

BRB No. 01-0940 BLA

DOMINICK SALENTRO )

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Claimant-Petitioner )

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v. )

DATE ISSUED: \_\_\_\_\_

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EASTERN ASSOCIATED COAL )

CORPORATION )

)

Employer-Respondent )

)

DIRECTOR, OFFICE OF WORKERS' )

COMPENSATION PROGRAMS, )

UNITED STATES DEPARTMENT )

OF LABOR )

)

Party-in-Interest )

DECISION and ORDER

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

C. Patrick Carrick, Morgantown, West Virginia, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (99-BLA-0174) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) on a duplicate 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).<sup>1</sup> The case is before

<sup>1</sup>The Department of Labor has amended the regulations implementing the Federal

the Board for the second time. The administrative law judge found that the newly submitted pulmonary function studies were insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and found that the newly submitted evidence as a whole failed to establish total respiratory disability at 20 C.F.R. §718.204(b)(2). The administrative law judge thereby found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000).<sup>2</sup> Accordingly, the administrative law judge denied the claim.

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Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and they 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.

<sup>2</sup>While 20 C.F.R. §725.309(d) was amended, the amended regulation applies only to claims filed after January 19, 2001, and thus, is inapplicable to the instant claim.

The relevant procedural history of this case is as follows: claimant previously filed two claims with the Department of Labor (DOL), which were denied on the basis that the evidence failed to establish the existence of pneumoconiosis and total respiratory disability. Claimant then filed the instant duplicate claim with DOL on January 20, 1998. Director's Exhibit 1. Following a hearing, the administrative law judge issued a Decision and Order dated January 12, 2000. Therein, the administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4)(2000) and failed to establish total respiratory disability at Section 718.204(c)(1)-(4)(2000). Accordingly, the administrative law judge found that the newly submitted evidence failed to establish a material change in conditions pursuant to Section 725.309(d)(2000), and he denied the claim. Following claimant's appeal, the Board affirmed the administrative law judge's findings pursuant to Section 718.202(a)(1)-(4)(2000) and Section 718.204(c)(2)-(4)(2000), but vacated the administrative law judge's weighing of the newly submitted pulmonary function study evidence of record at Section 718.204(c)(1)(2000), and instructed him to reweigh the evidence on remand. The Board also instructed the administrative law judge to weigh all of the newly submitted evidence relevant to total disability in accordance with *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Fields v. Island Creek Coal Corp.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987). *Salentro v. Eastern Associated Coal Corp.*, BRB No. 00-0469 BLA (Jan. 31, 2001(unpub.)). On remand, the administrative law judge found that the newly submitted pulmonary function study evidence failed to establish total respiratory disability at Section 718.204(b)(2)(i),<sup>3</sup> and that all of the newly submitted evidence failed to establish total respiratory disability at Section 718.204(b)(2). He therefore found that the evidence did not establish a material change in conditions pursuant to Section 725.309(d)(2000). Accordingly, the administrative law judge denied the claim. Claimant then filed the instant appeal with the Board.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted evidence fails to establish total respiratory disability at Section 718.204(b)(2)(i). Claimant asserts that the administrative law judge's determination not to credit Dr. Renn's qualifying pulmonary function study is inconsistent with the administrative law judge's prior determination that Dr. Renn's opinion be credited at Sections 718.202(a)(4) and Section 718.204(b)(2)(iv). Employer, in response, asserts that the administrative law judge's finding that the evidence fails to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2) is supported by substantial evidence. Employer therefore urges

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<sup>3</sup>The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) is now found at 20 C.F.R. §718.204(b), while the provision pertaining to total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to this 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially challenges the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(i). Thereunder, the administrative law judge correctly found that only one of the three pulmonary function studies of record produced qualifying values, and that it produced qualifying values only pre-bronchodilator, and not post bronchodilator. Director's Exhibits 9, 23; Claimant's Exhibit 1; Decision and Order at 4-5. The administrative law judge permissibly found that the one qualifying pre-bronchodilator test was outweighed by the two non-qualifying pre-bronchodilator tests and the three non-qualifying post-bronchodilator tests on the basis that the latter constituted a preponderance of the evidence. See *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Moreover, we reject claimant's argument that there is a contradiction in the administrative law judge's decision to credit Dr. Renn's opinion that claimant does not have pneumoconiosis at Section 718.202(a), or a totally disabling respiratory impairment at Section 718.204(b)(2)(iv), but not credit the contrary results of Dr. Renn's objective tests, which he found outweighed by the many tests that produced non-qualifying values. See *McMath v. Director, OWCP*, 12 BLR 1-6 (1989); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). We affirm, therefore, the administrative law judge's determination that the newly submitted evidence fails to establish total respiratory impairment at Section 718.204(b)(1)(i).

The Board previously affirmed the administrative law judge's findings that total respiratory disability was not established pursuant to Section 718.204(b)(2)(ii), (b)(2)(iii) and (b)(2)(iv). *Salentro, supra*, slip op. at 4, n.2. In light of the administrative law judge's finding that claimant failed to establish total respiratory disability at Section 718.204(b)(2)(i), the administrative law judge's finding that the totality of the newly submitted evidence failed to establish total respiratory disability at Section 718.204(b)(2) is proper, and we affirm it. See *Rafferty, supra*; *Fields, supra*; *Shedlock, supra*. In light of the foregoing, we further affirm the administrative law judge's finding that the evidence fails to establish a material change in conditions pursuant to Section 725.309(d)(2000), and affirm the administrative law judge's denial of benefits. See *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995)(*en banc*), *cert. denied*, 117 S. Ct. 763 (1997).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge