BRB Nos. 97-1551 BLA
and 97-1551 BLA-A

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

Appeal of the Decision and Order - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Tulowitzki & Bilonick), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1756) of Administrative Law Judge Michael P. Lesniak 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 credited claimant with at least thirty-two years of qualifying coal mine employment, and determined that inasmuch as claimant took no action within one year of Admistrative Law Judge Thomas M. Burke's denial of his second claim on July 26, 1991, claimant's present claim, filed on August 7, 1995, was governed by the duplicate claim provisions at 20 C.F.R. §725.309.[1] The administrative law

[1]Claimant's initial claim for benefits was filed on November 18, 1974, and was

judge found that new evidence submitted subsequent to the prior denial was insufficient to establish either a totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1)-(4), or a material change in conditions pursuant to Section 725.309. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings pursuant to Section 718.204(c)(4). Employer responds, urging affirmance, and cross-appeals, contending that Administrative Law Judge Burke's prior finding of the existence of pneumoconiosis is not binding against employer in the instant proceedings. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

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 be entitled 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).

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denied by Administrative Law Judge Reno E. Bonfanti in a Decision and Order issued on November 7, 1986. Director's Exhibit 37. Claimant filed his second claim on November 19, 1987, which was denied by Administrative Law Judge Thomas M. Burke in a Decision and Order issued on July 26, 1991. Director's Exhibit 36.

[2]We affirm, as unchallenged on appeal, the administrative law judge's finding that the new evidence submitted subsequent to the prior denial was insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4). Specifically, claimant asserts that opinions of Drs. Gress and Schaaf establish that claimant is disabled at least in part by pneumoconiosis, and that the administrative law judge erroneously relied on the contrary opinions of Drs. Michos, Solic, Cox, Bush and Strother, who based their conclusions on the faulty premise that claimant did not have pneumoconiosis, yet failed to persuasively identify the cause of claimant's respiratory symptoms.[3] Claimant essentially requests a reweighing of the evidence, which is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *O'Keeffe, supra*. In evaluating the evidence at Section 718.204(c)(4), the administrative law judge properly determined that the opinion of Dr. Gress, that claimant was totally disabled by a combination of respiratory and non-respiratory conditions, supported a conclusion of total disability, but did not satisfy the threshold inquiry of whether claimant's respiratory or pulmonary impairment, standing alone, was totally disabling. Decision and Order at 4; Director's Exhibit 9; *see Beatty v. Danri Corp.*, 16 BLR 1-11 (1991). The administrative law judge acknowledged Dr. Schaaf's qualifications as a Board-certified pulmonary specialist who both examined claimant and reviewed the medical evidence of record, but determined that Drs. Cox and Bush disagreed with Dr. Schaaf's conclusion that claimant's pulmonary function and blood gas study results documented a totally disabling respiratory impairment, and opined that claimant's pulmonary function and blood gas study results were within normal limits. Decision and Order at 5, 6. Inasmuch as Drs. Solic, Cox, Bush and Strother are also Board-certified pulmonary experts who examined claimant and reviewed the medical evidence of record, and their opinion that claimant retains the respiratory capacity to perrform his usual coal mine employment is corroborated by the opinion of reviewing expert Dr. Michos, the administrative law judge acted within his discretion as trier-of-fact in according greater weight to the numerical preponderance of pulmonary expert opinions, which he found supported by the objective evidence of record. Decision and Order at 4-6; *see generally King v.Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge findings pursuant to Section 718.204(c)(4) are supported by substantial evidence and are affirmed. Inasmuch as claimant has failed to establish the existence of a totally disabling respiratory impairment, *see Beatty, supra*, a requisite element of entitlement under 20 C.F.R. Part 718, *see Trent, supra,* we affirm the

[3]Contrary to claimant's arguments, while the fact that a physician did not diagnose pneumoconiosis may affect his opinion as to the cause of disability at Section 718.204(b), it is not relevant to the inquiry of whether the miner suffers a totally disabling respiratory impairment pursuant to Section 718.204(c)(4).

administrative law judge's denial of benefits. Consequently, we need not reach employer's arguments on cross-appeal regarding whether it is bound by Administrative Law Judge Burke's findings on the issue of the existence of pneumoconiosis in the prior proceeding.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge