BRB No. 98-0956 BLA

LEONARD P. MACHESIC	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY)		DATE ISSUED:
	)	
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 of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Lynne G. Bressi (Law Offices of Charles A. Bressi, Jr.), Pottsville, Pennsylvania, for claimant.

John D. Maddox (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1317) of Administrative Law Judge Paul H. Teitler denying benefits on a 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). Claimant filed a duplicate claim on February 12, 1990.[1] In the initial Decision and Order, the administrative law judge

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on August 23, 1982. Director's Exhibit 46. By letter dated November 12, 1982, the Department of Labor (DOL) informed claimant that his claim was

found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. In addressing the merits of the claim, the administrative law judge, after crediting claimant with twenty-seven years of coal mine employment, found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge further found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated June 29, 1994, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). *Machesic v. Reading Anthracite Co.*, BRB No. 93-0098 BLA/A (June 29, 1994) (unpublished). Although the Board

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"informally denied until such time as evidence supporting [his] claim [was] submitted." *Id.* The DOL advised claimant that if he did not write the DOL within thirty days, his case would be administratively closed. *Id.* There is no indication that claimant took any further action in regard to his 1982 claim.

Claimant filed a second claim on February 22, 1985. Director's Exhibit 46. The district director denied the claim on July 8, 1985. *Id.* Pursuant to claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. *Id.* Claimant, however, subsequently submitted a motion to withdraw his claim. *Id.* By Decision and Order dated April 20, 1988, Administrative Law Judge Robert D. Kaplan approved claimant's request to withdraw his claim. *Id.*

Claimant filed a third claim on February 12, 1990. Director's Exhibit 1.

affirmed the administrative law judge's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(3), the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c)(2) and (c)(4). *Id.* The Board also vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b). *Id.* The Board, therefore, vacated the administrative law judge's award of benefits and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge, however, found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) and (c)(4). The administrative law judge further found that the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits. By Decision and Order dated June 19, 1996, the Board affirmed the administrative law judge's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *Machesic v. Reading Anthracite Co.*, BRB No. 95-1244 BLA (June 19, 1996) (unpublished). The Board also affirmed the administrative law judge's finding that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Id.* The Board, therefore, affirmed the administrative law judge's denial of benefits. *Id.*

Claimant subsequently requested modification of his denied claim. Finding 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, the administrative law judge denied claimant's request for modification. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §718.310. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

The Board has held that in considering whether a claimant has established a change in conditions 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 entitlement which defeated entitlement in the prior decision. *See 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 the prior decision, the Board affirmed the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c). *Machesic*, *supra*. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c).

Claimant contends that the administrative law judge erred in finding the newly submitted pulmonary function study evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1). We disagree. The administrative law judge correctly noted that the only newly submitted pulmonary function study of record, a study conducted on April 17, 1995, is non-qualifying. Decision and Order On Modification at 4; Director's Exhibit 124. Inasmuch as the only newly submitted pulmonary function study is non-qualifying, we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1).[2]

Inasmuch as no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) and (c)(3), these findings are also affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant finally contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Claimant specifically argues that the administrative law judge erred in finding Dr. Cali's opinion insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Dr. Cali opined that further exposure to dust, fumes or chemicals could exacerbate claimant's condition. Director's Exhibit 124. Dr. Cali further opined that claimant's pulmonary condition

[2]Claimant contends that the administrative law judge erred in relying upon Dr. Levinson's invalidation of claimant's April 17, 1995 pulmonary function study. *See* Decision and Order on Modification at 4; Employer's Exhibit 1. However, inasmuch as claimant's April 17, 1995 pulmonary function study is non-qualifying, the administrative law judge's error, if any, in his consideration of Dr. Levinson's invalidation is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

precluded him from performing heavy, strenuous work around the coal mines. *Id.*

The administrative law judge properly found that Dr. Cali's statements that claimant should not return to work in the mines because it would exacerbate his condition is not equivalent to a finding of total disability. Decision and Order on Modification at 5. A medical opinion that merely advises against returning to work in a dusty environment is insufficient to establish a totally disabling respiratory or pulmonary impairment. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988).

Moreover, the administrative law judge also permissibly discredited Dr. Cali's opinion that claimant was totally disabled because he found that Dr. Cali did not have an accurate understanding of the exertional requirements of claimant's coal mine employment. Although Dr. Cali assumed that claimant's coal mine employment involved heavy strenuous labor, the administrative law judge found that claimant's coal mine jobs did not require heavy physical labor. Decision and Order on Modification at 5. Inasmuch as claimant's hearing testimony supports the administrative law judge's finding that claimant's coal mine jobs did not require heavy physical labor,[3] this finding is affirmed. Since Dr. Cali's finding of total disability was premised upon an inaccurate assumption that claimant's coal mine employment required heavy labor, the administrative law judge properly found that Dr. Cali's opinion was insufficient to support a finding of total disability pursuant to 20 C.F.R.

[3]At the March 25, 1992 hearing, claimant testified that his last job classification was that of a shovel operator, a position he held for the last five or six years of his coal mine employment. Director's Exhibit 65 at 10. Claimant, however, testified that he also drove trucks, operated a bulldozer, operated a payloader and performed sweeping and odd jobs around the breaker during this period. *Id.* at 10-11. Claimant testified that he spent two-thirds of his time doing these other jobs. *Id.* at 12. During these other jobs, claimant testified that he sometimes had to lift grease buckets weighing fifty pounds. *Id.* Although claimant had to perform some lifting, he acknowledged that it was "not real heavy." *Id.* Claimant also indicated that he had to climb in and out of the equipment. *Id.* at 12-13. Claimant had to use his hands and feet to operate the equipment. *Id.* at 14. On cross-examination, claimant testified that he was able to operate the shovel sitting down. *Id.* at 21. Claimant also testified that the levers that he had to move back and forth were hydraulic. *Id.* Although claimant testified it was "pretty hard to move" the lever that turned the shovel, he only had to move this lever "maybe four or five times a day." *Id.* Claimant testified that he had to exert fifteen to twenty pounds of pressure to operate the foot pedals. *Id.* at 22. Claimant testified that he had to press the foot pedals "a couple of hundred times a day." *Id.*

§718.204(c)(4). *See generally Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4).

Inasmuch as the administrative law judge properly found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 is affirmed. *Nataloni*, *supra*.

Inasmuch as no party challenges the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, this finding is affirmed. *Skrack*, *supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge