U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0342 BLA

ERNEST K. WERTZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INTERNATIONAL ANTHRACITE CORPORATION	)	DATE ISSUED: 04/27/2017
	)	
and	)	
	)	
STATE WORKERS' INSURANCE FUND (PENNSYLVANIA)	)	
	)	
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 on Modification of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Daniel A. Miscavige (Gillespie, Miscavige & Ferdinand), Hazelton, Pennsylvania, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Modification (2014-BLA-5319) of Administrative Law Judge Scott R. Morris (the administrative law judge), rendered pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge determined that claimant failed to demonstrate a change in conditions because the new evidence on modification, when considered in conjunction with the prior evidence, failed to establish that claimant is totally disabled. The administrative law judge also determined that there was no mistake in a determination of fact by Administrative Law Judge Theresa Timlin in her June 28, 2011 Decision and Order. Therefore, the administrative law judge found that claimant failed to establish a basis for modification at 20 C.F.R. §725.310 and denied benefits.

On appeal, claimant argues that the administrative law judge erred in failing to find that he established total disability based on the pulmonary function studies and the medical opinion of Dr. Kraynak. Claimant also asserts that the administrative law judge erred in failing to find that he has at least fifteen years of qualifying coal mine employment for invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.[2] Employer/carrier responds, urging affirmance of the denial of benefits. Claimant has also filed a reply brief, reiterating his arguments. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

[1] Claimant filed a claim for benefits on March 10, 2009, which was denied by Administrative Law Judge Theresa C. Timlin on June 28, 2011, because although claimant established the existence of pneumoconiosis arising out of coal mine employment, he did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Director's Exhibits 2, 48. On appeal, the Board affirmed the denial of benefits. *Wertz v. Int'l Anthracite Corp*., BRB No. 11-0717 BLA (July 25, 2012) (unpub.); Director's Exhibit 52. By letter dated July 17, 2013, claimant requested modification. Director's Exhibit 58.

[2] Under Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

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

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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. When considering a modification request, the administrative law judge has the authority to reconsider all the evidence for any mistake in a determination of fact, even the ultimate fact of entitlement. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-61-63 (3d Cir. 1995).

I. Change in Conditions - Total Disability

The administrative law judge initially considered whether claimant established a change in conditions by proving that he is totally disabled. The regulations provide that a miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: (i) pulmonary function studies showing values equal to or less than those listed in Appendix B of 20 C.F.R Part 718; or (ii) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or (iii) the miner has pneumoconiosis and is shown by the evidence to suffer from cor pulmonale with right-sided congestive heart failure; or (iv) where total disability

[3] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibits 3, 6. 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, 1-202 (1989) (en banc).

cannot be established by the preceding methods, a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

A. Pulmonary Function Study Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the two pulmonary function studies that were submitted on modification by the parties. Decision and Order at 4-8; Director's Exhibit 53; Employer's Exhibit 2. The administrative law judge found that results for the July 1, 2013 pulmonary function study conducted by Dr. Kraynak were qualifying for total disability,[4] while the results for the pulmonary function study "by Dr. Cali seven months later on February 11, 2014 were not, despite the fact that the technician reported that [claimant] displayed poor effort." Decision and Order at 6; Employer's Exhibit 3. In resolving the conflict in the evidence, the administrative law judge concluded:

> I find that the improvement between the studies conducted by Dr. Kraynak and those conducted by Dr. Cali, as well as the lack of any contemporaneous information on [claimant's] effort and cooperation from the technician who conducted Dr. Kraynak's testing, casts doubt on the reliability of Dr. Kraynak's study. While Dr. Cali's study may be invalid due to poor effort, nevertheless it establishes [claimant's] minimum pulmonary capability, which is above disability levels.

Decision and Order at 7 (footnote omitted). Thus, the administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id*.

Claimant argues that because the non-qualifying study is invalid due to poor effort it has no probative value in determining the issue of total disability. Claimant maintains that the administrative law judge improperly rejected the qualifying July 1, 2013 pulmonary function study when "no physician had called the validity of the study into question." Claimant's Brief at 11. Claimant also maintains that the administrative law judge failed to properly consider Dr. Kraynak's testimony that claimant gave good effort, cooperation, and comprehension during the July 1, 2013 pulmonary function study. Claimant's assertions of error are rejected as without merit.

[4] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" pulmonary function study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

Contrary to claimant's contention, the regulations at 20 C.F.R. §718.103 and Appendix B, governing pulmonary function studies, do not require "optimal" effort on the part of the miner in order for a pulmonary function study to be deemed valid. Therefore, the administrative law judge permissibly credited the non-qualifying February 11, 2014 pulmonary function study. 20 C.F.R. §718.103(b)(5); *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 n.4 (1987).

Furthermore, the administrative law judge permissibly determined that, despite claimant's poor effort, the non-qualifying February 11, 2014 pulmonary function results are "a better indicator of [claimant's] true pulmonary ability" as "pulmonary function testing is effort-dependent and spurious low values can result, but spurious high values are not possible." Decision and Order at 7 n.4, *citing Adruscavage v. Director, OWCP*, No. 93-3291, slip op. at 9-10 (3rd Cir. 1994) (unpub.) (affirming administrative law judge's decision to credit the most recent non-qualifying pulmonary function studies over earlier qualifying pulmonary function studies, as a better indicator of the miner's respiratory condition). The administrative law judge therefore permissibly determined that the non-qualifying results in this case represent claimant's "minimum pulmonary capability." Decision and Order at 4; *see Andrascuvage*, slip op. at 9-10; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1968).

Additionally, the administrative law judge accurately noted that while the report of the July 1, 2013 pulmonary function study "contains a space to report [claimant's] cooperation, or to make comments," nothing was recorded. Decision and Order at 7; Claimant's Exhibit 1. Although claimant is correct that Dr. Kraynak testified that claimant's cooperation and effort were good, the administrative law judge permissibly concluded that the lack of "contemporaneous" information called into question the reliability of the study.[5] *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999) (credibility of witness testimony is within the sound discretion of the administrative law judge); *Mabe*, 9 BLR at 1-68.

[5] Although the administrative law judge referenced a "technician," the report of the July 1, 2013 pulmonary function study does not indicate who administered the study. Claimant's Exhibit 1. Furthermore, the report notes "unconfirmed interpretation – MD should review." *Id.*

Thus, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 7.

B. Medical Opinion Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[6] the administrative law judge considered the medical opinions of Drs. Cali and Kraynak which were submitted on modification by the parties. Decision and Order at 8. Dr. Cali examined claimant on February 11, 2014, and diagnosed asthma, but did not offer an opinion on the issue of total disability. Employer's Exhibit 2.

In contrast, Dr. Kraynak, claimant's treating physician, prepared a report dated August 9, 2013, wherein he stated that: claimant was under his care for "severe [b]lack lung disease;" "has complaints of increased [shortness of breath], productive cough and exertional dyspnea;" and is totally disabled. Director's Exhibit 55. The administrative law judge also noted that during his deposition, Dr. Kraynak indicated that he had reviewed Dr. Cali's pulmonary function study, and described that it showed "significant pulmonary impairment." Claimant's Exhibit 1 at 8. In response to counsel's question asking him to explain why claimant was totally disabled, without consideration of the results of the pulmonary function study evidence, Dr. Kraynak stated: "[b]ased on [claimant's] complaints of shortness of breath, productive cough, and severe exercise limitations, it would be my opinion that he would still be disabled due to his coal worker[s'] pneumoconiosis." *Id*. at 9 The administrative law judge found that Dr. Kraynak's opinion was not well-reasoned and, thus, concluded claimant failed to establish total disability based on the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant asserts that the administrative law judge erred in discrediting Dr. Kraynak's opinion. As an initial matter, claimant's argument that the administrative law judge failed to properly credit Dr. Kraynak's diagnosis of total disability as Dr. Kraynak is a treating physician. *See Soubik v. Director, OWCP*, 366 F.3d 226, 236, 23 BLR 2-82, 2-101 (3d Cir. 2004) (while a treating physician's opinion may be given additional deference, there is no *per se* rule that a treating physician's opinion must always be accorded the greatest weight). Taking into consideration the factors set forth at 20 C.F.R.

[6] There are no blood gas studies by which claimant may establish total disability under 20 C.F.R. §718.204(b)(2)(ii), and there is no evidence in the record to establish that claimant has cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii).

§718.104(d),[7] the administrative law judge observed that Dr. Kraynak treats claimant once a year for breathing symptoms and that "there is nothing to indicate that he sees [claimant] frequently enough to obtain a superior understanding of [claimant's] condition. . . [nor] does the record include testing and examinations that show Dr. Kraynak has obtained superior and relevant information about [claimant's] condition." Decision and Order at 7-8. We see no error in the administrative law judge's finding that Dr. Kraynak's role as a treating physician did not enhance the probative value of his opinion. *See Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20-21 (3d Cir. 1997); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

Furthermore, the administrative law judge permissibly concluded that Dr. Kraynak's opinion was not sufficiently reasoned to satisfy claimant's burden of proof. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002) (The opinions of treating physicians get the deference they deserve based on their power to persuade). Contrary to claimant's contention, the administrative law judge permissibly gave Dr. Kraynak's opinion less weight because Dr. Kraynak relied on the July 1, 2013 qualifying pulmonary function study, which the administrative law judge reasonably found to be of "doubtful reliability." Decision and Order at 7; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge also permissibly concluded that Dr. Kraynak's opinion was not well-reasoned as Dr. Kraynak reviewed Dr. Cali's February 11, 2014 pulmonary function study, which had non-qualifying values under the regulatory criteria, and "did not explain why he thought that they showed 'significant respiratory impairment.'" Decision and Order at 7, *quoting* Claimant's Exhibit 1; *see Lango*, 104 F.3d at 578, 21 BLR at 2-20; *Clark*, 12 BLR at 1-155.

Additionally, the administrative law judge accurately observed that Dr. Kraynak's "brief letter, dated August 9, 2013 contains no objective findings other than the results of the pulmonary function studies, and a recitation of [claimant's subjective] symptoms."

[7] The regulation at 20 C.F.R. §718.104(d) requires the adjudication officer to take into consideration the following factors in weighing the opinion of the miner's treating physician: (1) nature of relationship; (2) duration of relationship; (3) frequency of treatment; and (4) extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation additionally provides that "the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

Decision and Order at 9. Dr. Kraynak testified that claimant complained of having "difficulty walking approximately a quarter or half block or up several steps without stopping to regain his breath." Claimant's Exhibit 1 at 7. However, as noted by the administrative law judge, Dr. Kraynak "acknowledged that there had not been any diagnostic tests that would quantify the exercise limitations complained of by [claimant]." Decision and Order at 5, *citing* Claimant's Exhibit 1 at 10. Thus, because the administrative law judge permissibly found that Dr. Kraynak did not adequately explain his diagnoses and did not identify physical limitations for comparison with claimant's job duties, we affirm the administrative law judge's finding that Dr. Kraynak's opinion on total disability is not well-reasoned and is insufficient to satisfy claimant's burden of proof pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000).

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. *See Anderson*, 12 BLR at 1-112; *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). We therefore affirm the administrative law judge's findings that claimant failed to establish total disability and thereby demonstrate a change in conditions pursuant to 20 C.F.R. §725.310.[8] *Keating*, 71 F.3d at 1123, 20 BLR at 2-63.

II. Mistake in a Determination of Fact – Length of Coal Mine Employment

The administrative law judge found that there was no mistake in a determination of fact with regard to the prior denial of benefits.[9] Decision and Order at 10. Claimant

[8] As total disability is a requisite element and we affirm the administrative law judge's finding that claimant is not totally disabled, it is not necessary that we address claimant's arguments regarding the administrative law judge's finding that he failed to also establish the element of disability causation pursuant to 20 C.F.R. §718.204(c). *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[9] The administrative law judge found that there was no mistake in a determination of fact in Judge Timlin's prior determination that claimant failed to establish total disability, and we affirm his finding as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

contends that the administrative law judge merely adopted the prior finding by Judge Timlin that claimant had only ten years of coal mine employment, and did not properly consider whether he established at least fifteen years of coal mine employment for invocation of the Section 411(c)(4) presumption. It is not necessary, however, that we review the administrative law judge's findings on length of coal mine employment, as claimant's failure to establish total disability precludes invocation of the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Because claimant failed to establish a change in conditions or a mistake in a determination of fact under 20 C.F.R. §725.310, with regard to the issue of total disability, benefits are precluded. *Keating*, 71 F.3d at 1123, 20 BLR at 2-63; *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge