicated against claimant, *see* Director's Exhibit 29, is affirmed, we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(d)(2000) in accordance with standard enunciated in *Rutter*, *supra*.[3]

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[3] Inasmuch as the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2) or, therefore, a material change in conditions pursuant to Section 725.309(d)(2000), are affirmed, we need not address employer's contentions raised in its cross-appeal.