BRB No. 08-0556 BLA

C. H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOLBROOK MINING COMPANY	)	
	)	DATE ISSUED: 04/23/2009
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 Denying Request for Modification of Administrative Law Judge William S. Colwell, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

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

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Request for Modification (2004-BLA-5084) of Administrative Law Judge William S. Colwell, rendered on a subsequent 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).[1] Director's

[1] Claimant initially filed a claim for benefits on May 5, 2000. Director's Exhibit 1. On August 21, 2000, the district director denied benefits, finding that although claimant established the existence of pneumoconiosis arising out of coal mine employment, he failed to establish total disability. *Id.* Claimant took no further action

Exhibit 3. The administrative law judge credited claimant with "just over" ten years of coal mine employment and found that he had a smoking history of at least twenty-eight years, at a rate of one pack per day. Decision and Order at 6. The administrative law judge determined that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(1), (4) and 718.203(b). The administrative law judge, however, determined that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, thus, he found that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(iv).[2] Employer responds, urging affirmance of the denial of

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with regard to the denial of his May 2000 claim, until he filed a second application for benefits on March 2, 2001. *Id.* The district director inquired whether claimant was requesting modification of the August 21, 2000 decision or whether his intention was to wait until August 22, 2001 to file a subsequent claim for benefits. *Id.* Claimant replied and opted to wait to file a subsequent claim. *Id.* On October 11, 2001, claimant filed his third application for benefits. Director's Exhibit 3. On March 11, 2003, the district director denied the claim, finding that although claimant established the existence of pneumoconiosis arising out of coal mine employment, he failed to establish total disability. Director's Exhibit 18. On May 23, 2003, claimant filed a fourth application for benefits, which the district director treated as a request for modification. Director's Exhibit 20. The district director denied modification on the grounds that there was no new evidence to demonstrate a change in conditions and that there was no mistake in a determination of fact with respect to the prior denial. Director's Exhibits 23. Claimant requested a formal hearing. Director's Exhibit 24. Administrative Law Judge Rudolf L. Jansen granted claimant's motion for continuance on December 1, 2004 and Administrative Law Judge Daniel A. Sarno granted a joint motion for continuance on February 7, 2006. The administrative law judge held a formal hearing in Hazard, Kentucky on October 17, 2006.

[2] Claimant asserts that the administrative law judge erred in finding that he is not totally disabled pursuant to 20 C.F.R. §718.204(c). Claimant's Brief at 2. Under the revised regulations, which became effective on January 19, 2001, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b)(2).

benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief unless requested to do so by the Board.[3]

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.[4] 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 725.310 provides that modification may be granted on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, the administrative law judge must assess the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence establishes at least one element of entitlement that defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-83 (1993). If a change is established, the administrative law judge must then consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits of the claim. *Id*. Pursuant to a modification request, the administrative law judge has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Regarding the issue of total disability, claimant contends that the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with the medical reports assessing disability. Claimant's Brief at 3, *citing Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107, 2-124 (6th Cir. 2000);

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[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant has a smoking history of at least twenty-eight years, a history of ten years of coal mine employment, that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

Hvizdzak v. North Am. Coal Corp., 7 BLR 1-469 (1984); *Parsons v. Black Coal Co.*, 7 BLR 1-469 (1984). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a driller and a blaster. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, it is rational to conclude 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 Brief at 3.

Contrary to claimant's contention, a miner's inability to withstand further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, the administrative law judge noted that claimant worked as a sandblaster. Decision and Order at 6. The administrative law judge also correctly found that none of the physicians of record have opined that claimant has a totally disabling respiratory or pulmonary impairment, and that their opinions were supported by the objective evidence of record, including the non-qualifying pulmonary function and blood gas studies of record.[5] *Cornett,* 227 F.3d at 578, 22 BLR at 2-124; Decision and Order at 14; Director's Exhibit 9; Claimant's Exhibit 1; Employer's Exhibits 1-3, 10. Therefore, because claimant has failed to raise any meritorious allegation of error, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish total disability pursuant to Section

[5] The newly submitted medical reports relevant to the issue of total disability are those of Drs. Rosenberg and Wicker. Drs. Rosenberg and Wicker were aware that claimant worked as a driller and a blaster. Director's Exhibit 9; Employer's Exhibits 2, 3, 10. Dr. Rosenberg opined that from a pulmonary standpoint, claimant could perform his previous coal mine employment. Employer's Exhibits 2, 3, 10. In a December 7, 2001 report, Dr. Wicker noted that claimant's "respiratory capacity cannot be determined due to failure to comply with testing protocol." Director's Exhibit 9. Dr. Wicker also performed a pulmonary function study on March 26, 2002, which produced valid non-qualifying results, but he did not readdress the issue of total disability. *Id.* Additionally, the medical reports, submitted prior to claimant's request for modification, by Drs. Wicker, Lockey, Hudson, Broudy and Vuskovich, indicate that claimant was able, from a pulmonary standpoint, to do his usual coal mine job as a driller and a blaster. Director's Exhibit 1.

718.204(b)(2)(iv).[6] *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; s*ee also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir.1986); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); Decision and Order at 14.

In light of the foregoing, we also affirm the administrative law judge's overall finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2) and his determination that claimant did not demonstrate a change in conditions or a mistake in a determination of fact pursuant to Section 725.310.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[6] We also reject claimant's assertion that, since pneumoconiosis is a progressive and irreversible disease, the administrative law judge erred in failing to find that his condition has worsened to the point that he is now totally disabled. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes and Tucker Co.*, 11 BLR 1-147 (1988).