U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0232 BLA

WAYNE A. YURICICH[1]	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
	)	DATE ISSUED: 05/27/2021
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits upon Request for Modification of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for Claimant.

Anne Marie Scarpino (Elena S. Goldstein, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

[1] Administrative Law Judge Scott R. Morris mistakenly identified Claimant's last name as "Yurich" and not "Yuricich."

Claimant appeals Administrative Law Judge Scott R. Morris's Decision and Order Denying Benefits Upon Request for Modification (2018-BLA-06026) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves Claimant's request for modification of the denial of his subsequent claim[2] and is before the Benefits Review Board for a second time.[3]

In an October 21, 2015 Decision and Order Denying Benefits, Administrative Law Judge Theresa C. Timlin found Claimant established 2.25 years of coal mine employment, the existence of clinical pneumoconiosis, and a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a)(1), 718.309. However, Judge Timlin found Claimant did not establish that his clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R §718.203(b), or that he is totally disabled due to legal pneumoconiosis and thus she denied benefits. 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(i), 718.204(c). Claimant appealed and the Board affirmed Judge Timlin's finding that he failed to establish total disability and the denial.[4] *Yuricich v. Director, OWCP*, BRB No. 16-0109 BLA, slip op. at 2-5 (Dec. 21, 2016) (unpub.).

Claimant requested modification and the case was assigned to Judge Morris (the administrative law judge). He found no mistake in a determination of fact regarding the prior denial of benefits. He also determined that the new evidence on modification is insufficient to establish total disability and thus found Claimant did not establish a change in conditions. Accordingly, the administrative law judge found no basis for granting modification and denied benefits. 20 C.F.R. §§725.310, 718.204(b).

On appeal, Claimant contends the administrative law judge erred in finding that he is not totally disabled due to pneumoconiosis and is not entitled to modification. The Director, Office of Workers' Compensation Programs (the Director), asserts the

[2] The district director denied Claimant's initial claim for failure to establish any element of entitlement. Director's Exhibit 1. Claimant filed his current subsequent claim on October 4, 2011. Director's Exhibit 3.

[3] We incorporate the procedural history of this claim as set forth in the Board's prior decision. *Yuricich v. Director, OWCP*, BRB No. 16-0109 BLA, slip op. at 1-2 (Dec. 21, 2016) (unpub.).

[4] Because Claimant failed to establish total disability, a requisite element of entitlement at 20 C.F.R. Part 718, the Board did not reach Claimant's assertions of error concerning the administrative law judge's length of coal mine employment, legal pneumoconiosis, and disease causation findings.

administrative law judge's analysis of total disability is flawed and requests that the Board remand the case for further consideration.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Modification

The administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310. When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Mistake in a Determination of Fact

Claimant asserts the administrative law judge did not adequately address his assertions that Judge Timlin's decision contains mistakes in her determinations of fact. Claimant's Brief at 12-16. We agree. While this case was pending before the administrative law judge on modification, Claimant asserted Judge Timlin erred in finding that he established only 2.25 years of coal mine employment and not four years of coal mine employment; in discrediting Dr. Kraynak's opinion regarding whether Claimant has legal pneumoconiosis; and in finding Dr. Kraynak's opinion insufficient to establish that his clinical pneumoconiosis arose out of his coal mine employment. Claimant's Brief on

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1.

Modification at 8, 17, 21-22. The administrative law judge noted that Claimant alleged errors in Judge Timlin's length of coal mine employment, legal pneumoconiosis, and disease causation findings; however, he did not address Claimant's specific assertions. Decision and Order on Modification at 6. Rather, he summarily stated that he "reviewed the entire record for the prior claim and this current claim," and found "the prior claim does not contain any evidence of a mistake in fact." *Id*. Because the administrative law judge did not address Claimant's specific assertions of error, and he failed to explain his finding as the Administrative Procedure Act (APA) requires,[6] we vacate it. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Change in Conditions – Total Disability

A miner is totally disabled if a pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

In support of his modification request, Claimant submitted a December 8, 2018 pulmonary function test and letters from Dr. Kraynak dated December 12, 2017 and December 20, 2018.[7] Director's Exhibit 35; Claimant's Exhibits 1, 3. The Director argued before the administrative law judge that the December 8, 2018 pulmonary function study

[6] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[7] In his December 12, 2017 letter, Dr. Kraynak summarized the results of his physical examination of Claimant and stated, "I feel this gentleman would be unable to work in any capacity at this time due to his Black Lung Disease." Director's Exhibit 35. In his December 20, 2018 report, Dr. Kraynak stated Claimant's December 8, 2018 pulmonary function study "revealed severe restrictive defects without improvement after bronchodilation," and opined Claimant "remains significantly disabled from his respiratory condition." Claimant's Exhibit 1.

did not conform to the quality standards at 20 C.F.R. Part 718 App. B (2)(ii)(G),[8] and that Dr. Kraynak's opinion was not sufficiently reasoned to support a finding of total disability. Director's Closing Brief at 3-6.

The administrative law judge found the December 8, 2018 study produced qualifying values.[9] Decision and Order on Modification at 7-8; Claimant's Exhibit 3. Because it was conducted more than six years after the previously submitted non-qualifying pulmonary function study evidence, he found Claimant established total disability at 20 C.F.R. §718.204(b)(i). Decision and Order on Modification at 8.

Turning to Dr. Kraynak's opinion, the administrative law judge found that while Dr. Kraynak indicated Claimant has a severe respiratory impairment and is totally disabled, his reliance on the December 8, 2018 study was "questionable because he does not explain the excessive variability of the test results." Decision and Order at 10 n.21, *citing* 20 C.F.R. Part 718, App. B (2)(ii)(G), Director's Closing Brief at 5. The administrative law judge further found Dr. Kraynak did not address the exertional requirements of Claimant's usual coal mine employment and that his opinion was "conclusory." Decision and Order on Modification at 10. Thus, the administrative law judge determined that Dr. Kraynak's opinion was not reasoned to support a finding of total disability at 20 C.F.R. §718.204(b)(iv). *Id.* Weighing the modification evidence as a whole, the administrative law judge found it in equipoise because "the recent pulmonary function study supports a finding of total disability but the medical opinion evidence does not." Decision and Order on Modification at 11. Thus, he found Claimant did not establish total disability and could not prove a change in conditions.

Pulmonary function study results "shall [not] constitute evidence of the presence or absence of a respiratory or pulmonary impairment" unless conducted and reported in "substantial compliance" with the quality standards in 20 C.F.R. §103(c) and Appendix B 20 C.F.R. Part 718. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, App. B; *see*

[8] The Director argued the test does not meet the relevant quality standard because the highest pre-bronchodilator FEV1 result on the December 8, 2018 study "is 1.42 liters and next highest is 1.21 liters, which is a difference of 14% or 210 milliliters." Director's Closing Brief at 5. The test's report also includes the following notation: "FEV1 Var: 210 ml." Claimant's Exhibit 3. The Director argued, however, that Dr. Kraynak did not attempt to explain this excessive variability. *Id.*

[9] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

Keener v. Peerless Eagle Coal Co., 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b); *see Director, OWCP v. Siwiec*, 894 F.2d 635, 638 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987). The administrative law judge must then, in his role as fact-finder, determine the probative weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

Relevant to this appeal, Appendix B states, "The variation between the two largest FEV1's of the three acceptable tracings should not exceed 5 percent of the largest FEV1 or 100 ml, whichever is greater." 20 C.F.R. Part 718, App. B (2)(ii)(G). But, even if the study results in excess variability, it "may still be submitted for consideration in support of a claim for black lung benefits" if the "[f]ailure to meet this standard [is] clearly noted in the test report by the physician conducting or reviewing the test." *Id*. As the regulations explain, such a test may be credited despite being nonconforming because "individuals with obstructive disease or rapid decline in lung function will be less likely to achieve this degree of reproducibility." *Id*.; *see* 65 Fed. Reg. 79,952-79,953 (Dec. 20, 2000) (This requirement "will ensure that a physician certifies the results of the pulmonary function test while recognizing that it does not meet the percent variability requirement" and "will provide the adjudicator with greater flexibility in determining whether the pulmonary function study actually substantiates the presence of a significant pulmonary impairment[.]").

We agree with the Director that the administrative law judge's analysis is flawed. First, although he found the variance in the FEV1 values on the December 8, 2018 study exceed that required under 20 C.F.R. Part 718 App. B (2)(ii)(G), he did not address whether that variance affected the validity of the pulmonary function study results at 20 C.F.R. §718.204(b)(2)(i). Director's Brief at 2. Second, the administrative law judge "incongruously" discounted Dr. Kraynak's reliance on the qualifying study without initially resolving whether it was invalid and unreliable. *Id*. Third, the administrative law judge "improperly concluded that the total disability evidence was in equipoise; Dr. Kraynak's opinion was not contrary to the [pulmonary functions study] evidence, it was merely discredited and therefore of no probative weight." *Id*.

Because the administrative law judge failed to properly determine whether the December 8, 2018 pulmonary function study is in substantial compliance with the quality standards, we vacate his finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). Further, to the extent the administrative law judge has not adequately explained his discrediting of Dr. Kraynak's opinion for relying on that study, we vacate his

determination that Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[10] *See Wojtowicz*, 12 BLR at 1-165.

Remand Instructions

The administrative law judge must first consider whether Claimant established a change in conditions. 20 C.F.R. §725.310. In so doing, the administrative law judge must determine whether the December 8, 2018 pulmonary function study is in substantial compliance with the quality standards and reach a finding as to whether Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). He must then determine whether Dr. Kraynak's opinion is adequately reasoned and documented to support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). Further, the administrative law judge must consider all of the record evidence together, old and new, and determine whether Claimant has established that he is totally disabled. 20 C.F.R. §718.204(b); *Defore*, 12 BLR at 1-28-29; *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability and thereby establishes a change in conditions, the administrative law judge must then address whether Claimant established that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203, 718.204(c). Relevant to that analysis, the administrative law judge must address Claimant's specific assertions that Judge Timlin made mistakes in her determinations of fact in the prior decision on the issues of length of coal mine employment, clinical pneumoconiosis causation, and legal pneumoconiosis. 20 C.F.R. §725.310; *Keating*, 71 F.3d at 1123. If Claimant establishes that he is totally disabled due to pneumoconiosis, the administrative law judge must determine if granting modification would render justice under the Act. 20 C.F.R. §725.310; *Sharpe v. Director, OWCP*, 495

[10] Although substantial evidence supports the administrative law judge's finding that Dr. Kraynak, in his new report, did not "discuss" the exertional requirements of Claimant's usual coal mine employment, Claimant correctly states that he previously discussed them in his prior depositions. Claimant's Brief at 5. We reject, however, Claimant's contention that the administrative law judge erred in not crediting Dr. Kraynak's "unrebutted" opinion due to his status as Claimant's treating physician. Claimant's Petition for Review at 3; Claimant's Brief at 11. An administrative law judge may give controlling weight to a treating physician's opinion based on the nature and duration of his relationship with the miner and the frequency and extent of his treatment. 20 C.F.R. §718.104(d)(1)-(4). The weight given to a treating physician's opinion, however, "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Lango v. Director, OWCP*, 104 F.3d 573, 577 (3d Cir. 1997).

F.3d 125, 128 (4th Cir. 2007). In rendering his findings on remand, the administrative law judge must explain the bases for his findings of fact and credibility determinations in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Denying Benefits Upon Request for Modification is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge