

BRB No. 09-0537 BLA

HARVEY FARLEY)
)
 Claimant-Respondent)
)
 v.) DATE ISSUED: 04/29/2010
)
 HEARTLAND COAL COMPANY)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Modification – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Modification – Awarding Benefits (2008-BLA-5331) of Administrative Law Judge Daniel L. Leland, with respect to

employer's request for modification,¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).² The administrative law judge credited claimant with eighteen years of coal mine employment, based on the stipulation of the parties, and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was sufficient to establish the existence of both clinical and legal pneumoconiosis arising from coal mine employment at 20 C.F.R. §§718.202(a)(1), (4), 718.203(b) and total disability due to pneumoconiosis at 20 C.F.R. §§718.204(b)(2), 718.204(c). The administrative law judge determined, therefore, that there was no mistake in a determination of fact or change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied employer's request for modification.

Employer appeals, arguing that the administrative law judge did not properly weigh the medical opinions of Drs. Zaldivar and Baker regarding the issue of total disability causation under 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's denial of the request for modification. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.³

¹ Claimant filed his current claim on October 1, 2002, and the district director denied the claim on June 27, 2003. Director's Exhibits 3, 21. Claimant appealed, and on December 30, 2004, Administrative Law Judge Richard A. Morgan issued a Decision and Order Denying Benefits based upon his determination that claimant failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Director's Exhibit 39. Claimant appealed and on November 22, 2005, the Board issued a Decision and Order vacating the administrative law judge's finding at 20 C.F.R. §718.204(c) and remanding the case for further consideration. *Farley v. Heartland Coal Co.*, BRB No. 05-0372 BLA (Nov. 22, 2005)(unpub.); Director's Exhibit 48. On July 31, 2006, Judge Morgan issued a Decision and Order on Remand – Awarding Benefits in which he concluded that claimant's pneumoconiosis was a substantially contributing cause of his total disability at 20 C.F.R. §718.204(c). Director's Exhibit 57. Employer appealed, and on August 15, 2007, the Board issued a Decision and Order affirming the award of benefits. *Farley v. Heartland Coal Co.*, BRB No. 06-0905 BLA (Aug. 15, 2007)(unpub.); Director's Exhibits 58, 69. Employer subsequently filed a timely request for modification on October 17, 2007.

² The recent amendments to the Black Lung Act, which became effect on March 23, 2010, do not apply in this case, as the claim was filed before January 1, 2005.

³ We affirm, as unchallenged on appeal, the administrative law judge's finding of eighteen years of coal mine employment and his findings that claimant established the existence of pneumoconiosis arising out of coal mine employment at 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 supported by substantial evidence, is rational, and is 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).

Pursuant to 20 C.F.R. §725.310, modification may be granted on the grounds of a change in conditions or a mistake in a determination of fact in the prior disposition of the claim. See 20 C.F.R. §725.310(a). When a request for modification is filed, the administrative law judge has the authority to reconsider all the evidence for any mistake in a determination of fact, including whether the ultimate fact of entitlement was wrongly decided. *Betty B. Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

In analyzing whether there was a change in conditions or a mistake in a determination of fact regarding total disability causation at 20 C.F.R. §718.204(c), the administrative law judge credited the opinions of Drs. Zaldivar and Baker.⁵ Dr. Zaldivar

§§718.202(a)(1), (4), 718.203(b) and total disability at 20 C.F.R. §718.204(b)(2), but did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁵ The administrative law judge noted that Judge Morgan gave Dr. Gaziano's opinion, that pneumoconiosis was a significantly contributing cause of claimant's total disability, little weight because he failed to discuss claimant's smoking history. Decision and Order at 10 n.6; Director's Exhibit 12. The administrative law judge did not otherwise address Dr. Gaziano's opinion. The administrative law judge assigned no weight to Dr. Repsher's opinion, that claimant did not have a pulmonary impairment related to coal dust exposure, because Dr. Repsher found, contrary to the administrative law judge's determination, that claimant does not have pneumoconiosis and that he is not totally disabled due to a respiratory impairment. Decision and Order at 10; Employer's Exhibits 2, 6. In addition, the administrative law judge found that Dr. Repsher's statement that coal mine dust exposure causes significantly less reduction in the FEV1 than cigarette smoking, directly contradicts the view adopted by the Department of Labor in the amended regulations that became effective on January 19, 2001. Decision and

examined claimant on August 4, 1999 and March 26, 2003 and diagnosed coal workers' pneumoconiosis (CWP) and bullous emphysema. Director's Exhibits 1, 13. In his 2003 report, Dr. Zaldivar stated that claimant had a pulmonary impairment caused by emphysema. Director's Exhibit 13. Dr. Zaldivar further indicated that "[t]here is co-existent damage from pneumoconiosis" and that claimant's coal dust exposure made a "small contribution" to his pulmonary impairment. *Id.* Employer deposed Dr. Zaldivar on November 27, 2007 and submitted the deposition transcript in support of its request for modification. Director's Exhibit 77. Dr. Zaldivar testified that the main cause of claimant's impairment was emphysema, with CWP "contributing some to the overall airway obstruction." *Id.* at 14. When asked whether coal dust exposure or CWP had a material adverse effect on claimant's impairment, Dr. Zaldivar stated:

If by material it is meant that [CWP] will be the factor that will determine whether or not this individual is going to be free of shortness of breath, then there is no material contribution from the [CWP] because the shortness of breath, in my opinion, is the result of the bullous emphysema.

Id. at 23-24. Dr. Zaldivar further indicated that if claimant did not suffer from severe bullous emphysema, he would not be aware of any respiratory or pulmonary impairment caused by pneumoconiosis and that claimant would be disabled to the same degree if he did not have pneumoconiosis. *Id.* at 24, 26.

Dr. Baker examined claimant on August 23, 2003 and September 26, 2008. Director's Exhibit 29; Claimant's Exhibit 3. In his reports of these examinations, Dr. Baker diagnosed CWP, chronic obstructive pulmonary disease (COPD), bronchitis and hypoxemia. *Id.* Dr. Baker determined that claimant's CWP was caused by coal dust exposure, while the remaining conditions were attributable to both coal dust exposure and smoking. *Id.* Dr. Baker opined that claimant has a totally disabling respiratory impairment to which CWP, coal dust exposure and smoking are significant contributors. Claimant's Exhibit 3. Dr. Baker also reviewed additional medical evidence and issued a third report in which he reiterated his findings and cited recent statements by the Global Initiative for Chronic Obstructive Lung Disease (GOLD) in support of his opinion, that coal dust exposure and smoking cause similar reductions in FEV1. *Id.*

The administrative law judge agreed with the conclusion, set forth in the 2006 Decision and Order awarding benefits, that Dr. Zaldivar's statements, that there is damage from CWP and that CWP makes a small contribution to claimant's pulmonary

Order at 10-11. We affirm the administrative law judge's discrediting of Dr. Repsher's opinion, as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

impairment, were sufficient to meet the criteria in 20 C.F.R. §718.204(c)(1). Decision and Order at 10; Director's Exhibits 13, 77. Further, the administrative law judge determined that Dr. Zaldivar's deposition testimony did not significantly change the conclusions in his report, "as he acknowledged that [claimant's] [CWP] was contributing to his airway obstruction and may cause shortness of breath." Decision and Order at 10; Director's Exhibit 77. Therefore, the administrative law judge found that there was no mistake in a determination of fact in crediting Dr. Zaldivar's opinion as supportive of claimant's burden at 20 C.F.R. §718.204(c). Decision and Order at 10.

With respect to Dr. Baker's opinion, the administrative law judge stated that Dr. Baker's recent opinion, that claimant is totally disabled due to coal dust exposure and cigarette smoking, was entitled to more weight than Dr. Zaldivar's opinion because he examined claimant five and one-half years after Dr. Zaldivar. Decision and Order at 10; Claimant's Exhibit 3. The administrative law judge also noted that Dr. Baker's opinion was supported by his citation to GOLD's conclusion, that FEV1 losses from coal dust exposure and cigarette smoking are similar. *Id.*

Employer argues that Dr. Zaldivar's newly submitted deposition testimony establishes a mistake in a determination of fact in the 2006 Decision and Order awarding benefits, because it proves that claimant's pneumoconiosis made only a negligible, inconsequential, or insignificant contribution to claimant's total disability. In addition, employer asserts that Dr. Baker's opinion is unsupported and, therefore, unreasoned because he did not explain how claimant's pneumoconiosis contributed to his impairment and did not address claimant's smoking history. Employer also states that the administrative law judge did not consider that Dr. Baker based his opinion on a finding of complicated pneumoconiosis, which is contrary to the administrative law judge's determination that there is no x-ray evidence of this condition. Further, employer argues that Dr. Baker's finding of minimal resting arterial hypoxemia is inconsistent with the administrative law judge's finding that none of the arterial blood gas studies is qualifying. Additionally, employer maintains that Dr. Baker's explanation of the significance of claimant's pulmonary function study results is conclusory and that Dr. Baker did not relate the medical literature he referenced specifically to claimant. Lastly, employer asserts that Dr. Baker's opinion is not supported by the medical records of Dr. Ottaviano, claimant's pulmonary physician, which do not contain a diagnosis of pneumoconiosis or a totally disabling respiratory impairment due to pneumoconiosis.

Pursuant to 20 C.F.R. §725.310, employer bears the burden of demonstrating that there has been a change in claimant's condition since the award of benefits in 2006 or that the award of benefits contained a mistake in a determination of fact. *See Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28. In this case, employer essentially asks the Board to reweigh the medical opinion evidence relevant to the issue of total disability causation and to conclude that the administrative law judge

erred in determining that the award of benefits did not contain a mistake in a determination of fact on this issue. The Board is not empowered to make credibility determinations regarding the medical evidence and must defer to the administrative law judge in the exercise of his or her role as fact-finder. *See* 33 U.S.C. 921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §§725.351(b), 725.477; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Regarding Dr. Zaldivar’s opinion, the administrative law judge acted within his discretion in determining that Dr. Zaldivar’s deposition testimony did not assist employer in satisfying its burden of proof on modification, as he reiterated the conclusions set forth in his 2003 report, that claimant’s lungs show damage from pneumoconiosis and that pneumoconiosis contributes to claimant’s obstructive impairment.⁶ *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); Director’s Exhibit 77 at 14. Moreover, contrary to employer’s assertion, substantial evidence supports the administrative law judge’s permissible determination that Dr. Zaldivar acknowledged that claimant’s pneumoconiosis contributed to his overall airway

⁶ Revised 20 C.F.R. §718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner’s totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a “substantially contributing cause” of the miner’s disability if it:

- (i) Has a material adverse effect on the miner’s respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1). In the comments accompanying the publication of the amended regulations, the Department of Labor indicated that the “substantially contributing cause” standard set forth in 20 C.F.R. §718.204(c) implements the standard developed “in court of appeals precedent since 1989 which varie[s] little from circuit to circuit.” 65 Fed. Reg. 79946 (2000). The Department of Labor also stated that the addition of the word “material” to 20 C.F.R. §718.204(c), establishes that “evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner’s total disability” does not satisfy the standard. *Id.*

obstruction. Director's Exhibit 77 at 23-24. We affirm, therefore, the administrative law judge's finding that Dr. Zaldivar's deposition testimony does not establish that there was a mistake in a determination of fact in the award of benefits. *See Hicks*, 138 F.3d at 535, 21 BLR at 2-340; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

In addition, we reject employer's arguments regarding the administrative law judge's crediting of Dr. Baker's opinion at 20 C.F.R. §718.204(c). Contrary to employer's contention, in rendering his opinion, that CWP and coal dust exposure are substantially contributing causes of claimant's obstructive impairment, Dr. Baker did not cite x-ray evidence of complicated pneumoconiosis as the rationale underlying his findings.⁷ Director's Exhibit 29; Claimant's Exhibit 3. Further, because Dr. Baker's diagnosis of minimal resting hypoxemia is not equivalent to a finding that claimant's blood gas study results were qualifying under 20 C.F.R. §718.204(b)(2)(ii), it does not conflict with the administrative law judge's finding that none of the arterial blood gas studies is qualifying.⁸ Director's Exhibit 29; Claimant's Exhibit 3. In addition, the administrative law judge acted within his discretion in determining that Dr. Baker's opinion, that claimant's pulmonary impairment is due to coal dust exposure and cigarette smoking and that the effects from both are additive, was supported by the recent medical literature he cited and claimant's objective test results. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; Claimant's Exhibit 3. Furthermore, contrary to employer's argument, the administrative law judge was not required to determine that Dr. Baker's opinion is inconsistent with the opinion of Dr. Ottaviano, claimant's pulmonary physician, who diagnosed claimant with COPD, with ongoing tobacco use. *See Hicks*, 138 F.3d at 535, 21 BLR at 2-340; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Employer's Exhibit 9. Dr. Baker attributed a portion of claimant's impairment to cigarette smoking, while Dr. Ottaviano was silent as to whether CWP or coal dust exposure played any role in claimant's impairment. Director's Exhibit 29; Claimant's Exhibit 3; Employer's Exhibit 9.

⁷ Dr. Baker interpreted a chest x-ray, dated August 23, 2003, as positive for coal workers' pneumoconiosis (CWP) with a profusion of 1/2. Director's Exhibit 29. He also relied on an interpretation of an x-ray, dated September 26, 2008, by Dr. Alexander to diagnose CWP, with a profusion of 1/2 and a size A opacity. Claimant's Exhibit 3. Further, in his report, dated October 6, 2008, Dr. Baker reviewed ten interpretations of four x-rays, eight of which were positive, with a profusion ranging from 1/1 to 2/2. *Id.*

⁸ A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

In light of the foregoing, we affirm the administrative law judge’s finding that employer has not proven, pursuant to 20 C.F.R. §718.204(c), that claimant’s pneumoconiosis “makes only a negligible inconsequential, or insignificant contribution to [claimant’s] total disability.” 65 Fed. Reg. 79,946 (Dec. 20, 2000). We also affirm, therefore, the administrative law judge’s denial of employer’s request for modification at 20 C.F.R. §725.310, as employer did not establish a change in conditions or a mistake in a determination of fact in the award of benefits. *See Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

Accordingly, the administrative law judge’s Decision and Order on Modification – Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge