BRB No. 11-0250 BLA

MELVIN L. KRISE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KOCHER COAL COMPANY	)	
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	DATE ISSUED: 12/21/2011
	)	
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 Granting Request For Modification of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order Granting Request For Modification (2009-BLA-05876) of Administrative Law Judge Theresa C. Timlin rendered on a claim filed 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). This case involves a miner's claim filed on October 21, 2002, and which is before the Board for the third time. It is now being considered pursuant to claimant's request for modification. *See* 20 C.F.R. §725.310.

Initially, Administrative Law Judge Paul H. Teitler found that, pursuant to the parties' stipulation, claimant established the existence of pneumoconiosis arising out of his 18.46 years of coal mine employment.[1] *See* 20 C.F.R. §§718.201, 718.202, 718.203. Judge Teitler, however, found that claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2). Accordingly, Judge Teitler denied benefits. Director's Exhibit 78.

Pursuant to claimant's appeal, the Board vacated Judge Teitler's decision on procedural grounds that are no longer at issue on modification, and remanded the case to him for further consideration.[2] *Krise v. Kocher Coal Co.*, BRB No. 04-0727 BLA (Apr. 29, 2005) (unpub.). On remand, after addressing, in part, the Board's remand instructions, Judge Teitler again denied benefits, incorporating the findings from his previous decision. Upon review of claimant's appeal, the Board again vacated Judge Teitler's decision on procedural grounds and remanded the case to him without reaching the merits. *Krise v. Kocher Coal Co.*, BRB No. 06-0135 BLA (Nov. 30, 2006) (unpub.). On remand, because Judge Teitler was no longer available, the case was reassigned, without objection, to Administrative Law Judge Adele H. Odegard, who resolved the procedural issues in accordance with the Board's instructions. With respect to the merits of the claim, Judge Odegard reviewed and adopted the findings in Judge Teitler's first decision, and denied benefits because claimant failed to establish that he was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 120.

Claimant timely requested modification, *see* 20 C.F.R. §725.310, which was granted by Administrative Law Judge Theresa C. Timlin (the administrative law judge). After accepting the parties' continued stipulation that claimant suffers from pneumoconiosis arising from his coal mine employment, the administrative law judge found no mistake of fact in the previous determination that claimant did not establish that he was totally disabled. However, relying on the weight of the new pulmonary function study evidence, *see* 20 C.F.R. §718.204(b)(2)(i), and the new medical opinion evidence,

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[1] Claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, 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*).

[2] The procedural matters that were at issue in the initial proceedings on the claim involved Administrative Law Judge Paul H. Teitler's rulings on whether employer was entitled to submit a post-hearing deposition of one of its physicians, and, if so, on the proper scope of the deposition, and its admissibility under 20 C.F.R. §725.414. *Krise v. Kocher Coal Co.*, BRB No. 04-0727 BLA (Apr. 29, 2005) (unpub.); *Krise v. Kocher Coal Co.*, BRB No. 06-0135 BLA (Nov. 30, 2006) (unpub.).

see 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that the evidence established that claimant is now totally disabled, thereby demonstrating a change in condition under 20 C.F.R. §725.310. Decision and Order at 5-10. The administrative law judge also found that claimant is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Decision and Order at 10-11. Accordingly, the administrative law judge awarded benefits. *Id*. at 12.

On appeal, employer argues that the administrative law judge erred in finding that claimant is totally disabled.[3] Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under 20 C.F.R. Part 718, a miner must establish that he has pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one 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*).

Within one year of a denial of benefits, a miner may seek modification based upon a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). To demonstrate a change in conditions, a miner must submit new evidence to establish at least one of the elements of entitlement that he failed to establish in the prior decision; an administrative law judge must independently assess the new evidence and consider it together with previously submitted evidence to determine if an element has been established. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). An administrative law judge has broad discretion to grant modification based on a mistake of fact, including the ultimate fact of entitlement to benefits. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

[3] We affirm the administrative law judge's unchallenged findings that claimant had 18.46 years of coal mine employment, and that claimant suffers from pneumoconiosis arising out of his employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

A miner is considered totally disabled if a pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work or comparable employment. *See* 20 C.F.R. §718.204(b)(1). A miner can establish that he is totally disabled with qualifying pulmonary function or arterial blood gas studies, with evidence showing that he suffers from cor pulmonale with right-sided congestive heart failure, or with a documented, reasoned medical opinion. *See* 20 C.F.R. §718.204(b)(2).

With his request for modification, claimant submitted a new pulmonary function study, conducted by Dr. Kraynak on October 8, 2008, and a medical opinion from Dr. Kraynak. Employer countered with a pulmonary function study conducted by Dr. Levinson on February 22, 2010, and a medical opinion from Dr. Levinson.

In analyzing whether the new pulmonary function studies were qualifying[4], the administrative law judge noted that Dr. Levinson measured claimant's height as 70 inches, and that Dr. Kraynak measured it as 71 inches. The administrative law judge noted further that, including the two new pulmonary function studies, the record contained three studies listing claimant's height as 70 inches, and three studies listing it as 71 inches. Decision and Order at 6; Director's Exhibits 15, 36, 42, 48, 121; Employer's Exhibit 2. Taking the average of the heights on all six studies, the administrative law judge found claimant's height to be 70.5 inches and used that measurement to determine whether the pulmonary function studies were qualifying for total disability. Decision and Order at 6.

The administrative law judge found that the weight of the pulmonary function study evidence supported a finding of total disability. Although Dr. Kraynak's 2008 study was qualifying, the administrative law judge found it to be invalid, citing Dr. Levinson's "superior qualifications" to credit Dr. Levinson's opinion that, based on the flow volume curves, claimant exhaled when he was supposed to inhale. Decision and Order at 6-7; Employer's Exhibit 1. But the administrative law judge found Dr. Levinson's 2010 study to be both valid and qualifying. Although Dr. Levinson opined that his pulmonary function study produced non-qualifying values, *see* 20 C.F.R. §718.204(b)(2)(i); Employer's Exhibit 3 at 26-27, the administrative law judge found that, using her finding that claimant's height is 70.5 inches, both the pre-bronchodilator and post-bronchodilator values of Dr. Levinson's study were qualifying.[5] Decision and

[4] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables 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).

[5] The administrative law judge noted that even if Dr. Levinson's recorded height of 70 inches were used, the post-bronchodilator values on Dr. Levinson's pulmonary function study were qualifying. Decision and Order at 7, 9.

Order at 7. Reasoning that the more recent, February 22, 2010, pulmonary function study conducted by Dr. Levinson provided a better indication of claimant's current respiratory condition, the administrative law judge found that the weight of the pulmonary function study evidence supported a finding of total disability.

The administrative law judge also found that the weight of the new medical opinions supported a finding that claimant is totally disabled. Dr. Levinson opined that claimant's pulmonary function studies and arterial blood gas studies showed "preserved function" inconsistent with any disability. Employer's Exhibit 3 at 29. But the administrative law judge found Dr. Levinson's reasoning to be inconsistent with the record, pointing out that the results of Dr. Levinson's 2010 pulmonary function study were qualifying. Decision and Order at 9. Because Dr. Levinson failed to adequately explain why the 2010 pulmonary function study did not support a finding of total disability, the administrative law judge gave his opinion little weight. *Id*. In contrast, the administrative law judge credited Dr. Kraynak's opinion that claimant's condition had worsened and that he was totally disabled. *Id*. at 9-10. The administrative law judge noted that Dr. Kraynak's opinion – based on his own clinical observation of claimant and his review of Dr. Levinson's qualifying pulmonary function study – was supported by the record, and he therefore gave it greater weight.[6] *Id*. at 10.

The administrative law judge therefore found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in condition pursuant to 20 C.F.R. §725.310(c). Decision and Order at 10.

Employer argues that the administrative law judge erred in finding that claimant is totally disabled. Employer's Brief at 2-5. Employer challenges the administrative law judge's analysis of the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), arguing first that the administrative law judge erred in finding claimant's height to be 70.5 inches. *Id*. at 3. This argument lacks merit. Employer mistakenly contends that the administrative law judge only considered recent pulmonary function studies when making her finding; in fact, the administrative law judge considered all six studies in the record, Decision and Order at 6, and properly took the average to make a finding as to claimant's actual height. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-41, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983).

[6] The administrative law judge discounted the portion of Dr. Kraynak's opinion that was based on his own 2008 pulmonary function study, which, as noted earlier, the administrative law judge found to be invalid. Decision and Order at 10.

Employer also argues that the administrative law judge should not have considered the heights from pulmonary function studies that were found to be invalid. Employer's Brief at 3-4. Employer, however, offers no reason why the invalid pulmonary function studies in this case – which were found to be invalid because of inadequate effort by claimant – should call the recorded measurements of claimant's height into question. Decision and Order at 7; Director's Exhibit 78 at 4-5. Finally, employer contends that the 2010 pulmonary function study does not support a finding of total disability, because its values were higher than were obtained on claimant's 2008 study. Employer's Brief at 4-5. This argument lacks merit because it overlooks the administrative law judge's finding that the February 22, 2010, pulmonary function study was both valid and qualifying. We therefore reject employer's argument, and affirm the administrative law judge's finding that the pulmonary function study evidence established total disability. *See Soubik v. Director, OWCP*, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584, 21 BLR 2-215, 2-234 (3d Cir. 1997); Decision and Order at 7.

Employer next contends, pursuant to 20 C.F.R. §718.204(b)(2)(iv), that Dr. Levinson's medical opinion regarding total disability was credible and entitled to more weight than Dr. Kraynak's opinion. Employer's Brief at 5. Employer's argument on this point is essentially a request that we reweigh the evidence, which we may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Finally, employer argues that the administrative law judge erred in finding total disability established because she did not weigh the contrary probative evidence against the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2). Employer's Brief at 5. We reject this argument. In finding total disability established, the administrative law judge considered the evidence relevant to each subsection of 20 C.F.R. §718.204(b)(2), finding that none of the blood gas studies was qualifying at subsection (ii), that the pulmonary function study evidence was qualifying under subsection (i), and that the medical opinion evidence established total disability pursuant to subsection (iv). The administrative law judge did not specifically discuss together the evidence relevant to each subsection of 20 C.F.R. §718.204(b)(2). However, the administrative law judge acknowledged that the blood gas study evidence was not qualifying and that the pulmonary function study evidence and the medical opinion evidence – which took into account the blood gas study and the pulmonary function studies – established total disability. We therefore conclude that the administrative law judge's decision is sufficient to show that she considered all of the relevant evidence together in finding that claimant established total disability. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986).

We therefore affirm the administrative law judge's finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b). We also affirm the administrative law

judge's unchallenged finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the administrative law judge's Decision and Order Granting Request For Modification 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