U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0140 BLA

JOSEPH B. KAPES Claimant-Petitioner v. VITO J. RODINO, INCORPORATED and AMERICAN MINING INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/04/2017 DECISION and ORDER

Appeal of the Decision and Order of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (2013-BLA-05918) of Administrative Law Judge Theresa C. Timlin denying claimant's request to modify the denial of benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of the denial of a claim filed on February 11, 1999,[2] pursuant to 20 C.F.R. §725.310 (2000).[3]

Previously, claimant established twenty-eight years of coal mine employment, the existence of pneumoconiosis[4] arising out of coal mine employment, and total disability, but did not establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[5] On February 7, 2013, claimant filed his fifth request for

[1] By letter dated June 2, 2017, claimant's counsel informed the Board that claimant died on May 21, 2017.

[2] Congress amended the Act in 2010, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. The amendments do not apply to this claim because it was filed before January 1, 2005.

[3] The Department of Labor revised the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 version of the Code of Federal Regulations. The revised regulation at 20 C.F.R. §725.310 does not apply to claims, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

[4] In her May 27, 2003 Decision and Order, Administrative Law Judge Janice K. Bullard found pneumoconiosis established by the x-ray and medical opinion evidence, pursuant to 20 C.F.R. §718.202(a)(1), (4). Director's Exhibit 128.

[5] Pursuant to claimant's fourth request for modification, in a decision dated March 3, 2011, Administrative Law Judge Adele Higgins Odegard found that claimant again failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and, therefore, failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). On appeal, the Board affirmed Judge Odegard's determination pursuant to 20 C.F.R. §718.204(c) and, therefore, affirmed the denial of claimant's request for modification. *Kapes v. Vito J. Rodino, Inc.*, BRB No. 11-0464 BLA (Feb. 17, 2012) (unpub.); Director's Exhibit 223.

modification. In a Decision and Order that is the subject of the current appeal, the administrative law judge found that claimant did not establish that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). She therefore determined that the evidence did not establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied claimant's request for modification.

On appeal, claimant contends that the administrative law judge erred in denying his request for modification. Employer/carrier responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

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.[6] 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 be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 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 an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a) (2000). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits

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We incorporate herein the procedural history of the case as set forth in the Board's prior decision.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4 n.6; Director's Exhibit 2.

eligibility." *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-61-63 (3d Cir. 1995); *see Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Total Disability Due to Pneumoconiosis

At this stage in the case, it is undisputed that claimant established every element of entitlement but the final one, disability causation. To establish that he was totally disabled due to pneumoconiosis, claimant must establish that pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(i), (ii). Claimant must establish the cause of his total disability "by means of a physician's documented and reasoned medical report." 20 C.F.R. §718.204(c)(2).

The administrative law judge considered the new opinions of Drs. Hertz and Kraynak.[7] Decision and Order at 6-11; Employer's Exhibit 1; Claimant's Exhibit 2. Dr. Hertz[8] acknowledged that claimant had clinical pneumoconiosis, but opined that claimant's totally disabling chronic obstructive pulmonary disease (COPD) was due to his forty-five pack-year smoking history. Employer's Exhibit 1. Dr. Hertz noted that claimant's forced vital capacity (FVC) results on pulmonary function testing actually improved over the last twelve years and that during his July 24, 2013 testing claimant's FVC improved fifteen percent after administration of a bronchodilator. Dr. Hertz opined that both the improvement in vital capacity over time and the significant reversibility after bronchodilation are inconsistent with an impairment due to pneumoconiosis, but characteristic of COPD from smoking and the improvement expected after the cessation

[7] The administrative law judge permissibly found, and claimant does not contest, that the medical opinions from claimant's prior modification requests lacked probative value due to their age. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 5 n.9. The administrative law judge noted, however, that Dr. Kraynak's opinion regarding the cause of claimant's impairment has remained "substantially consistent." Decision and Order at 9; Director's Exhibits 162, 163, 186, 201, 212.

[8] Dr. Hertz examined claimant on August 4, 2013 and was deposed on March 4, 2014.

of smoking.[9] Employer's Exhibit 1 at 14-16. Lastly, Dr. Hertz opined that claimant's increased oxygen level after exercise on his past and recent blood gas studies is also inconsistent with a disability due to coal workers' pneumoconiosis. *Id*. at 19.

By contrast, Dr. Kraynak[10] opined that claimant's COPD was due to both cigarette smoking and coal workers' pneumoconiosis. Dr. Kraynak opined that claimant's coal workers' pneumoconiosis alone was sufficient to cause claimant's respiratory disability, but that there was also "some element of obstructive pulmonary disease . . . associated with his tobacco abuse." Claimant's Exhibit 2 at 16, 18. Dr. Kraynak disagreed with Dr. Hertz's opinion regarding the significance of reversibility after bronchodilators, noting that even though "black lung" is considered an irreversible disease, there is some element of reversibility upon administration of a bronchodilator. Claimant's Exhibit 1 at 11-12. Dr. Kraynak further opined that a fifteen percent improvement after bronchodilation is not a significant improvement, but "is in a realm of improvement that you would see with a classic miner that is currently receiving benefits." *Id*.

Dr. Kraynak also noted his disagreement with Dr. Hertz's conclusion that the "improvement in the FEV_1 and [FVC] would rule out coal workers' pneumoconiosis as at least a substantial contributing factor in [claimant's] respiratory compromise." *Id*. at 13. Dr. Kraynak reiterated that some degree of reversibility on a pulmonary function study does not preclude an impairment caused by coal workers' pneumoconiosis. *Id*. at 14. Further, describing the level of exercise administered during Dr. Hertz's exercise blood gas study as minimal and inadequate to show oxygen desaturation, Dr. Kraynak disagreed that the results were inconsistent with coal workers' pneumoconiosis. *Id*. at 12-13. Noting that coal dust is a "respiratory pathogen" and a "very toxic agent," Dr. Kraynak criticized Dr. Hertz for not describing the pulmonary effect of claimant's twenty-eight years of coal mine employment. *Id*. at 15. Dr. Kraynak concluded that "claimant [was] totally and permanently disabled due to coal workers' pneumoconiosis contracted during his employment in the anthracite coal industry." *Id*. at 16.

The administrative law judge found that Dr. Hertz's opinion that claimant's disability was due to smoking is well-reasoned and well-documented and entitled to significant weight, because Dr. Hertz persuasively explained how the longitudinal progression of claimant's objective test results supported his conclusions. Decision and

[9] The record reflects that claimant quit smoking in 1997. Claimant's Exhibit 1 at 17-18; Employer's Exhibit 1 at 7; *see* Claimant's Brief at 6.

[10] Dr. Kraynak was claimant's treating physician and his most recent opinion was given by deposition on May 16, 2014.

Order at 9. By contrast, the administrative law judge found that Dr. Kraynak's opinion that claimant was totally disabled due to pneumoconiosis is conclusory and contradictory and entitled to little weight. The administrative law judge therefore found that the new medical opinion evidence failed to establish disability causation at 20 C.F.R. §718.204(c).

Claimant argues that Dr. Kraynak's opinion is well-reasoned, and that the administrative law judge erred in rejecting it as insufficient to establish disability causation. Claimant argues that the administrative law judge "selectively analyzed" Dr. Kraynak's opinion, and failed to accord it appropriate weight based on his status as a treating physician. Claimant's Brief at 3, 11-19. Contrary to claimant's contention, the administrative law judge did not selectively analyze or mischaracterize Dr. Kraynak's opinion. Rather, the administrative law judge permissibly assessed the reasoning of Dr. Kraynak's opinion regarding the cause of claimant's total disability and found it to be inadequate. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

The administrative law judge first considered the relative qualifications of the physicians and determined that Dr. Kraynak, who is Board-eligible in family medicine, is less qualified to offer an opinion regarding the cause of claimant's respiratory disability than Dr. Hertz, who is Board-certified in internal medicine and pulmonary disease. Decision and Order at 9-10. The administrative law judge further found that while Dr. Kraynak may have explained why the pattern of claimant's impairment is not inconsistent with an impairment due to pneumoconiosis, he failed to persuasively explain why the medical evidence in this case demonstrates that claimant's disability was due to pneumoconiosis. *Id*. at 11. Rather, the administrative law judge found that, as in his prior opinions,[11] "Dr. Kraynak seem[ed] to rest his conclusion on the sole fact that claimant spent twenty-eight years working as a coal miner." *Id*.

[11] In 2010, when asked how he could say that claimant's disabling pulmonary condition was due to coal workers' pneumoconiosis, Dr. Kraynak responded:

> Again, this gentleman has a 28-year history of exposure to anthracite coal dust and there is no argument that coal dust is a respiratory pathogen, and 28 years is a significant time of exposure. Here, we have a gentleman [who had] black lung that is accepted on his x-ray, we have 28 years of exposure, there is no doubt that there is a significant contribution of that to his breathing impairment, as well as, again, the tobacco abuse.

Director's Exhibit 212 at 17.

Additionally, the administrative law judge found that Dr. Kraynak's testimony contains unexplained "inconsistencies and contradictions" that undermined his credibility. *Id*. at 11. For example, the administrative law judge noted that Dr. Kraynak did not reconcile his testimony that claimant's fifteen percent improvement in FVC after administration of a bronchodilator is not a significant improvement, with his later statement that a fifteen percent improvement post-bronchodilator is considered a significant degree of reversibility according to the medical literature. Decision and Order at 11; Claimant's Exhibit 2 at 11, 21. Because Dr. Kraynak did not adequately explain how the medical evidence in this case demonstrates that pneumoconiosis was the cause of this claimant's disability, the administrative law judge permissibly found that his opinion is largely conclusory, not well-reasoned, and entitled to little weight.[12] *See* 20 C.F.R. §718.204(c)(2); *Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 577-78, 21 BLR 2-12, 2-20-21 (3d Cir. 1997); Decision and Order at 11.

Substantial evidence supports the administrative law judge's permissible credibility determination, and the Board is not empowered to reweigh the evidence. *Anderson*, 12 BLR at 1-113. Therefore, we affirm the administrative law judge's finding that Dr. Kraynak's opinion on disability causation is insufficient to satisfy claimant's burden of proof pursuant to 20 C.F.R. §718.204(c). *Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Because the administrative law judge permissibly discredited Dr. Kraynak's opinion, the only opinion supporting a finding of disability causation, we affirm the finding that claimant failed to establish that pneumoconiosis was a substantially contributing cause of his total

[12] Claimant contends that the administrative law judge should have accorded greater weight to Dr. Kraynak's opinion based upon his status as claimant's treating physician. An administrative law judge is not required to accord greater weight to the opinion of a treating physician, based on that status alone. *See Soubik v. Director, OWCP*, 366 F.3d 226, 236, 23 BLR 2-82, 2-101 (3d Cir. 2004). Rather, the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation. *See* 20 C.F.R. §718.104(d)(5). Here, the administrative law judge considered Dr. Kraynak's status as a treating physician, but permissibly found that his opinion was not well-reasoned. Decision and Order at 10-11. Consequently, we reject claimant's contention.

disability, pursuant to 20 C.F.R. §718.204(c).[13] As we have affirmed the administrative law judge's finding that the evidence, considered as a whole, does not establish that claimant's disability was due to pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). *Keating*, 71 F.3d at 1123, 20 BLR at 2-63. We, therefore, affirm the administrative law judge's denial of claimant's request for modification.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[13] Therefore, we need not address claimant's argument that the administrative law judge erred in crediting the opinion of Dr. Hertz, pursuant to 20 C.F.R. §718.204(c). Claimant's Brief at 8-10. Any error in that determination was harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).