BRB No. 11-0464 BLA

JOSEPH B. KAPES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 02/17/2012
	)	
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	)	DECISION and ORDER

Appeal of the Decision and Order of Adele Higgins Odegard, 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/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (10-BLA-05213) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge) denying claimant's request to modify the denial of benefits 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, involving a claim filed on February 11, 1999, is before the Board for the third time.[1] In a Decision and Order issued on July 2, 2008, Administrative Law Judge Janice K. Bullard denied claimant's third request for modification, finding that claimant failed to establish that he was totally disabled due to pneumoconiosis. After the Board dismissed claimant's appeal of that decision as abandoned on January 8, 2009, claimant timely requested modification. *See* 20 C.F.R. §725.310 (2000).[2] The district director denied modification and, after the case was referred to the Office of Administrative Law Judges, the parties waived their right to a hearing and requested a decision on the record.

In a Decision and Order dated March 3, 2011, 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[3] pursuant to 20 C.F.R. §725.310(a) (2000). Accordingly, the administrative law judge denied claimant's request for modification.

On appeal, claimant contends that the administrative law judge erred in finding that claimant did not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and therefore erred in failing to find that there was a change in conditions since the previous decision denying benefits pursuant to 20 C.F.R. §725.310

[1] Both of claimant's earlier appeals of administrative law judge decisions denying benefits were dismissed. His first appeal was dismissed at his request so that he could seek modification with the district director, and his second appeal was dismissed as abandoned. Director's Exhibits 171, 200.

[2] 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 (2010). 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).

[3] By Order dated April 21, 2010, the administrative law judge informed claimant's counsel that she would consider claimant's failure to allege a mistake in a determination of fact to be waiver of that issue. As claimant's counsel thereafter failed to submit either a brief or final argument alleging a mistake in fact, the administrative law judge found that claimant waived that issue. Decision and Order at 2-3. On appeal, claimant does not challenge this aspect of the administrative law judge's decision.

(2000). Employer/carrier responds, urging affirmance of the administrative law judge's denial of claimant's request for modification. The Director, Office of Workers' Compensation Programs, has not filed a response brief. [4]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[5] 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 the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that he is totally disabled by 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 entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Claimant may establish a basis for modification of the denial of his claim by establishing either a change in conditions or a mistake in a determination of fact.[6] 20 C.F.R. §725.310 (2000). 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, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

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[4] Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. The recent amendments to the Act, which became effective on March 23, 2010, do not apply to this case, because claimant filed this claim before January 1, 2005.

[5] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 2. 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 (1989) (*en banc*).

[6] As noted above, the administrative law judge found that claimant waived the issue of a mistake in a determination of fact. Because claimant does not challenge the administrative law judge's finding, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Previously, claimant established the existence of pneumoconiosis arising out of his coal mine employment, and total disability, but did not establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 196 at 4-13. On modification, the administrative law judge considered two new medical reports from Drs. Kraynak and Levinson regarding whether claimant is totally disabled due to pneumoconiosis. In his medical report, Dr. Kraynak concluded that claimant's coal worker's pneumoconiosis contributes to his total respiratory disability. Director's Exhibit 201. At his deposition, Dr. Kraynak testified that claimant's pneumoconiosis contributes to claimant's total disability because claimant's respiratory impairment is "primarily restrictive," as reflected by the reduced forced vital capacity (FVC) value present on the June 4, 2009 pulmonary function study that was administered by Dr. Levinson. Claimant's Exhibit 1 at 11-12, 15. In addition, Dr. Kraynak noted that claimant's smoking history could "possibly" explain the results of claimant's June 4, 2009 pulmonary function study. *Id.* at 14. In contrast, Dr. Levinson opined that claimant is totally disabled due to chronic obstructive pulmonary disease (COPD), as a result of smoking, as well as diabetes, bladder cancer, hypertension, and stomach conditions. Director's Exhibit 202. Dr. Levinson, who performed the June 4, 2009 pulmonary function study, noted that this study was invalid, as it was "performed with poor effort," since claimant did not give his "maximal effort throughout the [FVC] attempt." *Id.* at 4.

In weighing the medical opinion evidence at 20 C.F.R. §718.204(c), the administrative law judge found that the credibility of Dr. Kraynak's opinion as to the cause of claimant's total disability was undermined, because Dr. Kraynak's conclusion that the miner suffered from a "restrictive impairment" was based upon the June 4, 2009 pulmonary function study, which was invalid. Decision and Order at 12. The administrative law judge noted that this study was the only pulmonary function study performed in conjunction with the current modification request. Decision and Order at 6-7. The administrative law judge also indicated that the evidence suggested that Dr. Kraynak treated claimant only for his respiratory impairment, and she refrained from giving Dr. Kraynak's opinion any increased weight despite his status as a treating physician. *See* 20 C.F.R. §718.104(d)(5); Decision and Order at 12, n.19. Finally, the administrative law judge found Dr. Kraynak's statements concerning the impact of claimant's other medical conditions on his respiratory condition to be conclusory. *Id.* at 12. In light of the above, the administrative law judge accorded Dr. Kraynak's opinion little weight. The administrative law judge also accorded Dr. Levinson's opinion little weight, finding his opinion to be not well-reasoned, as he failed to explain why, under the circumstances, claimant's respiratory impairment is not causally related, at least in part, to pneumoconiosis. Decision and Order at 11.

Claimant contends that the administrative law judge erred in finding that claimant did not establish a change in conditions, because she mischaracterized the evidence Dr.

Kraynak relied upon in determining that claimant suffers from a "restrictive impairment." This argument lacks merit.

Contrary to claimant's contention, the administrative law judge acted within her discretion in according little weight to Dr. Kraynak's opinion on the issue of disability causation. The administrative law judge appropriately found the June 4, 2009 pulmonary function study to be invalid, based on the opinion of Dr. Levinson, who administered the study. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987); Decision and Order at 12. Dr. Levinson determined that claimant did not give "a maximal effort throughout the [FVC] attempt" in this study. Decision and Order at 12; Director's Exhibit 202 at 4. Further, the administrative law judge noted that Dr. Kraynak did not disagree with Dr. Levinson's invalidation of the June 4, 2009 pulmonary function study, or perform any of his own studies as part of claimant's current modification request. Decision and Order at 7; Claimant's Exhibits 1, 3. Having found that the only pulmonary function study performed as part of the present modification request was invalid, and that Dr. Kraynak relied on this study in determining that claimant's pneumoconiosis contributes to his total disability because he suffers from a "primarily restrictive defect," the administrative law judge reasonably discounted Dr. Kraynak's opinion. *See Siwiec*, 894 F.2d at 639, 13 BLR at 2-267 (holding that a medical report based upon unreliable data "does not constitute a well reasoned medical judgment . . ."); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). Accordingly, contrary to claimant's contention, the administrative law judge reasonably declined to accord Dr. Kraynak's opinion increased weight based upon his status as claimant's treating physician. *See* 20 C.F.R. §718.104(d)(5). Therefore, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c), as they are rational and supported by substantial evidence.

In light of our affirmance of the administrative law judge's finding that the evidence of record does not establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), we affirm the administrative law judge's denial of claimant's request for modification. 20 C.F.R. §725.310(a) (2000).

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