BRB No. 09-0553 BLA

CHESTER H. BLANKENSHIP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
R & J ENERGY COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 04/28/2010
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Virginia Thornsbury, Iaeger, West Virginia, for claimant.

Kathy L. Snyder and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-5561) of Administrative Law Judge Linda S. Chapman (the administrative law judge), with respect

to a modification request[1] filed on April 29, 2005, 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] After crediting claimant with twenty-two years of coal mine employment, the administrative law judge concluded that claimant did not establish total disability at 20 C.F.R. §718.204(b), based on the newly submitted evidence, and, thus, did not establish a change in conditions. The administrative law judge also found, based on a consideration of the evidence as a whole, that claimant did not demonstrate a mistake in a determination of fact.[3] Accordingly, the administrative law judge denied claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000) and denied benefits.

[1] Claimant filed claims on June 29, 1973, and February 27, 1992, which were denied because claimant did not establish any element of entitlement. Director's Exhibits 21, 22. Claimant filed his third claim on January 17, 1995. Director's Exhibit 1. Administrative Law Judge Richard T. Stansell-Gamm determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis, but denied benefits on the merits, as claimant did not prove that he was totally disabled. Director's Exhibit 41. The Board affirmed the denial of benefits. *Blankenship v. R & J Energy Co*., BRB No. 99-0892 BLA (May 25, 2000) (unpub.); Director's Exhibit 50. Claimant subsequently submitted additional evidence to the Board and requested that the Board remand the case to the district director for consideration of a request for modification. Director's Exhibits 51, 53. On May 28, 2004, Administrative Law Judge Edward Terhune Miller denied the modification request. Director's Exhibits 56, 66. On April 29, 2005, claimant again sought modification of the denial of benefits. Director's Exhibit 66. A hearing was scheduled before Administrative Law Judge Jeffrey Tureck, but it was continued because claimant had not complied with certain discovery requests. Director's Exhibits 89, 92. The case was later reassigned to Administrative Law Judge Stephen L. Purcell, who issued an order in which he found that the evidentiary record did not establish a change in condition or mistake in fact and remanded the claim to the district director for a new pulmonary evaluation. Director's Exhibit 102. On remand, Dr. Porterfield examined claimant at the request of the Department of Labor. Director's Exhibit 107. The case was returned to the Office of Administrative Law Judges for a hearing before Administrative Law Judge Linda S. Chapman (the administrative law judge). Director's Exhibit 109.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as all of the claims were filed prior to January 1, 2005.

[3] The Department of Labor amended the regulations implementing the Black Lung Benefits Act, effective January 19, 2001. As the claims in this case were filed prior to

Claimant appeals, arguing that the administrative law judge erred in permitting employer to submit additional evidence in violation of 20 C.F.R. §725.414 (2000).[4] In addition, claimant objects to employer's x-ray evidence because he did not have a chance to submit rebuttal evidence. Further, claimant asserts that the administrative law judge erred in finding that the newly submitted evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of claimant's modification request and benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[5]

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.[6] 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).

Claimant may establish modification by demonstrating either a change in conditions since the issuance of the previous denial or a mistake in a determination of fact in the previous denial. 20 C.F.R. §725.310(a) (2000). In considering whether a change in conditions has been established, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in

---

January 19, 2001, the amended version of 20 C.F.R. §725.310 does not apply. 20 C.F.R. §725.2.

[4] As the claims in this case were filed prior to January 19, 2001, the amended version of 20 C.F.R. §725.414 does not apply. 20 C.F.R. §725.2.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-two years of coal mine employment and her findings that claimant failed to establish a change in conditions, based on the newly submitted evidence, or a mistake in a determination fact, based on the evidence as a whole, at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] Virginia Thornsbury, a lay representative, appeared on claimant's behalf at the hearing conducted by the administrative law judge and filed the Petition for Review and a brief in support of the Petition for Review on claimant's behalf before the Board. Inasmuch as Ms. Thornsbury is acting as a bona fide lay representative in this case, we will use the standard of review applicable when a claimant is represented by counsel. *See Burkholder v. Director, OWCP*, 8 BLR 1-58 (1985); *see also Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order); Director's Exhibit 17.

conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element that defeated entitlement in the prior decision. 20 C.F.R. §725.310 (2000); *see 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).[7]

I. Evidentiary Issues

A. The Administrative Law Judge's Findings

At the November 6, 2008 hearing, claimant objected to the admission of x-ray evidence proffered by employer because he was not given the opportunity to obtain re-readings by a physician of his choosing. Hearing Transcript at 39. Employer's counsel offered to assist claimant's counsel in locating the three films, dated April 19, 1995, April 16, 2007, and November 26, 2007. *Id*. at 39-40. Employer's counsel stated that claimant's correspondence with the Department of Labor concerning the April 16, 2007 film was to no avail, as the Department of Labor is not in possession of this x-ray. *Id*. Regarding the April 19, 1995 film, employer's counsel explained that claimant needed to contact the Department of Labor and request that it be sent to a specific physician. *Id*. at 40. The administrative law judge offered to allow claimant additional time to locate the x-rays at issue and obtain re-readings, but claimant declined the opportunity to develop this evidence.[8] *Id*. at 47.

---

[7] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 2. 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*).

[8] At the hearing, the following exchange took place between the administrative law judge and claimant's representative, Ms. Thornsbury:

> JUDGE CHAPMAN: All right. But, to make it clear, you're waiving the opportunity to rebut these films after the hearing and submit those to me --
>
> MS. THORNSBURY: Right.
>
> JUDGE CHAPMAN: -- for consideration?
>
> MS. THORNSBURY: Right.

Hearing Transcript at 47.

In her Decision and Order, the administrative law judge summarized Judge Purcell's Order remanding the case to the district director for a complete pulmonary evaluation to provide evidence of claimant's current condition. Decision and Order at 4. The administrative law judge stated that Judge Purcell, citing 20 C.F.R. §725.414 (2000), ruled that because employer did not request an examination of claimant until after the claim had been sent to the Office of the Administrative Law Judges (OALJ), it waived its right to have claimant examined. *Id*. In addition, the administrative law judge noted that Judge Purcell ruled that previous orders compelling claimant to submit to an additional pulmonary examination by a physician of employer's choosing were erroneously issued. *Id*. at 4-5. The administrative law judge concluded that, when the claim went back to the district director on remand and additional evidence was developed, employer had the right to respond to such evidence. *Id*. at 5. The administrative law judge also stated that she advised claimant at the hearing of employer's right to procure evidence in response to the evidence claimant developed on remand.[9] *Id*.

B. Arguments on Appeal

Claimant argues that the administrative law judge erred in allowing employer to submit new medical evidence following Judge Purcell's remand of the case to the district director for a new complete pulmonary evaluation. Claimant maintains that because employer "was satisfied with Judge Stansell-Gamm's [1999] Decision and Order" denying benefits, its request for an independent medical examination "seven years and two hearings later" was not made in good faith, as required by 20 C.F.R. §725.414(e)(2) (2000).[10] Claimant's Brief at 2-3. Employer responds, contending that claimant's

---

[9] At the hearing, the administrative law judge stated:

> That is not the situation that existed at the time Judge Purcell sent it back. There was no new medical evidence. There was nothing that the employer needed to address. But . . . that evidence having been developed in the form of Dr. Porterfield's examination and testing, the employer has the right to have that evidence addressed, and it did not sleep on those rights. It sounds to me like the employer made every effort to go out and address that. So I'm going to allow the employer to submit evidence in this modification request.

Hearing Transcript at 16.

[10] Under 20 C.F.R. §725.414(e)(2) (2000):

argument is irrational, as he wants the benefit of new medical evidence, while depriving employer of the ability to respond. Additionally, employer argues that due process requires that it be allowed to submit new evidence because, otherwise, it would be required to rely on older, and potentially less persuasive, medical information.

The administrative law judge is granted broad discretion in resolving procedural issues, including the admission of evidence into the record. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). A party seeking to overturn an administrative law judge's resolution of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion. *See Harris v. Old Ben Coal Co*., 23 BLR 1-98 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon*., 24 BLR 1-13 (2007)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*); *Cochran v. Consolidation Coal Co*., 12 BLR 1-137 (1989).

We reject claimant's allegation that the administrative law judge erred in allowing employer to develop evidence in response to the complete pulmonary evaluation performed by Dr. Porterfield. The administrative law judge acted within her discretion in determining that, on remand to the district director, employer was entitled to submit evidence in response to the new medical evidence developed on claimant's behalf. A fundamental requirement of due process is the opportunity to be heard to ensure a fair disposition of the case. *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). Procedural due process also requires that the parties have the opportunity to fairly respond to evidence, and present their own case in full. *Id*. Judge Purcell remanded this case to the district director for a new pulmonary evaluation because it had been pending for an extended time, and, therefore, there was no medical evidence pertaining to claimant's current condition. *See* Director's Exhibit 102. The administrative law judge acted within her discretion in determining that due process required that both parties be entitled to submit additional evidence to either support or rebut the new evidence. The administrative law judge's action was also consistent with 20 C.F.R. §725.310(b) (2000), which provides that in a modification proceeding, "[a]dditional evidence may be submitted by any party or requested by the [district director]."

> A notified operator which does not undertake a good faith effort to develop its evidence before the [district director] shall be considered to have waived its right to either have the claimant examined by a physician of its choosing or have the claimant's evidence submitted for review by a physician of its choosing.

20 C.F.R. §725.414(e)(2) (2000).

Claimant also challenges the administrative law judge's admission of the x-ray interpretations obtained by employer on remand because he was not permitted to submit rebuttal interpretations. In addition, claimant asserts that he was prejudiced by the district director's failure to provide him with a copy of Dr. Porterfield's report until the case was transferred to the Office of Administrative Law Judges for a hearing. Further, claimant argues that the district director "chose an attorney," Joseph Wolfe, to represent him, without his approval. Employer responds, arguing that its evidence was properly admitted, that claimant waived his right to submit rebuttal evidence, and that claimant's additional arguments are based upon incorrect information.

Claimant's allegations are without merit. With respect to the x-ray readings developed by employer on remand, the administrative law judge denied benefits based upon claimant's failure to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, she did not consider the x-ray evidence submitted by employer. Accordingly, error, if any in the administrative judge's admission of employer's newly submitted x-ray evidence is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Regarding the district director's provision of Dr. Porterfield's report to claimant, claimant was aware that Dr. Porterfield examined him on November 26, 2007 and was advised of Dr. Porterfield's findings in the district director's Proposed Decision and Order, dated February 8, 2008. Director's Exhibits 107. Claimant filed an objection to the district director's Proposed Decision and Order on March 5, 2008 and requested a hearing, but did not ask for a copy of Dr. Porterfield's report or a chance to respond to it. In addition, at the hearing before the administrative law judge, claimant did not challenge the admissibility of Dr. Porterfield's report. Because the district director gave claimant a copy of Dr. Porterfield's report prior to the hearing, and claimant had the opportunity to seek redress for the tardiness of the district director's action, but did not do so, we affirm the administrative law judge's decision to admit Dr. Porterfield's report of his examination of claimant and the accompanying data. *See Harris*, 23 BLR at 1-104; *Clark*, 12 BLR at 1-151; *Cochran*, 12 BLR at 1-141.

We also find there is no merit to claimant's allegation that the district director attempted to select a different representative for claimant. Mr. Wolfe mistakenly believed that he represented claimant and requested a continuance of the scheduled November 6, 2008 hearing, which the administrative law judge granted on October 21, 2008. Subsequently, however, Mr. Wolfe notified the administrative law judge, and all parties, that he never represented claimant. The administrative law judge then reset the hearing for the original date. As a result, claimant did not suffer any prejudice from this error. *Betty B Coal Company v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir.

1999). We affirm, therefore, the administrative law judge's evidentiary rulings in this case.

II. 20 C.F.R. §718.204(b)(2)(iv)

A. The Administrative Law Judge's Findings

In considering whether claimant established a change in conditions regarding total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Rosenberg, Porterfield, Cardona, Castle, Basheda, and Fino. The administrative law judge noted that Dr. Rosenberg found that claimant was able to perform his previous coal mine employment from a pulmonary perspective and that any reduction in the values observed on claimant's pulmonary function testing was due to claimant's inadequate effort. Decision and Order at 15. The administrative law judge did not accord any weight to Dr. Porterfield's opinion, that claimant is "100% impaired based on [the results of his pulmonary function study]," because Dr. Porterfield relied upon pulmonary function studies that the administrative law judge determined were not valid.[11] *Id*. at 14; Director's Exhibit 106. The administrative law judge also accorded "little, if any, weight" to Dr. Cardona's opinion, that claimant is totally and permanently disabled from his previous coal mine employment, because Dr. Cardona did not perform any objective testing, but rather relied upon the physical examination and claimant's report of symptoms. Decision and Order at 14; *see* Claimant's Exhibit 2. In contrast, the administrative law judge accorded Dr. Castle's opinion, that claimant retains the pulmonary capacity to perform his previous coal mine employment, significant weight because it was based on a review of all of the medical evidence, was well-reasoned, and was supported by the objective medical evidence. *Id*. Similarly, the administrative law judge gave significant weight to the opinions of Drs. Basheda and Fino, who found no evidence of a pulmonary impairment that would prevent claimant from performing his previous coal mine employment, because they were well-reasoned, based on a review of all of the available evidence and supported by the objective medical evidence. Decision and Order at 15; *see* Employer's Exhibits 17, 20.

The administrative law judge concluded that she relied "on the opinions of Drs. Rosenberg, Castle, Basheda, and Fino over the opinions of Drs. Porterfield and Cardona,"

[11] The administrative law judge relied on Dr. Renn's opinion. Decision and Order at 15. Dr. Renn reviewed the results of claimant's November 26, 2007 pulmonary function test and found that it was invalid because claimant did not maintain maximal effort throughout the entire FVC maneuver, did not maintain the FVC maneuver for the required period, and did not perform any satisfactory FVC maneuvers. Employer's Exhibit 6.

to determine that claimant did not establish that he has a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv), and, therefore did not establish a change in conditions at 20 C.F.R. §725.310 (2000). Decision and Order at 15. The administrative law judge also stated that, after reviewing all of the medical evidence in the record, she found that claimant did not establish a mistake of fact in Judge Miller's determination that claimant did not establish the existence of a totally disabling respiratory impairment. *Id*. Consequently, the administrative law judge denied claimant's request for modification, and denied benefits. *Id*. at 16.

B. Arguments on Appeal

Claimant argues that the opinions of Drs. Vasudevan, Porterfield and Cardona show that "a big change" has occurred in his condition since Judge Stansell-Gamm denied benefits. Claimant's Brief at 4. Claimant asserts that he is unable to perform his previous coal mine employment and that Dr. Rosenberg's report is not entitled to any weight because he did not have claimant walk on a treadmill or perform any other type of exercise. Employer responds, arguing that the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv) is supported by substantial evidence.

We affirm the administrative law judge's findings that claimant did not establish a change in conditions or a mistake in a determination of fact on the issue of total disability, as they are rational and supported by substantial evidence. With respect to claimant's assertion that Dr. Vasudevan's opinion supports a finding of a change in conditions, because this evidence was considered by Judge Miller in his May 20, 2004 Decision and Order denying modification, the administrative law judge properly did not consider it when determining whether the newly submitted evidence established that claimant developed a totally disabling pulmonary impairment since Judge Miller's decision.[12] *See Kingery v. Hunt Branch Coal Co*., 19 BLR 1-6 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp*., 14 BLR 1-156 (1990), *modified on recon*., 16 BLR 1-71 (1992). In addition, the administrative law judge acted within her discretion in assigning no weight to Dr. Porterfield's opinion regarding total disability, as it was based solely on pulmonary function studies that she determined were not valid. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984). Further, the administrative law judge acted within her discretion in giving little weight to Dr. Cardona's opinion because she found it to be not well-reasoned or supported by objective

[12] The administrative law judge explicitly indicated that she considered Dr. Vasudevan's opinion, which was part of the record before Judge Miller, solely to determine whether there was a mistake in a determination of fact in Judge Miller's May 20, 2004 Decision and Order denying modification. *See* Decision and Order at 7 n.2.

medical evidence on the ground that Dr. Cardona did not perform, or review the results of, any objective tests. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Clark*, 12 BLR at 1-155.

The administrative law judge also acted within her discretion in according more weight to the opinions of Drs. Castle, Basheda and Fino because she found them to be well-reasoned, based on a review of all of the medical evidence and supported by the objective medical evidence. *Grizzle v. Pickands Mather & Co*., 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Clark*, 12 BLR at 1-155; *Minnich v. Pagnotti Enterprises, Inc*., 9 BLR 1-89 (1986). Therefore, we affirm the administrative law judge's finding that the newly submitted evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2), and, thus, did not establish a change in condition at 20 C.F.R. §725.310 (2000).

We also affirm the administrative law judge's finding that the medical evidence of record, as a whole, is insufficient to establish a mistake in a determination of fact in Judge Miller's 2004 Decision and Order, as it is rational and supported by substantial evidence.[13] Consequently, we affirm the administrative law judge's finding that claimant did not establish a basis for modification at 20 C.F.R. §725.310 (2000). *Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

[13] Judge Miller acted within his discretion in determining that the evidence submitted by claimant in support of his initial request for modification was insufficient to establish total disability, as there were no valid pulmonary function studies and Dr. Vasudevan's opinion, that claimant is totally disabled, was conclusory and not well-reasoned. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); 2004 Decision and Order at 5-7. Judge Miller also rationally found that the prior denial of benefits did not contain a mistake in a determination of fact on the issue of total disability, as all of the objective studies were nonqualifying and the preponderance of well-reasoned opinions established that claimant was not totally disabled. *Id*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge