BRB No. 04-0750 BLA

HAROLD RAY SMITH	)	
	)	
Claimant- Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 04/29/2005
	)	
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 on Remand – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Harold Ray Smith, Dawson Springs, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand - Denial of Benefits (01-BLA-0977) of Administrative Law Judge Robert L. Hillyard rendered on claimant's request for modification 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). This case is on appeal before the Board for the second time. The procedural history of this case is contained in the Board's previous decision. *Smith v. Peabody Coal Co.*, BRB No. 03-0283 BLA (Oct. 30, 2003) (unpub.). In that decision, pursuant to claimant's appeal, the Board vacated Judge Hillyard's decision denying benefits and remanded the case to the administrative law judge to apply the proper modification standard. The Board further vacated Judge Hillyard's weighing of

the medical opinion of Dr. O'Bryan and instructed him to determine whether the evidence was sufficient to establish total respiratory disability under 20 C.F.R. §718.204(b)(2)(iv) and, if reached, whether the evidence was sufficient to establish disability causation under the appropriate standard pursuant to 20 C.F.R. §718.204(c).

On remand, Judge Hillyard (the administrative law judge) found, based on his review of the evidence and his review of Administrative Law Judge Donald W. Mosser's analysis and determinations, that Judge Mosser made no mistake in a determination of fact. Turning to whether the evidence established a change in conditions since the prior denial, the administrative law judge examined the newly submitted medical opinions, consisting of the opinions of Drs. O'Bryan, Branscomb, Simpao, and Fino, and found that the opinion of Dr. Fino, who opined that claimant was not totally disabled, was entitled to determinative weight because it was better reasoned and better supported by objective evidence than the other medical opinions. The administrative law judge also accorded Dr. Fino's opinion greater weight because it was rendered by a physician who possessed superior qualifications. Relying on his previous findings, which were affirmed by the Board, that total disability was not also demonstrated under Section 718.204(b)(2)(i) and (ii) and his finding that there was no evidence presented nor did the parties allege that claimant suffered from cor pulmonale or complicated pneumoconiosis, the administrative law judge weighed all the evidence together and found the evidence failed to demonstrate total disability under Section 718.204(b). Decision and Order on Remand at 2 n.1, 10, 11. The administrative law judge additionally found that, even if total disability were established, the evidence did not establish total disability due to pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order on Remand at 13. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds to this *pro se* appeal, urging affirmance of the administrative law judge's denial of benefits. 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.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order on Remand below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order on Remand if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

After consideration of the administrative law judge's Decision and Order on

Remand and the evidence of record, we conclude that the administrative law judge's Decision and Order on Remand is supported by substantial evidence and contains no reversible error because the administrative law judge properly found that the evidence of record failed to establish a basis for modification of the prior denial. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Relevant to Section 718.204(b)(2)(iv), the newly submitted medical opinion evidence consists of the opinions of four physicians, Drs. Simpao, O'Bryan, Branscomb, and Fino. After conducting a complete pulmonary evaluation of claimant and administering appropriate diagnostic tests on October 23, 2001, Dr. Simpao opined that claimant suffers from a pulmonary impairment that would prevent him from performing his usual coal mine employment. Claimant's Exhibit 2. On November 14, 2001, Dr. O'Bryan's examination and testing of claimant revealed blood gas studies indicating a metabolic problem, dyspnea, and restrictive ventilatory impairment attributable to claimant's heart disease and diabetic medications. Employer's Exhibit 1. Dr. Branscomb reviewed the medical records and, in a report dated May 22, 2002, acknowledged that the most recent pulmonary function study could be demonstrative of some form of temporary, intermittent, or continuing obstructive airways disease, but he declined to render such a diagnosis due to the marked variation between these test results and the previous ten or eleven tests. Employer's Exhibits 2, 4. Similarly, Dr. Fino reviewed the medical records on two separate occasions and, on January 12, 2002, opined that there is no objective evidence of respiratory impairment and on June 21, 2002, opined that the additional information provided in Dr. Simpao's report did not change his opinion that total respiratory disability is absent. Employer's Exhibits 3, 5.

The administrative law judge properly found that Dr. Branscomb's opinion, that the most recent pulmonary function study could be interpreted as supporting the presence of some form of temporary, intermittent, or continuing obstructive airways disease but he was unable render such a diagnosis with reasonable probability, was insufficient to demonstrate total respiratory disability under Section 718.204(b)(2)(iv) because Dr. Branscomb failed to term claimant totally disabled, render an actual disability assessment, or to address the severity of claimant's pulmonary impairment, if any. *See Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*); Employer's Exhibits 2, 4. The administrative law judge found that Dr. Simpao's opinion was entitled to less weight because Dr. Simpao, who possessed no specialized medical qualification or demonstrated pulmonary expertise, not only relied on a pulmonary function study that was invalidated, but also failed to incorporate claimant's smoking history into his diagnosis, to discuss the impact of claimant's cardiac disease and previous coronary artery bypass surgery, as had other physicians of record, or to explain his total disability assessment in light of the non-qualifying arterial blood gas study he administered. While the administrative law judge recognized that a physician's total respiratory disability opinion may not be rejected on the basis that the physician relied upon non-qualifying pulmonary function and/or blood

gas studies, *see e.g., Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000), the administrative law judge, within a rational exercise of his discretion, discounted Dr. Simpao's opinion because it was inadequately reasoned and unsupported by objective studies, and because its underlying documentation could not logically lead to an assessment that claimant was totally disabled by a respiratory or pulmonary impairment. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 13. Although the administrative law judge acknowledged that Dr. O'Bryan found that claimant was totally disabled, the administrative law judge permissibly found that the contrary opinion of Dr. Fino was more persuasive and, therefore, entitled to dispositive weight because Dr. Fino, who is Board-certified in internal medicine with a subspecialty in pulmonary diseases, based his opinion on four independent, consultative reviews of all the medical evidence, relied on supportive, pulmonary function and arterial blood gas studies dated from 1990 through 2001, delineated the diagnostic studies supportive of his conclusion that there was no objective evidence of respiratory or pulmonary impairment, and therefore, rendered a well reasoned and documented opinion. Because the administrative law judge's determination that Dr. Fino's opinion was sufficiently documented and reasoned is rational and supported by substantial evidence, we affirm his crediting of Dr. Fino's opinion over the contrary opinions of Drs. Simpao and O'Bryan pursuant to Section 718.204(b)(2)(iv). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103 (crediting of physician's report as reasoned is a credibility determination within purview of administrative law judge); *see also Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *King*, 8 BLR at 1-262; *Lucostic*, 8 BLR at 1-46 (1985); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984). Consequently, we affirm the administrative law judge's determination that the newly submitted medical opinion evidence failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee*, 9 BLR at 1-4; Decision and Order on Remand on Remand at 12-13.

Furthermore, we affirm the administrative law judge's determination that, assuming that claimant had demonstrated that he is totally disabled, his entitlement to benefits is precluded under Section 718.204(c) on the basis that Dr. O'Bryan, the only physician who rendered a reliable, credible opinion finding a restrictive ventilatory impairment, opined that claimant's disability is related solely to cardiovascular disease and is not due to coal workers' pneumoconiosis, chronic obstructive pulmonary disease, asthma, or any other primary pulmonary disease. Because this determination is rational and supported by substantial evidence, we affirm the administrative law judge's Section 718.204(c) determination. 20 C.F.R. §718.204(c); *see Peabody Coal Co. v. Smith*, 127

F.3d 504, 21 BLR 2-180 (6th Cir. 1997); Decision and Order on Remand at 13; Employer's Exhibit 1.

Because the administrative law judge properly found that claimant failed to satisfy his burden of establishing a change in conditions or a mistake in a determination of fact, we affirm the administrative law judge's finding that claimant failed to demonstrate a basis for modification pursuant to Section 725.310. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-14-15 (1994)(*en banc*); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Accordingly, the Decision and Order on Remand – Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge