**U.S. Department of Labor**

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

BRB No. 20-0036 BLA

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| JAMES B. TROSPER | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: 09/30/2020 |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Request for Modification of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Asher, Kentucky, for Claimant.

William M. Bush (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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 JONES, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Claimant appeals Administrative Law Judge Lauren C. Boucher's Decision and Order Denying Request for Modification (2019-BLA-05149) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

This case involves Claimant's request for modification of the denial of his claim filed on July 9, 2013.[1]

Judge Boucher (the administrative law judge) credited the parties' stipulation that Claimant worked in qualifying coal mine employment for at least fifteen years. She found, however, that Claimant failed to establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, she determined Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] She concluded Claimant failed to establish either a mistake in a determination of fact or a change in conditions at 20 C.F.R. §725.310, and thus denied benefits.

On appeal, Claimant challenges the administrative law judge's finding that he failed to establish total respiratory disability. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.[3]

The Benefits Review 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

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[1] Claimant filed his application for benefits on July 9, 2013. Director's Exhibit 2. In a Decision and Order issued on September 23, 2016, Administrative Law Judge Theresa C. Timlin denied benefits because Claimant failed to establish he suffers from a totally disabling respiratory impairment at 20 C.F.R. §718.204(b). Director's Exhibit 34. Claimant requested modification of the denial of benefits and filed supportive medical evidence on October 24, 2016. Director's Exhibit 35.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's determinations that Claimant established at least fifteen years of qualifying coal mine employment, but failed to establish total respiratory disability based on pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 3, 5-6, 10-11; Claimant's Memorandum Brief at 4-8.

evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, a 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 (1986) (en banc).

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(a). When a request for modification is filed, "any mistake may be corrected, including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *see Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 954 (6th Cir. 1999); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

**Total Respiratory Disability**

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on qualifying pulmonary function or arterial blood gas studies,[5] evidence of 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 the relevant evidence supporting a finding of total disability against the contrary probative evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v.*

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

*Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

In considering whether Claimant established a change in condition under Section 725.310, the administrative law judge found the newly submitted evidence,[6] considered in conjunction with the evidence previously submitted, insufficient to establish total disability. Decision and Order on Modification at 5-10. The administrative law judge also found Claimant failed to establish a mistake in a determination of fact because Dr. Dye did not provide a well-reasoned and documented opinion that Claimant suffers from a respiratory impairment precluding him from performing his usual coal mine employment. Decision and Order on Modification at 7-8; Director's Exhibits 35, 36.

Claimant contends the administrative law judge erred in discrediting Dr. Dye's opinion because he is Claimant's treating physician and his opinion was adequately documented as it was based on Claimant's work and medical histories, pulmonary function studies, and several "thorough" physical examinations.[7] Claimant's Memorandum Brief at 4. We disagree.

The administrative law judge acknowledged Dr. Dye is Claimant's treating physician in accordance with 20 C.F.R. §718.104(d),[8] noting the record demonstrated Dr.

[6] This evidence consisted of a September 26, 2018 pulmonary function study that produced non-qualifying results, a medical opinion from Dr. Dye, and Claimant's hearing testimony and treatment records. Director's Exhibits 35, 36; Claimant's Exhibits 1, 2; Hearing Tr. at 17. Claimant did not submit any new arterial blood gas studies, and there is no evidence of cor pulmonale with right-sided congestive heart failure or that Claimant suffers from complicated pneumoconiosis. Decision and Order on Modification at 5 nn.3-5; *see* 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 718.204(b)(2)(i), (ii).

[7] While Claimant concentrates his argument on Dr. Dye's opinion, he also appears to contend Dr. Baker's opinion is sufficient to establish total respiratory disability. *See* Claimant's Memorandum Brief at 3, 4, 7. However, Dr. Baker specifically opined Claimant does not have a totally disabling respiratory impairment because his "pulmonary function studies and arterial blood gas studies, . . . though mildly reduced, do not meet disability standards." Director's Exhibit 15. Therefore, the administrative law judge correctly found there was no mistake in Judge Timlin's determination that Dr. Baker's opinion does not support a finding of total disability. Decision and Order on Modification at 11; Director's Exhibit 15.

[8] 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

Dye examined Claimant during "several visits… in the past few years," treated Claimant for his respiratory symptoms, and prescribed inhalers and breathing medications. Decision and Order on Modification at 7. She also noted while Dr. Dye's treatment records do not "reflect that he himself administered pulmonary diagnostic tests," such as pulmonary function studies and arterial blood gas studies, "it is clear from [his] report that he has reviewed at least some such information." *Id.* at 7-8; *see* Director's Exhibits 35, 36. The administrative law judge correctly noted, however, that Dr. Dye only stated "symptoms" as the basis for his opinion that Claimant is totally disabled due to a pulmonary impairment. Decision and Order on Modification at 8; Director's Exhibit 35.

Dr. Dye's October 12, 2016 report is a typed questionnaire with hand-written responses to questions. Director's Exhibit 35. When asked whether "the miner [is] totally and permanently disabled to perform the required duties related to his regular coal mining job as a result of his pulmonary impairment," Dr. Dye placed an "X" next to the word "Yes" and stated the basis for this diagnosis is "symptoms." *Id*. Dr. Dye's treatment records document Claimant's visits on August 16, 2016, October 12, 2016, December 12, 2016, and November 12, 2018. Director's Exhibit 36. As the administrative law judge correctly found, these records do not contain an opinion of a totally disabling respiratory impairment. Decision and Order on Modification at 9. Therefore, she permissibly found Dr. Dye failed to provide an adequate basis for his opinion that Claimant suffers from a totally disabling respiratory impairment and reasonably concluded his opinion was conclusory. *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 483 (6th Cir. 2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order on Modification at 8.

Contrary to Claimant's argument, the administrative law judge did not reject Dr. Dye's disability opinion because he relied on non-qualifying or non-conforming objective tests. She permissibly discredited his opinion as he failed to persuasively explain how the symptoms supported his conclusion and, therefore, his one-word explanation for the basis of his disability assessment was insufficient. *See Flynn*, 353 F.3d at 483; *Clark*, 12 BLR at 1-155; Decision and Order on Modification at 7-8. The administrative law judge thus permissibly found Dr. Dye's opinion unreasoned and undocumented, and not entitled to

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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 Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002) (treating physicians get "the deference they deserve based on their power to persuade").

any weight, despite his status as Claimant's treating physician.[9] *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003) (administrative law judge must consider whether the treating physician has offered a persuasive opinion entitled to deference); *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order on Modification at 8. We affirm therefore the administrative law judge's determination Claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[10]

Weighing all of the relevant evidence together, the administrative law judge rationally determined Claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2). *See Shedlock*, 9 BLR at 1-198; Decision and Order on Modification at 9-10. Consequently, we affirm the administrative law judge's determination Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2). We therefore further affirm the administrative law judge's finding that Claimant did not establish a change in conditions

[9] The administrative law judge correctly observed Dr. Dye indicated Claimant demonstrated, during his November 12, 2018 office visit, "moderate restrictive disease on recent spirometry." Claimant's Exhibit 2. We agree with the Director's argument that the administrative law judge permissibly concluded she could not "infer that Claimant's moderate impairment is disabling" based on the absence of sufficient medical evidence. Decision and Order on Modification at 8; Claimant's Exhibit 2; Director's Brief at 7. Thus, we reject Claimant's argument, to the extent he makes it, that the administrative law judge erred in failing to compare any impairment assessment by Dr. Dye to the exertional requirements of Claimant's usual coal mine employment. Claimant's Memorandum Brief at 6-7.

[10] Claimant contends it would be "rational" for the administrative law judge to have concluded "that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis . . . ." Claimant's Memorandum Brief at 7. He also contends his lay testimony, in conjunction with Dr. Dye's opinion and treatment notes, establishes total disability. *Id.* We disagree. As the Director correctly notes, a recommendation against further dust exposure is not a diagnosis of total respiratory or pulmonary disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989). Moreover, considering the inadequacies in Dr. Dye's opinion as affirmably found by the administrative law judge, Claimant's testimony as to his health problems could not establish his total disability. *See* 20 C.F.R. §718.305(b)(3) ("In a claim involving a living miner, a miner's affidavit or testimony, or a spouse's affidavit or testimony, may not be used by itself to establish the existence of a totally disabling respiratory or pulmonary impairment.").

pursuant to 20 C.F.R. §725.310. Decision and Order on Modification at 9-10. Because Claimant does not raise any specific challenges to the administrative law judge's finding there was no mistake in a determination of fact in Judge Timlin's prior denial, we affirm the administrative law judge's determination that Claimant failed to establish a basis for modification, and her denial of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 10-11.

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the denial of benefits. In finding Claimant does not have a totally disabling respiratory impairment, the administrative law judge discredited Dr. Dye's October 12, 2016 diagnosis because he "offer[ed] only one word as the basis for his opinion that Claimant is totally disabled: 'symptoms.'" Decision and Order on Modification at 8, *quoting* Director's Exhibit 35. However, in his treatment notes from that same day, Dr. Dye specifically identified Claimant's frequent episodes of shortness of breath, with the following symptoms:

> The patient notes inability to get air in and difficulty getting air out. Symptom is aggravated by mild activity (eg. walking). Symptom is relieved by rescue inhalers and rest. Associated symptoms include excessive sputum, fatigue and wheezing. Pertinent negatives include chest pressure/discomfort and hemoptysis. Additional information: patient has not been able to afford inhalers in past but with worsening disease is going to go ahead and restart them.

Director's Exhibit 36 at 6. Thus, contrary to the administrative law judge's finding, Dr. Dye identified the symptoms underpinning his diagnosis of total disability.

If credited, frequent shortness of breath aggravated by mild activity such as walking, relieved only by rescue inhalers and rest, could satisfy Claimant's burden to establish his inability to perform the "heavy manual labor" required of his previous coal mining job. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in doctor's report sufficient to establish total disability); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability *or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion*.") (emphasis added); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) (miner is totally disabled if he cannot perform the exertional requirements of his previous job).

Because the administrative law judge did not consider this aspect of Dr. Dye's opinion, the Board must remand the claim with instructions to weigh this evidence in the first instance and render a new finding on total disability. 30 U.S.C. §923(b) (administrative law judge must address all relevant evidence); *Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983) ("When the ALJ fails to make important and necessary

factual findings, the proper course for the Board is to remand the case . . . rather than attempting to fill the gaps in the ALJ's opinion.").

I, therefore, dissent.

GREG J. BUZZARD
Administrative Appeals Judge