BRB No. 04-0215 BLA

RAYMOND HOOPER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 08/12/2004
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-0012) of Administrative Law Judge Janice K. Bullard rendered on claimant's May 17, 2002 request for modification of the denial of benefits in the instant duplicate 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).[1] Based on the date of filing, the

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Considering the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge concluded that the evidence failed to establish total disability, an element previously adjudicated against claimant, and therefore, found that neither a mistake in a determination of fact nor a change in conditions had been shown at 20 C.F.R. §725.310 (2000). The administrative law judge found, therefore, that claimant failed to establish a basis for modification of the prior denial. Accordingly, benefits were denied.

On appeal, claimant contends that the evidence establishes total disability and total disability due to pneumoconiosis and that in finding otherwise, the administrative law judge erred in weighing the evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any 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*).

The instant case arises within the jurisdiction of the United States Court of Appeals which has declared that on modification pursuant to 20 C.F.R. §725.310 (2000), "the [administrative law judge] must review all evidence of record – any new evidence submitted in support of modification as well as the evidence previously of record – and 'further reflect' on whether any mistakes of fact were made in the previous adjudication of the case." *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62-63 (3d Cir. 1995).

[2] The procedural history of this case is set forth in full in the Board's decisions in *Hooper v. Director, OWCP*, BRB No. 99-0749 BLA (June 9, 2000)(unpub.) and *Hooper v. Director, OWCP*, BRB No. 01-0152 BLA (Oct. 16, 2001)(unpub.). Subsequent to the Board's 2001 decision in *Hooper*, claimant petitioned for modification on May 17, 2002 and requested a hearing on August 30, 2002. Director's Exhibits 76, 80, 81. A formal hearing was held before the administrative law judge on April 8, 2003.

Claimant contends that the pulmonary function study evidence of record establishes total disability pursuant to Section 718.204(b)(2)(i) and that the administrative law judge erred in finding to the contrary.

We disagree. There are four newly submitted pulmonary function studies of record. The qualifying[3] studies dated April 18, 2002 and November 22, 2002 were found invalid by Drs. Levinson and Michos, respectively; both physicians are Board-certified in internal medicine and pulmonary disease. Director's Exhibits 78, 85. The two most recent pulmonary function studies, dated February 3, 2003 and February 24, 2003, produced non-qualifying values. Director's Exhibit 95; Claimant's Exhibit 1. While also considering the four previously submitted pulmonary function studies of record, the administrative law judge accorded more weight to the opinions of Drs. Levinson and Michos invalidating the two newly submitted qualifying studies[4] based on the physicians' superior qualifications,[5] and, further, accorded greater weight to the two most recent non-qualifying studies noting that claimant's effort was good and the values were higher than the studies of 2002. This was rational.[6] *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Claimant next contends that Dr. Kraynak's opinion establishes total disability pursuant to Section 718.204(b)(2)(iv). Claimant argues that Dr. Kraynak's opinion is entitled to additional weight based on his status as claimant's treating physician.

Claimant's contention lacks merit. The administrative law judge properly accorded less weight to Dr. Kraynak's opinion as he found that it was not well-reasoned and documented, as the physician had relied on invalid and nonqualifying pulmonary function studies, and as his conclusion that claimant's condition was deteriorating was

[3] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. 718.204(b)(2)(i).

[4] Claimant's contention that Dr. Kraynak provided rebuttal to Dr. Levinson's finding that the April 18, 2002 pulmonary function study was invalid, lacks merit as there is no evidence in the record to support such a claim and claimant cites to none.

[5] Dr. Kraynak is Board eligible in family medicine. Claimant's Exhibit 2.

[6] The administrative law judge's findings that total disability was not established at 20 C.F.R. §718.204(b)(2)(ii) and (b)(2)(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

contradicted not only by the results of pulmonary function studies, but also by claimant's testimony. This was rational. *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Clark*, 12 BLR at 1-155; *Dillon*, 11 BLR at 1-114; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Further, the administrative law judge properly found that Dr. Kraynak, as claimant's treating physician, failed to keep independent notes detailing his treatment of claimant. *Fields*, 10 BLR at 1-22. Thus, contrary to claimant's argument, Dr. Kraynak is not entitled to more weight as claimant's treating physician, as the administrative law judge found that his opinion was not well reasoned or documented. 20 C.F.R. 718.104(d)(5); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Accordingly, the administrative law judge properly found, on weighing all the relevant medical evidence together, that claimant failed to establish total disability at 20 C.F.R. §718.204(b). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986) *aff'd on recon en banc*, 9 BLR 1-237 (1987).

Further, the administrative law judge is empowered to weigh the medical evidence of record and draw his own inferences therefrom, *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997), and the Board may not reweigh the evidence or substitute its own inferences on appeal if the administrative law judge's findings are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, to the extent claimant seeks a reweighing of the evidence, we reject claimant's arguments. We affirm the administrative law judge's finding that the evidence fails to establish total disability at 20 C.F.R. §718.204(b), and, therefore, that claimant failed to establish a basis for modification at 20 C.F.R. §725.310 (2000) of the prior denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge