BRB Nos. 98-1219 BLA
and 98-1219 BLA-A

JERRY ALFRED STOVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY)		DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Ray E. Ratliff, Jr., Charleston, West Virginia, for claimant.

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

Edward Waldman (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand (95-BLA-388) 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). This case is before the Board for the

second time. In the original Decision and Order, Administrative Law Judge George A. Fath dismissed employer as the responsible operator and held the Black Lung Disability Trust Fund liable for benefits. The administrative law judge next credited claimant with fifteen years of coal mine employment based on a stipulation by the parties and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.[1] The administrative law judge considered only the evidence submitted subsequent to the previous denial and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge thus found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. Claimant appealed the denial of benefits to the Board and the Director, Office of Workers' Compensation Programs (the Director), cross-appealed with respect to the dismissal of employer as the responsible operator. In *Stover v. Westmoreland Coal Co.*, BRB Nos. 96-0271 BLA and 96-0271 BLA-A (Sept. 26, 1996) (unpub.), the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1) and (4), but vacated the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) based on intervening case law issued by the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), since the administrative law judge failed to determine if the newly submitted evidence demonstrated the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). The Board thus remanded the case for further consideration of the relevant evidence and a determination of whether claimant demonstrated a material change in conditions in light of *Rutter, supra*. The Board also instructed the administrative law judge to consider all of the evidence of record to determine if the evidence supports entitlement to benefits if he found that claimant demonstrated a material change in conditions. Finally, the Board vacated the administrative law judge's dismissal of employer as the responsible operator and instructed the administrative law judge to reconsider this issue on remand in light of the holding in *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995). The Board subsequently denied employer's Motion for Reconsideration by Order dated May 9, 1996.

[1] Claimant filed his initial claim for benefits on September 17, 1984 which was finally denied on December 11, 1986. No further action was taken on that claim. Director's Exhibit 29. The instant claim was filed on September 20, 1991. Director's Exhibit 1.

On remand, the case was reassigned to Administrative Law Judge Kichuk who initially determined that employer was correctly named as the responsible operator. The administrative law judge next found that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis, total disability or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.204(b), (c)(1)-(4). The administrative law judge thus concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were again denied. On appeal, claimant contends that the administrative law judge erred in failing to find pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(4). Employer responds, urging affirmance of the denial of benefits and also contends, on cross-appeal, that the administrative law judge erred in finding that it was the properly designated responsible operator. The Director responds, urging affirmance of the administrative law judge's designation of the responsible operator.

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 the 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish: that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge noted that the newly submitted x-ray evidence of record consisted of ten x-ray readings of two x-rays and that the clear majority of Board-certified radiologists and B-readers interpreted both x-rays as negative for the existence of pneumoconiosis. Decision and Order at 8-10; Director's Exhibit 11-12, 33, 40. As a result, the administrative law judge weighed all of the relevant x-ray evidence of record and rationally accorded greater weight to the preponderance of x-ray interpretations by the readers with superior qualifications. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Contrary to claimant's assertion, the administrative law judge was required to evaluate only the evidence associated with the instant claim in

determining whether a material change in conditions was established. *Rutter, supra*. In addition, as each physician provided an interpretation of the November 4, 1991 x-ray, any failure by the administrative law judge to consider the quality designation of the x-ray is harmless. *Auxier v. Director, OWCP*, 8 BLR 1-109 (1985); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Lambert v. Itmann Coal Co.*, 6 BLR 1-256 (1983). We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[2]

[2] The administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge also rationally determined that the recent medical opinion evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge considered the recent medical opinion evidence and permissibly accorded greatest weight to the opinion of Dr. Zaldivar, based on his superior qualifications and the quality of the opinion which the administrative law judge found to be the most thorough as well as the best reasoned and documented opinion. *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order on Remand at 11-15; Director's Exhibit 33. Additionally, the administrative law judge acted within his discretion as trier-of-fact in according less weight to the opinion of Dr. Rasmussen diagnosing pneumoconiosis and bronchitis due to coal dust exposure as Dr. Rasmussen's diagnosis of pneumoconiosis was based, in part, on an unreliable x-ray report and his diagnosis of chronic bronchitis was inadequately explained as it conflicted with his finding of minimal morning cough and sputum production. *Clark, supra*; *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); Decision and Order on Remand at 13-14; Director's Exhibit 8.[3] The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

[3] In addition, the administrative law judge correctly observed that Dr. Daniel's report did not support claimant's burden because the doctor did not affirmatively find clinical pneumoconiosis and did not address the issue of legal pneumoconiosis. Decision and Order at 14.

In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge permissibly credited the opinion of Dr. Zaldivar, that claimant was not totally disabled from a respiratory standpoint, based on his credentials and well-reasoned report, his examination of claimant and review of the medical evidence, and the corroboration provided by Dr. Daniel's opinion.[4] *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King, supra*; *Wetzel, supra*; Decision and Order at 17-19. In addition, the administrative law judge rationally gave diminished weight to Dr. Rasmussen's opinion as he referred to a blood gas study that contained values which were indicative of total disability, but did not specifically state that claimant's respiratory or pulmonary impairment prevented him from performing his usual coal mine employment. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1291 (1984); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order on Remand at 17-18. Consequently, the administrative law judge properly found that the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4). *Clark*; *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Furthermore, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields, supra*; *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish total disability pursuant to Section 718.204(c)(4). Inasmuch as claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(c), we affirm the administrative law judge's finding that claimant failed to demonstrate a material change in conditions pursuant to Section 725.309(d) and we affirm the denial of benefits. *Rutter, supra*. Moreover, claimant's assertion that the administrative law judge erred in failing to determine whether the prior denial was based on a mistake of fact is misplaced as the instant claim is a duplicate claim subject to the provisions of Section 725.309(d) and not a modification request subject to the provisions of Section 725.310. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Finally, we need not address employer's argument on cross-appeal challenging the administrative law judge's finding that it is the properly designated responsible operator since we affirm the denial of benefits and thus, the issue is not ripe for adjudication. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990).

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed.

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[4] The administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge