BRB No. 01-0520 BLA

CLIFFORD D. HUNT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GLENROCK 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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet), Denver, Colorado, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd), Washington, D.C., for employer.

Edward Waldman (Eugene Scalia, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-1261) of Administrative Law Judge Thomas M. Burke awarding 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] Initially, the administrative law judge noted that two medical reports

[1] The Department of Labor has amended the regulations implementing the Federal

submitted by employer post-hearing were not admitted into the record, as they addressed matters outside the scope of discovery permitted by the administrative law judge for the submission of post-hearing evidence. Next, the administrative law judge found that the instant, duplicate claim was timely filed and that claimant established approximately twenty-five years of coal mine employment.[2] The administrative law judge noted that 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 United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, in *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F. 3d 1502, 20 BLR 2-302 (10th Cir. 1996). After considering and comparing the evidence submitted with claimant's original claim with the evidence submitted subsequent to the denial of claimant's original claim, the administrative law judge initially found that the relevant x-ray evidence failed to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(1), or, therefore, a material change in conditions, and that the results of the relevant blood gas study evidence was mixed, neither precluding or demonstrating total disability, *see* 20 C.F.R. §718.204(b)(2)(ii), and, therefore, was insufficient to indicate any material change in conditions. However, the administrative law judge further found that the relevant pulmonary function study and medical opinion evidence established that claimant was totally disabled due to pneumoconiosis arising out of coal mine employment, *see* 20 C.F.R. §718.204(b)(2)(i), (iv), (c), and, therefore, established a material change in conditions pursuant to Section 725.309(d) (2000). On the merits, the administrative law judge found the existence of pneumoconiosis, as more broadly defined by the Act and regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201, was established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), and that pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §718.203(b). Finally, the administrative law judge found that total disability was established by the

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Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective 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 originally filed a claim on April 23, 1991, while still employed in coal mine employment, which was finally denied by the district director on September 23, 1991, inasmuch as claimant failed to establish the existence of pneumoconiosis, pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis, Director's Exhibit 46. Specifically, the district director noted that a May, 1991, pulmonary function study was not valid and that, while a May, 1991, blood gas study met the standards for demonstrating disability, there was no evidence that the demonstrated impairment was due to pneumoconiosis, *id.* CL took no further action on this claim. Claimant filed a second, duplicate claim on July 13, 1998, Director's Exhibit 1, which is at issue herein.

evidence of record as a whole pursuant to 20 C.F.R. §718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), and that total disability due to pneumoconiosis was established pursuant to 20 C.F.R. §718.204(b) (2000), as revised at 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer contends that the instant, duplicate claim was not timely filed, that the administrative law judge erred in failing to admit relevant post-hearing evidence submitted by employer, that the administrative law judge's application of the revised regulations entitles employer to a new hearing on remand, and, finally, that the administrative law judge erred in finding that a material change in conditions was established pursuant to Section 725.309(d) (2000), in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis established pursuant to Section 718.204(b) (2000), as revised at 20 C.F.R. §718.204(c). Claimant responds, urging that the administrative law judge's Decision and Order awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has also responded, urging the Board to reject employer's contentions that the instant duplicate claim was not timely filed, that the revised regulations affect the outcome of this case, and that the administrative law judge failed to weigh all relevant evidence under Section 718.202(a).

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).

Initially, employer contends that the instant, duplicate claim was untimely filed. The statute of limitations at Section 422(f) of the Act, 30 U.S.C. §932(f), provides:

> Any claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later -
>
> (1) a medical determination of total disability due to pneumoconiosis; or
>
> (2) March 1, 1978.

The implementing regulation at 20 C.F.R. §725.308, which has not been revised, provides in pertinent part:

> (a) A claim for benefits...shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been

> communicated to the miner or a person responsible for the care of the miner...
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, ... the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308. The Board has held that Section 725.308(a) requires a written medical report, found to be probative, reasoned, and documented by the administrative law judge, indicating total respiratory disability due to pneumoconiosis in such a manner that the miner was aware, or, in the exercise of reasonable diligence, should have been aware, that he was totally disabled due to pneumoconiosis arising out of coal mine employment and that "communication to the miner" is to be construed as to require that a medical opinion is actually physically received by the miner and that mere knowledge of the contents of a medical report, *i.e.*, imparted by oral statements to the miner and/or hearsay communications, is insufficient, *see Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993); *see also Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-945 (1994).

The Tenth Circuit held in *Brandolino* that a final finding by the most recent adjudicator of a miner's claim (regardless of whether the adjudicator is a claims examiner, an administrative law judge or the Board) that the claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders such evidence ineffective to trigger the running of the statute of limitations that would bar the filing of a subsequent duplicate claim, *see Brandolino*, 90 F. 3d at 1507-1508, 20 BLR at 2-312-313, and, therefore, held that it need not decide whether such evidence was adequate to constitute a medical determination of total disability due to pneumoconiosis under the Board's standard in *Adkins*, *supra*. *See Brandolino*, 90 F. 3d at 1508 n. 9, 20 BLR at 2-313 n. 9. However, the Tenth Circuit declined to decide whether the Board's holding in *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990), *see also Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990), that the statute of limitations provided by Section 422(f) of the Act, 30 U.S.C. §932(f), and implemented by 20 C.F.R. §725.308, does not apply to duplicate claims, is inconsistent with the Act, *see Brandolino*, 90 F. 3d at 1507 n. 7, 20 BLR at 2-312 n. 7.

Employer contends that the record demonstrates that after the final denial of claimant's original claim by the district director on September 23, 1991, *see* Director's Exhibit 46, claimant was diagnosed repeatedly as totally disabled due to pneumoconiosis and claimant was aware of these diagnoses. Claimant testified at the hearing that in 1992, he was told by his treating physician, Dr. Cubin, that he was disabled due to his lung problems arising out of his coal mine employment, *see* Hearing Transcript at 55. Dr. Cubin completed an insurance form on December 13, 1991, on which he diagnosed chronic bronchitis and

pulmonary fibrosis and found that claimant suffered from a Class III moderate respiratory impairment, Claimant's Exhibit 5; Employer's Exhibits 18-19. Subsequently, on January 10, 1992, Dr. Cubin completed another insurance form on which he indicated that he originally recommended that claimant stop working in August, 1990, and stated in response to the question of when he anticipated that claimant could return to work, "never," *id*. Thereafter, in a letter dated November 11, 1999, Dr. Cubin stated that his records showed that he had told claimant that he had emphysema due to coal dust on "9/7/84," *id*.

The administrative law judge cited the Board's holding in *Andryka, supra*, that the statute of limitations applies only to the first claim filed, *see also Faulk, supra*, and further found that the fact that claimant had filed his original claim while he was still gainfully employed as a coal miner constituted "extraordinary circumstances" under which the statute of limitations period should be tolled, *see* 20 C.F.R. §725.308(c); *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1994). Thus, the administrative law judge found that claimant's duplicate claim was timely filed. Decision and Order at 4.

Employer contends that whether claimant's original claim was filed while he was still employed as a coal miner is irrelevant as to whether his duplicate claim was timely filed and ignores the fact that claimant had ceased working in coal mine employment by the time his original claim was finally denied in September, 1991. In addition, employer contends that in *Brandolino*, the Tenth Circuit cited with approval the holding of the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). In *Ross*, a claimant returned to coal mine employment after the denial of his original claim and then filed a duplicate claim. The Sixth Circuit held that under Section 725.308(a), the time period in which a miner must file for benefits starts, at a minimum, after each denial of a previous claim, provided the miner works in the coal mines for a substantial period of time after the denial and a new medical opinion of total disability due to pneumoconiosis is communicated, *see Ross*, 42 F.3d at 996, 19 BLR at 2-16. Thus, the Sixth Circuit held that it "need not hold, as did the Board" in *Faulk, supra*; *see also Andryka, supra*, (and as the administrative law judge held in this case) that Section 725.308 applies only to the filing of a miner's initial claim, to decide the case in *Ross, id*.

Contrary to employer's contention, the Tenth Circuit cited with approval the Sixth Circuit's holding in *Ross* only as to the proposition that a claimant should not be barred from bringing a duplicate claim pursuant to Section 725.309 when his or her first claim was premature because the claimant's condition had not yet progressed to the point that he met the Act's definition of total disability due to pneumoconiosis, *see Brandolino*, 90 F. 3d at 1507, 20 BLR at 2-312; *see also Ross*, 42 F.3d, at 996, 19 BLR at 2-16. However, in *Brandolino*, the Tenth Circuit specifically declined to decide whether the Board's holding in *Andryka, supra*; *see also Faulk, supra*, that the statute of limitations does not apply to duplicate claims is inconsistent with the Act, *see Brandolino*, 90 F. 3d at 1507 n. 7, 20 BLR

at 2-312 n. 7. Thus, the administrative law judge's reliance on the Board's holdings in *Faulk, supra*, and *Andryka, supra*, that the statute of limitations applies only to the first claim filed, is not, as employer asserts, contrary to law and/or misplaced.

In any event, as both the Director and claimant contend, Dr. Cubin's January 10, 1992, written statement that he believed that claimant could never return to work, Claimant's Exhibit 5; Employer's Exhibits 18-19, does not indicate whether he believed that claimant was totally disabled due to pneumoconiosis arising out of coal mine employment. Moreover, claimant's testimony that he was "told" by Dr. Cubin that he was disabled due to his lung condition arising out of coal mine employment in 1992 and Dr. Cubin's indication that he "told" claimant in 1984 that he had emphysema due to coal dust reveal merely claimant's knowledge of Dr. Cubin's opinion by the doctor's oral statements to claimant and/or by hearsay and are insufficient to satisfy the requirement that Dr. Cubin's medical opinion, even if it were sufficient to indicate that claimant was totally disabled due to pneumoconiosis arising out of coal mine employment, be reduced to a writing which was actually physically received by claimant, *see Adkins, supra*; *see also Daugherty, supra*. Consequently, the administrative law judge's finding that claimant's duplicate claim was timely filed is affirmed as supported by substantial evidence and, therefore, any error by the administrative law judge in relying on the Board's holding in *Andryka, supra*; *see also Faulk, supra*; *see also Brandolino, supra*, and/or on the fact that claimant filed his original claim while he was still gainfully employed as a coal miner, is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Next, employer contends that the administrative law judge erred in failing to admit relevant, post-hearing evidence submitted by employer. In light of a motion filed by employer that further discovery be permitted post-hearing in order to obtain medical records from Dr. Smith, who was identified for the first time at the hearing as one of claimant's treating physicians, the administrative law judge issued orders on July 14, 2000, and September 20, 2000, granting the parties time to conduct post-hearing discovery pertaining to Dr. Smith and to obtain a review of Dr. Smith's records by employer's experts. Pursuant to the administrative law judge's orders, employer obtained and submitted records from Dr. Smith, Employer's Exhibit 20, and a medical opinion from Dr. Branscomb, Employer's Exhibit 21, and two opinions from Dr. Repsher, Employer's Exhibits 22-23, both of whom reviewed Dr. Smith's records. However, by order dated October 5, 2000, the administrative law judge determined that as the preponderance of the information contained in the report from Dr. Branscomb, Employer's Exhibit 21, involved rebuttal of an opinion from Dr. James, which had been submitted by claimant prior to the hearing, rather than rebuttal of Dr. Smith's opinion, Dr. Branscomb's post-hearing opinion would not be admitted into evidence, as he had addressed matters outside the scope of discovery permitted by the administrative law judge for the submission of post-hearing evidence. Similarly, by order dated October 20, 2000, the administrative law judge determined that because one of the reports from Dr.

Repsher, *see* Employer's Exhibit 22, exclusively addressed the opinion of Dr. James which had been submitted by claimant prior to the hearing, rather than Dr. Smith's opinion, that post-hearing opinion of Dr. Repsher was excluded from the record, as he addressed matters outside the scope of discovery permitted by the administrative law judge for the submission of post-hearing evidence. The administrative law judge did, however, admit another post-hearing opinion of Dr. Repsher's, which addressed Dr. Smith's opinion, *see* Employer's Exhibit 23.

Finally, employer objected to claimant's submission, in response, of a post-hearing report from Dr. James, Claimant's Exhibit 15. In an order dated November 20, 2000, the administrative law judge determined that, although the post-hearing opinion of Dr. James responded to the post-hearing opinion from Dr. Repsher that was admitted into the record, as well as Dr. Smith's report, Dr. James's post-hearing report did not exceed the scope of post-hearing discovery permitted by the administrative law judge, because Dr. Repsher's post-hearing report was limited to a review of Dr. Smith's records. In addition, the administrative law judge found that it was appropriate for claimant's expert to have the last word, as claimant bears the ultimate burden of proof.

Employer contends that the administrative law judge erred in excluding the post-hearing reports of Drs. Branscomb and Repsher, inasmuch as they had both considered the opinion of Dr. James which had been submitted by claimant prior to the hearing, in conjunction with the records from Dr. Smith, in order that they could have a complete understanding of the case. Thus, employer contends that their opinions constituted relevant evidence. Employer also argues that the administrative law judge's rulings are inconsistent, *i.e.*, he disallowed the post-hearing reports of Drs. Branscomb and Repsher for having reviewed evidence beyond Dr. Smith's records, yet he admitted the post-hearing opinion of Dr. James, who also reviewed evidence beyond Dr. Smith's records. In response, claimant notes that employer had submitted other opinions from Drs. Branscomb and Repsher, reviewing the opinion of Dr. James which claimant had submitted prior to the hearing, and that those opinions had been admitted prior to the administrative law judge's ruling on rebuttal evidence, *see* Director's Exhibit 40; Employer's Exhibits 16-18; Hearing Transcript.

The administrative law judge has broad discretion in resolving procedural issues, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Farber v. Island Creek Coal Co.*, 7 BLR 1-428, 1-429 (1984); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984), and if the administrative law judge determines during a hearing that the documentary evidence is incomplete as to any issue to be adjudicated, he may, within his discretion, leave the record open to allow the parties a reasonable time to obtain and submit "only such additional evidence as is required," 20 C.F.R. §725.456(e) (2000), *see also* 20 C.F.R. §725.2(c); *see Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992)(en banc)(Brown, J. concurring; Smith, J. dissenting);

King v. Cannelton Industries, Inc., 8 BLR 1-146, 1-148 (1985); *see also Conn v. White Deer Coal Co.*, 6 BLR 1-979 (1984).

In this case, the administrative law judge, within his discretion, determined that the "only such additional evidence" that was "required" to be submitted by the parties post-hearing was evidence regarding Dr. Smith's medical treatment records. Inasmuch as the post-hearing opinions of Drs. Branscomb and Repsher addressed the opinion of Dr. James, which had been submitted by claimant prior to the hearing, the administrative law judge, within his discretion, excluded those opinions as they went beyond the scope of rebuttal he had declared permissible. Similarly, the administrative law judge determined, within his discretion, that the post-hearing opinion of Dr. James, which addressed the post-hearing report that was admitted from Dr. Repsher, did not exceed or go beyond the scope of permissible rebuttal, because Dr. Repsher's report was limited to a review of Dr. Smith's medical treatment records. Consequently, we reject employer's contention that the administrative law judge erred in failing to admit relevant post-hearing evidence submitted by employer from Drs. Repsher and Branscomb.

Next, employer contends that, because the hearing in this case was held prior to the effective date of the revised regulations, and the administrative law judge applied the revised regulations in his Decision and Order which was issued subsequent to the effective date, than due process requires that the case be remanded for a new hearing and an opportunity for employer to submit evidence in response to the new standards contained in the revised regulations. Specifically, employer contends that the administrative law judge applied the definition of "legal"pneumoconiosis pursuant to the revised regulation at Section 718.201 in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), and gave greater weight to the opinions of claimant's treating physicians when weighing the medical opinion evidence of record pursuant to the revised regulation at 20 C.F.R. §718.104(d), but failed to properly apply the revised standards for establishing total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c), which employer asserts take into account non-pulmonary and non-respiratory conditions.

Contrary to employer's contention, the revised regulation at 20 C.F.R. §718.204(a) states that "any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis," *see* 20 C.F.R. §718.204(a). This is consistent with the case-law of the Tenth Circuit prior to the issuance of the revised regulations, *see Twin Pines Coal Co. v. United States Department of Labor* [*White*], 854 F.2d 1212, 1215, 11 BLR 2-198, 2-205 (10th Cir. 1988); 65 Fed. Reg. 79947 (Dec. 20, 2000). Moreover, as the Director contends, the revised causation standard under 20 C.F.R. §718.204(c)(1) is consistent with Tenth Circuit case-law regarding the prior causation standard at 20 C.F.R. §718.204(b) (2000), *see* 20 C.F.R. §718.204(c)(1); *Mangus v.*

Director, OWCP, 882 F.2d 152, 13 BLR 2-9 (10th Cir. 1989)(pneumoconiosis is at least a contributing cause of disability).

In addition, although the administrative law judge noted that the revised regulation at Section 718.104(d), requires that special consideration be given to the report of a miner's treating physician's opinion and allows that such an opinion may be given controlling weight, the revised evidentiary quality standard at Section 718.104(d) only applies to evidence developed after January 19, 2001, *see* 20 C.F.R. §718.101(b), and, therefore, does not apply to any evidence in this case. Moreover, the administrative law judge specifically stated that "there is no intent to assign controlling weight" to the opinions of claimant's treating physicians in this case pursuant to the revised evidentiary quality standard at Section 718.104(d), *see* Decision and Order at 26. In any event, the revised evidentiary quality standard at Section 718.104(d) is consistent with "the well-established rule" in the Tenth Circuit that the administrative law judge "must give substantial weight to the testimony of a claimant's treating physician unless good cause is shown to the contrary," *see Hansen v. Utah Power & Light Co.*, 984 F.2d 364, 368, 17 BLR 2-48, 2-55 (10th Cir. 1993); *Micheli v. Director, OWCP*, 846 F.2d 632, 636, 11 BLR 2-171, 2-179 (10th Cir. 1988).

Finally, in regard to the definition of "legal"pneumoconiosis pursuant to the revised regulation at Section 718.201, which the administrative law judge utilized in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), "legal" pneumoconiosis as currently defined under the revised 20 C.F.R. §718.201(a)(2) and (b), includes any chronic "obstructive" pulmonary disease "significantly related to, or substantially aggravated by, dust exposure in coal mine employment" and recognizes that pneumoconiosis is a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure," *see* 20 C.F.R. §718.201(c). *See also* 30 U.S.C. §902(b). Prior to the issuance of the revised definition of "legal" pneumoconiosis, applicable in this case, *see* 20 C.F.R. §718.2, the Tenth Circuit recognized pneumoconiosis "as a disease that develops progressively, *see Brandolino*, 90 F.3d at 1507, 20 BLR at 2-312, and the Board recognized the distinction between "legal" and "clinical" pneumoconiosis, *see Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-106 (1998), and that a diagnosis of obstructive pulmonary disease related to dust exposure in a miner's coal mine employment meets the statutory definition of pneumoconiosis, *see Heavilin v. Consolidation Coal Co.*, 6 BLR 1-1209, 1-1212 (1984); *see also Utah Power and Light Co. v. Director, OWCP*, [*Wilson*], No. 93-9503, 13 F.3d 408 (Table), 1993 WL 503179 (10th Cir., Dec. 9, 1993)(unpub.)(holding that a physician's opinion that coal dust exposure caused the miner's chronic obstructive pulmonary disease constituted substantial evidence of pneumoconiosis).[3] Thus, because the

[3] Moreover, the comments accompanying the revised definition of pneumoconiosis at 20 C.F.R. §718.201 also refer to the "overwhelming scientific and medical evidence demonstrating that coal mine dust exposure can cause obstructive lung disease," *see* 65 Fed.

revised definition of pneumoconiosis under 20 C.F.R. §718.201 is consistent with the statutory definition of pneumoconiosis, *see* 30 U.S.C. §902(b), and the relevant case-law issued prior to the issuance of the revised definition, the revised definition of pneumoconiosis does not affect or impact the outcome or disposition of this case. Consequently, we reject employer's request that this case be remanded for a new hearing and an opportunity for employer to submit evidence in response to the new standards contained in the revised regulations.

On the merits, employer contends that the administrative law judge erred in finding that a material change in conditions was established pursuant to Section 725.309(d) (2000), *see* 20 C.F.R. §725.2(c), in finding "legal" pneumoconiosis established by the medical opinion evidence pursuant to Sections 718.201 and 718.202(a)(4), and in finding total disability due to pneumoconiosis established pursuant to Section 718.204(b) (2000), as revised at 20 C.F.R. §718.204(c). The Tenth Circuit has held that, in order to prevail on a duplicate claim pursuant to Section 725.309(d) (2000), a claimant must prove for each element that actually was decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied, *see Brandolino, supra*. The Tenth Circuit held that the administrative law judge must compare the "evidence obtained after [the] prior denial to evidence considered in or available at the time of [the] prior claim..." to determine if claimant's condition in these elements has "worsened materially since the time of his earlier denial," *id*. The administrative law judge noted that claimant's original claim was denied in this case because claimant failed to establish the existence of pneumoconiosis, pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis, Director's Exhibit 46.

Reg. 79944 (Dec. 20, 2000), and that the revised definition will render invalid as inconsistent with the regulations medical opinions which categorically exclude obstructive lung disorders from occupationally-related pathologies, *see* 65 Fed. Reg. 79938 (Dec. 20, 2000).

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 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*.[4]

Comparing the evidence from claimant's original claim and the evidence developed since the denial of claimant's original claim, the administrative law judge found the x-ray evidence of record insufficient to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(1), or a material change in condition, Decision and Order at 8, 22, and found that the results of the blood gas study evidence were "mixed" and/or "fluctuate[d]," *i.e.*, neither precluding or demonstrating total disability, *see* 20 C.F.R. §718.204(b)(2)(ii), and therefore did not indicate a material change in conditions, Decision and Order at 9, 22, 27. However, the administrative law judge further found that while the results of the pulmonary function study evidence dating from October,1980, through December, 1991, were "mixed" and/or "fluctuated," the valid pulmonary function study evidence dating from January, 1997, and on was consistently qualifying, *see* 20 C.F.R. §718.204(b)(2)(i), and, therefore, reflected a material change in conditions, Decision and Order at 9, 22-23. *See* Director's Exhibit 9; Employer's Exhibits 18-20; Claimant's Exhibit 6-7. With regard to the medical opinion evidence, the administrative law judge found that the medical opinions pre-dating the denial of claimant's original claim were insufficient to establish the existence of pneumoconiosis for various reasons: they did not address pneumoconiosis or were insufficient to constitute a diagnosis of pneumoconiosis and/or neither precluded nor established the existence of "legal"pneumoconiosis, *see* 20 C.F.R. §§718.201; 718.202(a)(4); and none found that

[4] Contrary to employer's contention, regardless of whether claimant believed the denial of his original claim was a mistake, *see* Hearing Transcript at 53, since claimant's original claim was denied he failed to establish the existence of pneumoconiosis, pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis, Director's Exhibit 46, claimant must prove with respect to each element that was decided adversely to claimant in the prior denial, that there has been a material change in that condition since the prior claim was denied, *see Brandolino*, *supra*.

claimant was totally disabled due to pneumoconiosis, *see* 20 C.F.R. §718.204(c). Decision and Order at 10-11, 23. Ultimately, the administrative law judge credited the medical opinions offered following the denial of claimant's original claim, which found that claimant's condition had deteriorated and that he had become totally disabled due to pneumoconiosis which arose, at least in part, from his coal mine employment. The administrative law judge found that these opinions were consistent with claimant's medical treatment history of increased usage of oxygen and bronchodilators and claimant's testimony regarding his symptoms of worsening dyspnea.

Employer contends that the administrative law judge did not provide any specific rationale for crediting the medical opinions finding that claimant's condition had deteriorated and that he was now totally disabled due to pneumoconiosis arising, in part, from his coal mine employment over the contrary medical opinion evidence, other than the fact that the administrative law judge found that they were consistent with claimant's testimony regarding his symptoms. Contrary to employer's contention, the administrative law judge referred to his "reasons set forth below," *i.e.*, where the administrative law judge specifically delineated his weighing of the medical opinion evidence in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), *see* Decision and Order at 23, 24-27. The administrative law judge found the opinions of Dr. James, as corroborated by the opinions of Dr. Guicheteau, as well as those of claimant's treating physicians, Drs. Smith and Cubin, were more persuasive than the contrary opinions of Drs. Repsher and Branscomb, as they were better documented and reasoned, more consistent with the objective pulmonary function study evidence and claimant's history of coal dust exposure, as well as claimant's testimony regarding his symptoms of worsening shortness of breath and medical records.[5]

[5] Dr. James diagnosed moderately severe chronic obstructive pulmonary disease arising from claimant's coal mine employment that was totally disabling, noting that there were no other causes, such as smoking or asthma, that could explain claimant's chronic obstructive pulmonary disease, and Dr. James found a significant change in claimant's respiratory condition between 1991 and 1998, Claimant's Exhibits 1-2, 10, 15; Hearing Transcript. Dr. James is a board-certified physician in internal medicine and pulmonary diseases, as well as a B-reader, *id*. Similarly, Dr. Guicheteau found that claimant had chronic obstructive pulmonary disease caused by his coal dust exposure that was totally disabling, Director's Exhibits 11-12; Employer's Exhibits 18-19. Dr. Cubin agreed that claimant had chronic obstructive pulmonary disease due to his coal dust exposure and found that claimant had a Class III moderate impairment, Claimant's Exhibit 5; Employer's Exhibits 18-19, and Dr. Smith agreed that claimant had severe chronic obstructive pulmonary disease due to black lung disease and not asthma, Claimant's Exhibits 13-14; Employer's Exhibit 20.

On the other hand, Dr. Repsher found that claimant did not have any respiratory

disease arising from his coal mine employment, but asthma, as he had a purely obstructive impairment, and that claimant was not totally disabled, Director's Exhibits 37, 40; Employer's Exhibits 17-18, 23. Dr. Repsher attributed claimant's pulmonary function study results showing obstruction to a psychiatric illness and/or hysteria due to a somatization disorder and vocal cord dysfunction, *id*. Dr. Repsher testified, however, that he could not exclude some small component of "legal" pneumoconiosis, but it was not clinically significant, Hearing Transcript at 126, 138, 141. Dr. Repsher is a board-certified physician in internal medicine and pulmonary diseases, as well as a B-reader, *id*. Finally, Dr. Branscomb, a board-certified physician in internal medicine and a B-reader, reviewed the evidence and found no evidence of any lung disease arising from claimant's coal mine employment and found that claimant was not totally disabled, but suffered from chronic obstruction due to asthma, Employer's Exhibit 16.

Employer further contends, however, that the administrative law judge erred in finding "legal" pneumoconiosis established by the medical opinion evidence pursuant to Sections 718.201 and 718.202(a)(4). "Legal" pneumoconiosis includes any chronic "obstructive" pulmonary disease "significantly related to, or substantially aggravated by, dust exposure in coal mine employment" and recognizes that pneumoconiosis is a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure," *see* 30 U.S.C. §902(b); 20 C.F.R. §§718.201(a)(2), (b)-(c); *see also* 20 C.F.R. §718.202(a)(4). Initially, we reject employer's contention that the administrative law judge erred, in this case arising within the jurisdiction of the Tenth Circuit, in failing to weigh all like and unlike evidence together under Section 718.202(a), including the x-ray, CT scan and medical opinion evidence. Establishing pneumoconiosis under one of the four methods pursuant to Section 718.202(a)(1)-(4) obviates the need to do so under any of the other methods, *see* 20 C.F.R. §718.202(a)(1)-(4); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *see also Beatty v. Danri Corp.*, 16 BLR 1-11 (1991), *rev'd and aff'd on other grounds*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995). Moreover, "legal" pneumoconiosis, as defined at 30 U.S.C. §902(b) and 20 C.F.R. §718.201, is a broader category than "clinical" pneumoconiosis; it is not dependent upon a determination of "clinical" pneumoconiosis, and the absence of "clinical" pneumoconiosis does not necessarily influence a physician's diagnosis of "legal" pneumoconiosis, *See Jones*, 21 BLR at 1-106; *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). In the present case, the administrative law judge reasonably found that although the evidence of record was insufficient to establish "clinical" pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(2), the weight of the newly submitted medical opinions established "legal" pneumoconiosis pursuant to Section 718.202(a)(4). Thus, the administrative law judge did not err in his method of weighing the evidence pursuant to Section 718.202(a)(1)-(4).

Employer also contends that the administrative law judge did not adequately explain why he credited the opinion of Drs. James, as supported by the opinions of Drs. Guicheteau, Smith and Cubin, as better reasoned and more consistent with the objective evidence, than the contrary opinions of Drs. Repsher and Branscomb. Employer contends that in diagnosing "legal" pneumoconiosis, Dr. James relied upon pulmonary function study results and medical studies concluding that coal dust causes chronic obstructive pulmonary disease are either non-specific as to the cause of claimant's pulmonary disease or are general and do not address claimant's specific condition. In addition, employer contends that claimant's coal mine employment history and lack of a smoking history, which Drs. James and Guicheteau also relied upon, do not constitute objective evidence upon which to diagnose pneumoconiosis.

Contrary to employer's contention, the medical studies relied upon by Dr. James, indicating that coal dust causes chronic obstructive pulmonary disease, are consistent with

the definition of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(2) and (b), which includes any chronic "obstructive" pulmonary disease "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Moreover, the comments accompanying the revised definition of pneumoconiosis at 20 C.F.R. §718.201 also refer to the "overwhelming scientific and medical evidence demonstrating that coal mine dust exposure can cause obstructive lung disease," *see* 65 Fed. Reg. 79944 (Dec. 20, 2000), and that the revised definition will render invalid as inconsistent with the regulations medical opinions which categorically exclude obstructive lung disorders from occupationally-related pathologies, *see* 65 Fed. Reg. 79938 (Dec. 20, 2000).

In this case, the administrative law judge also found that the contrary opinion of Dr. Repsher, attributing claimant's pulmonary function study results showing obstruction to a psychiatric illness and/or hysteria due to a somatization disorder and vocal cord dysfunction, was not supported by any other physician of record, including claimant's treating physicians or the opinion of a psychiatrist, Dr. Dubester, Director's Exhibit 46; Employer's Exhibits 18-19. Decision and Order at 24-26. In addition, the administrative law judge noted that Dr. Repsher did testify that he could not exclude some small component of "legal" pneumoconiosis and found that his opinion, that it was not clinically significant, was contrary to the preponderance of the evidence of record, including claimant's pulmonary function study results and the records from claimant's treating physicians. Similarly, the administrative law judge found that Dr. Branscomb's contrary opinion, that claimant suffered from chronic obstruction due to asthma, was based on a misunderstanding of claimant's medical and coal mine employment history that was inconsistent with claimant's testimony and the treatment records and opinions provided by Drs. Smith and Cubin. Thus, ultimately the administrative law judge, within his discretion, credited the opinions of Drs. James, Guicheteau, Smith and Cubin that claimant suffered from "legal" pneumoconiosis, as he found them to be 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. Repsher and Branscomb.

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, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Consequently, as the administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and draw his 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), the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Sections 718.201 and 718.202(a)(4) is affirmed, as rational and supported by substantial evidence.

Employer also contends that the administrative law judge erred in finding total disability due to pneumoconiosis established pursuant to Section 718.204(b) (2000), as revised at 20 C.F.R. §718.204(c). Pursuant to 20 C.F.R. §718.204(c)(1), a miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis as defined in Section 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *see also Mangus*, *supra*. The administrative law judge reiterated his weighing of the conflicting medical opinion evidence, *i.e.*, for "the reasons previously outlined," Decision and Order at 28, and found that the relevant opinions of Drs. James and Guicheteau that claimant's totally disabling respiratory or pulmonary impairment is attributable, at least in part, to his coal mine employment were more persuasive than the contrary opinions of Drs. Repsher and Branscomb that claimant was not totally disabled due to pneumoconiosis or any other respiratory or pulmonary, *i.e.*, as they were better documented and reasoned, more consistent with the objective evidence and claimant's history of coal dust exposure, in conjunction with the absence of any other causative exposures such as smoking or allergic history, as well as claimant's testimony regarding his symptoms of worsening shortness of breath and medical records. Decision and Order at 23-26. Employer again contends that the administrative law judge did not adequately explain his finding and failed to consider evidence of other possible causes of claimant's impairment.

Contrary to employer's contention, the administrative law judge considered the opinions of Drs. Repsher and Branscomb, that claimant's impairment was due to causes other than his coal mine employment. The administrative law judge found that the contrary opinion of Dr. Repsher, attributing claimant's pulmonary function study results showing obstruction to a psychiatric illness, was not supported by any other physician of record, including the records of claimant's treating physicians or the opinion of a psychiatrist, Dr. Dubester, Decision and Order at 24-26, and found that Dr. Branscomb's contrary opinion that claimant's obstruction was due to asthma was based on a misunderstanding of claimant's medical and coal mine employment history that was inconsistent with claimant's testimony and the treatment records. Ultimately, the administrative law judge, within his discretion, credited the opinions of Drs. James and Guicheteau, as he found them to be better supported by the objective evidence, *see Wetzel*, *supra*, and were better reasoned and documented than the contrary opinions of Drs. Repsher and Branscomb, *see Clark*, *supra*; *Fields*, *supra*; *Lucostic*, *supra*. Thus, the administrative law judge's finding that total disability due to pneumoconiosis arising out of coal mine employment was established pursuant to Section 718.204(b) (2000), as revised at 20 C.F.R. §718.204(c), is affirmed, as rational and supported

by substantial evidence, *see Anderson, supra*; *Worley, supra*.

Employer further contends that the administrative law judge erred in relying on the fact that the newly submitted pulmonary function study evidence was qualifying in support of his finding that a material change in conditions was established pursuant to Section 725.309(d) (2000), *see* 20 C.F.R. §725.2(c), as employer notes that some of the pulmonary function studies submitted with claimant's original claim were also qualifying and the district director had already found in claimant's original, denied claim, that claimant's objective study results met the standards for demonstrating disability, *see* Director's Exhibit 46. Thus, employer contends that the pulmonary function study evidence in fact demonstrates that claimant's condition has not materially changed.

First, it appears that employer waived the issue of whether claimant had become totally disabled since the prior denial and, therefore, whether he had established a material change in conditions with respect to that element, because employer did not list total disability as a contested issue before the administrative law judge on form CM-1025, *see* Director's Exhibit 47, and employer reiterated at the hearing that the list of contested issues on form CM-1025 at Director's Exhibit 47 was accurate, *see* Hearing Transcript at 6; 20 C.F.R. §725.463(a). The administrative law judge's statement of contested issues reflect his correct understanding that employer did not contest total disability, *see* Decision and Order at 3.[6]

Second, despite his understanding that employer had not contested total disability, the administrative law judge reasonably analyzed the relevant evidence in the prior claim, including both pulmonary function studies and blood gas studies. He determined the evidence was mixed and, therefore, insufficient to demonstrate disability. The administrative law judge properly found, as supported by substantial evidence, that the newly submitted pulmonary function study evidence was consistently qualifying, *see* Director's Exhibit 9; Employer's Exhibits 18-20; Claimant's Exhibit 6-7. Thus, the administrative law judge found that the newly submitted pulmonary function study evidence supported Dr. James's opinion that claimant was totally disabled due to "legal" pneumoconiosis and that his condition had deteriorated and/or worsened. Dr. James opined that claimant's pulmonary function study results revealed that claimant suffered from an obstruction which the doctor

[6] In addition, inasmuch as the administrative law judge's findings that pneumoconiosis arising out of coal mine employment was established pursuant to Section 718.203(b) and that total disability was not a contested issue and/or was established pursuant to Section 718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), *see* Decision and Order at 3, 27-28, have not been challenged on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

attributed to claimant's coal dust exposure, in light of claimant's coal mine employment history and the absence of any other causative exposures, such as smoking or allergic history, Decision and Order at 24. Moreover, the administrative law judge relied on the qualifying, newly submitted pulmonary function study evidence to discredit Dr. Repsher's contrary opinion, that claimant did not have any clinically significant or disabling obstructive pulmonary disease or "legal" pneumoconiosis and that claimant's condition had not changed, Decision and Order at 24-25. Consequently, inasmuch as the administrative law judge found that the newly submitted evidence, considered in conjunction with the previously submitted evidence, established "legal" pneumoconiosis, pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis arising out of coal mine employment, *i.e.*, the elements of entitlement that were decided adversely to claimant in the prior denial, the administrative law judge properly found that a material change in conditions was established in accordance with the standard enunciated in *Brandolino, supra*.

Employer also argues that the administrative law judge irrationally held that claimant established a material change in conditions by establishing the existence of pneumoconiosis[7] and causation[8] because the administrative law judge's finding was supported by the opinions of three doctors who, employer contends, believed that claimant had pneumoconiosis at the time of the prior denial. Specifically, employer contends that Dr. James's opinion, based on his review of the evidence of record, that claimant's respiratory condition in 1990 and that claimant's respiratory symptoms in 1972 arose from his coal mine employment, merely

[7] "Legal" pneumoconiosis includes any chronic "obstructive" pulmonary disease "significantly related to, or substantially aggravated by, dust exposure in coal mine employment" and recognizes that pneumoconiosis is a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure," *see* 30 U.S.C. §902(b); 20 C.F.R. §§718.201(a)(2), (b)-(c); *see also* 20 C.F.R. §718.202(a)(4).

[8] Pursuant to 20 C.F.R. §718.204(c)(1), a miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis as defined in Section 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *see also Mangus, supra*.

reflect that Dr. James believed that the prior denial (based, in part, on the fact that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment) was mistaken and not that claimant had had a material change in his condition. Similarly, employer contends that the opinions of claimant's treating physicians, Drs. Smith and Cubin, that claimant had chronic obstructive pulmonary disease due to black lung disease and/or his coal dust exposure, whose opinions the administrative law judge had found supported Dr. James's opinion that claimant had "legal" pneumoconiosis, merely reflect that they believed that claimant had "legal" pneumoconiosis since before the prior denial and not that claimant has had a material change in his condition.

Contrary to employer's contention, the administrative law judge correctly determined that in establishing the existence of pneumoconiosis pursuant to Sections 718.201 and 718.202(a)(4), claimant had demonstrated a material change in conditions. It is indisputable that claimant's condition has worsened since the prior denial. Although Dr. James and Dr. Cubin opined that they believed that claimant had pneumoconiosis since before the time of the prior denial, Dr. James did not know claimant at that time. Hence, his opinion is speculative and has the benefit of hindsight and there is no evidence to support Dr. Cubin's statement that he held that opinion at that time.[9] Thus, while it is possible that claimant had pneumoconiosis at the time of the prior denial, claimant did not have compelling evidence of pneumoconiosis until his condition worsened and that evidence was first presented in this duplicate claim. In addition, all of Dr. Smith's treatment records and opinions date from after the prior denial and Dr. Smith did not venture an opinion on claimant's condition prior to his treatment of claimant, *see* Claimant's Exhibits 13-14; Employer's Exhibit 20. Hence, the medical opinions credited by the administrative law judge support his finding that in establishing the existence of pneumoconiosis, claimant had demonstrated a material change in condition.

Finally, inasmuch as the administrative law judge credited Dr. James's opinion, that there had been a significant change in claimant's respiratory condition between 1991 and 1998 and that he was now totally disabled due to his chronic obstructive pulmonary disease arising from his coal mine employment, Claimant's Exhibits 1-2, 10, 15; Hearing Transcript,

[9] Although Dr. Cubin stated in a 1999 opinion that he told claimant that he had emphysema due to coal dust in 1984, none of Dr. Cubin's treatment records dating from before the prior denial reflect such an opinion, *see* Claimant's Exhibit 5; Employer's Exhibit 18. Moreover, the administrative law judge credited only the 1999 opinion of Dr. Cubin issued eight years subsequent to the prior denial, that claimant had chronic obstructive pulmonary disease due to his coal dust exposure, Claimant's Exhibit 5; Employer's Exhibit 18, as supporting the opinion of Dr. James, that claimant had totally disabling "legal" pneumoconiosis.

in finding that a material change in conditions was established pursuant to Section 725.309(d) (2000), Dr. James's opinion (and the administrative law judge's finding) is in accord with the standard enunciated in *Brandolino, supra*, insofar ast it shows that claimant's pneumoconiosis has become totally disabling since the prior denial.[10] Consequently, we affirm the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d) (2000), *Brandolino, supra*, and that entitlement was established pursuant to Part 718, *see Trent, supra*; *Perry, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[10] We also reject employer's contention that the administrative law judge erred in according little weight to the medical opinions finding no pneumoconiosis pre-dating the prior denial, in light of the progressive nature of pneumoconiosis, *see* Decision and Order at 24 n. 11. Inasmuch as the definition of pneumoconiosis recognizes that pneumoconiosis is a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure," *see* 20 C.F.R. §718.201(c), and the Tenth Circuit has recognized pneumoconiosis "as a disease that develops progressively," *see Brandolino*, 90 F.3d at 1507, 20 BLR at 2-312, the administrative law judge, within his discretion, gave little weight to the medical opinions finding no pneumoconiosis which pre-dated the prior denial in this duplicate claim, *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990).

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge