BRB Nos. 98-1051 BLA
and 98-1051 BLA-A

GEORGE E. MARCUM	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
CLAUDE SMITH TRUCKING	)	
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
CLAY TRANSPORT CORPORATION	)	DATE ISSUED: 8/31/99
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE CORPORATION	)	
	)	
Employer/Carrier-Respondents Cross/Petitioners	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

W. Barry Lewis (Lewis & Lewis), Hazard, Kentucky, for Clay Transport Corporation.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Jeffrey J. Bernstein, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

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

PER CURIAM:

Claimant appeals, and Clay Transport Corporation (employer) cross-appeals, the Decision and Order Denying Benefits (98-BLA-0035) of Administrative Law Judge Thomas F. Phalen, Jr., 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). Claimant filed his first claim on March 13, 1987. The district director denied benefits on the ground that claimant failed to establish any of the elements of entitlement. The district director also identified Claude Smith Trucking, claimant's most recent coal mine employer, and employer, claimant's next most recent coal mine employer, as potentially responsible operators. Director's Exhibit 27. Employer responded to the notice of the claim, contending that it was not the responsible operator. Claude Smith Trucking did not respond. The case was subsequently referred to the Office of Administrative Law Judges (OALJ) for a formal hearing. At the hearing on June 29, 1989, Judge Huddleston stated that in view of the failure of Claude Smith Trucking to appear and contest any of the issues in the case, Claude Smith Trucking had waived its right to contest any issues. Judge Huddleson subsequently issued an Order dismissing the claim and dismissing employer as a putative responsible operator. In his Order, Judge Huddleson stated that good cause had not been shown for claimant's failure to attend the formal hearing. Judge Huddleston also found that employer must be dismissed as the responsible operator, as Claude Smith was in default, having failed to ever respond to the district director's initial findings or notice of hearing. Claimant appealed to the Board, which affirmed both the dismissal of claimant's claim and the dismissal of employer as responsible operator.[1] *See Marcum v. Claude Smith Trucking*, BRB No. 90-0976 BLA (Feb. 26, 1992) (unpublished). Claimant subsequently filed a

[1]The Board held that Clay Transport Corporation (employer) was not the responsible operator because it was not the coal operator for which the miner had worked most recently for a period of one year. *See Marcum v. Claude Smith Trucking*, BRB No. 90-0976 BLA (Feb. 26, 1992) (unpublished). On his employment history form, claimant indicated that he worked for Claude Smith Trucking from 1981 to 1986 and worked for employer from 1975 to 1980. Director's Exhibit 27(170).

request for modification, which the district director denied on June 13, 1993. It appears that claimant took no further action with respect to this claim.

Claimant filed the present claim on March 15, 1996. The district director identified Claude Smith Trucking as the responsible operator, and retained employer as the secondary responsible operator. The claim was denied by the district director and claimant requested a hearing before an administrative law judge. In an Order of Remand issued on April 29, 1997, Administrative Law Judge Donald W. Mosser noted that employer had filed a motion to be dismissed as a party or to remand the case to the district director for further development of the evidence on the issue of responsible operator. Judge Mosser also noted that Claude Smith Trucking had filed a motion to continue the hearing or to remand the case for further development. Thus, Judge Mosser canceled the hearing and remanded the case to the district director for the development of additional evidence on the responsible operator issue.

After the development of additional medical evidence, a hearing was held before the administrative law judge on February 11, 1998.[2] The administrative law judge found that because Claude Smith Trucking was out of business, had no assets, and was uninsured at the time of claimant's employment, it could not be the responsible operator. Thus, the administrative law judge found that employer was the responsible operator in this case. 20 C.F.R. §§725.492, 725.493. The administrative law judge noted that the instant case involved a duplicate claim and considered whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 under the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). After crediting claimant with twenty-four years of coal mine employment, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that the newly submitted evidence was insufficient to establish total disability at 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law

[2]Claude Smith Trucking did not appear at the hearing. In his brief to the administrative law judge, the Director, Office of Workers' Compensation Programs (the Director), argued that employer was properly named by the district director as a secondary responsible operator and should be liable for any benefits awarded. The Director stated that Claude Smith Trucking was unlikely to pay any benefits awarded, noting that nothing was ever submitted by Claude Smith Trucking or by claimant regarding the financial condition of that company or its officers.

judge concluded that the evidence was insufficient to establish a material change in conditions under *Ross* and denied benefits.

On appeal, claimant contends that the administrative law judge erred in evaluating the x-ray evidence of record and the medical opinion evidence of record under Section 718.202(a)(1) and (a)(4) and Section 718.204(c)(4). Employer responds, urging affirmance of the denial of benefits. Employer also cross-appeals, challenging the administrative law judge's finding that it is the responsible operator. The Director, Office of Workers Compensation Programs, responds to employer's cross-appeal, agreeing with employer that the administrative law judge erred in finding that Claude Smith Trucking was out of business and without assets, and contending that Claude Smith Trucking should be designated the responsible operator.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, under whose jurisdiction the instant case arises, has held that in considering whether claimant has established a material change in conditions, the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether claimant has proven at least one element of entitlement previously adjudicated against him. *See Ross, supra.*

In challenging the administrative law judge's finding pursuant to Section 718.202(a)(1), claimant generally contends that the administrative law judge erred in his consideration of the newly submitted x-ray evidence by relying automatically upon the qualification of the readers and the preponderance of the negative readings. Claimant also states that the administrative law judge "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 5. Claimant's arguments are without merit. The administrative law judge properly found that all of the negative x-ray readings were by highly qualified readers, while the only positive

reading was by Dr. Bushey, who has no special qualifications. Director's Exhibit 29 at 184. Thus the administrative law judge permissibly found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1).[3] *See Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Robert v. Bethlehem Mines Corp.,* 8 BLR 1-211 (1985).

[3]We affirm the administrative law judge's findings that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3) as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In challenging the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), claimant argues that the administrative law judge did not adequately explain his reason for rejecting the reports of Drs. Baker and Bushey.[4] Claimant also maintains that these opinions are well reasoned and well documented, and would have been adequate to support a finding of pneumoconiosis. The administrative law judge noted that Drs. Broudy, Dahhan, and Fino indicated that claimant does not have pneumoconiosis. Decision and Order at 17; Director's Exhibit 29 at 138, 144; Employer's Exhibit 1. The administrative law judge determined that Dr. Broudy's opinion was entitled to less weight because he did not identify the cause of claimant's dyspnea. Decision and Order at 17; Director's Exhibit 29 at 144. The administrative law judge also noted that Dr. Dahhan failed to explain why he ruled out coal dust exposure as a possible cause of claimant's chronic obstructive lung disease. Decision and Order at 17; Director's Exhibit 29 at 144. The administrative law judge concluded that claimant did not establish the existence of pneumoconiosis by a preponderance of the medical evidence, as only Drs. Baker and Bushey found any evidence of pneumoconiosis, while Drs. Broudy, Dahhan, and Fino indicated that claimant is not suffering from the disease. Decision and Order at 17.

Under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), the administrative law judge is required, in his role as a fact-finder, to weigh all of the relevant medical evidence of record and render findings, including the underlying rationale, with respect to this evidence. *See Hall v. Director, OWCP,* 12 BLR 1-80 (1988). Regarding the medical opinions of record, if the physicians' respective conclusions are conflicting, the administrative law judge must resolve the conflict and set forth an explanation for his determination. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). In order to accomplish this task, the administrative law judge should consider factors that tend to either bolster, or render suspect, the credibility of the medical reports of record. *See Hutchens v. Director, OWCP,* BLR 1-16 (1985). In the present case, the administrative law judge's discussion of the evidence does not satisfy the APA, inasmuch as the administrative law judge noted factors which diminished the reliability of the opinions of Drs. Dahhan and Broudy, but then treated them as equal in probative weight to the

[4]Dr. Baker diagnosed chronic obstructive pulmonary disease due to coal dust exposure and smoking. Director's Exhibit 7. The administrative law judge found that this opinion constituted a diagnosis of legal pneumoconiosis. Decision and Order at 16. Dr. Bushey diagnosed pneumoconiosis, Category 2/1. Director's Exhibit 29 at 183.

opinions of Drs. Baker and Bushey. *See Lafferty, supra; Hutchens, supra.* Because the administrative law judge did not adequately explain his relative weighing of the medical opinions pertinent to the issue of the existence of pneumoconiosis, his findings under Section 718.202(a)(4) are vacated and the case is remanded to the administrative law judge for reconsideration of the opinions of Drs. Baker, Bushey, Dahhan, Broudy, and Fino.

Turning to the issue of total disability, claimant also asserts that the administrative law judge erred in failing to find Dr. Baker's opinion sufficient to establish total disability under Section 718.204(c)(4). The administrative law judge permissibly found Dr. Baker's assessment of moderate to moderately severe impairment insufficient to establish that claimant was totally disabled to perform his last coal mine work as a coal truck driver, which the administrative law judge found was not very strenuous. *See McMath v. Director, OWCP,* 12 BLR 1-6 (1988); Decision and Order at 19; Director's Exhibit 7. We, therefore, affirm the administrative law judge's determination that Dr. Baker's opinion was insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4).

We also hold that it was unnecessary for the administrative law judge to consider evidence relating to claimant's age, education and work experience since these factors are not relevant to establishing total disability under Section 718.204(c)(4). *See generally Fields v. Island Creek Coal Co.,* 10 BLR 1-17 (1989). Lastly, there is no merit in claimant's suggestion that total disability should be inferred due to the time which has passed since he was diagnosed with pneumoconiosis, as it is claimant's affirmative burden to introduce evidence establishing that he is totally disabled. *See Gee v. W.G. Moore & Sons,* 9 BLR 1-4 (1986)(*en banc*). Noting that claimant raises no further allegations of error on the part of the administrative law judge in finding that the newly submitted medical opinion evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(c)(4), we affirm that finding. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).[5]

In light of our decision to vacate the administrative law judge's determination that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis, we must also vacate the administrative law judge's

[5]As claimant has not specifically challenged the administrative law judge's findings at 20 C.F.R. §718.204(c)(1)-(3), they are affirmed. *Skrack, supra.*

finding that claimant failed to establish a material change in conditions pursuant to Section 725.309. *Ross, supra.* On remand, should the administrative law judge find that claimant has established a material change in conditions, he must consider all of the evidence of record, both old and new, in considering entitlement on the merits. *Id.*

On cross-appeal, employer contends that the administrative law judge erred in finding that employer is the responsible operator. Employer argues that the administrative law judge erred in revisiting the issue of responsible operator since the Board had previously affirmed Judge Huddleston's finding that Claude Smith Trucking is the responsible operator. Employer also argues that the administrative law judge's finding that Claude Smith Trucking has no assets is completely unsupported by the record. In response, the Director agrees with employer that the record contains no evidence to support the administrative law judge's finding that Claude Smith Trucking is out of business and has no assets. Thus, the Director contends that the administrative law judge erred in finding that employer was the responsible operator, stating that the Board should hold that Claude Smith Trucking is the responsible operator.

Subject to the provisions of 20 C.F.R. §725.493(a)(2) and (a)(3) and provided that the conditions of 20 C.F.R. §725.492(a)(2)-(4) are met, the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than one year shall be the responsible operator. 20 C.F.R. §725.493(a)(1). Section 725.492(a)(4) provides that in order for an operator to be liable for benefits, the operator must be capable of paying benefits.

Initially, we disagree with employer's contention that the administrative law judge was precluded from addressing the issue of responsible operator in the instant duplicate claim.[6] *See Sellards v. Director, OWCP,* 17 BLR 1-77 (1993). However,

[6]In the Board's decision in claimant's prior claim, the Board held that employer was not the responsible operator because it was not the employer that had employed the miner most recently for a period of one year. *Marcum v. Claude Smith Trucking,* BRB No. 90-0976 BLA (Feb. 26, 1992) (unpublished). Subsequent to the Board's decision, the United States Court of Appeals for the Fourth Circuit held in *Director, OWCP v. Trace Fork [Matney]*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995), that the Board had erred in holding that an employer can qualify as a responsible operator under 20 C.F.R. §725.493(a)(4) only if it also qualifies as a prior operator under §725.493(a)(2).

we agree with employer and the Director that the record is presently devoid of evidence that establishes that Claude Smith Trucking is out of business and incapable of assuming liability. We therefore vacate the administrative law judge's finding that Claude Smith Trucking is not the responsible operator because it is incapable of paying benefits and vacate the administrative law judge's finding that employer is the responsible operator. *See generally Lester v. Mack Coal Co.,* 21 BLR 1-126 (1999) (*en banc)(*McGranery, J., dissenting in part and concurring in part). On remand, the administrative law judge should reconsider the issue of responsible operator. 20 C.F.R. §§725.492, 725.493. We note that it is within the discretion of the administrative law judge to reopen the record for the submission of further evidence or to remand the case to the district director for further evidentiary development.[7] *See* 20 C.F.R. §725.456(e); *Lester, supra.*

[7]The district director has referred to Mr. Claude Smith as the owner of Claude Smith Trucking, but the record contains no evidence clarifying this position. Director's Exhibit 27(4); *see* 20 C.F.R. §725.491(c)(2)(I); *Lester v. Mack Coal Co.,* 21 BLR 1-126 (1999)(*en banc)(*McGranery, J., dissenting in part and concurring in part). Pursuant to Section 725.491(c)(2)(I), an individual may be held liable for benefits if identified as a sole proprietor, a partner in a partnership, or a member of a family business. *See Lester, supra.*

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge