

BRB No. 09-0561 BLA

FRANK BRANDENBURG)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 04/28/2010
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, 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 (2007-BLA-06093) of Administrative Law Judge Donald W. Mosser rendered on a claim filed on March 12, 2002, 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).¹ Director's Exhibit 3. In his Decision and Order, the administrative law judge credited claimant with at least ten years of coal mine

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant filed his claims prior to January 1, 2005.

employment, as stipulated by the parties. The administrative law judge adjudicated claimant's March 12, 2002 claim as a subsequent claim under the regulations at 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge found that claimant failed to satisfy his burden to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

Claimant appeals, asserting that the administrative law judge erred in evaluating the x-ray and medical opinion evidence as to the existence of pneumoconiosis, and that he erred in finding that claimant is not totally disabled. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge erred in adjudicating claimant's March 12, 2002 claim as a subsequent claim under 20 C.F.R. §725.309. The Director asserts that since claimant has a "1999 claim [that] was not withdrawn, his March 2002 application must be considered a modification petition." Director's Brief at 2. The Director, however, maintains that the Board should affirm the administrative law judge's denial of benefits.

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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address the Director's assertion that the administrative law judge erred in treating the March 12, 2002 application for benefits as a subsequent claim. The relevant procedural history of this case is as follows. Claimant first filed a claim for benefits on November 17, 1994, which was denied by the district director on October 10, 1995, because the evidence failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. On March 19, 1999, claimant filed a second claim, which was denied by Judge Mosser on September 27, 2000. *Id.* Pursuant to claimant's appeal, the Board affirmed the denial of benefits on October 15, 2001. *Brandenburg v. Director, OWCP*, BRB No. 01-0169 BLA (Oct. 15, 2001) (unpub.); Director's Exhibit 1. On March 12, 2002, claimant filed a third application for benefits and wrote on the Form CM-911 claim form:

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1- 200 (1989) (*en banc*); Director's Exhibit 3.

I wish to withdraw any previous claim – denied [October 15, 2001] by the Benefits Review Board. I believe a new claim under the new regulations would be more advantageous.

Director's Exhibit 3 (emphasis added).

In a letter dated March 21, 2002, the district director advised claimant that the earliest possible date that he could file a new claim for benefits was October 16, 2002, one year after the Board's October 15, 2001 decision. Director's Exhibit 1. Enclosed with the letter was an "Appeal Questionnaire," which claimant was instructed to complete in order to clarify whether he wished to file a new claim or have his March 12, 2002 application treated as a request for modification. *Id.* Claimant completed the questionnaire on March 22, 2002, and check-marked the box, indicating that he wanted to file a new claim, and did not wish to pursue an appeal or modification of his denied claim. *Id.*

On March 28, 2002, the district director issued a "Proposed Decision and Order Withdrawal of Claim," indicating that claimant's request to withdraw his March 19, 1999 claim was granted and that the claim was considered to have been withdrawn in accordance with 20 C.F.R. §725.306(b). Thereafter, the district director processed claimant's March 12, 2002 claim as a subsequent claim, and issued a Proposed Decision and Order denying benefits on June 6, 2003. Director's Exhibit 14. Claimant requested a hearing, and the case was transferred to the Office of Administrative Law Judges (OALJ). The transmittal memorandum to OALJ from the district director, dated September 3, 2003, noted that the March 19, 1999 claim was withdrawn but was included in Director's Exhibit 1, along with the initial claim filed on November 17, 1994. In his Decision and Order dated March 19, 2009, the administrative law judge discussed the procedural history of the case and adjudicated the March 12, 2002 claim as a subsequent claim. Decision and Order at 2.

The Director maintains on appeal that the March 12, 2002 claim is a request for modification and not a subsequent claim. The Director specifically contends that the district director erred in issuing an Order granting claimant's request for withdrawal of his prior claim filed on March 19, 1999.³ We agree with the Director's position. In

³ The administrative law judge also found that the district director's Order was in error because claimant did not actually state on the appeal questionnaire that he wished to withdraw his prior claim pursuant to 20 C.F.R. §725.306. Decision and Order at 3. However, in reaching this conclusion the administrative law judge does not appear to have considered claimant's specific statement on his March 12, 2002 claim form, indicating that he wished to withdrawal his prior claim.

Clevenger v. Mary Helen Coal Co., 22 BLR 1-193 (2002) (*en banc*), the Board held that the provisions of 20 C.F.R. §725.306, permitting a miner to withdraw his or her claim, are applicable only up until such time as a decision on the merits issued by an adjudication officer (e.g., the district director or an administrative law judge) becomes effective, *see* 20 C.F.R. §§725.419, 725.479, 725.502, at which time there no longer exists an appropriate adjudication officer authorized to approve a withdrawal request under 20 C.F.R. §725.306. *Clevenger*, 22 BLR at 1-199-200; *accord Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-190-191 (2002) (*en banc*). Under the facts of this case, the district director erred in granting claimant's request to withdraw his March 19, 1999 claim, as a decision on the merits of that claim had already been issued by the administrative law judge on September 27, 2000. *See Clevenger*, 22 BLR at 1-199-200; Director's Exhibit 1. Therefore, contrary to the administrative law judge's finding, claimant's March 12, 2002 claim must be considered a request for modification, as it was filed within one year of the Board's October 15, 2001 decision. 20 C.F.R. §725.309(c).

Although the administrative law judge did not apply the regulations at 20 C.F.R. §725.310, we agree with the Director that substantial evidence supports his denial of benefits, and that it is not necessary to remand this claim for further consideration. A miner may establish a basis for modification in his or her claim by establishing either a change in conditions or a mistake in a determination of fact. *See* 20 C.F.R. §725.310. In considering whether a change in conditions has been established pursuant to 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement⁴ which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Moreover, the administrative law judge has the authority to "correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The administrative law judge may reconsider all the evidence for any mistake of fact, including whether the ultimate fact of entitlement was wrongly decided. *See Youghioghny and Ohio Coal Co. v. Milliken*, 200

⁴ In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 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*).

F.3d 942, 22 BLR 2-46 (6th Cir. 1999); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

In this case, although the administrative law judge did not reconsider the evidence submitted with claimant's 1999 claim to determine whether there was a mistake in fact with regard to the prior denial, we consider this error to be harmless, as the Board specifically affirmed a denial of benefits with respect to the prior claim because there was no evidence whatsoever to support a finding that claimant had pneumoconiosis or that he was totally disabled. Director's Exhibit 1; *see Brandenburg*, BRB No. 01-0169, slip op. at 3-4; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Thus, because claimant is unable to establish a mistake in a determination of fact, as a matter of law, it is not necessary that we remand the case to the administrative law judge for consideration of that issue pursuant to 20 C.F.R. §725.310.

As to the issue of a change in conditions, because the administrative law judge evaluated the newly submitted evidence to determine whether claimant established the existence of pneumoconiosis or total disability, we are able to apply his credibility findings to the regulation at 20 C.F.R. §725.310. We therefore will address claimant's assertions of error with regard to the administrative law judge's finding that claimant did not establish a change in conditions since the denial of his prior claim.

On appeal, claimant contends that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).⁵ This argument has no merit. The administrative law judge correctly noted that there was only one x-ray obtained in conjunction with the March 12, 2002 claim, which was read by Dr. Broudy, a B reader, as negative for pneumoconiosis. Decision and Order at 4; Director's Exhibit 10. As the administrative law judge properly found that the newly submitted x-ray does not support a finding of pneumoconiosis, claimant's general assertions that the administrative law judge "may have 'selectively analyzed' the x-ray evidence," that he was not required to "defer to a [reader] with superior qualifications" or "accept as conclusive the numerical superiority of x-ray interpretations" have no merit. Claimant's Brief at 3; *see White v. New White Coal Co.*, 23 BLR at 1-1, 1-4-5 (2004); Director's Exhibit 10. Thus, we affirm the administrative law judge's finding at 20 C.F.R. §718.202(a)(1).

⁵ We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings of at least ten years of coal mine employment and that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant also contends that the administrative law judge erred in finding that he failed to establish the existence of pneumoconiosis based on the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). We disagree. As noted by the administrative law judge, the record developed in conjunction with claimant's March 12, 2002 request for modification contains only one medical opinion, by Dr. Broudy, who "did not diagnose pneumoconiosis or any respiratory disease due to coal dust exposure."⁶ Decision and Order at 6; Director's Exhibit 10. We, therefore, affirm the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), and his overall determination that claimant did not satisfy his burden of proving the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Claimant also argues that the administrative law judge erred in finding that he is not totally disabled.⁷ We disagree. Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that there was one pulmonary function study submitted in conjunction with claimant's March 12, 2002 request for modification, which was qualifying for total disability.⁸ However, because Dr. Broudy, the physician who

⁶ Dr. Broudy examined claimant on June 3, 2002, at the request of the Department of Labor, and diagnosed claimant with "atrial fibrillation and bradycardia" along with "cardiac pacemaker," all attributable to coronary atherosclerosis. Director's Exhibit 10. He noted that, although the values on claimant's pulmonary function study were reduced, the results are largely related to "suboptimal effort" and claimant's cardiac disease, as claimant has no pulmonary impairment. *Id.* He also noted that claimant had a normal arterial blood gas study. *Id.* According to Dr. Broudy, claimant did not have any occupational lung disease caused by his coal mine employment. *Id.* He opined that claimant was unable to work considering factors such as claimant's age, decreased mobility and decreased muscle mass. *Id.* In a supplemental report dated September 22, 2005, Dr. Broudy specifically explained that he did not diagnose total disability based on the results of the pulmonary function study but rather on "factors unrelated to [claimant's] pulmonary condition." Director's Exhibit 20.

⁷ Claimant, citing 20 C.F.R. §718.204(c), asserts that the administrative law judge erred in finding that he is not totally disabled. Claimant's Brief at 5. 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).

⁸ A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B 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)(i). A "qualifying" arterial blood gas study yields values that are equal to

performed the June 3, 2002 pulmonary function study, indicated that it was invalid due to sub-optimal effort, the administrative law judge determined that the study did not establish that the miner had a totally disabling respiratory or pulmonary impairment. Decision and Order at 7; Director's Exhibit 10. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that there was only one newly submitted arterial blood gas study dated June 3, 2002, but that the study was non-qualifying for total disability. Decision and Order at 7. The administrative law judge also found that, because the record did not contain any evidence to establish that the miner had cor pulmonale with right-sided congestive heart failure, claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id.* Since claimant does not assign specific error to the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i)-(iii), they are affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Pursuant to Section 718.204(b)(2)(iv), claimant asserts that the administrative law judge was required to consider the exertional requirements of his usual coal mine work in conjunction with the medical reports assessing disability. Claimant's Brief at 5, *citing Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant states, "[i]t can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis" and that, "[t]aking 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." Claimant's Brief at 6. Claimant asserts that the administrative law judge erred because he "made no mention of claimant's usual coal mine work in conjunction with his assessment of disability." *Id.* at 6.

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. *See 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). Additionally, the administrative law judge properly considered the exertional requirements of claimant's usual coal mine work, noting that he worked as a loader and hauler and that his job "involved digging, picking, shoveling and shooting the coal." Decision and Order at 3.

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).

Furthermore, in considering the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge correctly found that Dr. Broudy's opinion did not satisfy claimant's burden of proof. The administrative law judge noted that Dr. Broudy determined that claimant was unable to perform his job in the mines, but that Dr. Broudy "made it very clear . . . that this disability is in no way related to the claimant's pulmonary condition." Decision and Order at 7. The regulation at 20 C.F.R. §718.204(b)(1) states that "a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, *standing alone*, prevents or prevented the miner" from performing his usual coal mine work or comparable gainful employment. 20 C.F.R. 718.204(b)(1) (emphasis added). Moreover, the regulation at 20 C.F.R. §718.204(a) further provides, in pertinent part, that "any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a). The administrative law judge properly found that Dr. Broudy did not diagnose a totally disabling respiratory or pulmonary impairment but attributed claimant's disability to non-respiratory conditions, namely "age [of eighty-one years], [and] his frail and weakened condition due to arthritis and heart disease." Decision and Order at 7. We therefore affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(iv), and his overall determination that claimant did not establish total disability based on the newly submitted evidence.⁹ *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); Decision and Order at 7.

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because there is no basis from which to conclude that there was a mistake in fact with regard to the prior denial, and since we affirm the administrative law judge's finding that the newly submitted evidence does not establish the existence of pneumoconiosis or total disability, claimant is unable to establish a basis for modification pursuant to 20 C.F.R. §725.310.

⁹ Claimant asserts 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. However, contrary to claimant's assertion, the administrative law judge's finding of total disability must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8. (2004).

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