

BRB No. 02-0208 BLA

HOMER BLACKBURN	)	
	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
SOW BRANCH COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Gregory Herrell (Arrington Schelin & Herrell, P.C.), Bristol, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order on Remand Denying Benefits (99-BLA-0635) of Administrative Law Judge Thomas F. Phalen, Jr., (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). The case is before the Board for the fourth time. In his most recent decision on remand, 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(c)(1)(2000),<sup>2</sup> and found that the newly submitted medical opinions were insufficient to establish total respiratory disability at 20 C.F.R. §718.204(c)(4)(2000).<sup>3</sup> The administrative law judge, therefore, found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000).<sup>4</sup> Accordingly, the administrative law judge denied the claim.

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<sup>1</sup>Claimant is Homer Blackburn, who filed two applications for benefits. The first claim was filed with the Social Security Administration on January 11, 1973. Director's Exhibit 110. Claimant then filed the instant claim on June 6, 1983. Director's Exhibit 1.

<sup>2</sup>The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<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).

<sup>4</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 filed a claim with the Social Security Administration(SSA) on January 11, 1973, which was denied by the SSA Appeals Council on June 30, 1977. Director's Exhibit 101. Claimant then filed an election card with DOL on April 7, 1978, requesting that the Department of Labor (DOL) review the claim. *Id.* This claim was denied by a claims examiner on August 17, 1979, and claimant took no further action on this claim. *Id.* Claimant filed a duplicate claim on June 6, 1983. Director's Exhibit 1. Following a hearing, Administrative Law Judge Giles J. McCarthy issued a Decision and Order dated March 27, 1991. 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 denial of benefits. *Blackburn v. Sow Branch Coal Co.*, BRB No. 91-1054 BLA(Jan. 29, 1993)(unpub.); Director's Exhibit 72. Claimant filed with the Board a request for reconsideration, along with new evidence, which the Board construed as a request for modification. The Board remanded the case, therefore, to the district director. Director's Exhibits 72, 75. Following the district director's denial of modification, the case was assigned to Administrative Law Judge Stuart A. Levin. Judge Levin issued a Decision and Order dated September 12, 1996, wherein he found that the newly submitted evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(2000) and total respiratory disability at Section 718.204(c)(2000). Thus, Judge Levin found the evidence insufficient to establish a change in conditions pursuant to Section 725.310(2000). Director's Exhibit 95.<sup>5</sup> Accordingly, Judge Levin denied the claim. Following claimant's appeal, the Board affirmed Judge Levin's denial of modification. *Blackburn v. Sow Branch Coal Co.*, BRB No. 97-0135 BLA (Sept. 25, 1997(unpub.)). Director's Exhibit 100. Claimant then filed a second request for modification with DOL on September 22, 1998. Director's Exhibit 101. The case was assigned to Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge). Judge Phalen found that the evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2)(2000) and thereby, sufficient to establish a change in conditions pursuant to Section 725.310(2000), and therefore, sufficient to establish a material change in conditions pursuant to Section 725.309(d)(2000). He denied the claim, however, on the basis that the evidence as a whole was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1)-(4)(2000). Following claimant's appeal, the Board affirmed the administrative law judge's findings at Section 718.204(c)(2) and (c)(3)(2000), but vacated his findings at Section 718.204(c)(1) and (c)(4)(2000), and

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<sup>5</sup>Judge Levin noted that claimant had not alleged a mistake in a determination of fact, except in those matters affirmed by the Board. Consequently, Judge Levin found that the evidence did not support modification, and accordingly denied benefits. Decision and Order dated September 12, 1996 at 3.

remanded the case to the administrative law judge for reconsideration of the evidence. *Blackburn v. Sow Branch Coal Co.*, BRB No. 00-0530 BLA (Mar. 28, 2001)(unpub.). On remand, Judge Phalen issued a Decision and Order dated September 27, 2001, wherein he again found that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to both Section 718.204 (c)(1) and (c)(4)(2000). The administrative law judge, therefore, denied benefits. 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(c)(1)(2000). Claimant asserts that the administrative law judge's determination not to credit Dr. Sahyouni's qualifying pulmonary function study is irrational. 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(c)(2000) is supported by substantial evidence. Accordingly, employer urges 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 the instant appeal.<sup>6</sup>

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'Keeffe 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(c)(1)(2000) on the merits. Claimant argues that the administrative law judge's weighing of the pulmonary function studies thereunder is irrational. We agree. The administrative law judge correctly found that all three of the most recent pulmonary function studies of record produced qualifying values. Director's Exhibit 103; Claimant's Exhibit 1; Employer's Exhibit 1; Decision and Order at 4-5. The administrative law judge permissibly credited the three studies based on their recency. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Casella v. Kaiser Steel Co.*, 11 BLR 1-131 (1986); Decision and Order at 6. The administrative law judge, however, then weighed the three most recent pulmonary function studies of record, and found that the studies conducted on January 19, 1999 and April 19, 1999, although qualifying, were not

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<sup>6</sup>We affirm, as unchallenged on appeal, the administrative law judge's findings that employer is the putative responsible operator, that the two pulmonary function studies dated January 19, 1999 and April 19, 1999 are invalid pursuant to Section 718.204(c)(1)(2000) and his finding that the evidence fails to establish total respiratory disability pursuant to Section 718.204(c)(4)(2000). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 20 C.F.R. §718.204(b)(2)(i), (iv).

valid due to suboptimal effort. In contrast, the administrative law judge found that the test performed by Dr. Sahyouni on September 18, 1998 was both qualifying and valid. Director's Exhibit 103; Claimant's Exhibit 1; Employer's Exhibit 1; Decision and Order at 4-6. The administrative law judge concluded that the pulmonary function study evidence failed to establish total respiratory disability based upon a preponderance of the evidence. Decision and Order at 6. We hold that the administrative law judge irrationally "weighed" the two qualifying, but invalid, tests against the one qualifying, and valid, test to find that the two invalid tests outweighed the one valid study. Decision and Order at 6. Once the administrative law judge acknowledged that two of the most recent pulmonary function studies were invalid, he should have credited Dr. Sahyouni's qualifying pulmonary function study as uncontradicted. *See generally Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Crapp v. U.S. Steel Corp.*, 6 BLR 1-476 (1983). We reverse, therefore, the administrative law judge's finding at Section 718.204(c)(1)(2000), and hold that the pulmonary function study dated September 18, 1998 by Dr. Sahyouni establishes total respiratory disability thereunder. 20 C.F.R. §718.204(b)(2)(i).

On remand, the administrative law judge must weigh the evidence supportive of a finding of totally respiratory disability against all of the contrary probative evidence of record, in order to determine if claimant has established the existence of a totally disabling respiratory impairment at Section 718.204(b)(2) on the merits. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields, supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987). If the administrative law judge determines that the evidence establishes the existence of a totally disabling respiratory impairment, then he must weigh all of the evidence, to determine if the evidence is sufficient to establish that claimant's totally disabling respiratory impairment is due to pneumoconiosis at 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed, in part, and reversed in part, and the case is remanded to the administrative law judge for further proceedings consistent with this decision.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY                      JEAN                      HALL  
Administrative Appeals Judge

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PETER A. GABAUER, Jr.  
Administrative Appeals Judge