BRB No. 05-0692 BLA

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<tr><td>SAMUEL C. ARTONE, SR.

Claimant-Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondent</td><td>)
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DATE ISSUED: 04/25/2006

DECISION and ORDER</td></tr>
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Appeal of the Decision and Order Denying Benefits on Modification of a Subsequent Claim of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Harry T. Coleman (Law Offices of Harry T. Coleman), Carbondale, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Howard Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Modification of a Subsequent Claim (04-BLA-6621) of Administrative Law Judge Janice K. Bullard rendered 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 third and current claim for benefits on February 20, 2001.[1] In the initial decision

[1] Claimant's first claim, filed on June 28, 1973, was finally denied on March 31, 1980, because claimant did not establish any element of entitlement. Director's Exhibit

in this claim, Administrative Law Judge Robert D. Kaplan found that claimant established the existence of pneumoconiosis, an element of entitlement that was previously decided against him, and therefore demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Director's Exhibit 40 at 4. Judge Kaplan found, however, that claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment. Accordingly, Judge Kaplan denied benefits. Director's Exhibit 40 at 6-9.

Upon review of claimant's appeal, the Board affirmed Judge Kaplan's denial of benefits. *Artone v. Director, OWCP*, BRB No. 03-0177 BLA (Sep. 30, 2003)(unpub.); Director's Exhibit 47. On November 17, 2003, claimant timely requested modification of the denial pursuant to 20 C.F.R. §725.310. Director's Exhibit 48.

On modification, Administrative Law Judge Janice K. Bullard credited claimant with at least twenty years of coal mine employment[2] and found the existence of pneumoconiosis established pursuant to the parties' stipulations. Considering the new evidence submitted by the parties on modification in conjunction with that previously submitted, the administrative law judge found that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 7-9. The administrative law judge therefore concluded that claimant did not establish either a change in conditions or a mistake in a determination of fact under 20 C.F.R. §725.310 to justify modification of the prior denial of benefits. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.[3]

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18. Claimant's second claim, filed on April 15, 1997, was finally denied on August 6, 1997, because claimant failed to establish any element of entitlement. Director's Exhibit 17.

[2] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibits 2, 17, 18. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] The administrative law judge's length of coal mine employment determination and her findings that total disability was not established pursuant to 20 C.F.R.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Talati and Levinson, both of whom the administrative law judge noted are Board-certified in Internal Medicine and Pulmonary Diseases. Dr. Talati examined and tested claimant and concluded that he has a "very mild pulmonary impairment which doesn't preclude performing [his] last coal mine job." Director's Exhibit 55 at 4. Dr. Levinson examined and tested claimant and concluded that he has a "mild reduction in . . .airflow" that leaves claimant "unable to perform the full duties of his last coal mine employment." Claimant's Exhibit 1 at 3.

The administrative law judge gave "little weight" to Dr. Levinson's opinion because she found it to be "conclusory," "not well-reasoned," and "without significant support from the objective evidence." Decision and Order at 8. Specifically, the administrative law judge noted that Dr. Levinson previously examined and tested claimant on May 20, 1997, and at that time diagnosed him with a mild pulmonary impairment that did not disable him from performing his usual coal mine employment. Director's Exhibit 17. The administrative law judge further noted that in Dr. Levinson's current report of August 30, 2004, Dr. Levinson again diagnosed a mild impairment, yet reached a different conclusion as to disability:

> Although Dr. Levinson has stated that he has noted a decline in Claimant's condition, the test results do not show a disabling degree of dysfunction, nor does Dr. Levinson's characterization of the older tests differ from the new tests, in that he found they both showed a mild degree of impairment.

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§718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Decision and Order at 8. In this context, the administrative law judge chose to accord "greater weight" to Dr. Talati's opinion, as "more consistent with the objective data of record." Decision and Order at 8-9. Alternatively, the administrative law judge found that, at best, the opinions of Drs. Talati and Levinson "would be in equipoise, and generally inconclusive as to whether or not Claimant has a total respiratory disability." Decision and Order at 9.

Claimant argues that the administrative law judge's analysis of Dr. Levinson's opinion was "absurd" and "constitutes error as a matter of law" because Dr. Levinson is a medical expert and he "was in a better position to compare [claimant's] condition in 1997." Claimant's Brief at 3. Claimant essentially asks the Board to reweigh the evidence, which we cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Contrary to claimant's contention, the administrative law judge acted within her discretion to assess the medical opinions when she found that Dr. Levinson's current opinion was not as well-reasoned or supported as Dr. Talati's opinion. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). There is substantial evidence to support the administrative law judge's finding. Claimant additionally suggests that Dr. Levinson was his treating physician and that Dr. Levinson's opinion merited greater weight on that basis. Claimant's Brief at 3. Review of the record discloses no evidence that Dr. Levinson is claimant's treating physician.[4] Nevertheless, even assuming *arguendo* that Dr. Levinson is a treating physician, the administrative law judge permissibly assessed the credibility of his opinion in light of its reasoning and documentation. *See* 20 C.F.R. §718.104(d)(5). Finally, although claimant insists that Dr. Levinson's opinion was "clearly entitled to greater weight than that afforded by the Administrative Law Judge," Claimant's Brief at 3, he presents no reason to disturb the administrative law judge's alternative finding that Dr. Levinson's opinion merited equal weight with Dr. Talati's opinion, leaving the evidence in equipoise and thus insufficient to satisfy claimant's burden of proof. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Therefore, we reject claimant's allegations of error and we affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv).

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[4] Throughout the proceedings in this claim, claimant has testified that Dr. Moro is his treating physician. Jan. 14, 2005 Hearing Tr. at 9, 14; Aug. 7, 2002 Hearing Tr. at 23.

We affirm the administrative law judge's finding that claimant did not establish that he is totally disabled, and we affirm her attendant findings that claimant did not establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Nataloni v. Director, OWCP*, 17 BLR 1-111 (1993). We therefore affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Modification of a Subsequent Claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge