BRB No. 98-0604 BLA

WILLIAM HUFF, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH ON THE NORTH FORK, INCORPORATED, ARCH MINERAL CORPORATION	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
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 and the Order Denying Petition for Reconsideration on Responsible Operator Issue of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen, Chartered), 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 and the Order Denying Petition for Reconsideration on Responsible Operator Issue (97-BLA-0266) of Administrative Law Judge Alfred Lindeman on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). In his decision, the administrative law

judge found that employer is the properly named responsible operator in this case. Regarding the issue of entitlement, the administrative law judge adopted the prior administrative law judge's finding of twenty-four years of coal mine employment, and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. In a subsequent Order, the administrative law judge denied employer's request for reconsideration with

[1]Claimant filed his initial claim on April 16, 1987. Director's Exhibit 25. On November 26, 1990, Administrative Law Judge Gerald M. Tierney issued a Decision and Order denying benefits based on claimant's failure to establish the existence of pneumoconiosis. *Id*. The Board affirmed Judge Tierney's denial of benefits. *Huff v. Blue Diamond Coal Co.*, BRB No. 91-0537 BLA (Sept. 15, 1992)(unpub.). Further, the Board denied claimant's request for reconsideration. *Huff v. Blue Diamond Coal Co.*, BRB No. 91-0537 BLA (Order)(Apr. 7, 1993)(unpub.). Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent application for benefits on March 19, 1996. Director's Exhibit 1.

respect to the responsible operator issue.[2]

On appeal, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Claimant also urges the Board to affirm the administrative law judge's finding that employer is the proper responsible operator. Employer responds, urging affirmance of the administrative law judge's denial of benefits, and contending that the administrative law judge erred in finding that it is the proper responsible operator. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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).

After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge stated that "[c]laimant's previous claim was denied for failure to establish pneumoconiosis." Decision and Order at 4. The administrative law judge also indicated that although the issue of total disability was not reached in the prior denial, the previously submitted evidence is insufficient to establish total disability. *Id*. The United States Court of Appeals for the Sixth Circuit,

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[2]The administrative law judge stated, "I continue to find that the instant employer is capable of paying benefits and is therefore the responsible operator in this case." Order Denying Petition for Reconsideration on Responsible Operator Issue at 1.

[3]Inasmuch as the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(4) and 718.204(c)(1)-(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

within whose jurisdiction this case arises, has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and 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, 19 BLR 2-10 (6th Cir. 1994).

Claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). We disagree. The administrative law judge considered the newly submitted opinions of Drs. Wicker and Broudy and correctly stated that "neither Dr. Wicker nor Dr. Broudy found Claimant to be totally disabled from a pulmonary or respiratory standpoint." Decision and Order at 7. Dr. Wicker opined that claimant's respiratory capacity appears to be adequate to perform his previous occupation in the coal mining industry. Director's Exhibit 10. Similarly, Dr. Broudy opined that claimant retains the respiratory capacity to perform the work of an underground coal miner. Director's Exhibit 24; Employer's Exhibit 1. Thus, since Drs. Wicker and Broudy opined that claimant could perform his usual coal mine employment from a respiratory standpoint, we reject claimant's assertion that the administrative law judge erred by failing to compare the exertional requirements of claimant's usual coal mine employment with the disability assessments in the newly submitted medical reports. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*).

In addition, since the administrative law judge properly considered the newly submitted medical evidence at 20 C.F.R. §718.204(c)(4), we reject claimant's assertion that the administrative law judge erred by failing to consider claimant's age, education and work experience in his total disability analysis because these factors affect claimant's ability to obtain gainful employment. *See* 20 C.F.R. §718.204(c)(4). The fact that a miner would not be hired does not support a finding of total disability. *See Ramey v. Kentland-Elkhorn*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Since none of the physicians who submitted reports subsequent to the final denial of claimant's initial claim opined that claimant suffers from a total respiratory disability, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991). Moreover, since we have affirmed, as unchallenged on appeal, the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c)(1)-(3), *see* slip op. at 2-3 n.3, we affirm the administrative law judge's determination that the newly

submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309.[4] *See Ross, supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Order Denying Petition for Reconsideration on Responsible Operator Issue are affirmed.

SO ORDERED.

[4]In view of our disposition of this case, we need not reach employer's contention that the administrative law judge erred in finding that it is the proper responsible operator. Moreover, we also decline to address this issue on the ground that employer failed to raise its contention, which does not provide an alternative basis upon which the Board may affirm the ultimate disposition of the administrative law judge, in a cross-appeal. *See* 20 C.F.R. §802.212(b); *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991)(*en banc*).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge