BRB No. 12-0592 BLA

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| CYRIL M. CICULYA | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| JEDDO-HIGHLAND COAL COMPANY | ) | |
| | ) | |
| and | ) | |
| | ) | |
| LACKAWANNA CASUALTY COMPANY | ) | DATE ISSUED: 08/21/2013 |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits on Request for Modification of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Maureen E. Herron, Wilkes-Barre, Pennsylvania, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Request for Modification (2011-BLA-00001) of Administrative Law Judge Adele Higgins Odegard on a subsequent claim filed on January 10, 2001,[1] pursuant to the

[1] Claimant filed two previous claims. His first claim for benefits was filed with the Social Security Administration on October 20, 1971. It was finally denied by a Department of Labor district director on May 21, 1980. Director's Exhibit 1. Claimant

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[2] The procedural history of this case is as follows: Administrative Law Judge Janice K. Bullard found that claimant established fourteen years of coal mine employment and the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). She found, however, that a total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b) and, therefore, denied benefits. Director's Exhibit 60. Claimant appealed. The Board affirmed the years of coal mine employment and pneumoconiosis findings, but vacated the total respiratory disability finding and remanded the case for further consideration of that element. *Ciculya v. Jeddo Coal Co.*, BRB No. 04-0253 BLA (Oct. 29, 2004)(unpub.)(Director's Exhibit 66). Pursuant to the Board's remand instructions, Judge Bullard first forwarded the case to the district director for a new pulmonary evaluation pursuant to 20 C.F.R. §725.406. Director's Exhibit 71. When the case was returned to her, Judge Bullard again denied benefits because she found that a total respiratory disability was not established. Director's Exhibit 92. Claimant again appealed. On appeal, the Board vacated Judge Bullard's finding that a total respiratory disability was not established and the consequent denial of benefits and remanded the case to Judge Bullard to reconsider the medical evidence on the issue of total respiratory disability. *Ciculya v. Jeddo Coal Co.*, BRB No. 07-0247 BLA (Nov. 30, 2007) (unpub.)(Director's Exhibit 102). On remand, Judge Bullard again denied benefits. Director's Exhibit 102. Claimant appealed, and the Board affirmed the denial of benefits. *Ciculya v. Jeddo Coal Co.*, BRB No. 08-0819 BLA (July 10, 2009)(unpub.)(Director's Exhibit 108). On May 7, 2010, claimant requested modification, submitting new medical evidence on the issue of total disability. Director's Exhibit 112. On August 19, 2010, the district director granted claimant's request for modification, finding that he established total respiratory disability. Director's Exhibit 120. Employer requested a hearing. Director's Exhibit 121. Pursuant to a hearing on the case, Administrative Law Judge Adele Higgins Odegard (the administrative law judge) found that claimant was entitled to modification, based on her finding that claimant established total respiratory disability. Accordingly, she awarded benefits.

In this appeal, employer contends that the administrative law judge erred in finding total respiratory disability established and erred, therefore, in granting claimant's

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filed a second claim for benefits on February 19, 1991. This claim was dismissed on February 12, 1992 by Administrative Law Judge Robert D. Kaplan, as claimant failed to attend the hearing without good cause for his absence. *See* 20 C.F.R. §725.465.

[2] Because this case was filed before January 1, 2005, the 2010 amendments to the Black Lung Benefits Act do not apply. Also, because this claim was filed prior to the effective date of the 2001 amended regulations at 20 C.F.R. Part 725, the evidentiary limitations at 20 C.F.R. §725.414 do not apply. 20 C.F.R. §725.2(c).

request for modification. Claimant has not responded to the employer's appeal. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[3] 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Pursuant to Section 725.310 (2000), claimant may, within a year of a final order, request modification of a denial of benefits. Modification may be granted if there are changed conditions or if there was a mistake in a determination of fact in the earlier decision. 20 C.F.R. §725.310(a)(2000); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994). In this case, the administrative law judge granted claimant's request for modification because she found that the new evidence established total respiratory disability and, therefore, a change in conditions. 20 C.F.R. §725.310 (2000).

**20 C.F.R. §718.204(b)**
**Total Respiratory Disability**

In evaluating the new evidence on total respiratory disability, the administrative law judge first addressed the pulmonary function study evidence. The administrative law judge found that Dr. Kraynak's April 29, 2010 study resulted in qualifying values, while Dr. Levinson's March 31, 2011 study resulted in non-qualifying values. The administrative law judge further found that the validity of both of these tests was disputed. The administrative law judge concluded:

> [b]ecause there is no valid and reliable pulmonary function test, I find that the [c]laimant is unable to establish total respiratory disability under [Section 718.204(b)(2)(i)].

[3] Because claimant's coal mine employment was in Pennsylvania, 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).

Decision and Order at 9.[4]

Turning to Section 718.204(b)(2)(ii), the administrative law judge found that total respiratory disability was established thereunder.[5] The administrative law judge noted that, "[c]laimant attained a value qualifying for disability," on the March 31, 2011 blood gas study, the only newly submitted blood gas study.

The administrative law judge next considered the new medical opinion evidence pursuant to Section 718.204(b)(2)(iv). The administrative law judge accorded little weight to the opinions of Drs. Kaplan, Levinson and Fino, who found that claimant did not have a total respiratory disability, because she found they were not well-reasoned. Regarding Dr. Kaplan's opinion, the administrative law judge found that it was unclear that Dr. Kaplan reviewed the qualifying blood gas study, and that he had instead relied exclusively on the March 31, 2011 non-qualifying pulmonary function study. Regarding the opinion of Dr. Levinson, the administrative law judge found that it was not well-reasoned because, although Dr. Levinson stated that the claimant's blood gas study showed a "mild degree of hypoxemia," he did not address the fact that the blood gas study was qualifying. Employer's Exhibits 1, 5. Similarly, the administrative law judge found that Dr. Fino's opinion was not well-reasoned because he agreed with Dr. Levinson that claimant's qualifying blood gas study did "not imply pulmonary disability." Employer's Exhibit 3.

Turning to the opinions that found that claimant has a totally disabling respiratory impairment, the administrative law judge concluded that "the portions of Drs. Kraynak's opinion that relied on the [April 29, 2010] invalid pulmonary function study, and on his 'eyeball test' are not well-reasoned."[6] Decision and Order at 19. However, she found that his opinion was entitled to "some weight, because it is based in part on the qualifying arterial blood gas test." Decision and Order at 19. Regarding Dr. Prince's opinion, the

[4] The administrative law judge also found that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii), as "there is no evidence of cor pulmonale with right sided congestive heart failure." Decision and Order at 10. This finding is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] This finding is affirmed as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[6] Dr. Kraynak explained, "[i]n medicine it's called the eyeball test, where you can look at somebody and without someone opening up their (sic) mouth, or whatever, you can make observations." Claimant's Exhibit 7 at 21-22.

administrative law judge found it well-reasoned and accorded "it significant weight[,]" as Dr. Prince noted that "[c]laimant has a history of declining oxygenation with exercise, on arterial blood gas testing, dating back to 2005[,]" and his most recent March 31, 2011 blood gas study was qualifying.[7] Decision and Order at 19. The administrative law judge, therefore, found that total respiratory disability was established pursuant to Section 718.204(b)(2)(iv) by the better reasoned medical opinion of Dr. Prince, which was buttressed by the opinion of Dr. Kraynak.

Next, the administrative law judge found that, weighing the pulmonary function studies, the blood gas study, and the medical opinions together, total respiratory disability was established pursuant to Section 718.204(b) overall. Based on this finding, the administrative law judge found that claimant was entitled to modification, based on a change in conditions pursuant to Section 725.310 (2000).

Employer contends, however, that the administrative law judge "did not properly evaluate the pulmonary function [study] evidence and the medical opinion evidence" pursuant to Section 718.204(b)(2)(i) and (iv). Employer's Brief at 3. Employer contends, therefore, that the administrative law judge erred in finding that claimant established total respiratory disability and modification.

First, employer contends that the administrative law judge, after noting that Dr. Levinson opined that the non-qualifying March 31, 2011 pulmonary function study result was valid, impermissibly substituted her own opinion for that of a medical expert to find that the test was invalid. In evaluating the March 31, 2011 non-qualifying pulmonary function study, the administrative law judge reviewed the comments of Drs. Simelaro and Prince, who stated that the March 31, 2011 pulmonary function study was invalid because it was not conducted in compliance with the regulations. *See* Appendix C to 20 C.F.R. Part 718; Claimant's Exhibits 5, 6. Nonetheless, she found that it was not shown "how the deficiencies in that test may have affected the values the [c]laimant attained."[8]

[7] The administrative law judge accorded less weight to Dr. Simelaro's opinion that claimant has a total respiratory disability because it was not well-reasoned. The administrative law judge found that Dr. Simelaro relied on an invalidated pulmonary function study and "cited physical symptoms unsupported by the record." Decision and Order at 19.

[8] The administrative law judge noted that:

> It is well-recognized that pulmonary function tests are effort-dependent. Thus, one may conclude that even an invalid test may serve to establish that a claimant has at least the pulmonary capacity demonstrated in that test. *See generally*

Decision and Order at 17. Thus, contrary to employer's contention, the administrative law judge did not substitute her opinion for that of a physician, in evaluating the March 31, 2011 pulmonary function study. Rather, she noted that, even though the test had been invalidated by reviewing physicians, it was still a non-qualifying test. However, in weighing the test along with the other pulmonary function study, the blood gas study, and the medical opinions, she rationally found that, because the pulmonary function study results of both the qualifying April 29, 2010 study and the non-qualifying March 31, 2011 study were in dispute, the pulmonary function study evidence was not as reliable on the issue of total respiratory disability as the undisputed qualifying blood gas study and the better reasoned medical opinion evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Accordingly, we reject employer's argument concerning the administrative law judge's evaluation of the March 31, 2011 pulmonary function study and we affirm the administrative law judge's Section 718.204(b)(2)(ii) finding.

Employer also contends, pursuant to Section 718.204(b)(2)(iv), that because the administrative law judge improperly rejected the non-qualifying March 31, 2011 pulmonary function study, she improperly rejected the opinions of Drs. Kaplan, Fino and Levinson, who relied on the March 31, 2011 non-qualifying pulmonary function study to find that claimant did not have a total respiratory disability. We disagree.

The administrative law judge properly accorded little weight to the opinions of Drs. Kaplan, Fino and Levinson, who found that claimant did not have a total respiratory disability, because they were not well-reasoned. Regarding Dr. Kaplan's opinion, the administrative law judge found that it was unclear whether Dr. Kaplan reviewed the qualifying blood gas study. Instead, the administrative law judge noted that Dr. Kaplan relied "principally on 'quantitative objective data[,]' which he defined as pulmonary function test results." Decision and Order at 18. The administrative law judge rationally found that Dr. Kaplan's opinion was not well-reasoned because:

> Dr. Kaplan's methodology of relying exclusively on pulmonary function test results to support his opinion is inconsistent with the regulation, which, … specifically recognizes that disability may be present even without qualifying pulmonary function tests.

Decision and Order at 18.

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> *Andruscavage v. Director, OWCP*, (No. 93-3291)(3d Cir., Feb. 22, 1984)(unpub.) slip op. at 9-10 (higher results may be best indicators of a claimant's condition).

Decision and Order at 17.

Further, the administrative law judge properly found that Dr. Fino's opinion, that claimant's qualifying blood gas study did not establish pulmonary disability, was not well-reasoned because …, "Dr. Fino did not address [the fact] that … [c]laimant's [blood gas study] is qualifying for disability under Department of Labor standards." Decision and Order at 18.

Similarly, the administrative law judge properly found that Dr. Levinson's opinion was not well-reasoned because, although Dr. Levinson stated that claimant had a "mild degree of hypoxemia," he did not address the fact that:

> [c]laimant's most recent arterial blood gas test was qualifying for disability, and [he] does not explain how such a result shows the [c]laimant to have the 'residual capacities' to perform coal mine work. At his deposition, while finally conceding that the [c]laimant's arterial blood gas test was qualifying, Dr. Levinson stated this result did not establish 'in and of itself' that the [c]laimant was unable to work in coal mine employment….

Decision and Order at 18. The administrative law judge, therefore, properly found:

> that Dr. Levinson's conclusion is at odds with the regulation, which stipulates that a miner who has a valid and qualifying arterial blood gas test is totally disabled. Appendix C to Part 718.

Decision and Order at 18.

In light of the foregoing, the administrative law judge properly rejected the opinions of Drs. Kaplan, Fino and Levinson on the issue of total respiratory disability. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark*, 12 BLR at 1-155. Because employer does not challenge the administrative law judge's decision to credit the opinion of Dr. Prince and the opinion of Dr. Kraynak in part, we affirm the administrative law judge's finding that the better reasoned opinion of Dr. Prince, buttressed by the opinion of Dr. Kraynak, establishes a total respiratory disability pursuant to Section 718.204(b)(2)(iv). *See Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155.

Further, we affirm the administrative law judge's finding that the new medical evidence, when weighed together, establishes total respiratory disability pursuant to

Section 718.204(b) overall.[9] *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987). We, therefore, affirm the administrative law judge's finding of modification, based on a change in conditions pursuant to Section 725.310 (2000). As employer has not otherwise challenged the administrative law judge's finding that modification was established, we affirm the award of benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[9] As employer has not challenged the administrative law judge's finding that disability causation was established pursuant to 20 C.F.R. §718.204(c), that finding is also affirmed. *Skrack*, 6 BLR at 1-711.