BRB No. 03-0765 BLA

CLARENCE TURNER Claimant-Petitioner v. MANALAPAN MINING COMPANY, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/29/2004 DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

W. Stacy Huff (Huff Law Offices), Harlan, Kentucky, for employer.

Sarah M. Hurley (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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:

Claimant appeals the Decision and Order (02-BLA-5394) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits 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 a claim filed on February 5, 2001. Director's Exhibit 2. In a Proposed Decision and Order dated November 13, 2001, the district director denied the claim.[2] Director's Exhibit 24. Claimant subsequently filed a request for modification of the district director's denial of benefits. Director's Exhibit 26. In a Proposed Decision and Order dated May 24, 2002, the district director found that the evidence was insufficient to establish that claimant suffered from pneumoconiosis caused at least in part by his coal dust exposure. Director's Exhibit 29. The district director also found that the evidence was insufficient to establish the existence of a totally disabling respiratory impairment. *Id.* The district director, therefore, denied claimant's request for modification. *Id.* At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 30, 34. Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) held a hearing on January 22, 2003.

In his Decision and Order dated July 31, 2003, the administrative law judge addressed claimant's request for modification of the district director's November 13, 2001 denial of benefits. Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, the administrative law judge denied claimant's request for modification. On appeal, claimant argues that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant further contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, contending that the administrative law judge properly considered Dr. Dahhan's report.

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[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] The district director found that claimant was not entitled to benefits because claimant failed to show that he was totally disabled due to pneumoconiosis. Director's Exhibit 24.

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. 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).

We initially note that the administrative law judge erred in considering whether the evidence was sufficient to establish modification of the district director's denial of claimant's claim. In interpreting 20 C.F.R. §725.310 (2000),[3] the Board has held that an administrative law judge is not required to make a preliminary determination regarding whether a claimant has established a basis for modification of the district director's denial of benefits before reaching the merits of entitlement. Rather, the Board has recognized that such a determination is subsumed into the administrative law judge's decision on the merits. The Board has held that an administrative law judge is not constrained by any rigid procedural process in adjudicating claims in which modification of the district director's decision is sought. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*¸ 17 BLR 1-9 (1992). The administrative law judge, therefore, was authorized to address the merits of claimant's claim without first addressing whether the evidence was sufficient to establish modification of the district director's denial of the claim.

However, because the administrative law judge, in his consideration of whether there was a mistake in a determination of fact, considered all of the evidence of record, he effectively addressed the merits of claimant's claim. In doing so, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge denied benefits.

Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R.

[3] Because claimant filed his claim after January 19, 2001, revised Section 725.310 is applicable. We note, however, that the Board's holdings regarding the effect of a claimant's request for modification of a district director's denial of benefits set out in *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992) and *Kott v. Director, OWCP*¸ 17 BLR 1-9 (1992) are not affected by the revisions to Section 725.310.

§718.204(b)(2)(iv).[4] In finding the medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge credited Dr. Dahhan's opinion that claimant did not suffer from a totally disabling respiratory disability[5] over the contrary opinions of Drs. Baker[6] and Hussain.[7] Decision and Order at 15-16. Claimant contends that the administrative law judge erred in finding the opinions of Drs. Baker and Hussain insufficient to establish total disability. We disagree. Utilizing the reference provided by Dr. Baker in his report, the administrative law judge found that the "Class I" impairment diagnosed by Dr. Baker corresponded to a

[4] Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly affirm the administrative law judge's finding that the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Id.*

[5] Dr. Dahhan opined that, from a respiratory standpoint, claimant retained the physiological capacity to continue his previous coal mining work. Director's Exhibit 11.

[6] Dr. Baker opined that:

> Patient has a Class I impairment based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which is based on vital capacity and FEV1 both being greater than 80% of predicted.
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> ***
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> Patient has a second impairment based on the presence of [p]neumoconiosis which is based on Section 5.8, Page 106, Chapter Five, Guides to Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in [the] coal mining industry or other similar dusty occupations.

Director's Exhibit 10.

[7] Dr. Hussain opined that claimant suffered from a moderate pulmonary impairment. Director's Exhibit 9. Dr. Hussain further opined that claimant did not have the respiratory capacity to perform the work of a coal miner. *Id.*

0% impairment of the whole person. Decision and Order at 7, 16. The administrative law judge, therefore, permissibly found that Dr. Baker's diagnosis of a "Class I" impairment was insufficient to support a finding of total disability.

Dr. Baker also opined that because persons who develop pneumoconiosis should limit their further exposure to coal dust, it could be implied that claimant was 100% occupationally disabled for work in the coal mining industry. Director's Exhibit 10. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989), this second aspect of Dr. Baker's opinion is also insufficient to support a finding of total disability.

While Dr. Hussain opined that claimant was totally disabled from a pulmonary standpoint, Director's Exhibit 9, Dr. Dahhan opined that claimant retained the respiratory capacity to perform his usual coal mine employment. Director's Exhibit 11. The administrative law judge accorded less weight to Dr. Hussain's opinion because the doctor failed to explain his basis for finding that claimant's non-qualifying May 9, 2001 pulmonary function study revealed a moderate airways obstruction. Decision and Order at 16. The administrative law judge, therefore, found that Dr. Hussain's opinion was not sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 16. The administrative law judge also properly credited Dr. Dahhan's opinion that the miner was not totally disabled from a respiratory standpoint over Dr. Hussain's contrary opinion based upon Dr. Dahhan's superior qualifications.[8] *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 16. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[9]

[8] Dr. Dahhan is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 11. Dr. Hussain's qualifications are not found in the record.

[9] Although the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii) and (iv), he found that the arterial blood gas study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). In light of this latter finding, the administrative law judge weighed all the relevant evidence together, both like and unlike, in considering whether claimant had established total disability pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). The administrative law judge found that the non-qualifying pulmonary function study evidence and the medical opinion evidence were not outweighed by the qualifying arterial blood gas study evidence of record. Decision and

In light of our affirmance of the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Consequently, we need not address claimant's contentions regarding the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

Order at 17. The administrative law judge, therefore, found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Inasmuch as no party challenges this finding, it is affirmed. *Skrack, supra*.