U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0185 BLA

ROBERT P. HORAN Claimant-Petitioner v. BLASCHAK COAL CORPORATION and SOMERSET CASUALTY INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/28/2019 DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification and Denying Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Barbara L. Feudale, Gordon, Pennsylvania, for claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Request for Modification and Denying Benefits (2016-BLA-05199) of Administrative Law Judge Lystra A. Harris, rendered 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 a request for modification of the denial of a miner's claim filed on October 20, 2004. This is the fourth time that this case has been before the Board. [1]

In the most recent prior decision, the Board affirmed the denial of claimant's request for modification by Administrative Law Judge Teresa C. Timlin, holding that she permissibly determined claimant failed to establish total disability and, therefore, did not demonstrate a change in conditions or a mistake in a determination of fact under 20 C.F.R. §725.310. *Horan v. Blaschak Coal Corp*., BRB No. 14-0258 BLA (Oct. 30, 2014) (unpub.). On January 27, 2015, claimant timely filed a second request for modification. After the district director denied his request, the case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Lystra A. Harris (the administrative law judge) for hearing. In her Decision and Order dated December 26, 2017, the administrative law judge accepted the parties' stipulation to nineteen years of coal mine employment and found that granting claimant's request for modification would be in the interest of justice. She further found, however, that claimant failed to establish total disability and, therefore, did not establish either a basis for modification or invocation

[1] Administrative Law Judge Janice K. Bullard denied the October 20, 2004 claim in a Decision and Order issued August 30, 2007. Director's Exhibit 40. She credited claimant with nineteen years of coal mine employment and found that he established the existence of pneumoconiosis, but failed to establish total respiratory or pulmonary disability. *Id*. Pursuant to claimant's appeal, the Board affirmed the findings of nineteen years of coal mine employment and pneumoconiosis, but vacated the denial of benefits and remanded the case for reconsideration of the blood gas study and medical opinion evidence. *R.H.* [*Horan*] *v. Blaschak Coal Corp.*, BRB No. 07-0971 BLA (Sept. 22, 2008) (unpub.). On remand, Judge Bullard determined that the evidence did not establish total disability and again denied benefits in a Decision and Order issued May 20, 2009. Director's Exhibit 53. On appeal, the Board affirmed the denial of benefits. *Horan v. Blaschak Coal Corp.*, BRB No. 09-0684 BLA (July 27, 2010) (unpub.). Claimant timely requested modification on January 21, 2011. Director's Exhibit 65. In a Decision and Order issued on March 28, 2014, Administrative Law Judge Theresa C. Timlin found that claimant did not establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Director's Exhibit 94. Claimant appealed the denial of benefits to the Board.

of the rebuttable presumption of total disability due to pneumoconiosis.[2] The administrative law judge denied benefits accordingly.

On appeal, claimant contends the administrative law judge erred in determining the pulmonary function study and medical opinion evidence insufficient to establish total disability. Employer/carrier (employer) responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the findings of the administrative law judge if they are supported by substantial evidence, rational, and consistent with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (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).

Modification of a denial of benefits may be granted if a change in conditions has occurred or because of a mistake in a determination of fact in the prior decision. 20 C.F.R. §725.310.[4] When considering a modification request, the administrative law judge must

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] Because claimant's coal mine employment was in Pennsylvania, 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); Director's Exhibit 3.

[4] The administrative law judge mistakenly referred to the present case as involving a request for modification of a denied subsequent claim. *See* Decision and Order at 4. Nevertheless, she applied only the regulation governing modification, 20 C.F.R. §725.310,

reconsider the evidence for any mistake of fact, including the ultimate fact of entitlement. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995). In this case, total disability was adjudicated against claimant. He therefore was required to establish a change in condition or a mistake of fact regarding disability to establish modification.

A miner is considered totally disabled if he has a respiratory or pulmonary impairment that, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions can establish disability. 20 C.F.R. §718.204(b)(2)(i)-(iv). If the administrative law judge finds disability has been established under one or more subsections, she must weigh that evidence against contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The administrative law judge determined no subsection established total disability. Decision and Order at 7-12.

The administrative law judge considered the two pulmonary function studies submitted on modification. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 7-8; Employer's Exhibit 1; Claimant's Exhibit 3. The administrative law judge found Dr. Kruklitis's November 13, 2015 pulmonary function study non-qualifying,[5] and Dr. Kraynak's April 20, 2016 study qualifying. The administrative law judge determined: "Here, [c]laimant showed different results on the two tests which were taken only five months apart. Under such circumstances, the test results are equally persuasive. Because the test results are equally persuasive but reach conflicting results, the results of the pulmonary function stud[ies] are in equipoise." Decision and Order at 8. She therefore concluded that the preponderance of the pulmonary function study evidence did not support a finding of total disability. *Id*.

Claimant argues that because the Act is remedial in nature, the administrative law judge must resolve the conflict in claimant's favor where, as here, the evidence is conflicting and presents true doubt. This contention is without merit: the United States

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and rendered the necessary findings pursuant to that regulation. Decision and Order at 4-13.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

Supreme Court has overruled the true doubt rule. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267 (1994) (holding true doubt rule contravenes Administrative Procedure Act's requirement the burden of proof remain with claimant), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993). Because claimant does not otherwise challenge the pulmonary function study evidence, we affirm it does not establish total disability. 20 C.F.R. §718.204(b)(2)(i).

Under 20 C.F.R. §718.204(b)(2)(iv),[6] the administrative law judge considered new medical opinions from Drs. Kruklitis and Kraynak. Decision and Order at 5, 9-10; Director's Exhibit 109; Claimant's Exhibits 5, 6, 8; Employer's Exhibit 1. Dr. Kruklitis, a Board-certified pulmonologist, stated claimant does not have a disabling respiratory impairment.[7] Employer's Exhibit 1. Dr. Kraynak, Board-eligible in Family Medicine and claimant's treating physician, diagnosed a totally disabling restrictive impairment.[8] Claimant's Exhibits 5, 6. The administrative law judge accorded greater weight to Dr. Kruklitis than Dr. Kraynak, concluding claimant failed to establish disability through medical opinions. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 12.

Claimant argues the administrative law judge erred in crediting Dr. Kruklitis's opinion over Dr. Kraynak's. Claimant asserts the administrative law judge should have accorded Dr. Kraynak's opinion controlling weight based on his status as claimant's treating physician. 20 C.F.R. §718.104(d). We disagree. The administrative law judge in his role as fact-finder determines the credibility of medical opinion evidence. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). The Board cannot

[6] The administrative law judge determined that total disability was not established at 20 C.F.R. §718.204(b)(2)(ii), as the new blood gas study was non-qualifying for total disability. Decision and Order at 8; Employer's Exhibit 1. She further found that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii) because there is no evidence of cor pulmonale with right-sided congestive heart failure. *Id*. We affirm these findings, as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] Dr. Kruklitis examined claimant and set forth his findings in a report dated on November 13, 2015. Employer's Exhibit 1. He also testified by deposition on June 30, 2016. *Id.*

[8] Dr. Kraynak saw claimant once a month from 2014 to 2017 for shortness for breath. He set forth his findings in his treatment records, in written reports dated August 18, 2015 and May 9, 2016, and in his June 10, 2016 deposition testimony. Claimant's Exhibits 3, 6.

reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson*, 12 BLR at 1-113. Contrary to claimant's assertion, Dr. Kraynak's status does not automatically entitle his opinion controlling weight. The administrative law judge must also consider "its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

The administrative law judge considered the relevant criteria,[9] and permissibly determined the brief and conclusory nature of Dr. Kraynak's treatment notes did not provide a basis for finding a superior understanding of claimant's condition over time.[10]

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[9] Pursuant to 20 C.F.R. §718.104(d), "the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician":

> (1) *Nature of relationship.* The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;
>
> (2) *Duration of relationship.* The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;
>
> (3) *Frequency of treatment.* The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition; and
>
> (4) *Extent of treatment.* The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.

[10] The administrative law judge stated:

> The record also includes treatment notes from Dr. Kraynak from January 2, 2014 through May 24, 2017. Upon review, these notes are identical in language and findings except for slight changes in [c]laimant's blood pressure or weight. The notes all report [c]laimant presents with shortness of breath, productive cough and exertional dyspnea. The findings on physical examination all note an increase in AP diameter with scattered wheezes. The impression on all the notes is, "Black Lung Disease." The plan on all the notes is, "Continue inhaler. This gentleman is totally and

See Balsavage v. Director, OWCP, 295 F.3d 390, 396 (3d Cir. 2002); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); Decision and Order at 11-12. She further found Dr. Kraynak's opinion not well-supported because the qualifying pulmonary function study he administered produced markedly lower values than Dr. Kruklitis's non-qualifying study, conducted just five months earlier, and the previously submitted studies. Decision and Order at 12. We affirm this finding as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

In contrast, the administrative law judge gave "significant weight" to Dr. Kruklitis's opinion that claimant is not disabled, finding it well-supported by the objective evidence and well-explained. Decision and Order at 11-12. She noted that Dr. Kruklitis based his opinion on what he described as a normal physical examination, normal spirometry, and normal resting and exercise blood gas testing. *Id.* Contrary to claimant's contention, the administrative law judge reasonably determined that Dr. Kruklitis had an adequate understanding of the level of exertion required by claimant's usual coal mine job as an oiler, based on his acknowledgement that claimant's coal mine employment required heavy labor.[11] *See Anderson*, 12 BLR at 1-113; Decision and Order at 10-11; Claimant's Brief at 10; Employer's Exhibit 1.

The administrative law judge also considered Dr. Kraynak's opinion that Dr. Kruklitis's exercise blood gas study was based on insufficient exercise, and contained insufficient information, to support his conclusion claimant is not disabled.[12] Decision and

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> permanently disabled due to his Black Lung Disease. He is precluded from any and all employment. I will see him in 1 month."

Decision and Order at 11.

[11] Dr. Kruklitis noted claimant performed general underground mining for twelve years, including drilling, scooping, working timber and using a jackhammer. Employer's Exhibits 1, 2. Subsequently, he switched to above ground mining, where his jobs included separating coal from other debris in the processing plant, working as a dozer operator and water truck driver, and performing maintenance of vehicles and equipment. Employer's Exhibits 1, 2. He agreed claimant's job duties were "heavy duty in nature." Employer's Exhibit 1 at 14.

[12] Dr. Kraynak noted that Dr. Kruklitis's report of the exercise blood gas study he administered omitted information regarding claimant's pulse rate, how fast he walked, or whether he took any breaks. Thus, he stated that the test did not provide enough insight into claimant's exertional abilities. Claimant's Exhibits 5; 6 at 20-22. He also stated that six minutes of ambulation does not adequately represent the exertional level of claimant's

Order at 10-12; Claimant's Exhibit 6 at 20-22. She noted that Dr. Kruklitis refuted Dr. Kraynak's criticisms of the exercise blood gas study, stating that six minutes of exercise is the standard means of assessing functional capacity. Decision and Order at 10, 12; Employer's Exhibit 1 at 23, 25. Dr. Kruklitis explained that the exercise testing is not meant to simulate claimant's work requirements, but is meant to provide evidence of hypoxia or hypoxemia. Employer's Exhibit 1 at 23, 25. Specifically, if claimant had a disabling respiratory condition, he would expect to see his blood oxygen levels start to decrease with exercise, and his carbon dioxide levels start to increase. *Id.* at 24, 28. Instead, claimant's resting and exercise studies showed he was exchanging oxygen and carbon dioxide normally.[13] Decision and Order at 10, 12; *Id.* at 24. Considering this explanation in light of his superior qualifications, the administrative law judge permissibly accorded greater weight to Dr. Kruklitis's determination of the probative value of the exercise blood gas study results. *See* 20 C.F.R. §718.105(c)(8); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638, (3d Cir. 1990); *Kramer*, 305 F.3d 203, 211 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163; Decision and Order at 12. Thus, the administrative law judge permissibly accorded greater overall weight to Dr. Kruklitis's opinion, finding it well-reasoned, well-documented, better-supported by the objective evidence of record and, therefore, more persuasive than Dr. Kraynak's contrary opinion .[14] *See Balsavage*, 295 F.3d at 396; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 12.

Because we have rejected claimant's contentions regarding the administrative law judge's crediting of Dr. Kruklitis's opinion over Dr. Kraynak's opinion, we affirm her finding that claimant failed to establish total disability by the medical opinion evidence. 20 C.F.R. §718.204(b)(2)(iv); *see Soubik v. Director, OWCP*, 366 F.3d 226, 233 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584 (3d Cir. 1997). We further affirm the finding that, considered as a whole, the evidence does not establish disability. 20 C.F.R.

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usual coal mine work, and concluded the blood gas study does not show exercise-induced hypoxemia because no exercise was actually induced. Claimant's Exhibits 5; 6 at 21-22, 28-29.

[13] Dr. Kruklitis stated that claimant's blood oxygen levels actually increased with exercise, which was a "fully appropriate response to exercise" and indicated no gas exchange abnormalities. Employer's Exhibits 1 at 37; 2.

[14] The administrative law judge noted that in addition to the normal resting and exercise blood gas studies he obtained, Dr. Kruklitis based his conclusion on the fact that claimant's physical examination and spirometry were also normal. Decision and Order at 10.

§718.204(b); *see Defore*, 12 BLR at 1-28-29; Decision and Order at 12-13. Accordingly, claimant has not demonstrated a change in condition justifying modification. *See* 20 C.F.R. §725.310; *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

The administrative law judge next found no mistake of fact in Judge Timlin's previous finding that claimant failed to establish total disability. Decision and Order at 13. We affirm this finding as supported by substantial evidence. *See Soubik*, 366 F.3d at 233; *Mancia*, 130 F.3d at 584. Consequently, we affirm the administrative law judge's denial of claimant's request for modification.[15] 20 C.F.R. §725.310(a); *see Keating*, 71 F.3d at 1123; Decision and Order at 13.

[15] The administrative law judge correctly observed that claimant's failure to establish total disability also precludes invocation of the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(ii); Decision and Order at 13.

Accordingly, we affirm the administrative law judge's Decision and Order Denying Request for Modification and Denying Benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge