BRB No. 04-0525 BLA

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| DAVID D. BOYD | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| NICK'S COAL COMPANY, INCORPORATED | ) | |
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| and | ) | |
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| ASHLAND COAL, INCORPORATED | ) | DATE ISSUED: 01/14/2005 |
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| 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 on Modification – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

David D. Boyd, Draffin, Kentucky, *pro se*.

Paul E. Jones (Jones, Walters, Turner & Shelton), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Modification – Denial of Benefits (2003-BLA-0138) of Administrative Law Judge Robert L. Hillyard 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).[1] This case involves claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000).[2] Considering the new evidence submitted by the parties on modification in conjunction with the evidence previously submitted, the administrative law judge found that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore concluded that claimant did not establish a change in conditions or mistake in a determination of fact to justify modification of the prior denial of benefits pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not participate in this appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as

[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.

[2] Claimant filed his claim on October 2, 1996. Director's Exhibit 1. The claim was denied by an administrative law judge on April 26, 1999, based on a finding that claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(2000). Director's Exhibit 44. On May 17, 2000, the Board affirmed the administrative law judge's denial of benefits. Director's Exhibit 51. Claimant timely requested modification on June 5, 2000. Director's Exhibit 53.

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 demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1980); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §725.310 (2000), claimant may, within a year of a final order, request modification of a denial of benefits. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). If a claimant alleges that the ultimate fact of entitlement has mistakenly decided, the administrative law judge has the authority "to reconsider all evidence for any mistake of fact or change in conditions," and modify the prior order. *Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence. Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge first permissibly determined that claimant's height is seventy-two inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983); Decision and Order at 6. The administrative law judge next properly determined that the August 24, 1999, December 16, 1999, November 27, 2000, November 12, 2001, and May 10, 2002 pulmonary function studies were non-qualifying.[3] Director's Exhibits 52, 60, 77, 86. Regarding the remaining three newly submitted studies, which were qualifying, the administrative law judge acted within his discretion in determining that these studies were invalid and entitled to no probative weight.[4] *See Prater v. Hite Preparation Co.*,

[3] A qualifying pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C respectively. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[4] The administrative law judge found that the May 23, 2002 and July 31, 2003 studies were non-conforming because Dr. Sundaram did not report the miner's cooperation or comprehension. Decision and Order at 17 - 18; Director's Exhibit 86; Claimant's Exhibit 1. The administrative law judge noted that Dr. Burki invalidated the May 23, 2002 study based on the curve shapes on the tracings and an improper paper speed of the measuring instrument, and Dr. Broudy invalidated the July 31, 2003 study

829 F.2d 1363, 1368, 10 BLR 2-297, 2-304-05 (6th Cir. 1987); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). As substantial evidence supports the administrative law judge's finding that the new pulmonary function studies do not establish that claimant is totally disabled, we affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(i).

The administrative law judge next properly found that claimant did not establish total disability by the blood gas study evidence, as none of the four newly submitted blood gas studies was qualifying. 20 C.F.R. §718.204(b)(2)(ii); Director's Exhibits 52, 60, 86; Employer's Exhibit 1. The administrative law judge also properly determined that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii). We therefore affirm the administrative law judge's findings.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Sundaram, Gibson, Broudy, Branscomb, Fino, and Dahhan to determine if they established total respiratory disability. Decision and Order at 19 – 22; Director's Exhibits 52, 55, 60, 65, 71, 73, 77, 86, 88, 89; Claimant's Exhibit 1; Employer's Exhibit 1, 3. In considering Dr. Sundaram's opinion, the administrative law judge noted accurately that a treating physician's opinion is not automatically entitled to greater weight, but that the opinion of a treating physician gets the deference it deserves based upon its power to persuade. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 625 (6th Cir. 2003); Decision and Order at 19. The administrative law judge found Dr. Sundaram's opinion that claimant suffers from a total respiratory disability to be well-reasoned, but permissibly accorded the opinion less weight based upon the physician's lack of any specialized credentials. *Williams*, 338 F.3d at 513, 22 BLR at 2-647; Decision and Order at 20. The administrative law judge also properly discounted Dr. Gibson's opinion that claimant is totally and permanently disabled for any type of gainful employment, notwithstanding that Dr. Gibson was also claimant's treating physician, because Dr. Gibson's opinion was found to be undocumented and unreasoned, and because Dr. Gibson did not possess any special medical credentials.[5] *Williams*, 338

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because of claimant's poor effort on the study. Director's Exhibit 86; Employer's Exhibit 2. The administrative law judge found that Dr. Broudy also invalidated the June 19, 2003 pulmonary function study, which he administered, based on claimant's poor effort on the study. Decision and Order at 18; Employer's Exhibit 1.

[5] The administrative law judge noted that Dr. Gibson did not specify which pulmonary tests he relied upon in making his disability determination. The administrative law judge found that if Dr. Gibson relied upon the valid, non-qualifying studies, then his findings conflicted with the results of those studies, and if he relied upon

F.3d at 513, 22 BLR at 2-647, *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 21.

With regard to the contrary opinions, the administrative law judge permissibly found that Dr. Broudy's opinion was based on the objective evidence in the record and was well-reasoned, and thus entitled to great weight.[6] *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 20, 22; Director's Exhibits 60, 65; Employer's Exhibits 1, 3. The administrative law judge also acted within his discretion by according great weight to the opinions of Drs. Dahhan, Branscomb, Fino, because these physicians possessed superior credentials and because he found that they rendered well-reasoned opinions. *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-495, 2-512 (6th Cir. 2002); *Clark*, 12 BLR at 1-155; *McMath v. Director*, OWCP, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director*, OWCP, 8 BLR 1-139 (1985), Decision and Order at 21 - 22; Director's Exhibits 71, 73 86. We therefore affirm the administrative law judge's finding that claimant failed to establish the presence of a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge next considered all of the new evidence pursuant to 20 C.F.R. §718.204(b)(2), and based upon the valid, non-qualifying pulmonary function studies, the non-qualifying blood gas studies, and the opinions of Drs. Broudy, Branscomb, Fino and Dahhan, rationally found that the evidence was insufficient to establish total respiratory disability. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). As the administrative law judge's finding is supported by substantial evidence, we affirm his finding that claimant did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2).

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the invalid, qualifying studies, then his analysis was flawed by the unreliability of the studies. Decision and Order at 21.

[6] The administrative law judge stated in a concluding paragraph that Dr. Broudy provided a well-reasoned opinion that claimant does not suffer from pneumoconiosis. Decision and Order at 22. It is clear from the administrative law judge's preceding discussion of Dr. Broudy's medical opinion, Decision and Order at 20, that the administrative law judge intended to say that Dr. Broudy's opinion was well-reasoned and documented as to the issue of total respiratory disability, not pneumoconiosis. We hold any error in this respect to be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Consequently, we affirm the administrative law judge's attendant finding that claimant did not establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

The administrative law judge further determined that a review of all of the pulmonary function studies, blood gas studies, and medical opinions of record disclosed no mistake in a determination of fact in the prior decision to deny benefits. Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §725.310 (2000), which we therefore affirm. *Worrell*, 27 F.3d at 230, 18 BLR at 2-296.

Accordingly, the administrative law judge's Decision and Order on Modification – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge