BRB Nos. 07-0244 BLA
and 07-0244 BLA-A

E.L.K.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 10/31/2007
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 Larry W. Price, Administrative Law Judge, United States Department of Labor.

E.L.K., Melvin, Kentucky, *pro se*.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Barry Joyner (Jonathan L. Snare, Acting Solicitor of Labor; 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 Judges, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, and employer cross-appeals the Decision and Order - Denying Benefits (03-BLA-5635) of Administrative Law Judge Larry W. Price rendered on a subsequent 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 filed this subsequent claim on April 9, 2001.[2] Because the administrative law judge determined that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to §718.204(b)(2), he found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the denial of his claim. Employer responds to claimant's appeal, urging affirmance of the administrative law judge's denial of benefits. Employer, however, has also filed a cross-appeal, asserting that, because the evidentiary limitations contained at 20 C.F.R. §725.414 are invalid, the administrative law judge erred in excluding an examination report by Dr. Dahhan, an x-ray interpretation by Dr. Poulos of a film dated February 14, 2005, and an x-ray interpretation by Dr. Spitz of a

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

[2] Claimant filed an initial claim for benefits on March 13, 1996, which was denied by Administrative Law Judge Daniel J. Roketenetz on April 15, 1998. Director's Exhibit 1. Judge Roketenetz found that claimant failed to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c) (2000). *Id*. Claimant appealed, and the Board affirmed the denial of benefits, *[E.L.K.] v. Island Creek Coal Co.*, BRB No. 98-1053 BLA (Apr. 27, 1999) (unpub.). *Id*. Claimant took no further action with regard to the denial of his initial claim until he filed the current subsequent claim on April 9, 2001. Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on November 13, 2002. Director's Exhibit 23. Claimant requested a hearing and the case was forwarded to the Office of Administrative Law Judges. Director's Exhibit 30. On September 9, 2003, claimant was ordered to show cause why he should not be compelled to attend a medical examination scheduled by employer. When claimant failed to respond to the show cause order, Administrative Law Judge Robert L. Hillyard dismissed the claim on October 7, 2003. Pursuant to claimant's appeal, the Board vacated Judge Hillyard's October 7, 2003 Order of Dismissal, *see [E.L.K.] v. Island Creek Coal Co.*, BRB No. 04-0123 BLA (Sept. 30, 2004) (unpub.), and the claim was ultimately reinstated by Judge Hillyard on April 14, 2005.

film dated April 4, 2003 (identified by employer as Employer's Exhibits 8-10)[3] from the record pursuant to that regulation. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not file a substantive response to claimant's appeal. The Director responds to employer's cross-appeal, urging the Board to reject employer's arguments with respect to the validity of Section 725.414.

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); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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).

In order to establish entitlement to benefits in a living miner's claim filed under the regulations at 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim was denied because he failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Decision and Order at 3; Director's Exhibit 1.

[3] We note that the administrative law judge's Decision and Order – Denying Benefits lists Dr. Dahhan's report as Employer's Exhibit 8, which he did exclude from the record. However, there is no indication in the record that the administrative law judge formally excluded the x-ray interpretations by Drs. Spitz and Poulos, although he did not consider them. Contrary to employer's assertion, the administrative law judge admitted Employer's Exhibit 9, which he identified as an x-ray reading by Dr. Wiot. Decision and Order at 2. The administrative law judge did not identify or specifically exclude Employer's Exhibit 10.

Consequently, claimant was required to submit new evidence demonstrating either that he had pneumoconiosis or was totally disabled, pursuant to Section 725.309(d)(2).

In considering whether claimant established the existence of pneumoconiosis, the administrative law judge first considered the x-ray evidence at 20 C.F.R. §718.202(a)(1). He correctly noted that the record contains six readings of four new x-rays dated April 24, 2001, September 4, 2001, October 31, 2001, and September 25, 2003. Decision and Order at 8; Director's Exhibits 7-10; Employer's Exhibits 1, 2. Of those six readings, there was only one positive reading for pneumoconiosis by Dr. Sundaram, an A reader, of a film dated April 24, 2001. Director's Exhibit 10. However, as noted by the administrative law judge, Dr. Sundaram's positive reading was countered by a negative reading for pneumoconiosis by Dr. Wiot, a Board-certified radiologist and B reader.[4] Decision and Order at 8; Employer's Exhibit 1. Because the administrative law judge considered Dr. Wiot to be better qualified, the administrative law judge permissibly assigned Dr. Sundaram's positive reading less probative weight. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 8. Moreover, as the administrative law judge properly found that all of the remaining x-rays were read as negative for pneumoconiosis, we affirm, as supported by substantial evidence, his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Because there is no biopsy evidence of record, claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Similarly, as claimant is ineligible for any of the presumptions listed at 20 C.F.R. §718.202(a)(3), in this living miner's claim filed after January 1, 1982, claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

[4] To become a certified as an A reader, a physician (not necessarily a radiologist) must submit six sample x-rays from his or her own files to the Appalachian Laboratory for Occupational Safety and Health (ALOSH) consisting of two x-rays negative for pneumoconiosis, two x-rays showing simple pneumoconiosis, and two showing complicated pneumoconiosis. As an alternative, the physician seeking an A rating can take a course approved by ALOSH in the classification systems for diagnosing pneumoconiosis. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A higher certification is a B reader. The B reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. *See* 42 C.F.R. §37.51. A Board-certified radiologist (BCR) is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Oestopathic Association. 20 C.F.R. §718.202(a)(ii)(c).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four new medical opinions by Drs. Sundaram, Wicker, Dahhan, and Respher, relevant to whether claimant suffered from pneumoconiosis. He properly noted that while Dr. Sundaram diagnosed pneumoconiosis, Drs. Wicker, Dahhan and Repsher specifically opined that claimant does not suffer from either clinical or legal pneumoconiosis. Decision and Order at 8; Director's Exhibits 7, 9; 10; Employer's Exhibits 2-4, 6, 7.

The administrative law judge permissibly gave less weight to Dr. Sundaram's diagnosis of clinical pneumoconiosis, since he determined that it was based solely on Dr. Sundaram's positive x-ray reading of the April 24, 2001 x-ray, which was reread as negative for pneumoconiosis by a more highly qualified physician. *See Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 8. In addition to diagnosing clinical pneumoconiosis by x-ray, the administrative law judge recognized that Dr. Sundaram diagnosed legal pneumoconiosis, insofar as the doctor specifically opined that claimant suffered from a respiratory impairment due, at least, in part, to coal dust exposure. Decision and Order at 8. In weighing the conflicting opinions relevant to whether claimant had legal pneumoconiosis, the administrative law judge assigned less probative weight to Dr. Sundaram's opinion, because he found that Dr. Sundaram "did not have the opportunity to review the other evidence in the record as did Drs. Wicker, Dahhan, and Respher[,]" whose opinions he further considered to be better reasoned and documented. Decision and Order at 8; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Moreover, unlike Drs. Dahhan and Respher, the administrative law judge noted that Dr. Sundaram was not Board-certified in pulmonary medicine. Decision and Order at 6, 8. Because the administrative law judge had discretion to credit the opinions of those physicians he determined to be the most-qualified, we affirm his decision to assign controlling weight to the opinions of Drs. Dahhan and Respher, that claimant did not have any evidence of a respiratory condition due to coal dust exposure, based on their status as Board-certified pulmonary specialists. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 6. Because the administrative law judge's credibility determinations were within his discretion as the trier of fact, *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002), we affirm his finding that newly submitted medical opinion evidence failed to demonstrate that claimant has pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Thus, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Although the new evidence failed to establish that claimant suffered from pneumoconiosis, because this case involves a subsequent claim under Section 725.309,

the administrative law judge also considered whether the new evidence established that claimant had a totally disabling respiratory or pulmonary impairment. Turning to the issue of total disability, the administrative law judge considered five new pulmonary function studies under 20 C.F.R. §718.204(b)(2)(i). The administrative law judge noted that there were four pulmonary function studies conducted during a ten week period from August 20, 2001 to October 31, 2001. Decision and Order at 9; *see* Director's Exhibits 7, 9-10, Employer's Exhibits 2, 7. He found that while "some of the results meet the numeric criteria for total disability at §718.204(b)(2)(i)," many of the tests were also invalidated due to poor effort.[5] Decision and Order at 9. As noted by the administrative law judge, the September 4, 2001 study was specifically invalidated by Dr. Renn, a Board-certified pulmonary expert, on the ground that claimant failed to maintain maximal effort.[6] Decision and Order at 4, 9; Director's Exhibit 7; Employer's Exhibit 5. Although the September 6, 2001 study, obtained during the Department of Labor examination, was qualifying for total disability, the administrative law judge was not persuaded that this study demonstrated claimant's actual respiratory capacity, since a September 25, 2003 study, performed two years later, resulted in much higher, non-qualifying values with "very poor" effort reported by Dr. Repsher. Decision and Order at 9; Employer's Exhibit 2. Thus, based on his consideration of all of the pulmonary function study evidence, and giving particular weight to the more recent non-qualifying test, the administrative law judge found that claimant failed to establish total disability, by a preponderance of the evidence, pursuant to Section 718.204(b)(2)(i). We affirm the administrative law judge's finding under Section 718.204(b)(2)(i) as it is supported by substantial evidence.

Under Section 718.204(b)(2)(ii), the administrative law judge properly found that none of the three newly submitted arterial blood gas studies dated September 4, 2001, October 31, 2001 and September 25, 2003 was qualifying for total disability. Decision and Order at 9; Director's Exhibits 7, 9; Employer's Exhibit 2. He also properly found that, since the record contains no evidence to prove that claimant has cor pulmonale with

[5] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The August 20, 2001 study was non-qualifying, reported poor effort and was found invalid by a Board-certified pulmonary specialist. Decision and Order at 4. The September 4, 2001 study was qualifying but was found invalid by a Board-certified pulmonary specialist. *Id.* The September 6, 2001 study was qualifying and reported "reasonably good" effort. *Id.* The October 31, 2001 study was non-qualifying and reported poor effort. *Id.*

right-sided congestive heart failure, claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 9.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge noted that claimant may establish total disability based on the reasoned and documented opinion of a physician stating that his respiratory or pulmonary condition prevents him from performing his usual coal mine work. The administrative law judge initially considered two disability awards issued by the Veterans Administration and Social Security Administration. He properly found that neither determination referenced medical evidence to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment, as required under the Act. *Schegan v. Waste Management and Processors, Inc.*, 18 BLR 1-41 (1994); Decision and Order at 10.

The administrative law judge also considered four new medical opinions, noting that Drs. Wicker and Sundaram opined that claimant was totally disabled, while Drs. Dahhan and Renn opined that claimant was not totally disabled from a respiratory or pulmonary standpoint. Decision and Order at 10-11. In weighing Dr. Wicker's opinion at Section 718.204(b)(2)(iv), the administrative law judge noted that Dr. Wicker based his diagnosis of total disability, in part, on the results of the September 4, 2001 pulmonary function test, which was invalidated by Dr. Renn, a pulmonary specialist, due to poor effort. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 10; Employer's Exhibit 5. He further noted that, while Dr. Wicker opined that claimant's September 4, 2001 arterial blood gas study showed moderate impairment, that study was non-qualifying for total disability under the regulations. Furthermore, the administrative law judge noted that two subsequent blood gas studies conducted by Drs. Dahhan and Repsher on October 31, 2001 and September 25, 2003 were interpreted as normal, or showing only a clinically insignificant impairment. Decision and Order at 10; Director's Exhibit 9; Employer's Exhibits 2, 3. Thus, the administrative law judge permissibly concluded that Dr. Wicker's opinion, that claimant was totally disabled, was entitled to less probative weight. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

Similarly, with respect to Dr. Sundaram, the administrative law judge properly determined that, while Dr. Sundaram diagnosed that claimant was totally disabled from his usual coal mine employment, Dr. Sundaram specifically testified that he did not know the details of claimant's coal mine job. Decision and Order at 10; Employer's Exhibit 7 at 19, 21; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-113 (6th Cir. 1995). In contrast, the administrative law judge determined that Drs. Dahhan and Repsher, provided reasoned and documented opinions that claimant was not totally disabled from a respiratory or pulmonary impairment. Decision and Order at 11. The administrative law judge also accorded the opinions of Drs. Dahhan and Respher controlling weight, on the issue of total disability, because he found that these doctors were better qualified, Board-

certified pulmonary specialists. Decision and Order at 11; *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003). Consequently, we affirm, as supported by substantial evidence, the administrative law judge's determination that claimant failed to establish a totally disabling respiratory or pulmonary impairment based on his review of the newly submitted medical opinion evidence at Section 718.204(b)(2)(iv).

In considering whether claimant established the existence of pneumoconiosis, the administrative law judge first considered the x-ray evidence at 20 C.F.R. §718.202(a)(1). He correctly noted that the record contains six readings of four new x-rays dated April 24, 2001, September 4, 2001, October 31, 2001, and September 25, 2003. Decision and Order at 8; Director's Exhibits 7-10; Employer's Exhibits 1, 2. Of those six readings, there was only one positive reading for pneumoconiosis by Dr. Sundaram, an A reader, of a film dated April 24, 2001. Director's Exhibit 10. However, as noted by the administrative law judge, Dr. Sundaram's positive reading was countered by a negative reading for pneumoconiosis by Dr. Wiot, a Board-certified radiologist and B reader.[7] Decision and Order at 8; Employer's Exhibit 1. Because the administrative law judge considered Dr. Wiot to be better qualified, the administrative law judge permissibly assigned Dr. Sundaram's positive reading less probative weight. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 8. Moreover, as the administrative law judge properly found that all of the remaining x-rays were read as negative for pneumoconiosis, we affirm, as supported by substantial evidence, his finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

[7] To become a certified as an A reader, a physician (not necessarily a radiologist) must submit six sample x-rays from his or her own files to the Appalachian Laboratory for Occupational Safety and Health (ALOSH) consisting of two x-rays negative for pneumoconiosis, two x-rays showing simple pneumoconiosis, and two showing complicated pneumoconiosis. As an alternative, the physician seeking an A rating can take a course approved by ALOSH in the classification systems for diagnosing pneumoconiosis. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A higher certification is a B reader. The B reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. *See* 42 C.F.R. §37.51. A Board-certified radiologist (BCR) is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Oestopathic Association. 20 C.F.R. §718.202(a)(ii)(c).

Because there is no biopsy evidence of record, claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Similarly, as claimant is ineligible for any of the presumptions listed at 20 C.F.R. §718.202(a)(3), in this living miner's claim filed after January 1, 1982, claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four new medical opinions by Drs. Sundaram, Wicker, Dahhan, and Respher, relevant to whether claimant suffered from pneumoconiosis. He properly noted that while Dr. Sundaram diagnosed pneumoconiosis, Drs. Wicker, Dahhan and Repsher specifically opined that claimant does not suffer from either clinical or legal pneumoconiosis. Decision and Order at 8; Director's Exhibits 7, 9; 10; Employer's Exhibits 2-4, 6, 7.

The administrative law judge permissibly gave less weight to Dr. Sundaram's diagnosis of clinical pneumoconiosis, since he determined that it was based solely on Dr. Sundaram's positive x-ray reading of the April 24, 2001 x-ray, which was reread as negative for pneumoconiosis by a more highly qualified physician. *See Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 8. In addition to diagnosing clinical pneumoconiosis by x-ray, the administrative law judge recognized that Dr. Sundaram diagnosed legal pneumoconiosis, insofar as the doctor specifically opined that claimant suffered from a respiratory impairment due, at least, in part, to coal dust exposure. Decision and Order at 8. In weighing the conflicting opinions relevant to whether claimant had legal pneumoconiosis, the administrative law judge assigned less probative weight to Dr. Sundaram's opinion, because he found that Dr. Sundaram "did not have the opportunity to review the other evidence in the record as did Drs. Wicker, Dahhan, and Respher[,]" whose opinions he further considered to be better reasoned and documented. Decision and Order at 8; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Moreover, unlike Drs. Dahhan and Respher, the administrative law judge noted that Dr. Sundaram was not Board-certified in pulmonary medicine. Decision and Order at 6, 8. Because the administrative law judge had discretion to credit the opinions of those physicians he determined to be the most-qualified, we affirm his decision to assign controlling weight to the opinions of Drs. Dahhan and Respher, that claimant did not have any evidence of a respiratory condition due to coal dust exposure, based on their status as Board-certified pulmonary specialists. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 6. Because the administrative law judge's credibility determinations were within his discretion as the trier of fact, *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002), we affirm his finding that newly submitted medical opinion evidence failed to demonstrate that claimant has pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Thus, we affirm the administrative law judge's

finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Although the new evidence failed to establish that claimant suffered from pneumoconiosis, because this case involves a subsequent claim under Section 725.309, the administrative law judge also considered whether the new evidence established that claimant had a totally disabling respiratory or pulmonary impairment. Turning to the issue of total disability, the administrative law judge considered five new pulmonary function studies under 20 C.F.R. §718.204(b)(2)(i). The administrative law judge noted that there were four pulmonary function studies conducted during a ten week period from August 20, 2001 to October 31, 2001. Decision and Order at 9; *see* Director's Exhibits 7, 9-10, Employer's Exhibits 2, 7. He found that while "some of the results meet the numeric criteria for total disability at §718.204(b)(2)(i)," many of the tests were also invalidated due to poor effort.[8] Decision and Order at 9. As noted by the administrative law judge, the September 4, 2001 study was specifically invalidated by Dr. Renn, a Board-certified pulmonary expert, on the ground that claimant failed to maintain maximal effort.[9] Decision and Order at 4, 9; Director's Exhibit 7; Employer's Exhibit 5. Although the September 6, 2001 study, obtained during the Department of Labor examination, was qualifying for total disability, the administrative law judge was not persuaded that this study demonstrated claimant's actual respiratory capacity, since a September 25, 2003 study, performed two years later, resulted in much higher, non-qualifying values with "very poor" effort reported by Dr. Repsher. Decision and Order at 9; Employer's Exhibit 2. Thus, based on his consideration of all of the pulmonary function study evidence, and giving particular weight to the more recent non-qualifying test, the administrative law judge found that claimant failed to establish total disability, by a preponderance of the evidence, pursuant to Section 718.204(b)(2)(i). We affirm the administrative law judge's finding under Section 718.204(b)(2)(i) as it is supported by substantial evidence.

[8] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] The August 20, 2001 study was non-qualifying, reported poor effort and was found invalid by a Board-certified pulmonary specialist. Decision and Order at 4. The September 4, 2001 study was qualifying but was found invalid by a Board-certified pulmonary specialist. *Id.* The September 6, 2001 study was qualifying and reported "reasonably good" effort. *Id.* The October 31, 2001 study was non-qualifying and reported poor effort. *Id.*

Under Section 718.204(b)(2)(ii), the administrative law judge properly found that none of the three newly submitted arterial blood gas studies dated September 4, 2001, October 31, 2001 and September 25, 2003 was qualifying for total disability. Decision and Order at 9; Director's Exhibits 7, 9; Employer's Exhibit 2. He also properly found that, since the record contains no evidence to prove that claimant has cor pulmonale with right-sided congestive heart failure, claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 9.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge noted that claimant may establish total disability based on the reasoned and documented opinion of a physician stating that his respiratory or pulmonary condition prevents him from performing his usual coal mine work. The administrative law judge initially considered two disability awards issued by the Veterans Administration and Social Security Administration. He properly found that neither determination referenced medical evidence to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment, as required under the Act. *Schegan v. Waste Management and Processors, Inc.*, 18 BLR 1-41 (1994); Decision and Order at 10.

The administrative law judge also considered four new medical opinions, noting that Drs. Wicker and Sundaram opined that claimant was totally disabled, while Drs. Dahhan and Renn opined that claimant was not totally disabled from a respiratory or pulmonary standpoint. Decision and Order at 10-11. In weighing Dr. Wicker's opinion at Section 718.204(b)(2)(iv), the administrative law judge noted that Dr. Wicker based his diagnosis of total disability, in part, on the results of the September 4, 2001 pulmonary function test, which was invalidated by Dr. Renn, a pulmonary specialist, due to poor effort. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 10; Employer's Exhibit 5. He further noted that, while Dr. Wicker opined that claimant's September 4, 2001 arterial blood gas study showed moderate impairment, that study was non-qualifying for total disability under the regulations. Furthermore, the administrative law judge noted that two subsequent blood gas studies conducted by Drs. Dahhan and Repsher on October 31, 2001 and September 25, 2003 were interpreted as normal, or showing only a clinically insignificant impairment. Decision and Order at 10; Director's Exhibit 9; Employer's Exhibits 2, 3. Thus, the administrative law judge permissibly concluded that Dr. Wicker's opinion, that claimant was totally disabled, was entitled to less probative weight. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

Similarly, with respect to Dr. Sundaram, the administrative law judge properly determined that, while Dr. Sundaram diagnosed that claimant was totally disabled from his usual coal mine employment, Dr. Sundaram specifically testified that he did not know the details of claimant's coal mine job. Decision and Order at 10; Employer's Exhibit 7 at 19, 21; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-113 (6th Cir. 1995).

In contrast, the administrative law judge determined that Drs. Dahhan and Repsher, provided reasoned and documented opinions that claimant was not totally disabled from a respiratory or pulmonary impairment. Decision and Order at 11. The administrative law judge also accorded the opinions of Drs. Dahhan and Respher controlling weight, on the issue of total disability, because he found that these doctors were better qualified, Board-certified pulmonary specialists. Decision and Order at 11; *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003). Consequently, we affirm, as supported by substantial evidence, the administrative law judge's determination that claimant failed to establish a totally disabling respiratory or pulmonary impairment based on his review of the newly submitted medical opinion evidence at Section 718.204(b)(2)(iv).

Because the new evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and we affirm his denial of benefits.[10] *See White*, 23 BLR 1-1, 1-3.

[10] Although employer asserts that the administrative law judge erred in excluding Dr. Dahhan's report, and the x-ray readings of Drs. Spitz and Poulos from the record, the sole basis for employer's assertion of error is that the regulation at 20 C.F.R. §725.414 is invalid and violates Section 923(b) of the Act and Section 556(d) of the Administrative Procedure Act. Employer's Brief at 22-23. The Board, however, has rejected this argument and held that Section 725.414 is a valid regulation. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-58-59 (2004) (*en banc*).

Accordingly, we affirm the administrative law judge's Decision and Order – Denying Benefits.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge