U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0391 BLA

SCOTT P. WRIGHT and MONICA WRIGHT (on behalf of the Estate of CHARLES P. WRIGHT)	)	
Claimants-Petitioners	)	
v.	)	
ISLAND CREEK KENTUCKY MINING	)	DATE ISSUED: 07/26/2016
and	)	
Self-Insured through ISLAND CREEK COAL COMPANY c/o WELLS FARGO DISABILITY MANAGEMENT	)	
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 – Denial of Benefits on Modification in the Miner's Estate Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimants.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimants appeal the Decision and Order – Denial of Benefits on Modification in the Miner's Estate Claim (2009-BLA-05802) of Administrative Law Judge Larry S. Merck, rendered pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (the Act). The miner filed his claim on December 27, 2005. Administrative Law Judge Daniel F. Solomon denied benefits on December 30, 2008, finding that the miner failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The miner filed a request for modification on February 18, 2009, and the case was transferred to the Office of Administrative Law Judges (OALJ) and reassigned to Judge Merck (the administrative law judge). The miner subsequently died on December 8, 2011.[1] The administrative law judge issued his Decision and Order dated June 15, 2015, which is the subject of this appeal.

Based on the filing date of the miner's claim, the administrative law judge considered entitlement under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] Although he credited the miner with at least fifteen years of underground coal mine employment, the administrative law judge found that the evidence was insufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge determined that claimants were unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Because the evidence was

[1] Claimants are the son and daughter of Mildred Wright, the widow of the deceased miner, who was pursuing the claim on behalf of her husband's estate until she died on November 23, 2014. On September 15, 2015, claimants filed a motion requesting that the caption of the case be changed to reflect that they are now acting on behalf of the miner's estate. The Board granted the motion, changing the style of the case to reflect the substitution. *Wright v. Island Creek Coal Co.*, BRB No. 15-0391 BLA (Dec. 21, 2005) (unpub. Order). On May 6, 2015, the Board also granted a motion by employer's counsel to withdraw its cross-appeal, assigned BRB No. 15-0391 BLA-A. *Wright v. Island Creek Coal Co.*, BRB No. 15-0391 BLA-A (May 6, 2015) (unpub. Order).

[2] Pursuant to Section 411(c)(4), the miner is presumed to have been totally disabled due to pneumoconiosis if it is established that he had 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), as implemented by 20 C.F.R. §718.305.

insufficient to establish total disability, a requisite element of entitlement, benefits were precluded under 20 C.F.R. Part 718.

On appeal, claimants argue that the administrative law judge erred in his consideration of the pulmonary function studies and medical opinion evidence, relevant to whether the miner was totally disabled by a respiratory or pulmonary impairment.[3] Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits in a miner's claim, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, 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 that defeated an award in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In addition, the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). The administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that the miner had at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3.

In this case, the administrative law judge weighed all of the evidence together to determine whether a basis for modification and entitlement to benefits could be established through invocation of the Section 411(c)(4) presumption. The administrative law judge's findings on the issue of total disability are discussed below.

I. Invocation of the Section 411(c)(4) Presumption - Total Disability

The regulations provide that the miner shall be considered to have been totally disabled if his respiratory or pulmonary impairment, standing alone, prevented the miner from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, the miner's disability is established if: 1) pulmonary function tests show values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; or 2) arterial blood-gas tests show values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; or 3) the miner suffered from pneumoconiosis and is shown by the evidence to have suffered from cor pulmonale with right-sided congestive heart failure; or 4) where total disability cannot be established by the preceding methods, a physician exercising reasoned medical judgment concludes that the miner's respiratory or pulmonary condition was totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

In considering claimants' entitlement pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge initially summarized the pulmonary function tests submitted into the record before Judge Solomon.[5] Decision and Order on Modification at 6-7. The record reflects that Dr. Simpao examined the miner on behalf of the Department of Labor (DOL) on January 23, 2006, and a pulmonary function test conducted without the use of a bronchodilator was qualifying for total disability.[6] Director's Exhibit 9. The administrative law judge found that, in his March 3, 2008 report, Dr. Renn opined that the January 23, 2006 test was invalid because of the miner's "failure to maintain maximal effort, an unsatisfactory start of expiration, obstruction of the mouthpiece, in addition to problems [Dr. Renn] identified with each of the test maneuvers." Decision and Order on Modification at 7; *see* Director's Exhibit 59 at 3.

A pulmonary function test administered by Dr. Repsher, in conjunction with his examination of the miner on August 1, 2006, was qualifying before and after the use of a bronchodilator. Director's Exhibit 11. However, Dr. Repsher indicated in his report of

[5] Judge Solomon did not reach the issue of total disability and, therefore, did not consider the pulmonary function tests in his December 30, 2008 Decision and Order.

[6] A "qualifying" pulmonary function test yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" test exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

August 22, 2006 that the test was "medically invalid for interpretation, because of a gross lack of effort and cooperation" by the miner. *Id.*

A November 30, 2006 pulmonary function test administered by Dr. Selby was non-qualifying, before and after the use of a bronchodilator. Director's Exhibit 33. In a May 5, 2008 report, Dr. Repsher indicated that the November 30, 2006 test was invalid because the tracings showed "poor effort and cooperation." Director's Exhibit 43 at 16.

An October 26, 2007 pulmonary function test administered by Dr. Chavda yielded non-qualifying results, before and after the use of a bronchodilator. Director's Exhibit 61. As noted by the administrative law judge, Dr. Repsher testified during his deposition, on April 30, 2008, that Dr. Chavda's test "was medically invalid for interpretation." Decision and Order on Modification at 7; *see* Director's Exhibit 71 at 15.

A March 5, 2008 pulmonary function test by Dr. Simpao was non-qualifying for total disability and no bronchodilator was administered. Director's Exhibit 60. During his April 30, 2008 deposition, Dr. Repsher addressed the validity of the March 5, 2008 test and stated:

> Dr. Simpao's test shows the same problems that we had with basically the same results. And it looks like Dr. Simpao went ahead and did eight trials, where normally we only do three. So it's obvious that he felt that he was having a lot of problems too with [the miner] in cooperating with the testing.

Director's Exhibit 71 at 21.

In support of his modification request, the miner submitted a February 15, 2011 pulmonary function test, conducted at Muhlenberg Community Hospital by Dr. Chavda, which yielded qualifying values, before and after the use of a bronchodilator. Claimants' Exhibit 1. In the "Post Test Comments" section of the report, Dr. Chavda noted, "Good patient effort & cooperation. The results of this test met the ATS [American Thoracic Society] standards for acceptability and repeatability." Claimants' Exhibit 6.

In a report dated May 24, 2011, Dr. Zaldivar reviewed the February 15, 2011 pulmonary function test and stated that "the study is accompanied by three flow/volume loops which reveal a very large degree of hesitation during exhalation." Director's Exhibit 93 at 139. Dr. Zaldivar also commented that he had not received the flow versus time tracings "which are critical to the full interpretation of the study . . . but even if [they] were sent, the effort during exhalations clearly is submaximal and unreproducible." *Id*. On May 23, 2014, Dr. Chavda testified that the miner gave "good

effort" and "best cooperation" and he reiterated that the February 15, 2011 test was valid. Employer's Exhibit 6 at 22.

In determining the weight to accord the pulmonary function tests, the administrative law judge concluded:

> The record contains the results of six pulmonary function studies administered between 2006 and 2011. Three of these studies (two of which had pre[-bronchodilator] and post-bronchodilator results, and one had only pre-bronchodilator results) yielded qualifying values, and three of these studies (again, two of which had pre[-bronchodilator] and post-bronchodilator results, and one had only pre-bronchodilator results) yielded non-qualifying values. Each test was invalidated at least once. In a deposition taken on May 23, 2014, Dr. Chavda was questioned regarding Dr. Zaldivar's invalidation of his February 15, 2011 [pulmonary function test]. To rehabilitate his February 15, 2011 test, Dr. Chavda responded that these pulmonary function test results were valid. Because three pulmonary function [tests] yielded qualifying results, and three yielded non-qualifying results, I find that the pulmonary function study evidence is in equipoise, and it does not demonstrate total disability. Also, the invalidation reports from Drs. Renn, Repsher and Zaldivar, each of whom is highly qualified, supports my finding that [c]laimant has not demonstrated total disability by a preponderance of the pulmonary function study evidence pursuant to § 718.204(b)(2)(i).

Decision and Order on Modification at 17 (citations omitted).

In considering the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv),[7] the administrative law judge noted that Dr. Chavda opined, in his March 24, 2014 report, that "the 2011 pulmonary function study showed values that indicate that the miner could not perform his last coal mine employment job." Decision

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that none of the four arterial blood gas studies of record was qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), and that there is no evidence of record indicating that the miner suffered from cor pulmonale with right-sided congestive heart failure under 20 C.F.R. §718.204(b)(2)(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 17. We reject claimants' assertion that the administrative law judge erred in failing to consider the death certificate, as that evidence does not establish whether the miner was totally disabled by a respiratory or pulmonary impairment.

and Order on Modification at 17; *see* Claimants' Exhibit 5. The administrative law judge gave little weight to Dr. Chavda's opinion, however, because he "did not specifically address the miner's job titles or duties." Decision and Order on Modification at 17. Although Dr. Simpao opined in his January 23, 2006 report that the miner was totally disabled, and the administrative law judge concluded that he was aware of the exertional requirements of the miner's coal mine work, the administrative law judge determined that Dr. Simpao's opinion was outweighed by the contrary medical opinion evidence. *Id*.; *see* Director's Exhibit 9. Specifically, the administrative law judge gave controlling weight to the 2006-2008 opinions of Drs. Repsher and Selby, that the miner was not totally disabled, based on their credentials and the administrative law judge's finding that their opinions were supported by the non-qualifying arterial blood gas studies.[8] Decision and Order on Modification at 17; *see* Director's Exhibits 33, 41, 47 and 71.

Claimants state on appeal that "notwithstanding the disqualifications of all of the company doctors" pertaining to the pulmonary function tests, "[DOL's] reviewer" validated Dr. Simpao's qualifying pulmonary function test. Claimants' Brief at 4. They further state that while Dr. Repsher invalidated his own study, "[t]his is what Dr. Repsher does in every case where there is a qualifying value." *Id*.

Dr. Mettu reviewed the tracings associated with the January 23, 2006 pulmonary function test and stated that the "vents are acceptable." Director's Exhibit 9 at 8. Although the administrative law judge did not specifically address Dr. Mettu's validation report, any error in this regard is harmless, as claimants have not shown why remand of the case is necessary. S*ee Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984). Specifically, the administrative law judge concluded that the pulmonary function tests were in equipoise, independent of his observation that each study had been invalidated.[9] Claimants have not identified any specific error by the administrative law judge in finding the pulmonary function tests to be in equipoise. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR

[8] The administrative law judge found that while Dr. Basheda opined that the miner was not totally disabled, "he did not know the exertional requirements" of the miner's job titles, which included "general inside laborer and foreman." Decision and Order on Modification at 18. Thus, the administrative law judge gave Dr. Basheda's opinion less weight. *Id*.

[9] Claimants do not explain how the administrative law judge's analysis of the pulmonary function tests resulted in prejudicial error, as the administrative law judge counted as qualifying all of the pulmonary function tests which claimants argue should have been considered qualifying. Decision and Order on Modification at 6-7, 12, 17.

1-107 (1983). Thus, we affirm the administrative law judge's determination that the pulmonary function tests are insufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i).

With respect to the medical opinion evidence, claimants generally contend that the opinions of Drs. Simpao and Chavda should be credited because they performed their examinations on behalf of the Department of Labor. However, the Board has held specifically that the opinions of the Department of Labor physicians cannot be accorded greater weight due to their impartiality, absent conclusive evidence that the other physicians of record are biased and that the Department of Labor's expert is independent.[10] *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991) (en banc). In the absence of evidence of bias in this record, the administrative law judge had discretion to credit the opinions of Drs. Repsher and Selby at 20 C.F.R. §718.204(b)(2)(iv); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Claimants also state that the blood gas studies show "arterial hypoxemia and also reflect[] [the miner's] inability to function in a coal mine contrary to Dr. Repsher's opinion and Dr. Selby's opinion." Claimants' Brief at 6. However, as discussed *supra*, the administrative law judge found that all of the blood gas studies are non-qualifying for total disability under the regulations, and claimants do not allege error with that finding. Drs. Repsher and Selby each opined that the miner was not totally disabled, taking into account the blood gas study values. The administrative law judge is not permitted to act as a medical expert or substitute his opinion for those of Drs. Repsher or Selby in weighing the evidence. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986) (Interpretation of objective data is a medical determination for which an administrative law judge cannot substitute his own opinion).

Claimants assert that Dr. Chavda identified aspects of Dr. Rephser's report to support his opinion that that the miner could not perform his last coal mine employment: "Dr. Repsher's notation of progressive dyspnea for 2 years," ankle edema, medications for breathing, and reduced breath sounds. Claimants' Brief at 8. However, they do not explain why the administrative law judge was not permitted to give Dr. Chavda's opinion little weight, "as he did not address the miner's job duties or the physical requirements of his job." Decision and Order on Modification at 18; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-153. Further,

[10] There is no evidentiary basis for claimants' accusation that Dr. Repsher's opinion is "a falsified report" because he opined that the miner had a heart condition but the miner had not been treated for a heart condition during his lifetime. Claimants' Brief at 5; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991) (en banc).

claimants do not contest the administrative law judge's determination to credit Drs. Repsher and Selby because they possess qualifications superior to those of Dr. Simpao, and that he therefore would rely on their opinions. Decision and Order on Modification at 18; *see generally Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995).

We consider claimants' arguments on appeal to be a request that we reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv).

As the miner did not suffer from a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimants are not entitled to invocation of the Section 411(c)(4) presumption.[11]

[11] Pursuant to 20 C.F.R. §725.310, the administrative law judge did not address whether there was a mistake in a determination of fact in the prior denial. However, we consider any error to be harmless, as the administrative law judge weighed all of the record evidence and determined that it failed to establish total disability, a requisite element of entitlement. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984). Therefore, even if claimants had shown a mistake in a determination with regard to the prior denial, benefits are precluded in this case because the miner was not totally disabled.

Accordingly, the Decision and Order – Denial of Benefits on Modification in the Miner's Estate Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge