BRB No. 07-0138 BLA

R.S. Claimant-Petitioner v. RB COAL COMPANY, INCORPORATED and MANALAPAN MINING COMPANY, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/30/2007 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (04-BLA-6230) of Administrative Law Judge Richard A. Malamphy rendered 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 claim for black lung benefits on July 9, 1997, which was denied by the district director on October 29, 1997. Director's Exhibit 1A. Claimant requested a hearing, which was held before Administrative Law Judge Rudolf L. Jansen. In a Decision and Order dated March 30, 1999, Judge Jansen denied benefits because he found that claimant failed to establish the existence of pneumoconiosis or that he was totally disabled. Claimant appealed, and the Board affirmed these findings. *[R.S.] v. R B Coal Company, Inc.*, BRB No. 99-0716 BLA (Apr. 10, 2000) (unpub.); Director's Exhibit 1A. Claimant filed a second application for benefits on April 3, 2001, along with a request to withdraw his denied claim. Director's Exhibits 1 and 1A. The district director granted claimant's withdrawal request, but later rescinded that determination on October 22, 2003 because a decision on the merits of the first claim had already become final. Director's Exhibit 39; *see Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002) (*en banc*). Because claimant's April 3, 2001 application for benefits was filed within one year of the Board's April 10, 2000 Decision and Order, the district director considered that application to be a request for modification. *Id*. The district director issued a Proposed Decision and Order denying modification on January 24, 2004. Director's Exhibit 40. The case was forwarded to the Office of Administrative Law Judges for a formal hearing, which was held on January 25, 2006. In a Decision and Order dated September 14, 2006, Judge Malamphy (the administrative law judge) determined that the newly submitted evidence failed to establish either the existence of pneumoconiosis or that claimant was totally disabled, and therefore found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.

On appeal, claimant contends that the x-ray evidence is sufficient to establish that he has pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the administrative law judge failed to explain the weight accorded the medical opinions diagnosing pneumoconiosis at 20 C.F.R. §718.202(a)(4).[1] Claimant asserts that the administrative law judge erred in his consideration of Dr. Baker's opinion at 20 C.F.R. §718.204(b)(2)(iv) relevant to whether he is totally disabled. Claimant further argues that

[1] Claimant also asserts that the administrative law judge erred in allowing employer to submit x-ray evidence in excess of the evidentiary limitations set forth at 20 C.F.R §725.414. Claimant's Brief at 3-4. However, because this case involves claimant's request for modification of a claim filed on July 9, 1997, before the effective date of the revised regulations, the evidentiary limitations set forth at Section 725.414 are not applicable. *See* 20 C.F.R. §725.2(c).

the Director, Office of Workers' Compensation Programs (the Director), has failed to provide him with a complete and credible pulmonary evaluation. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director also responds, asserting that he has met his statutory obligation to provide claimant with a complete and credible pulmonary evaluation.[2]

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. 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 demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In order to be entitled to modification, claimant must establish a change in conditions or a mistake in fact.[3] The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310 (2000), 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. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (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 his March 30, 1999 Decision and Order denying benefits, Judge Jansen found that the evidence was insufficient to establish the existence of pneumoconiosis and total

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[2] We affirm, as unchallenged on appeal, the administrative law judge's finding of twelve years of coal mine employment, his finding that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3), and his finding that the newly submitted evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Claimant does not allege a mistake in fact pursuant to 20 C.F.R. §725.310 (2000).

disability. Director's Exhibit 1A. Consequently, in order to establish a change in conditions pursuant to Section 725.310 (2000), claimant must establish, based on the newly submitted evidence, that he suffers from pneumoconiosis or that he is totally disabled by a respiratory or pulmonary impairment. *Kingery*, 19 BLR at 1-11; *Nataloni*, 17 BLR at 1-84; *Kovac*, 14 BLR at 1-158.

After consideration of the administrative law judge's Decision and Order, the arguments of the parties, and the evidence of record, we affirm the administrative law judge's denial of benefits on the merits.[4] We specifically affirm the administrative law judge's finding, based on a consideration of all of the record evidence, that claimant is not totally disabled and, therefore, that he is not entitled to benefits.

We note that there was no evidence in the case record presented to Judge Jansen to support a finding that claimant was totally disabled. On modification, there are four medical opinions addressing whether claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Simpao opined that claimant had a mild respiratory impairment, and that he was unable to perform his regular coal mining duties.[5] Director's Exhibit 7. Dr. Baker also diagnosed a Class I respiratory impairment and recommended that claimant avoid further dust exposure. Director's Exhibit 5. In contrast, Dr. Dahhan opined that claimant's pulmonary function tests showed a mild obstructive impairment that was completely reversible after the administration of bronchodiolators. He diagnosed a mild respiratory impairment and opined that claimant retained the respiratory capacity to return to his last coal mine employment. Director's Exhibit 37. Dr. Rosenberg agreed with Dr. Dahhan that claimant's "post-bronchodilator" pulmonary function study results were normal, and that "from an oxygen perspective, [claimant] clearly is not totally disabled from performing his usual coal mine job." Employer's Exhibit 7.

In weighing the conflicting medical opinion evidence at Section 718.204(b)(2)(iv), the administrative law judge discounted Dr. Baker's opinion as being insufficient to establish total disability. Decision and Order at 8 (unpaginated). He also assigned less probative weight to Dr. Simpao's opinion, in comparison to the opinions of Drs. Dahhan and Rosenberg, because he found that Dr. Simpao failed to explain the basis for his

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

[5] Claimant does not challenge the administrative law judge's weighing of Dr. Simpao's opinion. The administrative law judge permissibly discounted the opinion of Dr. Simpao because he found that the doctor "did not provide a credible explanation for his conclusion." Decision and Order at 8 (unpaginated).

diagnosis of total disability or otherwise discuss how the objective evidence supported his opinion. *Id*.

Claimant does not challenge the weight accorded to employer's experts. Claimant only asserts that the administrative law judge erred in discounting Dr. Baker's opinion. Claimant specifically contends that the administrative law judge erred in failing to compare the exertional requirements of claimant's usual coal mine work in conjunction with Dr. Baker's diagnosis of a Class I respiratory impairment. Claimant's Brief at 9. We disagree. Dr. Baker's assessment of a Class I impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Chapter 5, p. 107, Table 5-12 (5th ed. 2001), corresponds to a rating of no impairment. *See Gamble v. Penn Allegheny Coal Co*., 5 BLR 1-457, 1-459-60 (1983). Moreover, the administrative law judge properly concluded that Dr. Baker's statement that claimant should avoid further coal dust exposure is not the equivalent of a finding of total disability. *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). Thus, we affirm as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). We also affirm his overall finding that claimant failed to establish total disability pursuant to 20 C.F.R .§718.204(b)(2).

Claimant also asserts that, because the administrative law judge did not credit Dr. Simpao's diagnosis of total disability, "the Director has failed to provide [him] with a complete, credible pulmonary evaluation sufficient to substantiate [his] claim, as required under the Act." Claimant's Brief at 7. The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101 (2000), 725.406 (2000). The Board has deferred to the Director's interpretation that Section 923(b) requires him to provide a complete pulmonary evaluation once per claim filed by a miner, but not a new pulmonary evaluation with each modification request. *Eversole v. Perry County Coal Corp*., BRB Nos. 05-0186 BLA, 05-0186 BLA-A (Jun. 27, 2005) (unpub.).

In this case, Dr. Simpao performed an examination of claimant, at the request of the Department of Labor, on June 5, 2001, prior to the district director's rescission order finding that claimant's April 3, 2001 application was, in fact, a request for modification and that claimant was not entitled to withdrawal his July 9, 1997 claim. Thus, it is apparent from the record that Dr. Simpao's examination was scheduled because the district director mistakenly believed that claimant's first claim had been withdraw and that his April 3, 2001 application was a new claim for benefits. On appeal, the Director does not respond to claimant's assertion that Dr. Simpao's evaluation was not a complete and credible pulmonary evaluation. Rather, the Director asserts that since claimant's most recent filing was a modification request from the denial of his denied 1997 claim,

the Department of Labor (DOL) has provided claimant with a complete and credible pulmonary examination, "namely, Dr. Baker's July 25, 1997 examination which was found well reasoned and documented by Judge Jansen." Director's Brief at 3. We agree.

The record reflects that Dr. Baker conducted an examination at the request of the DOL on July 25, 1997. Dr. Baker performed the full range of objective testing, as required by the regulations, and answered the questions posed on the DOL examination form as to each element of entitlement.[6] Director's Exhibit 1A at 188-192 (report labeled Director's Exhibit 10). Claimant does not allege that Dr. Baker's July 25, 1997 report was incomplete. Moreover, Judge Jansen specifically determined that Dr. Baker's opinion, that claimant was not totally disabled, was documented and reasoned. Decision and Order (Mar. 30, 1999) at 8. Thus, there is no merit to claimant's assertion he was not provided with a complete and credible pulmonary evaluation. *See Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994).

Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Trent*, 11 BLR at 1-27; *Perry v. Director, OWCP*, 9 BLR at 1-1 (1986) (*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson*, 12 BLR at 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that claimant is not totally disabled. Because claimant is unable to establish total disability, a requisite element of entitlement, benefits are precluded.[7] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. We therefore affirm the denial of benefits.

[6] Dr. Baker diagnosed pneumoconiosis and reported that claimant had a mild respiratory impairment that was not totally disabling. Director's Exhibit 1A (report labeled Director's Exhibit 10).

[7] Because we affirm the administrative law judge's denial of benefits on the merits, we decline to address his finding at 20 C.F.R. §725.310.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge