BRB No. 08-0748 BLA

C.G.L.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTOVER MINING COMPANY	)	DATE ISSUED: 06/30/2009
	)	
Employer-Respondent	)	
	)	
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 Modification of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Robert M. Estep (Estep & Estep), Tazewell, Tennessee, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Modification (07-BLA-0013) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) on a subsequent 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]

[1] Claimant filed his first claim on July 29, 1981. Director's Exhibit 16. It was finally denied by a claims examiner on February 18, 1983 because the evidence did not show that claimant had pneumoconiosis, that the pneumoconiosis was caused by coal mine work, or that claimant was totally disabled by the disease. *Id*. Claimant filed his

The administrative law judge accepted the parties' stipulation that claimant worked at least eight years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found that the new evidence failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge also found, on reviewing the decision of Administrative Law Judge Joseph E. Kane, along with the new evidence, that a mistake in a determination of fact was not made pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's request for modification and denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law

---

second claim on November 12, 1987. Director's Exhibit 2. After an administrative decision on April 29, 1988, *see* Director's Exhibit 11, and several decisions by Administrative Law Judge Thomas Schneider, Director's Exhibits 44, 79, and the Board, *see* [*C.G.L.*] *v. Eastover Mining Co.*, BRB No. 92-1271 BLA (Nov. 17, 1993) (unpub.); [*C.G.L.*] *v. Eastover Mining Co.*, BRB No. 94-2479 BLA (June 5, 1995) (unpub.); [*C.G.L.*] *v. Eastover Mining Co.*, BRB No. 94-2479 BLA (Sept. 30, 1997) (unpub. Order on Motion for Recon.), the case was reassigned to Administrative Law Judge Clement J. Kichuk, who issued a Decision and Order on Remand – Denying Benefits on July 22, 1998. Director's Exhibit 75. Judge Kichuk found that a material change in conditions was established, but he also found that total disability and total disability due to pneumoconiosis were not established. *Id*. The Board affirmed Judge Kichuk's finding that total disability was not established. [*C.G.L.*] *v. Eastover Mining Co.*, BRB No. 98-1509 BLA (Mar. 31, 2000) (unpub.). Further, the Board denied claimant's motion for reconsideration. [*C.G.L.*] *v. Eastover Mining Co.*, BRB No. 98-1509 BLA (June 22, 2000) (unpub. Order on Motion for Recon.). Following the Board's review, on September 17, 2001, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, denied claimant's petition for review of the Board's Decision and Order. Director's Exhibit 80. Claimant filed his third claim on March 25, 2002, which the Department of Labor construed as a request for modification. Director's Exhibits 81, 84. On March 24, 2005, Administrative Law Judge Joseph E. Kane issued a Decision and Order – Denying Benefits because total disability and total disability due to pneumoconiosis were not established. Director's Exhibit 107. The Board affirmed Judge Kane's denial of benefits. [*C.G.L.*] *v. Eastover Mining Co.*, BRB Nos. 05-0609 BLA/A (Feb. 16, 2006) (unpub.). Claimant filed a new request for modification on August 10, 2006. Director's Exhibits 119, 120, 121.

judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 entitlement. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Claimant may establish a basis for modification in his claim by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310. In considering whether a change in conditions has been established pursuant to Section 725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered 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 which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In addition, the administrative law judge has the authority to consider all the evidence for any mistake of fact, including the ultimate fact of entitlement. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). In the prior decision denying benefits, Judge Kane found that the evidence did not establish total disability at 20 C.F.R. §718.204(b) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Consequently, the issue before the administrative law judge was whether the new medical evidence established a change in conditions by establishing the existence of any element previously adjudicated against claimant or whether Judge Kane

[2] The administrative law judge's findings that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 5, 82. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

made a mistake in a determination of fact in finding that claimant failed to establish entitlement to benefits.

Claimant contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the reports of Drs. Baker, Dahhan, Vuskovich, and Rosenberg.[4] In a report dated November 30, 2006, Dr. Baker opined that the FEV1 and FVC values of claimant's June 22, 2006 pulmonary function study showed a borderline mild to moderate obstructive defect. Director's Exhibit 128. Dr. Baker further opined that, based on his observation of an x-ray showing coal workers' pneumoconiosis, "[claimant's] pulmonary function studies meet the disability standards for that condition at the time these tests were taken." *Id*. Dr. Dahhan, in a report dated August 29, 2007, opined that claimant has a pulmonary impairment as a result of heart surgery and complications from it. Employer's Exhibit 1. In reports dated October 17, 2007 and January 3, 2008, Dr. Vuskovich opined that claimant does not have a disabling pulmonary impairment. Employer's Exhibits 5, 9. Dr. Rosenberg, in a report dated October 22, 2007, opined that claimant does not have a significant respiratory condition, and that from a pulmonary perspective he can perform his previous coal mine employment. Employer's Exhibit 6. In a subsequent report dated December 14, 2007, Dr. Rosenberg opined that claimant does not have a disabling respiratory disorder and his prior conclusion concerning claimant's pulmonary condition remained intact. Employer's Exhibit 8.

The administrative law judge found that the opinions of Drs. Vuskovich and Rosenberg were entitled to probative value because they were well-documented and reasoned.[5] Decision and Order at 14. In addition, the administrative law judge found that Dr. Baker's opinion was entitled to diminished probative value, as it was undermined by his reliance on an invalid pulmonary function study. *Id*. Further, the administrative law judge did not give any probative value to Dr. Dahhan's opinion because he found that "while concluding [claimant's] breathing deficiency was cardiac, rather than pulmonary, based, Dr. Dahhan did not specifically addressed (sic) whether [claimant's] breathing

[4] At Section 718.204(b)(2)(iv), the administrative law judge also considered claimant's treatment records and Dr. Vaezy's report. The administrative law judge stated that "[claimant's] treatment records and Dr. Vaezy did not address whether he was totally disabled." Decision and Order at 13. Claimant does not challenge the administrative law judge's findings with regard to the treatment records and Dr. Vaezy's opinion.

[5] Claimant does not challenge the administrative law judge's findings with respect to the opinions of Drs. Vuskovich and Rosenberg.

insufficiency was totally disabling."[6] *Id*. at 13. Hence, based on the opinions of Drs. Vuskovich and Rosenberg, the administrative law judge concluded that the preponderance of the probative medical opinion evidence established that claimant does not have a totally disabling pulmonary impairment. *Id*. at 14.

Claimant asserts that because coal workers' pneumoconiosis is a progressive disease, the administrative law judge should have accorded dispositive weight to Dr. Baker's disability opinion. Specifically, claimant argues that "in the opinion of November 30, 2006 [Dr. Baker] has finally opined that the disease has now progressed to the point that it renders [claimant] totally disabled due to his coal workers' pneumoconiosis." Claimant's Brief at 17. Dr. Baker opined that the results of claimant's pulmonary function study values met the disability standards for someone with coal workers' pneumoconiosis, as seen on x-ray. Director's Exhibit 128. In considering Dr. Baker's opinion at Section 718.204(b)(2)(iv), the administrative law judge stated:

> [D]ue to a significant documentation deficiency, his conclusion that [claimant] is totally disabled loses probative value. In rendering his disability determination, Dr. Baker specifically relied on the June 2006 pulmonary function test. As previously discussed [at Section 718.204(b)(2)(i)[7]], I have determined the June 2006 pulmonary function tests (sic) is invalid. Consequently, Dr. Baker's reliance on invalid documentation undermines the probative value of his assessment.

---

[6] In addition, claimant does not challenge the administrative law judge's findings with regard to Dr. Dahhan's opinion.

[7] At Section 718.204(b)(2)(i), the administrative law judge considered the June 22, 2006 pulmonary function study and Dr. Vuskovich's opinion regarding its validity. Decision and Order at 8. Dr. Baker, who administered the June 22, 2006 pulmonary function study, noted that "[e]xhalation [was] not complete" and that there was "[n]o flow volume loop." Director's Exhibit 122. In a report dated October 17, 2007, Dr. Vuskovich reviewed the June 22, 2006 pulmonary function study and noted that "[t]ime-volume tracings and flow-volume loops were not available." Employer's Exhibit 5. Dr. Vuskovich therefore concluded that "[t]he…spirometry results [of this study] could not be validated." *Id*. The administrative law judge found that the June 22, 2006 pulmonary function study was invalid because of the following two reasons: 1) the notes accompanying the study indicated that claimant did not complete his exhalation and a flow volume loop was not obtained; and 2) the record does not contain the actual tracings for the study, even though Dr. Baker indicated that the FEV1 tracings were within 5%. Decision and Order at 8. Claimant does not challenge the administrative law judge finding that the June 22, 2006 pulmonary function study was invalid.

Decision and Order at 14.

An administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). In this case, the administrative law judge properly found that Dr. Baker's opinion was entitled to diminished probative value because Dr. Baker relied on an invalid pulmonary function study. *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984). Consequently, we reject claimant's assertion that the administrative law judge erred in failing to accord dispositive weight to Dr. Baker's opinion.

Claimant also asserts that the administrative law judge erred in failing to credit Dr. Baker's opinion based on his status as claimant's treating physician. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Rather, the Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id*. In this case, the administrative law judge acknowledged that Dr. Baker is claimant's treating physician. Decision and Order at 13-14. Nevertheless, as discussed *supra*, the administrative law judge properly found that Dr. Baker's opinion was entitled to diminished probative value because Dr. Baker relied on an invalid pulmonary function study. *Street*, 7 BLR at 1-67. Consequently, we reject claimant's assertion that the administrative law judge erred in failing to credit Dr. Baker's opinion based upon his status as claimant's treating physician. 20 C.F.R. §718.104(d)(5).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and, therefore, did not provide a basis for modifying the prior decision denying benefits.

Furthermore, because the administrative law judge properly found that the new evidence did not establish total disability at 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that the new evidence did not establish a change in conditions at 20 C.F.R. §725.310. *Kingery*, 19 BLR at 1-11; *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni*, 17 BLR at 1-84. Likewise, we affirm the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. The Sixth Circuit has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *Worrell*, 27 F.3d at 230, 18

BLR at 2-296. Here, in considering whether there was a mistake in a determination of fact, the administrative law judge stated:

> Upon my review of the same evidence Judge Kane considered, coupled with my assessment of the medical evidence developed since October 2003, I also conclude that the pulmonary function tests, arterial blood gas studies, and preponderance of the probative medical opinion [evidence] fail to prove [claimant] is totally disabled in terms of his pulmonary capacity to return to coal mining. Consequently, I conclude that no mistake of fact exists in Judge Kane's denial of [claimant's] first modification to his second claim for black lung disability benefits, as affirmed by [the Board].

Decision and Order at 15. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). As we detect no error in the administrative law judge's determination that claimant failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310, we affirm it.

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

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge