BRB Nos. 06-0334 BLA
and 06-0334 BLA-A

ANDY J. ADKINS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
KEY MINING, INCORPORATED	)	DATE ISSUED: 10/30/2006
	)	
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 Denial of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Andy J. Adkins, Lake City, Tennessee, *pro se*.[1]

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denial of Benefits (05-BLA-5130) of Administrative Law Judge Daniel F. Solomon on a

[1] Ms. Christie Hutson, Program Coordinator of Reachs Black Lung Clinics Program, requested on behalf of claimant that the Board review the administrative law judge's decision, but is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

subsequent claim[2] 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). Employer has filed a cross-appeal in the instant case. Initially, the administrative law judge credited the parties' stipulation that claimant worked in qualifying coal mine employment for fifteen years. The administrative law judge adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718 and found that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. In addition, the administrative law judge found that claimant failed to establish complicated pneumoconiosis, and therefore, claimant was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Hence, the administrative law judge found that claimant failed to establish a material change in conditions under 20 C.F.R. §725.309.[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's Decision and Order denying benefits. Employer responds to claimant's *pro se* appeal, urging affirmance of the administrative law judge's denial of benefits. Employer has also filed a cross-appeal arguing that, while the ultimate decision denying benefits in this case is rational and supported by substantial evidence, the portion of the administrative law judge's decision limiting employer's exhibits pursuant to 20 C.F.R. §725.414 should be overruled because the newly promulgated regulations that impose limitations on the evidence each party is permitted to submit are arbitrary and capricious. In addition,

[2] Claimant filed an application for benefits on April 11, 1994, which was denied by the district director on the basis of claimant having failed to establish any of the elements of entitlement. Director's Exhibit 1. Claimant subsequently filed a second claim on May 2, 2002. Pursuant to claimant's request, the district director withdrew this claim on October 21, 2003. Director's Exhibit 2. Claimant filed another claim on November 14, 2003, which is pending herein. Director's Exhibit 4.

[3] We note that because claimant filed his application for benefits on November 14, 2003, which is after January 19, 2001, the effective date for application of the newly amended regulations regarding "subsequent claims," the regulations set forth in Section 725.309 (2002) are applicable to the instant case and the instant claim is properly construed as a "subsequent claim" rather than a "duplicate claim." Hence, it is claimant's burden to demonstrate that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final. 20 C.F.R. §§725.309 (2000), 725.309 (2002); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

employer argues that the administrative law judge erred in failing to admit Employer's Exhibit 4 into the record because this exhibit contains chest x-ray interpretations that were offered to rebut chest x-rays, which were submitted as treatment records by claimant. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating his intention not to participate in this appeal.[4]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error because the administrative law judge's finding that claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final is rational, contains no reversible error, and is supported by substantial evidence.

The Existence of Pneumoconiosis Pursuant to Section 718.202(a)(1)-(4)

Relevant to Section 718.202(a)(1), the newly submitted x-ray evidence consists of eight x-ray interpretations of four chest x-ray films: four interpretations were read as negative for the existence of pneumoconiosis; three interpretations were read as positive for the existence of pneumoconiosis; and one reading was interpreted for film quality only. Decision and Order at 3; Director's Exhibits 2, 11-13, 20, 21. The administrative law judge considered the radiological expertise of the physicians interpreting the x-rays and found that the physicians who were both Board-certified radiologists and B-readers provided five interpretations: two interpretations were negative for pneumoconiosis; two interpretations were positive for pneumoconiosis; and one was for film quality only. Director's Exhibits 11, 12, 20, 21. Consequently, the administrative law judge determined that because the newly submitted evidence consisted of two positive and two negative readings rendered by dually-qualified radiologists, the x-ray evidence as a whole

[4] We affirm the administrative law judge's determination regarding length of coal mine employment, which is not adverse to claimant, because this determination is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2.

was "equivocal," and therefore, was insufficient to establish the existence of pneumoconiosis by a preponderance of the evidence.[5]

In his summary of the newly submitted x-ray evidence, the administrative law judge listed Director's Exhibit 20 as containing two negative interpretations of x-ray films dated November 3, 2003 and January 22, 2004 that were rendered by a dually-qualified radiologist, Dr. Wheeler. Decision and Order at 3. A review of the record reveals, however, that those x-ray interpretations were rendered by Dr. Wiot, who is a Board-certified radiologist and B-reader. Director's Exhibit 20. Because these x-ray readings were read as negative by an equally-qualified radiologist for the existence of pneumoconiosis and, moreover, are consistent with the administrative law judge's determination that the x-ray evidence is insufficient to affirmatively establish pneumoconiosis, we deem his error harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Inasmuch as the administrative law judge's analysis constitutes a qualitative and quantitative analysis of the newly submitted x-ray evidence, we affirm his weighing of the conflicting readings and his resultant finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See* 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v.*

[5] In determining whether each party's proffered evidence was admissible at the formal hearing, the administrative law judge noted that Director's Exhibit 20 contained three x-ray readings but admitted only two out of the three readings into the record. Hearing Transcript at 27-28; Director's Exhibit 20. The administrative law judge excluded Dr. Wiot's reading of the February 9, 2004 x-ray film because it exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414(a)(3)(ii) for rebuttal evidence. However, in a footnote in the Decision and Order, the administrative law judge stated that he admitted Director's Exhibits 1-29 into the record, but failed to mention that he excluded the February 9, 2004 x-ray reading, that is a part of Director's Exhibit 20, from consideration. Decision and Order at 2 n.2; Hearing Transcript at 6. Nonetheless, in his subsequent listing of x-rays submitted, he listed only two of the x-rays in Director's Exhibit 20, and his analysis considers only those two x-rays. Any error as to including all three x-ray interpretations would be harmless since the administrative law judge properly determined that the x-ray evidence was insufficient to establish pneumoconiosis, considering the x-rays in accordance with the evidentiary limitations established under Section 725.414, *i.e.*, considering only two of the interpretations from Director's Exhibit 20. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

North Camp Coal Co., 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 12.

Likewise, we affirm the administrative law judge's determination that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). A review of the record reveals that there is no biopsy evidence, hence, claimant cannot establish the existence of pneumoconiosis under Section 718.202(a)(2). Decision and Order at 12.

Next, the administrative law judge addressed whether claimant established the existence of pneumoconiosis under Section 718.202(a)(3) based on the presumptions set forth in Sections 718.304, 718.305, and 718.306. Relevant to Section 718.304(a), the newly submitted x-ray evidence consists of an interpretation of an x-ray film dated November 3, 2003 that was interpreted by Dr. Miller, a Board-certified radiologist and B-reader, who found a large opacity classified as Category B complicated pneumoconiosis; an interpretation of an x-ray film dated February 9, 2004 that was interpreted by Dr. Ahmed, a Board-certified radiologist and B-reader, who found a large opacity classified as Category A complicated pneumoconiosis; and an interpretation of an x-ray film dated January 22, 2004 that was interpreted by Dr. Baker, a B-reader, who found a large opacity classified as Category A complicated pneumoconiosis. Director's Exhibits 11, 12, 21. To the contrary, dually-qualified radiologist Dr. Wiot read the November 3, 2003 and January 22, 2004 films, B-reader Dr. Dahhan read the February 9, 2004 film, and B-reader Dr. Jarboe read the August 21, 2003 film and these three physicians found no evidence of either simple or complicated coal workers' pneumoconiosis. Director's Exhibits 13, 20; Employer's Exhibit 2.

The administrative law judge acknowledged all of the conflicting x-ray evidence relevant to Section 718.304(a) and, after considering the interpretations rendered by the physicians with greater demonstrated radiological expertise, *i.e.*, Board-certified radiologists who are also B-readers, found that two interpretations concluded there was evidence of complicated pneumoconiosis and two interpretations found no evidence of the disease.[6] Therefore, the administrative law judge rationally determined that the claimant failed to establish the existence of complicated pneumoconiosis by a preponderance of the evidence. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999) (x-ray evidence of large opacities does not automatically trigger irrebuttable presumption when conflicting evidence exists); *see also Staton*, 65 F.3d at 59, 19 BLR at 2-280; *Woodward*, 991 F.2d at 314, 17 BLR at 2-77; Decision and Order at 12. We, therefore, affirm the administrative law judge's determination pursuant to Section 718.304(a).

[6] *See* discussion in footnote 5.

Likewise, we affirm the administrative law judge's determination that the newly submitted evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(b). A review of the record reveals that there is no newly submitted biopsy evidence, hence, claimant cannot establish the presence of complicated pneumoconiosis under this subsection. 20 C.F.R. §718.304(b).

Relevant to Section 718.304(c), a review of the newly submitted evidence reveals Dr. Baker's January 22, 2004 report and deposition testimony, the treatment records of Drs. Hughes and Burrell, the reports of Drs. Wheeler and Scott interpreting two CT scans dated August 29, 2002 and May 26, 2004,[7] and the whole body Positron Emission Tomography (PET) scan interpreted by Dr. Press. In rendering his cardiopulmonary diagnosis, Dr. Baker opined that claimant has coal workers' pneumoconiosis with progressive massive fibrosis based on an abnormal chest x-ray and history of coal dust exposure. During his deposition on April 21, 2005, however, Dr. Baker testified that the Category A large opacity he found on claimant's x-ray "could be cancer, … some sort of scar from pneumonia, tuberculosis, a fungal infection, [or] any number of other infectious processes." Employer's Exhibit 5 at 10. During claimant's hospitalizations, Drs. Hughes and Burrell diagnosed coal workers' pneumoconiosis with silicosis and progressive massive fibrosis with conglomerate lesions in upper lung fields. Director's Exhibit 21. Dr. Wheeler interpreted both chest CT scans as illustrating no evidence of silicosis or coal workers' pneumoconiosis but found that a small mass in claimant's left upper lobe accompanied by irregular scars was consistent with "probable healed tuberculosis." Employer's Exhibits 1, 3. Dr. Wheeler reiterated his conclusions during his deposition taken on May 11, 2005. Employer's Exhibit 8. Dr. Scott interpreted these same two chest CT scans and, rendering findings similar to those of Dr. Wheeler, found focal scarring in both upper lungs with linear scars and changes consistent with "at least partially" healed tuberculosis. Employer's Exhibit 3. After reviewing claimant's chest as seen on the PET scan, Dr. Press diagnosed "extensive fluorodeoxyglucose uptake in both lungs associated with bilateral areas of consolidation" whose "appearance is suspicious for an inflammatory process such as progressive massive fibrosis or pneumoconiosis." Claimant's Exhibits 1, 2.

[7] Subsequent to the issuance of the administrative law judge's decision in this case, the Board issued *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J. concurring), holding that under Section 718.107, each party is entitled to submit only one reading of a CT scan as affirmative evidence. Hence, employer was entitled to submit only one reading of the August 29, 2002 CT scan and only one reading of the May 26, 2004 CT scan. However, since the CT scan evidence was uncontroverted and was uniformly negative, and the administrative law judge permissibly found all of the affirmative evidence was unpersuasive, (*see infra*), the error in this regard was harmless. *See Larioni*, 6 BLR at 1-1276.

The administrative law judge discounted the opinion of Dr. Baker, who is a B-reader, because his diagnosis of progressive massive fibrosis was based on his interpretation of the January 22, 2004 x-ray film that was reread by Dr. Wheeler, a physician with superior radiological expertise, as negative for complicated pneumoconiosis. Decision and Order at 12. Upon review, however, this film was reread by Dr. Wiot, not Dr. Wheeler. Even though the administrative law judge mistakenly referred to Dr. Wheeler as the interpreting physician of this x-ray film rather than Dr. Wiot, we deem the administrative law judge's error in this regard as harmless because Dr. Wiot, like Dr. Wheeler, is a dually-qualified radiologist, and he interpreted this x-ray as negative for complicated pneumoconiosis. *See Larioni*, 6 BLR at 1-1276; *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-649 (6th Cir. 2003) (administrative law judge may not rely on physician's opinion that miner has pneumoconiosis when physician based his opinion entirely on x-ray evidence that was discredited by administrative law judge); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 12. The administrative law judge observed further that Dr. Baker's opinion concerning the presence of complicated pneumoconiosis was equivocal because of his uncertainty during his deposition regarding the etiology of the category "A" opacity seen on claimant's x-ray. This was rational. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order at 12; Employer's Exhibit 5 at 10. Similarly, the administrative law judge permissibly discounted the reports of Drs. Hughes and Burrell on the ground that their reports lacked any basis for their conclusions or any supporting rationale. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 13. With respect to the CT scan evidence, the administrative law judge properly found that the CT scan reports were devoid of a diagnosis of complicated pneumoconiosis or progressive massive fibrosis, and hence, were demonstrative of an absence of complicated pneumoconiosis. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); Decision and Order at 13. Turning to the PET scan taken on November 16, 2004 submitted in connection with this claim, the administrative law judge initially analyzed whether this test constituted "other medical evidence" as set forth in Section 718.107, and therefore, could be given appropriate consideration with respect to the existence of pneumoconiosis.[8] The

[8] Section 718.107(a) states:

> The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, … or a respiratory or pulmonary

administrative law judge stated that the standard in Section 718.107(b) provides that the party proffering the "other medical evidence" bears the burden of establishing that it is medically acceptable and relevant to establishing or refuting entitlement to benefits. 20 C.F.R. §718.107(b); Decision and Order at 13. Noting that claimant had not submitted any evidence demonstrating whether a PET scan is medically acceptable or that it is a relevant diagnostic tool in diagnosing pneumoconiosis, the administrative law judge properly evaluated the deposition testimonies of Drs. Wheeler and Dahhan and, within a permissible exercise of his discretion, credited their opinions that PET scans were used primarily to diagnose cancer and metastases and not utilized in assessing the presence of pneumoconiosis. *See Harris v. Director, OWCP*, 3 F.3d 103, 106, 18 BLR 2-1, 2-4 (4th Cir. 1993); *Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985); Employer's Exhibits 7, 8 at 42-45; Decision and Order at 13. Because the administrative law judge's determination that, while the PET scan is a medically acceptable procedure, it is not a relevant tool in assessing the presence or absence of pneumoconiosis in this case, is rational and supported by substantial evidence, we affirm his finding to accord the PET scan less weight. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring); *Harris*, 3 F.3d at 106, 18 BLR at 2-4; *Miller*, 7 BLR at 1-694. Consequently, the administrative law judge properly determined that the evidence relevant to Section 718.304(c) was insufficient to establish the presence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304(c); *Melnick*, 16 BLR at 1-34, and we affirm the administrative law judge's determination that the newly submitted evidence is insufficient to establish the presence of complicated pneumoconiosis pursuant to Section 718.304(a)-(c).

Because the administrative law judge properly found that claimant failed to establish the presence of complicated pneumoconiosis, claimant is not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 718.304. Likewise, the respective presumptions set forth in Sections 718.305 and 718.306 are unavailable to claimant inasmuch as the instant claim was filed after January 1, 1982 and this is a living miner's claim. *See* 20 C.F.R. §§718.305, 718.306. Hence, we affirm the administrative law judge's determination that the evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(3). 20 C.F.R. §§718.202(a)(3), 718.304 - 718.306; Decision and Order at 12.

Turning to the administrative law judge's consideration of the medical opinion evidence pursuant to Section 718.202(a)(4), a review of the newly submitted evidence

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> impairment, may be submitted in connection with a claim and shall be given appropriate consideration.

20 C.F.R. §718.107(a).

reveals the opinions of three physicians, namely Drs. Baker, Jarboe, and Dahhan, and the hospital records and treatment notes of Drs. Fielder, Burrell, Hughes, Bruton, and Mitchell. In a report dated January 22, 2004, Dr. Baker diagnosed coal workers' pneumoconiosis with progressive massive fibrosis, chronic obstructive pulmonary disease due to coal mine dust exposure and cigarette smoking, and chronic bronchitis. Director's Exhibit 11. During his deposition on April 21, 2005, Dr. Baker testified that claimant had coal workers' pneumoconiosis category 1/0. Employer's Exhibit 5. After conducting a pulmonary evaluation of claimant on August 28, 2003, Dr. Jarboe opined that there was insufficient medical evidence to diagnose either simple or complicated coal workers' pneumoconiosis. Employer's Exhibit 2. Dr. Jarboe reiterated his opinion during his deposition on April 21, 2005. Employer's Exhibit 6. On February 17, 2004, Dr. Dahhan administered a pulmonary evaluation of claimant and opined that claimant does not suffer from coal workers' pneumoconiosis. Director's Exhibit 13. In various treatment records, Drs. Fielder, Burrell, Hughes, and Bruton each stated that claimant has coal workers' pneumoconiosis or silicosis. Director's Exhibit 21.

The administrative law judge found that the reliability of the coal workers' pneumoconiosis diagnosis rendered by Dr. Baker, who is Board-certified in internal medicine and pulmonary disease, was entitled to diminished weight because Dr. Baker relied on his positive interpretation of a chest x-ray, which was contrary to the administrative law judge's determination that the probative x-ray evidence, *i.e.*, readings rendered by physicians with superior radiological expertise, was insufficient to affirmatively establish the existence of pneumoconiosis. *See Williams*, 338 F.3d at 514, 22 BLR at 2-648-649; *Furgerson*, 22 BLR at 1-226; *Trumbo*, 17 BLR at 1-88-89; *Winters*, 6 BLR at 1-881 n.4; Decision and Order at 14; Director's Exhibit 11. The administrative law judge further found that Dr. Baker's attribution of claimant's chronic obstructive pulmonary disease and chronic bronchitis to coal dust exposure and cigarette smoking lacked any explanation or rationale discussing the basis for his conclusion that coal dust exposure was a causative factor. *See* 20 C.F.R. §718.201; *Clark*, 12 BLR at 1-149; *King*, 8 BLR at 1-262; *Lucostic*, 8 BLR at 1-46; Decision and Order at 14. Additionally, the administrative law judge found Dr. Baker's opinion further undermined because Dr. Baker testified during his deposition that claimant's category A large opacity illustrated on x-ray "could be" cancer, a scar from pneumonia, tuberculosis, a fungal infection, or any number of disease processes. Employer's Exhibit 5 at 10. Consequently, the administrative law judge permissibly determined that Dr. Baker's opinion regarding the existence of either clinical or legal pneumoconiosis was equivocal and did not support a finding of pneumoconiosis. *See Justice*, 11 BLR at 1-94; *Campbell*, 11 BLR at 1-19; Decision and Order at 14. Conversely, the administrative law judge found that the opinions of Dr. Jarboe and Dahhan, that claimant did not have pneumoconiosis, were more persuasive and, therefore, entitled to greater weight because these physicians' opinions were well-reasoned and consistent with the claimant's symptomatology, medical and cigarette smoking histories, physical examinations, and

objective medical tests. Within a permissible exercise of his discretion, the administrative law judge accorded great weight to Dr. Jarboe's opinion because: his finding of an absence of pneumoconiosis was consistent with the x-ray evidence; his attribution of claimant's bullous emphysema to a 45-pack-year cigarette smoking history was persuasive; and his explanation that coal dust inhalation did not result in pleural disease or calcified and pleural plaques was convincing. Similarly, the administrative law judge found persuasive Dr. Dahhan's opinion that claimant's obstructive defect was due to cigarette smoking and not coal dust exposure since the defect was responsive to bronchodilator therapy and since the pleural abnormalities seen on x-ray were not consistent with those associated with coal workers' pneumoconiosis. This was rational. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo*, 17 BLR at 1-88-89; *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); Decision and Order at 14; Director's Exhibit 13; Employer's Exhibits 2, 6. Lastly, the administrative law judge discounted the opinions of Drs. Fielder, Burrell, Hughes, and Bruton inasmuch as, in mentioning pneumoconiosis or progressive massive fibrosis in their treatment notes, the doctors failed to discuss their diagnoses or to provide information on which they relied.[9] *See Clark*, 12 BLR at 1-149; *King*, 8 BLR at 1-262; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 (1984); Decision and Order at 14-15; Director's Exhibit 21. Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm his weighing of the conflicting medical opinions and his crediting of the opinions of Drs. Jarboe and Dahhan pursuant to Section 718.202(a)(4) and, accordingly, affirm his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

[9] The administrative law judge did not specifically discuss the opinion of Dr. Mitchell. Apparently, he considered it in his discussion of Dr. Fielder's opinion since he noted Dr. Mitchell's consultation report under the heading of Dr. Fielder's treatment notes when setting forth the evidence. In any event, any error in not considering Dr. Mitchell's opinion was harmless as it, as well as the records of Drs. Bruton and Fielder, was written in 1994, and thus covered by the determination in claimant's first claim, which was denied. *See Larioni*, 6 BLR at 1-1276. Since the administrative law judge, in determining a change in conditions, should have considered the newly submitted evidence since the prior denial, any failure to consider Dr. Mitchell's opinion was harmless error, and, since the administrative law judge discounted the opinions of Drs. Fielder and Bruton, his consideration of these opinions is, likewise, harmless error. *See Larioni*, 6 BLR at 1-1276.

Total Respiratory Disability Pursuant to Section 718.204(b)(2)(i)-(iv)

We next turn to the administrative law judge's determination that claimant failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv). Relevant to Section 718.204(b)(2)(i), there are three newly submitted pulmonary function studies taken on August 21, 2003, January 22, 2004, and February 9, 2004, which yielded non-qualifying values.[10] Director's Exhibits 11, 13; Employer's Exhibit 2. The administrative law judge properly found that the pulmonary function study evidence produced non-qualifying values, and therefore, failed to demonstrate total respiratory disability. 20 C.F.R. §718.204(b)(2)(i); *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 15.[11] Relevant to Section 718.204(b)(2)(ii), the administrative law judge correctly found that the newly submitted arterial blood gas studies consisted of four tests: the tests dated August 21, 2003, January 22, 2004, and February 9, 2004 yielded non-qualifying values while the test taken on May 3, 2004 produced qualifying values. Director's Exhibits 11, 13, 21; Employer's Exhibit 2. The administrative law judge determined that because only the May 2004 blood gas study was qualifying, the newly submitted arterial blood gas studies failed to demonstrate total respiratory disability by the preponderance of the evidence. This was proper. *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fazio v. Consolidation Coal Co.*, 8 BLR 1-223, 1-224 (1985); Decision and Order at 15. Hence, we affirm the administrative law judge's determination that total respiratory disability was not demonstrated under Section 718.204(b)(2)(ii). Similarly, we affirm the administrative law judge's determination that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure, and thus, total disability cannot be demonstrated by that means. 20 C.F.R. §718.204(b)(2)(iii); *see Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991); Decision and Order at 15.

[10] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[11] Because the newly submitted pulmonary function studies indicate conflicting height measurements for claimant, the administrative law judge, within a proper exercise of his discretion, found that claimant's height was 64.51 inches for purposes of evaluating the pulmonary function studies. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 114, 19 BLR 2-70, 2-80-81 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 4 n.5.

Relevant to Section 718.204(b)(2)(iv), the newly submitted medical opinion evidence consists of the opinions of Drs. Baker and Dahhan, who opined that from a respiratory standpoint, claimant has the physiological capacity to continue his previous coal mine work and the opinion of Dr. Jarboe, who opined that claimant is totally and permanently disabled from a respiratory standpoint. Director's Exhibit 11, 13; Employer's Exhibits 2, 5. Finding that claimant's usual coal mine work was as a shuttle car operator in an underground coal mine and entailed heavy labor, the administrative law judge found the probative value of Dr. Jarboe's opinion diminished because Dr. Jarboe opined that claimant was totally and permanently disabled due to a respiratory impairment based, in part, on a severely reduced diffusing capacity, but later admitted that the ventilatory study administered by Dr. Dahhan demonstrated only a mildly reduced diffusion capacity and that claimant's arterial blood gas studies were non-qualifying. Accordingly, the administrative law judge found Dr. Jarboe's opinion on the issue of total respiratory disability worthy of less weight. This was proper. *See Stephens*, 298 F.3d at 522, 22 BLR at 2-513, *citing Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103 (determination as to whether physician's report is sufficiently reasoned and documented is credibility matter for administrative law judge); Decision and Order at 16. On the contrary, the administrative law judge assigned greater weight to the opinions of Drs. Dahhan and Baker, physicians who are Board-certified in internal medicine and pulmonary disease, because their opinions were consistent with diagnostic studies, claimant's ability to oxygenate his blood, his symptomatology, and medical and cigarette smoking histories. *See Clark*, 12 BLR at 1-149; *King*, 8 BLR at 1-262; *Carpeta*, 7 BLR at 1-147. Thus, because the administrative law judge's crediting of the opinions of Drs. Dahhan and Baker is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's determination that the newly submitted medical opinion evidence failed to demonstrate that claimant was totally disabled pursuant to Section 718.204(b)(2)(iv). *See Migliorini v. Director, OWCP*, 898 F.2d 1292, 1296-1297, 13 BLR 2-418, 2-425 (7th Cir. 1990), *cert. denied*, 498 U.S. 958 (1990); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*); Decision and Order at 16. Accordingly, after weighing all the evidence relevant to Section 718.204(b)(2)(i)-(iv), the administrative law judge properly found that the newly submitted evidence of record failed to affirmatively establish total respiratory disability under Section 718.204(b) and, this determination is affirmed. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*).

Inasmuch as we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability due to pneumoconiosis pursuant to Section 718.204, we also affirm the administrative law judge's finding that claimant failed to demonstrate that one of the

applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded. *See* 20 C.F.R. §725.309(d); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).[12]

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[12] Our affirmance of the administrative law judge's denial of benefits in this case obviates the necessity to address the merits of employer's cross-appeal. *See Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58 (2004) (*en banc*) (upholding validity of evidentiary limitations under Section 725.414).