BRB Nos. 03-0456 BLA
and 03-0456 BLA-A

OTIS D. BOWLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHARPLES COAL CORPORATION	)	
	)	DATE ISSUED: 03/08/2004
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order--Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Mary Rich Maloy (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order--Denying Benefits (2002-BLA-5406) of Administrative Law Judge Daniel L. Leland rendered 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] Claimant's prior application for benefits filed on February 2, 1990 was finally denied on July 25, 1990 because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(2000). Director's Exhibit 2. On February 9, 2001, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 4.

In a Decision and Order--Denying Benefits issued on March 27, 2003, the administrative law judge credited claimant with forty-two years and nine months of coal mine employment[2] and found that the medical evidence developed since the prior denial of benefits did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge therefore found that claimant did not demonstrate a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical evidence. Employer responds, urging affirmance. Employer also cross-appeals, challenging the administrative law judge's exclusion of evidence submitted by employer in excess of the limitations set forth at 20 C.F.R. §725.414. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in claimant's appeal, but responds to employer's cross-appeal, urging affirmance of the administrative law judge's evidentiary rulings.[3]

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[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 on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has forty-two years and nine months of coal mine employment, and that

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2),(3); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Pursuant to Section 718.204(b)(2)(ii), the administrative law judge found that the new blood gas study evidence did not support a finding that claimant is totally disabled. Claimant alleges that the administrative law judge erred in finding that total disability was not established "simply because the employer's physicians were able to obtain blood gas test results which did not independently demonstrate" total disability. Claimant's Brief at 7.

Claimant's contention lacks merit. The administrative law judge must weigh any contrary probative evidence in determining whether total disability is established. *Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty v. Danri Corp.*, 16 BLR 1-11, 1-13-

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claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

14 (1991). Although claimant submitted an April 10, 2001 resting blood gas study which was qualifying,[4] the administrative law judge permissibly found that study outweighed by both the resting and exercise blood gas studies conducted on October 3, 2001, which were non-qualifying, and by the September 23, 2002 resting blood gas study, which was also non-qualifying. *Beatty*, 16 BLR at 1-13-14; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(*en banc*); Director's Exhibit 16; Employer's Exhibits 1, 7. In so finding, the administrative law judge was persuaded by Dr. Zaldivar's testimony that the April 10, 2001 resting blood gas study was not a reliable indicator of claimant's respiratory condition, but rather, reflected the effect of claimant's obesity on his lungs when he is in a seated position. Decision and Order at 6; Employer's Exhibit 1 at 3; Employer's Exhibit 12 at 16-17, 19. Claimant does not challenge the administrative law judge's decision to rely on Dr. Zaldivar's testimony, which is therefore affirmed. *Skrack*, 6 BLR at 1-711. Because substantial evidence supports the administrative law judge's findings regarding the blood gas study evidence, we reject claimant's allegation of error and affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(b)(2)(ii).

Pursuant to Section 718.204(b)(2)(iv), claimant contends that the administrative law judge erred in accepting the opinions of Drs. Crisalli and Zaldivar that claimant has no respiratory or pulmonary impairment because, according to claimant, their opinions were based solely on more recent, non-qualifying blood gas studies. Claimant thus argues that in crediting the opinions of Drs. Crisalli and Zaldivar, the administrative law judge mechanically applied the later evidence rule, contrary to *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), and automatically presumed that higher test results are more credible than lower test results, in violation of *Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991). Claimant's Brief at 6.

Contrary to claimant's contention, the administrative law judge permissibly found the opinions of Drs. Crisalli and Zaldivar "well reasoned" because they were "based on the normal spirometry, normal lung volumes, normal diffusing capacity, and normal blood gas tests from their evaluations . . . ." Decision and Order at 6; *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Substantial evidence supports the administrative law judge's finding that Drs. Crisalli and Zaldivar based their opinions on a range of medical data. Employer's Exhibits 1, 7, 11, 12. Review of the administrative law judge's Decision and Order discloses that he did not rely on the "later is better" principle in weighing the medical evidence. Additionally, the administrative

[4] A "qualifying" blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

law judge did not presume that the higher test results of record were necessarily more reliable than the qualifying results of the April 10, 2001 blood gas study; he gave a reason for finding the April 10, 2001 study less reliable, based on Dr. Zaldivar's testimony. Decision and Order at 6. Consequently, we reject claimant's argument that the administrative law judge improperly weighed the evidence.

Claimant next argues that the administrative law judge erred in failing to compare Dr. Ranavaya's assessment of a moderate impairment with the exertional requirements of claimant's job as a tipple mechanic to determine whether he is totally disabled. The record indicates that Dr. Ranavaya diagnosed a "[m]oderate impairment as reflected by moderate hypoxemia at rest" on the April 10, 2001 resting blood gas study. Director's Exhibit 14 at 4. However, the administrative law judge permissibly found that Dr. Ranavaya's opinion was "deficient" because it was "based on the only qualifying blood gas study . . . which is against the weight of the blood gas study evidence," Decision and Order at 6; *Collins*, 21 BLR at 1-191; *Beatty*, 16 BLR at 1-13-14, and because it was based on test results that Dr. Zaldivar persuasively questioned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998)(holding that the administrative law judge must examine all relevant evidence as to total disability). An "administrative law judge is not required to accept evidence that he determines is not credible . . . ." *Bateman v. Eastern Associated Coal Corp*., 22 BLR 1-255, 1-264 (2003). Because the administrative law judge permissibly found that Dr. Ranavaya's moderate impairment rating was not credible, he did not err in declining to compare it with the exertional requirements of claimant's usual coal mine work. Therefore, we reject claimant's allegation of error and affirm the administrative law judge's finding that total disability was not established pursuant to Section 718.204(b)(2)(iv).

We affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to Section 718.204(b). Therefore, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). Because we affirm the denial of benefits, we need not address employer's cross-appeal.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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PETER A. GABAUER, JR.
Administrative Appeals Judge