BRB No. 11-0736 BLA

RICHARD W. COOPER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY, INCORPORATED	)	DATE ISSUED: 08/23/2012
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
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 – Denial of Benefits on Modification of a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits on Modification of a Subsequent Claim (2010-BLA-5489) of Administrative Law Judge Larry S. Merck,

rendered on a subsequent claim filed on April 5, 2002,[1] 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).[2] The relevant procedural history of the case is as follows. In a Decision and Order issued on March 25, 2008, Associate Chief Administrative Law Judge William S. Colwell credited claimant with twenty-two and three-quarter years of coal mine employment and adjudicated this claim under the regulations at 20 C.F.R. Part 718. Judge Colwell determined that the newly submitted biopsy evidence was sufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2) and, therefore, found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Considering the claim on the merits, however, Judge Colwell found that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2), and he denied benefits. Pursuant to claimant's appeal, the denial of benefits was affirmed by the Board. *R.C.* [*Cooper*] *v. Manalapan Mining Co.*, BRB No. 08-0557 BLA (Mar. 26, 2009) (unpub.).

On November 3, 2009, claimant filed a request for modification. Director's Exhibit 58. The case was assigned to Judge Merck (the administrative law judge). In considering claimant's modification request pursuant to 20 C.F.R. §725.310, the administrative law judge summarized all of the record evidence and determined that there was no mistake in a determination of fact with regard to Judge Colwell's denial of benefits. He also found that claimant did not establish a change in conditions, as the evidence failed to establish that claimant is totally disabled. Accordingly, the administrative law judge found that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310, and he denied benefits.

On appeal, claimant asserts that the administrative law judge erred in concluding that he is not totally disabled.[3] Employer responds, urging affirmance of the denial of

[1] Claimant filed an initial claim on December 19, 2000, which was denied by the district director on April 3, 2001, for failure to establish any element of entitlement. Director's Exhibit 37.

[2] On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Based on the April 5, 2002 filing date of this subsequent claim, the amendments are not applicable.

[3] In arguing that the evidence is sufficient to establish total disability, claimant cites to 20 C.F.R. §718.204(c). Claimant's Brief at [3] (unpaginated). However, under the revised regulations, which became effective on January 19, 2001, the provision

benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to claimant's appeal, unless specifically requested to do so by the Board.

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.[4] 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).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements that defeated entitlement in the prior decision.[5] *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). The administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also King v. Jericol Mining, Inc*., 246 F.3d 822, 825, 22 BLR 2-305, 2-310 (6th Cir. 2001).

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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).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 37.

[5] In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

In considering claimant's modification request, the administrative law judge summarized all of the evidence before Judge Colwell, along with the evidence on modification, relevant to whether claimant established total disability on the merits. Decision and Order on Modification at 17-27. Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[6] the administrative law judge noted that the evidence before Judge Colwell consisted of the medical opinions of Drs. Simpao and Echeverria, who opined that claimant suffers from a totally disabling respiratory or pulmonary impairment, and the medical opinions of Drs. Dahhan and Rosenberg, who opined that claimant is not totally disabled. *Id*. at 28-30; Director's Exhibit 12, Claimant's Exhibit 2; Employer's Exhibits 1, 6. The administrative law judge further noted that claimant did not "provide any additional affirmative medical reports or hospitalization and treatment records" to support his modification request, while employer submitted supplemental reports from Drs. Dahhan and Rosenberg, along with a new medical report from Dr. Vuskovich. Decision and Order on Modification at 30; Employer's Exhibits 2A, 3A, 4A. Dr. Vuskovich also opined that claimant is not totally disabled. Employer's Exhibit 4A.

Upon weighing this evidence, the administrative law judge agreed with Judge Colwell's finding, as affirmed by the Board, that Dr. Echeverria's opinion is not well-reasoned, as his report "did not contain any description of claimant's coal mine employment," and "because Dr. Echeverria failed to support his conclusion that claimant was totally disabled with any objective data." Decision and Order on Modification at 34-35, *quoting* 2008 Decision and Order at 28. The administrative law judge also agreed with Judge Colwell's decision to assign less weight to Dr. Simpao's finding of total disability, since Dr. Simpao reported claimant's objective tests as normal and based his opinion, in part, on physical findings that were contradicted "by examination findings of Dr. Dahhan two years later." Decision and Order on Modification, *quoting* 2008 Decision and Order at 28. In addition, the administrative law judge gave Dr. Vuskovich's opinion "full probative weight" as he found that it was supported by the pulmonary function and arterial blood gas studies. Decision and Order on Modification at 36. Accordingly, the administrative law judge concluded that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2)(iv) and, therefore, did not establish a basis for modification under 20 C.F.R. §725.310. *Id*. at 38.

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 3-4] (unpaginated), *citing Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. Coal*

[6] Because claimant does not challenge the administrative law judge's findings that the evidence is insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iii), they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Corp., 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant further states, "[i]t can be reasonably concluded that the claimant's usual coal mine work 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 4].

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). Furthermore, the administrative law judge acknowledged that claimant's usual coal mine work involved heavy manual labor, and specifically considered the exertional requirements in conjunction with the medical opinion evidence. Decision and Order on Modification at 6-7, *citing* 2008 Decision and Order at 6. The administrative law judge permissibly relied upon the opinions of Drs. Drs. Dahhan, Rosenberg and Vuskovich to find that claimant is not totally disabled from his usual coal mine employment. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc); Decision and Order on Modification at 34-36.

We consider claimant's arguments in this appeal to be tantamount to a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm, as supported by substantial evidence, the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(iv), and his overall conclusion, based on his consideration of all of the evidence, that claimant failed to establish total disability.[7] *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (en banc), *aff'd*, 9 BLR 1-104 (1986) (en banc). We further affirm the administrative law judge's finding that claimant did not establish a basis for modification pursuant to 20 C.F.R. §725.310, and the denial of benefits. *See King*, 246 F.3d at 825, 22 BLR at 2-310; *Nataloni*, 17 BLR at 1-82.

[7] Claimant also asserts that, because pneumoconiosis is a progressive and irreversible disease, and a "considerable amount of time . . . has passed since the initial diagnosis of pneumoconiosis," the administrative law judge should have concluded that claimant's condition has worsened to the point that he is now totally disabled. Claimant's Brief [at 4]. However, contrary to claimant's assertion, a finding of total disability must be based solely on the medical evidence of record. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8. (2004).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits on Modification of a Subsequent Claim 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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JUDITH S. BOGGS
Administrative Appeals Judge