

BRB No. 98-0870 BLA

CLAUDE COKER)
)
 Claimant-Petitioner))
)
 v.)
)
 LEJUNIOR ENERGY, INCORPORATED,) DATE ISSUED:
 JONES & JONES TRUCKING COMPANY,)
 and SHIELDS MINING COMPANY)
)
 Employer-Respondent)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Carrier for SHIELDS MINING)
 COMPANY)
)
)
 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 George P. Morin, Administrative Law Judge, United States Department of Labor.

Ronald C. Cox (Buttermore, Turner, & Boggs, P.S.C.), Harlan, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.
PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (97-BLA-0718) of Administrative Law Judge George P. Morin on a duplicate claim¹ 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). Noting that this is a duplicate claim, the administrative law judge credited claimant with sixteen years of qualifying coal mine employment, considered all of the newly submitted evidence, and found that claimant failed to establish total respiratory disability under 20 C.F.R. §718.204(c)(1)-(5). Decision and Order at 5-9. Therefore, the administrative law judge determined that claimant failed to establish a material change in conditions since the prior denial of his claim pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erroneously failed to address the existence of pneumoconiosis and whether his pneumoconiosis arose out of coal mine employment and that the administrative law judge impermissibly found that claimant was not totally disabled due to pneumoconiosis under 20 C.F.R. §718.204. Employer-Shields Mining Company responds, urging affirmance of the denial and additionally notes that it should be dismissed as responsible operator. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in this appeal. However, the Director notes that the administrative law judge found that Shields Mining Company is the properly designated responsible operator.²

¹ Claimant is Claude Coker, who filed his first application for benefits on January 6, 1986. Director's Exhibit 66. Administrative Law Judge Giles J. McCarthy issued a Decision and Order denying benefits on this claim on May 4, 1989. Director's Exhibit 66. Claimant did not appeal this denial, but rather, filed a second application for benefits on December 13, 1994, which is the subject of the case *sub judice*. Director's Exhibit 1.

² The Director argues that because the administrative law judge found that Shields Mining Company is the properly designated responsible operator liable for the payment of any benefits in this case, a determination which Shields Mining Company has neither challenged nor appealed, this finding must be affirmed as unchallenged. Contrary to the Director's argument, the administrative law judge made no such finding. Initially, the administrative law judge found that claimant was last employed by LeJunior Energy, Incorporated for a cumulative period of one year, but also identified two other corporate entities as potential responsible operators, Jones and Jones Trucking Company and Shields Mining Company. Decision and Order at 3-4. Nevertheless, the administrative law judge found that claimant's non-entitlement to benefits precluded a discussion on the issue of responsible operator and, furthermore, that the evidentiary record may be insufficient to render such a determination. Decision and Order at 4. Similarly, we need not address this issue

inasmuch as it is not within the scope of the issues raised on appeal. See 20 C.F.R. §§802.211, 802.212; *Barnes v. Director, OWCP*, 18 BLR 1-55, 1-57-58 (1994); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983).

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 the applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant argues that the administrative law judge erred by not rendering findings regarding the existence of pneumoconiosis and whether his pneumoconiosis arose out of coal mine employment because the evidence of record establishes each of these elements.

Pursuant to Section 725.309(d), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, articulated the standard for adjudicating duplicate claims, holding that "to assess whether a material change in condition is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him." *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-18 (6th Cir. 1994).

In the previous denial, Administrative Law Judge McCarthy found that claimant had affirmatively established the existence of pneumoconiosis arising out of coal mine employment under Sections 718.202(a) and 718.203(b), but denied benefits because claimant failed to demonstrate total disability pursuant to Section 718.204(c). See Director's Exhibit 66 at 5-7. Hence, the administrative law judge properly declined to address the existence of pneumoconiosis or whether the pneumoconiosis arose out of coal mine employment inasmuch as these issues were not within the scope of the threshold material change in condition determination. See *Ross, supra*.

Relevant to Section 718.204(c)(4), claimant contends that the administrative law judge erroneously found that he is not totally disabled.³ Specifically, claimant argues that the opinion of Dr. Marshall, as supported by the opinions of Drs. Kabani, Myers, and Bushey, demonstrate that he is totally disabled due to occupational pneumoconiosis.⁴ Contrary to claimant's initial contention, the opinions of Drs.

³ We affirm the administrative law judge's findings pursuant to Section 718.204(c)(1)-(3), (5), inasmuch as these findings are unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 5-6.

⁴ On July 18, 1994, Dr. Marshall opined that claimant is totally and

Kabani, Myers, and Bushey do not support that of Dr. Marshall inasmuch as Dr. Marshall is the only physician who opined that claimant has a totally disabling respiratory impairment. Director's Exhibits 13-16. We affirm the administrative law judge's finding that claimant failed to demonstrate total disability pursuant to Section 718.204(c)(4) inasmuch as the administrative law judge, within a proper exercise of discretion, found Dr. Dahhan's opinion, that claimant has the respiratory capacity to perform his usual coal mine employment, entitled to greater weight because this opinion was better supported by the objective test results. See *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order at 9; Director's Exhibit 54. The administrative law judge permissibly accorded less weight to Dr. Marshall's opinion because Dr. Marshall failed to explain how he arrived at his total disability conclusion in light of the accompanying non-qualifying pulmonary function study, see *Fields, supra*; *King, supra*, failed to indicate the exertional requirements of claimant's usual coal mine work, see *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27, 1-29 (1991)(*en banc*), and failed to explain the impact of claimant's cigarette smoking history on claimant's respiratory condition, see *Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Gilliam v. G & O Coal Co.*, 7 BLR 1-59 (1984). Decision and Order at 8-9. Inasmuch as the administrative law judge properly considered all of the newly submitted evidence of record to determine that claimant failed to establish total disability pursuant to Section 718.204(c), we affirm the administrative law judge's determination that claimant failed to satisfy his burden of establishing a material change in conditions under 20 C.F.R. §725.309(d). See *Ross, supra*.

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

permanently disabled for all work in a dusty environment and all manual labor due to "stage 2" pneumoconiosis. Director's Exhibit 14. In a report dated June 21, 1994, Dr. Bushey diagnosed "chronic obstructive pulmonary disease compatible with coal workers' pneumoconiosis," but his report is silent on the issue of total disability. Director's Exhibit 13. Dr. Myers diagnosed coal workers' pneumoconiosis in all zones of both lungs and opined that claimant "falls into Class I under the [American Medical Association] guidelines insofar as respiratory function impairment is concerned," and therefore, "he does not meet the criteria for disability under the Federal Black Lung Regulation Part 718." Director's Exhibit 15. In a report dated January 10, 1995, Dr. Kabani found a mild degree of respiratory impairment due to claimant's pneumoconiosis and history of cigarette smoking and stated that further exposure to coal dust would cause further impairment in pulmonary functions. Director's Exhibit 16.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge