BRB No. 12-0255 BLA

PRISCILLA ANN SEAY (o/b/o and Widow of WILLIAM DAVID SEAY) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	 DATE ISSUED: 02/28/2013 DECISION and ORDER

Appeal of the Decision and Order Awarding Living Miner's Benefits and Denying Survivor's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Jonathan Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Living Miner's Benefits and Denying Survivor's Benefits (2010-BLA-5292 and 2010-BLA-5294) of Associate Chief Administrative Law Judge William S. Colwell rendered on claimant's request for modification of a miner's claim and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[1] In the original decision, issued on July 26, 2007, Administrative Law Judge Edward Terhune Miller credited the miner with at least twenty years of coal mine employment, pursuant to the parties' stipulation, and adjudicated the miner's claim and the survivor's claim pursuant to the provisions at 20 C.F.R. Part 718. Judge Miller denied benefits in the miner's claim, finding that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Judge Miller also denied benefits in the survivor's claim, finding that the evidence was insufficient to establish that the miner had pneumoconiosis or that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Director's Exhibit 50.

Claimant submitted a request for modification of the denial of benefits in both claims, and the consolidated case was forwarded to Associate Chief Administrative Law Judge William S. Colwell (the administrative law judge) for a formal hearing. In the miner's claim, the administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Consequently, the administrative law judge found that the evidence established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and that modification would render justice under the Act.[2] In the survivor's claim, however, the administrative law judge determined that the evidence was insufficient to establish that the miner's death

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[1] Claimant is the widow of the miner, who died on March 12, 2004. Director's Exhibit 10. While claimant has not appealed the denial of modification and benefits in her survivor's claim, filed on June 8, 2004, claimant is pursuing the miner's claim, filed on May 23, 2003, on behalf of his estate. Director's Exhibits 1, 2.

[2] The United States Court of Appeals for the Fourth Circuit has held that an adjudicator, in considering whether to reopen a claim, must exercise the discretion granted under 20 C.F.R. §725.310 by assessing any factors relevant to the rendering of justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *see also D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33 (2008). These relevant factors include the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69.

was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in the miner's claim and denied benefits in the survivor's claim.

On appeal, employer contends that the administrative law judge erred in finding that granting modification in the miner's claim would render justice under the Act. Employer also challenges the administrative law judge's weighing of the evidence on the merits of the miner's claim on the issues of the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Employer also alleges that the administrative law judge subjected the medical opinions to inconsistent treatment and failed to comply with the provisions of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). Claimant responds, urging affirmance of the award of benefits in the miner's claim. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, but contends that the administrative law judge properly acted within his discretion in determining that modification would render justice under the Act.[3]

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.[4] 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).

Turning first to the issue of total respiratory disability, employer contends that the administrative law judge erred in accepting the reliability and accuracy of the September 2, 2003 exercise blood gas study, and in finding that the weight of the medical opinions of record, as supported by this qualifying[5] blood gas study on exercise, established total

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[3] We affirm, as unchallenged on appeal, the administrative law judge's denial of benefits in the survivor's claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

[5] A "qualifying" blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-

respiratory disability at Section 718.204(b). Employer asserts that the administrative law judge should have credited Dr. Zaldivar's opinion, that the validity of the September 2, 2003 blood gas study was questionable because the blood was not obtained through an indwelling cannula, and the exercise blood gases were not obtained on the same day as the resting blood gases. Employer further contends that the administrative law judge erred in crediting the opinions of Drs. Baker,[6] Perper[7] and Mullins[8] to support a finding of total respiratory disability, over the opinions of Drs. Hippensteel and Spagnolo, that the miner's total disability was primarily cardiac in nature, and that there was no disabling respiratory impairment. Employer maintains that, in discounting the opinions of Drs. Hippensteel and Spagnolo, the administrative law judge substituted his judgment for that of the medical experts. Employer's Brief at 5, 9-29.

After considering the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. The administrative law judge considered Dr. Zaldivar's concerns regarding the validity of the qualifying exercise blood gas study,[9] and permissibly determined that this study was, nonetheless, valid and

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qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[6] Dr. Baker diagnosed a significant respiratory impairment, which rendered the miner totally disabled, based primarily on the miner's qualifying exercise blood gas study. Claimant's Exhibit 2.

[7] Dr. Perper diagnosed a significant pulmonary impairment based on the miner's pulmonary function study and exercise blood gas study results, and opined that the miner's coal mine employment played a significant contributing role in his impairment. Director's Exhibit 71; Employer's Exhibit 2.

[8] Dr. Mullins performed the Department of Labor physical examination, and diagnosed the miner as 100% disabled from a respiratory perspective based on the results of his September 2, 2003 exercise blood gas study that indicated hypoxia. Director's Exhibit 11.

[9] Dr. Mullins administered a resting blood gas study on August 26, 2003, which produced non-qualifying results, and obtained an exercise blood gas study on September 2, 2003, which produced qualifying results. Director's Exhibit 11. Dr. Zaldivar stated in his report that "I do not know how accurate the blood gases are . . . because they were not obtained at the same time as the resting blood gases and [the miner's] general physical

constituted evidence of a totally disabling respiratory impairment, as Dr. Michos, a Board-certified internist and pulmonary diseases specialist, validated the study. Decision and Order at 31-33; Director's Exhibit 11. Further, contrary to Dr. Zaldivar's criticisms, the administrative law judge noted that the regulations do not mandate the use of a cannula when performing the study, nor do they require that the resting and exercise portions of the study be performed on the same day. 20 C.F.R. Part 718, Appendix C; Decision and Order at 30-31; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc).

While acknowledging that the pulmonary function studies of record at Section 718.204(b)(2)(i) did not establish total disability, the administrative law judge determined that they documented the presence of a mild obstructive respiratory impairment, and measured a different type of impairment from that of the exercise blood gas study, which supported a finding of total disability. Decision and Order at 49; *see Whitaker v Director, OWCP*, 6 BLR 1-983 (1984); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797 (1984). The administrative law judge further determined that none of the cardiac specialists who had examined the miner over the years specifically diagnosed coronary artery disease, cardiac disease, or arteriosclerotic cardiovascular disease, even though the miner's treatment records revealed that the miner had multiple risk factors for those diseases. Decision and Order at 34; Director's Exhibit 13. The administrative law judge acted within his discretion in discounting the opinions of Drs. Hippensteel and Spagnolo, that the miner had no disabling respiratory impairment and that his qualifying exercise blood gas study resulted from significant heart disease, as he found that they were not persuasive or adequately supported by the record.[10] Decision and Order at 34-

condition was unknown or unreported at the time of the second results. Additionally, the blood was obtained through a single stick of the radial artery, which is never as accurate as the ones obtained through an indwelling cannula." Director's Exhibit 12.

[10] The administrative law judge permissibly discounted Dr. Zaldivar's opinion regarding the nature and extent of the miner's disability at 20 C.F.R. §718.204(b), as the physician premised his opinion in large part upon the erroneous conclusion that the miner's exercise blood gas study was invalid, contrary to the administrative law judge's finding. Decision and Order at 48; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Additionally, the administrative law judge determined that Dr. Zaldivar failed to reconcile his initial finding, that the miner's pulmonary impairment would prevent him from performing part of his general labor work as a continuous miner operator, Director's Exhibit 12, with his deposition testimony, that the miner was able to perform very heavy manual labor from a respiratory standpoint "with the modification of no smoking plus bronchodilators," Director's Exhibit 47 at 22, and the conclusion in his supplemental report, that the miner was totally disabled as a whole man, but did not

36; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark*, 12 BLR at 1-155. Finding that the opinions of Drs. Baker, Perper and Mullins were well-reasoned and better supported by the medical data, the administrative law judge permissibly found that the weight of the relevant evidence was sufficient to establish total respiratory disability at Section 718.204(b). Decision and Order at 48; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. As substantial evidence supports the administrative law judge's findings at Section 718.204(b), they are affirmed.

Employer next maintains that the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4) is unsupported by the evidence of record and is inconsistent with applicable law. Employer contends that the administrative law judge erred in crediting the diagnoses of legal pneumoconiosis by Drs. Baker, Perper and Mullins, over the contrary opinions of Drs. Hippensteel, Spagnolo and Zaldivar, that the miner had no impairment related to coal dust exposure. Employer asserts that the administrative law judge substituted his own opinion for that of the physicians; failed to critically analyze the opinions; erroneously relied on opinions he determined were compromised; selectively analyzed the evidence; mischaracterized the opinions; ignored relevant evidence; and subjected the opinions to inconsistent treatment. Employer's Brief at 5, 9-15, 19-30. We disagree.

In evaluating the conflicting medical opinions of record on the issue of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge summarized the explanations and bases for the various physicians' conclusions, and acknowledged that the reversibility of the miner's pulmonary function study results weighed against a finding of legal pneumoconiosis. However, since the blood gas testing measured a different type of impairment, the administrative law judge rationally discounted the opinions of Drs. Hippensteel and Spagnolo, that the miner's disabling gas exchange impairment was due to significant cardiac disease, as insufficiently supported by the record. Decision and Order at 36, 40; *see Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge also permissibly accorded little weight to the opinion of Dr. Zaldivar, that the miner's pulmonary impairment resulted solely from emphysema caused by cigarette smoking, as the physician premised his opinion in part on views that the administrative law judge determined were inconsistent with the plain language of the regulations and the preamble to the amended regulations. Decision and Order at 37-40; *see* 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. 79,939, 79,940-43 (Dec.

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suffer a totally disabling respiratory impairment, Employer's Exhibit 3. Decision and Order at 47-48.

20, 2000); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009). The administrative law judge acted within his discretion in finding that the opinions of Drs. Baker and Perper, supported by the opinion of Dr. Mullins, that the miner suffered from lung disease caused by both smoking and coal dust exposure, were well reasoned and documented, and entitled to full probative weight. *See Clark*, 12 BLR at 1-155; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 42-43. In so finding, the administrative law judge determined that the doctors' diagnoses were based on the miner's valid and qualifying exercise blood gas testing, as well as the miner's symptoms, complaints, physical examination findings, employment and smoking histories, and medical treatment records. Decision and Order at 40-41; Director's Exhibits 11, 71; Claimant's Exhibits 1, 2; Employer's Exhibit 2. The administrative law judge determined that Drs. Perper, Baker and Mullins adequately explained why they concluded that coal dust exposure and smoking combined caused the miner's disabling chronic lung disease, and that their opinions were not premised on views that are inconsistent with the plain language of the regulations or the Department of Labor's position as set forth in the preamble to the regulations. Decision and Order at 41-43. Thus, within a proper exercise of his discretion, the administrative law judge found that the opinions of Drs. Baker and Perper, as supported by that of Dr. Mullins, were sufficient to affirmatively establish the existence of legal pneumoconiosis at Section 718.202(a)(4). *See* 20 C.F.R. §718.201(b); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); Decision and Order at 43; Director's Exhibits 11, 71; Claimant's Exhibits 1, 2; Employer's Exhibit 2. As substantial evidence supports the administrative law judge's credibility determinations in weighing the medical opinion evidence pursuant to Section 718.202(a)(4), and as the administrative law judge properly weighed together all of the relevant evidence in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), we affirm his finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a).

Turning to the issue of disability causation at Section 718.204(c), because Drs. Hippensteel, Spagnolo, and Zaldivar did not diagnose pneumoconiosis or a totally disabling respiratory impairment, in direct contradiction to the administrative law judge's finding that legal pneumoconiosis and total respiratory disability were established, the administrative law judge permissibly discredited their opinions. Decision and Order at 49; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383 (4th Cir. 2002). The administrative law judge rationally relied on the opinions of Drs. Baker, Perper, and Mullins, that both smoking and coal dust exposure were contributing causes of the miner's disabling respiratory impairment, to support his finding that the evidence established disability causation at Section 718.204(c), and we affirm his findings thereunder as supported by substantial evidence.

Lastly, we reject employer's contention that the administrative law judge erred in finding that granting modification would render justice under the Act. Citing *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007), the administrative law judge discussed the relevant factors to be considered, and noted that "the medical evidence in this claim is complex and adjudication of the modification petition is not futile, as an in-depth review of the medical evidence along with Judge Miller's decision reveals sufficient grounds upon which to find that a mistake in a determination of fact was made." Decision and Order at 6. Because we discern no error or abuse of discretion in the administrative law judge's determination that granting modification would render justice under the Act, it is affirmed. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). Thus, we affirm the administrative law judge's finding that claimant established a basis for modification pursuant to 20 C.F.R. §725.310, and affirm the award of benefits in the miner's claim.

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's Benefits and Denying Survivor's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge