BRB No. 02-380 BLA

ROBERT E. TOUCHINSKY Claimant-Petitioner v. K&K COAL COMPANY and ROCKWOOD CASUALTY INS. COMPANY Employer/Carrier-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: _____ DECISION and ORDER

Appeal of the Decision and Order - Denying Request for Modification and Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

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

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, 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: SMITH, McGRANERY, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Request for Modification and Denying Benefits (01-BLA-00201) of Administrative Law Judge Paul H. Teitler 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 first filed his claim in 1995. It was denied by Administrative Law Judge Romano in 1998 on the ground that, although claimant established the existence of pneumoconiosis arising out of coal mine employment, he did not prove total disability due to a pulmonary impairment. Director's Exhibit 45. That decision was not appealed.

Claimant then submitted additional evidence and requested modification pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 46. Administrative Law Judge Romano denied that request on the ground that claimant failed to prove total disability due to a pulmonary impairment and therefore failed to establish a change in conditions or a mistake of fact in the first denial. Director's Exhibit 65. Claimant did not appeal that decision.

On March 15, 2000, claimant again submitted additional evidence, including a new pulmonary function study and medical opinion evidence, and requested modification. More pulmonary function study results, an arterial blood-gas study, medical opinions, and depositions were admitted before the administrative law judge. Following a hearing, Administrative Law Judge Teitler found that claimant had failed to prove total disability because the weight of the credible pulmonary function studies showed no disability, there were no qualifying values on the newly submitted blood gas study, and the medical opinion evidence did not establish disability. Therefore, claimant failed to establish a change in conditions or mistake of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's evaluation of

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. As this claim was pending on January 19, 2001, the revised Section 725.310 regulation does not apply. *See* 20 C.F.R. §725.2 (2002).

the evidence regarding whether there has been a change in conditions or mistake of fact within the meaning of Section 725.310 (2000). Employer filed a response brief, arguing that substantial evidence supports the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, did not file a brief with 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. 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 determining whether claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, the 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 the element or elements of entitlement which defeated entitlement in the prior decision. *See Kovac v. BCNR Mining Corporation*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-164 (1989); *see also O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971). In determining whether there has been a mistake in a determination of fact pursuant to 20 C.F.R. §718.310, the administrative law judge must re-evaluate all of the evidence in the record. *Kovac, supra*.

Claimant argues that the administrative law judge did not specifically review all of the record evidence with respect to whether there was a mistake of fact. This argument lacks merit. The administrative law judge noted that he had reviewed all of the evidence in the record and made detailed findings regarding whether the newly submitted pulmonary function tests proved that claimant suffered from a disabling pulmonary impairment. He then applied those findings to the dual issues of change in conditions and mistake of fact and found that claimant:

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[2] On January 14, 2003, claimant filed a reply brief with a request to file the brief out of time. That request is granted.

> . . . has not established total disability under any of the methods set forth in subsection 718.204(b). Thus, he has not established any basis for finding a change in condition since the prior denial nor has he demonstrated any mistake in fact in the prior denial on the issue of total disability due to pneumoconiosis. In comparing the like and unlike evidence of record, both the evidence in the prior determination as well as the evidence submitted subsequent to the Claimant's motion for modification, I find the same insufficient to establish that Claimant is totally disabled.

Decision and Order at 8-9. Because the administrative law judge found the most recent pulmonary function studies and medical opinion evidence did not establish total disability, *a fortiori* he found there was no mistake of fact in the prior decisions on that issue.

Claimant argues the administrative law judge erroneously found that the newly submitted pulmonary function studies do not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). We disagree. In addressing whether claimant established a basis for modification pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge rationally found the newly submitted and prior evidence insufficient to establish total disability. First, the administrative law judge properly found that the pulmonary function study evidence was not qualifying, based upon the weight of the evidence and his assessment of the qualifications of the physicians who evaluated the four newly submitted studies. Decision and Order at 6-8. The administrative law judge acknowledged that the pulmonary function studies in the record yielded conflicting results; however, he determined that the non-qualifying and conforming results obtained on the June 2000 pulmonary function test administered by Dr. Levinson were the most reliable. *Id.* This finding is supported by substantial evidence, and we affirm it.

Claimant does not challenge the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §§718.204(b)(2)(ii) and (b)(2)(iii). Therefore we affirm those findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Finally, we find no error in the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). While the opinion of a treating physician such as Dr. Kraynak merits consideration, an administrative law judge may nevertheless disregard a treating physician's opinion that the judge finds is not adequately reasoned. *See Lango v. Director, OWCP*, 104 F.3d 573, 577,

21 BLR 2-12, 2-20 (3d Cir. 1997); *Schaaf v. Matthews*, 574 F.2d 160 (3d Cir. 1978); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Here the administrative law judge rationally so found.

Moreover, it is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co*., 7 BLR 1-178, 1-181 (1984), and to determine whether an opinion is documented and reasoned, *see Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp*., 8 BLR 1-46 (1985). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge if they are supported by substantial evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20 (1988). The administrative law judge acted within his discretion in according greater weight to Dr. Levinson's opinion than to Dr. Kraynak's because Dr. Levinson has superior qualifications (*see Dillon v. Peabody Coal Co*., 11 BLR 1-113 (1988); *Scott v. Mason Coal Co*., 14 BLR 1-37 (1990); *Wetzel, supra*; Decision and Order at 7-8)). The administrative law judge also found that Dr. Levinson's report is more thorough and better-documented; more consistent with the credible physicians' reports considered in the prior denials of benefits (Decision and Order at 8); and more consistent with the objective evidence. *See Wetzel, supra; see generally Voytovich v. Consolidation Coal Co*., 5 BLR 1-400 (1982); Decision and Order at 8.

Because the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2) is supported by substantial evidence, we affirm it. *See Fields, supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Inasmuch as claimant has failed to establish a change in conditions or a mistake of fact with regard to that element of his claim, we affirm the administrative law judge's denial of benefits.

[3] Dr. Levinson is Board-certified in Internal Medicine with a subspecialty in pulmonary medicine. Employer's Exhibit 1 at 7. Dr. Raymond Kraynak is Board-eligible in family medicine. Director's Exhibit 38.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge