BRB No. 07-0775 BLA

W.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/30/2008
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 Denying Benefits (2006-BLA-00046) of Administrative Law Judge Adele Higgins Odegard 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 fifth petition

[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.

for modification filed on October 20, 2005.[2] The administrative law judge found that since the record evidence was insufficient to establish that claimant had a totally disabling respiratory or pulmonary impairment, claimant failed to establish a basis for modification of the previous denial of his duplicate claim pursuant to 20 C.F.R. §725.310 (2000).[3] Accordingly, the administrative law judge denied benefits.

Claimant appeals, asserting that the administrative law judge erred in failing to properly consider whether there was a mistake in a determination fact with respect to the denial of his prior claim. Claimant further argues that the administrative law judge erred in failing to find that there has been a change in conditions. Claimant specifically asserts that the administrative law judge erred in rejecting the opinions of Drs. Kraynak, Kruk, Simelaro, and Prince that claimant is totally disabled. Claimant maintains that the

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[2] Claimant filed an initial claim on December 2, 1988, which was denied by Administrative Law Judge Paul H. Teitler, on January 25, 1990 because the evidence was found insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 17. Claimant filed a duplicate claim on April 13, 1992, which was denied by Administrative Law Judge Ainsworth H. Brown on the ground that claimant failed to establish the existence of pneumoconiosis. Director's Exhibits 1, 28. Claimant filed a petition for modification on March 1, 1995. Director's Exhibit 29. In a Decision and Order dated April 22, 1996, Judge Brown found that while claimant established the existence of pneumoconiosis, the evidence was insufficient to establish total disability. Director's Exhibit 63. Claimant appealed, and the denial was affirmed by the Board. [*W.M.*] *v. Director, OWCP,* BRB No. 96-0975 BLA (Mar. 28, 1997) (unpub.); Director's Exhibit 64. Claimant filed a second request for modification on September 23, 1997, which was denied by Judge Brown on November 3, 1998, and affirmed by the Board. Director's Exhibits 65, 83, 84; *see* [*W.M.*] *v. Director, OWCP,* BRB No. 99-0259 BLA (July 25, 2000) (unpub.). On December 21, 2000, claimant filed a third modification request, which was also denied by Administrative Law Judge Robert D. Kaplan on July 15, 2002. Director's Exhibits 85, 113. Although claimant appealed to the Board, his appeal was later dismissed as abandoned. [*W.M.*] *v. Director, OWCP,* BRB No. 02-0794 BLA (May 23, 2003) (unpub.) (Order); Director's Exhibit 117. Claimant filed a fourth modification request on September 20, 2003, which was denied by Administrative Law Judge Janice K. Bullard on October 28, 2004. Director's Exhibits, 118, 145. Judge Bullard found that claimant was not totally disabled. *Id*. Claimant appealed to the Board, but his appeal was later dismissed as abandoned. Director's Exhibit 150. Claimant took no further action until he filed the current modification request on October 20, 2005. Director's Exhibit 151.

[3] The revised regulation at 20 C.F.R. §725.310 does not apply to claims, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

administrative law judge identified inconsequential differences in the medical opinions as a basis for discrediting the physicians' opinions, and that she failed to adequately explain the basis for her credibility findings as required by the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

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).

Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the duplicate claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Third Circuit has held that in determining whether a material change in conditions has been established, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). In considering a request for modification of the denial of a duplicate claim, an administrative law judge must determine whether all of the evidence developed in the duplicate claim, including any new evidence submitted with the request for modification, establishes a change in conditions or whether there was a mistake in a determination of fact with respect to the prior denial of benefits. *See* 20 C.F.R. §725.309(d) (2000); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). If so, the administrative law judge must then consider the merits of the duplicate claim. *Hess*, 21 BLR at 1-143. In this case, claimant's initial claim was denied because he failed to establish any of the requisite elements of entitlement. Based on the Director's concession that claimant now suffers from pneumoconiosis, claimant has established, as a matter of law, a material change in conditions pursuant to Section 725.309 (2000).[5] Director's Brief at 2-3.

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[4] The case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 5. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 2.

[5] In light of the concession by the Director, Office of Workers' Compensation Programs, that claimant has pneumoconiosis, the administrative law judge erroneously

Pursuant to Section 725.310 (2000), the administrative law judge determined that claimant failed to establish a mistake in a determination of fact with the prior denial of his claim. We reject claimant's contention that administrative law judge failed to set forth the underlying basis for her finding as required by the APA.[6] The administrative law judge began her Section 725.310 (2000) analysis by stating:

> I have reviewed the record in this matter. I find no instance of mistake in determination of a fact [sic], in the record compiled to date. I further find that the evidence submitted in [c]laimant's current request for modification does not establish any mistake in determination of a fact [sic].

Decision and Order at 5. Because the administrative law judge indicated in her Decision and Order that she had reviewed all of the record evidence submitted prior to the current modification request, and she specifically concluded that the prior record was insufficient to establish that claimant was totally disabled, we affirm her finding that claimant failed to establish a mistake in a determination of fact pursuant to Section 725.310 (2000).[7] *See generally Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order at 5.

Claimant also argues that the administrative law judge erred by not finding that he established a change in conditions pursuant to Section 725.310 (2000). The administrative law judge reviewed the evidence from the present modification request

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stated that there had been "no change in the conditions of entitlement" pursuant to 20 C.F.R. §725.309 (2000). Decision and Order at 17. However, we consider this error to be harmless, insofar as the administrative law judge's finding that claimant is not totally disabled was based on her review of the record as a whole. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984)

[6] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439; 21 BLR 2-269, 2-272 (4th Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[7] As noted by the Director, the administrative law judge essentially incorporates the previous findings of the prior administrative law judges in this case. Director's Brief at 3. Furthermore, the administrative law judge also specifically noted that, at the hearing, although claimant was invited to discuss in his closing brief any specific mistakes in fact in the adjudication of his claim that warranted reconsideration, claimant elected not to file a post-hearing brief. Decision and Order at 5 n.6.

and found it insufficient to establish that claimant is totally disabled. The administrative law judge found that all of the pulmonary function study and arterial blood gas study evidence was non-qualifying for total disability and that the record contains no evidence that claimant suffers from cor pulmonale. *See* 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 7-9. The administrative law judge also rejected the opinions of Drs. Kraynak, Kruk, Simelaro and Prince, that claimant is totally disabled, as well as the contrary opinion of Dr. Dittman, that claimant is not totally disabled. Decision and Order at 9-16. Thus, the administrative law judge found that there was no credible evidence to satisfy claimant's burden of proof to establish that he is totally disabled. *See* 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 16.

Claimant asserts that the administrative law judge failed to adequately explain the basis for her decision to reject the opinions of Drs. Kraynak, Kruk, Simelaro and Prince, that claimant has a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv).[8] Claimant contends that the administrative law judge failed to consider that while none of the pulmonary function studies produced qualifying values for total disability, the studies of March 22, 2006 and April 19, 2006 were greatly reduced from normal, and the study of January 5, 2007 (demonstrating much higher values on the FEV1, FVC and MVV) was specifically invalidated by Kraynak. Claimant's Brief at 6.

Contrary to claimant's contention, the administrative law judge properly considered Dr. Kraynak's opinion that the January 5, 2007 pulmonary function study was "clearly invalid" because the flow loops, showing frequent changes in their appearance, indicated "coughing or some technical malfunction," and "the values are extraordinarily and impossibly high." Claimant's Exhibit 15. The administrative law judge specifically assigned less weight to Dr. Kraynak's opinion that the January 5, 2007 study was invalid because Dr. Kraynak is not Board-certified in any discipline, and the administrative law judge questioned whether he had "the expertise necessary to give a complete analysis of the [January 5, 2007] test." Decision and Order at 15, n.21. Moreover, as noted by the administrative law judge, "even assuming that this test is invalid, that fact does not establish that the [c]laimant has a pulmonary disability" as the remaining pulmonary function study evidence is also non-qualifying for total disability. *Id*.

We also reject claimant's assertion that the administrative law judge erred in his treatment of the opinions of Drs. Simelaro and Prince, regarding whether claimant is totally disabled. As noted by the administrative law judge, claimant submitted a

[8] We affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

validation report of the March 22, 2006 pulmonary function study by Dr. Simelaro and validation reports of the April 19, 2006 pulmonary function study by Drs. Simelaro and Prince. Claimant's Exhibits 5, 9, 12, 13. Dr. Simelaro remarked that the non-qualifying March 22, 2006 test demonstrated a moderate obstruction and "support[s] the presence of disabling respiratory impairment severe enough to prevent claimant from returning to his last coal mine employment as an underground miner where he was required to set timber . . . and also where he had to lift and carry weight up to 150 pounds." Claimant's Exhibit 5. Dr. Prince similarly opined, based on the April 19, 2006 non-qualifying pulmonary function study, that claimant had a moderate restrictive impairment and that his lung function was "insufficient to perform activities a coal miner, including lifting and carrying weights up to 150 pounds." Claimant's Exhibit 12.

The administrative law judge gave little weight to the opinions of Drs. Simelaro and Prince, noting that they based their disability opinions solely on the results of claimant's pulmonary function studies and did not appear to have examined claimant or "reviewed other records relating to his condition." Decision and Order at 15. The administrative law judge also found that neither Dr. Simelaro or Dr. Prince had an accurate understanding of claimant's usual coal mine work, which undermined their conclusion that claimant was totally disabled. Decision and Order at 15. The administrative law judge explained:

> The record does not reflect how Dr. Simelaro or Dr. Prince knew of the exertional requirements the Claimant's coal mine employment. At the December 2006 hearing at which I presided, Claimant's testimony did not include a discussion of the exertional nature of his coal mine employment. In fact, the most complete discussion of the physical requirements of the Claimant's usual coal mine employment took place at the October 1993 hearing at which [Judge] Brown presided (DX) 27. In that hearing, the Claimant testified that he lifted items weighing up to 175 pounds; he also stated, however, that after an injury in 1961 he was unable to lift so much weight (DX 27 at 18, 32). The Claimant's coal mine employment ended in 1965, and the exertional nature of the Claimant's work in the last year of his employment is not apparent from the record (DX 2). Even presuming that Dr. Simelaro and Dr. Prince had an adequate basis of knowledge upon which to make conclusions about the Claimant's pulmonary disability, I find that it was not clear whether their opinions were informed by accurate information about the nature of the Claimant's [last] coal mine employment.

Decision and Order Denying Benefits at 16 n. 22. Because claimant has the burden to establish the exertional requirements of his coal mine employment, *see Creggar v. U.S. Steel Corp.*, 6 BLR 1-1219, 1-1221 (1984), we conclude that the administrative law judge

acted within her discretion as the trier-of-fact in concluding that the opinions of Drs. Simelaro and Prince were insufficiently reasoned on the issue of whether claimant is totally disabled. Therefore, we affirm her decision to assign these opinions less weight at Section 718.204(b)(2)(iv).

Notwithstanding, we agree with claimant that the administrative law judge failed to adequately explain the basis for her credibility determinations with respect to Drs. Kraynak and Kruk. The administrative law judge assigned less weight to Dr. Kraynak's diagnosis of total disability, in part, because she found that Dr. Kraynak's observations of the claimant's physical condition were not supported by the other physicians' reports. The administrative law judge stated:

> For example, Dr. Kraynak observed that the [c]laimant wheezes, whereas the other two physicians observed that the [c]laimant's lungs were clear. Dr. Kraynak stated that the [c]laimant's heart was normal in rhythm and rate, but Dr. Kruk and Dr. Dittman noted a heart murmer.

Decision and Order at 14. The administrative law judge, however, does not specifically explain how any of the physical discrepancies she identified served to undermine Dr. Kraynak's opinion on whether claimant's respiratory impairment was totally disabling. Dr. Kraynak stated that claimant was totally disabled because the results of claimant's pulmonary function studies demonstrate a moderate respiratory impairment that would preclude claimant from performing his usual coal mine work.[9] Because the administrative law judge has not adequately explained the basis for her credibility finding, her decision fails to comport with the APA.[10] *Wojtowicz*, 12 BLR at 1-165;

[9] As noted by claimant, the administrative law judge's analysis fails to consider that Dr. Kraynak has been treating claimant for over twelve years and therefore, had the opportunity to observe claimant's physical symptoms over time as opposed to Drs. Kruk and Dittman, who examined claimant on one occasion. Claimant's Brief at 11.

[10] The Director, Office of Workers' Compensation Program, notes that in rejecting Dr. Dittman's opinion that claimant is not totally disabled, that administrative law judge erred in finding that Dr. Dittman's notation that claimant had angina and uncontrolled blood pressure was "troubling, because evidence of these medical problems appears nowhere else in the record. Director's Brief at 5 n6. We agree. As the Director correctly points out, Dr. Dittman's finding of angina and hypertension was partly based on the history provided by claimant, and his blood pressure reading, on the specific date of examination is not necessarily in conflict with prior normal blood pressure readings on other occasions by other physicians. Because we are remanding this case for further consideration, the administrative law judge should address whether Dr. Dittman's opinion is reasoned and documented on the issue of total disability, and explain the basis for his

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, 1-21 (1987).

Claimant contends that the administrative law judge mischaracterized the record and failed to adequately explain her findings when she accorded Dr. Kruk's opinion "no weight" because his conclusions were "equivocal." Claimant's Brief at 12. We agree. Dr. Kruk performed an exam on April 19, 2006. Claimant's Exhibit 3. Dr. Kruk noted that the spirometry revealed changes consistent with obstructive and restrictive defects and stated:

> I would consider that [claimant] is totally and permanently disabled secondary to coal worker's [sic] pneumoconiosis. This gentlemen becomes extremely dyspneic with minimal exertion. He has had to alter his lifestyle significantly because of his breathing difficulties …. He has no history of any heart problems. He was never a cigarette smoker. His prognosis for any improvement in the future is dismal.

Claimant's Exhibit 3. The administrative law judge concluded that Dr. Kruk:

> is equivocal in his determination regarding claimant's condition. Dr. Kruk notes that the claimant's pulmonary function test results show both obstructive and restrictive impairments; then Dr. Kruk states only that he "would consider" that the Claimant is disabled and does not express any degree of certainty about this determination.

Decision and Order at 15. We conclude that the administrative law judge erred in her interpretation of Dr. Kruk's opinion as "equivocal." The administrative law judge has not considered Dr. Kruk's first statement of his April 19, 2006 report where he notes that, "[claimant] had originally been evaluated by myself back in July at 2001 [sic] and at that that time I felt he was totally and permanently disabled secondary to coal workers' pneumoconiosis. Claimant's Exhibit 3. In addition, Dr. Kruk specifically referenced claimant's pulmonary function test that showed both obstructive and restrictive defects. *Id*. Because the administrative law judge has not considered the full context of Dr. Kruk's opinion and since she has provided no further explanation as to why Dr. Kruk's opinion is entitled to "no weight," we vacate her finding that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(iv). *Wojtowicz*, 12 BLR 1-at 162.

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credibility determinations. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*);

On remand, the administrative law judge must reconsider whether claimant established total disability based on the medical opinion evidence pursuant to Section 718.204(b)(2)(iv). In so doing, the administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the APA. *Wojtowicz*, 12 BLR 1-at 162. If the administrative law judge finds that the newly submitted medical opinions are sufficient to establish total disability under Section 718.204(b)(2)(iv), he must weigh this evidence against the contrary probative evidence of record to determine whether claimant has established total disability pursuant to Section 718.204(b)(2) and a change in condition pursuant to Section 725.310 (2000). *See Fields*,10 BLR at 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*).[11]

[11] Claimant requests that the case be reassigned to a new administrative law judge. However, we refuse this request as claimant points to no evidence of bias or recalcitrance by this administrative law judge in her consideration of this case. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part, and vacated in part, and the case is remanded for further consideration with this opinion.

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