BRB No. 03-0583 BLA

RAY L. McKINNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/29/2004
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Ray L. McKinney, Richmond, Kentucky, *pro se*.

Rita Roppolo (Howard M. 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, without the assistance of legal counsel, appeals the Decision and Order - Denying Benefits (2002-BLA-0304) of Administrative Law Judge Rudolf L. Jansen 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] The administrative

[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.

law judge determined that this case involves a request for modification, pursuant to 20 C.F.R. §725.310 (2000), of the denial of claimant's duplicate claim filed on July 15, 1997.[2] Decision and Order at 3, 10. Initially, the administrative law judge credited

[2] Claimant filed his initial application for benefits with the Social Security Administration (SSA) on September 10, 1970, which was finally denied by SSA on March 22, 1979. Director's Exhibits 23-267, 23-213. At this time, the case was forwarded to the Department of Labor (DOL) for consideration. Director's Exhibit 23-213. In addition, claimant filed an initial application for benefits with DOL on March 3, 1976. Director's Exhibit 23-209. These claims were denied by the district director on March 28, 1980. Director's Exhibit 23-166.

Claimant filed a second application for benefits with DOL on June 20, 1984, which was denied by the district director on October 1, 1984. Director's Exhibits 23-161, 23-122. Following transfer of the case to the Office of Administrative Law Judges, and by a Decision and Order dated October 21, 1985, Administrative Law Judge Jeffrey Tureck denied benefits. Judge Tureck found that the 1984 application for benefits was a duplicate claim and that the evidence submitted since the prior denial was insufficient to establish a material change in conditions. Director's Exhibit 23-48. The Board affirmed the denial of benefits in a Decision and Order issued on November 28, 1988. *McKinney v. Triple A Coal Co.*, BRB No. 85-2684 BLA (Nov. 28, 1988)(unpub.); Director's Exhibit 23-34.

Claimant filed a third application for benefits on July 8, 1991, which was denied by the district director on December 12, 1991. Director's Exhibits 23-363, 23-329. Claimant requested modification of this denial on October 13, 1992, which was denied by the district director on October 18, 1993. Director's Exhibits 23-323, 23-324. Following transfer of this claim to the Office of Administrative Law Judges, the claim was denied in a Decision and Order dated August 14, 1995 by Administrative Law Judge Donald W. Mosser. Director's Exhibit 23-1. Judge Mosser credited claimant with four years of coal mine employment and adjudicated the claim under 20 C.F.R. Part 718. Addressing the merits of entitlement, Judge Mosser found that the district director previously found that claimant established the existence of pneumoconiosis arising out of claimant's coal mine employment. However, Judge Mosser found that the newly submitted evidence was insufficient to establish a total respiratory disability. Consequently, Judge Mosser found that the evidence was insufficient to establish a change in claimant's condition and he further found that there was no mistake in a determination of fact in the denial of claimant's 1991 claim. Director's Exhibit 23-1 at 8. In addition, Judge Mosser found that the evidence submitted since the denial of claimant's 1984 claim was insufficient to establish that claimant is totally disabled due to pneumoconiosis arising out of his coal mine employment and, therefore, the evidence is insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Director's Exhibit 23-1 at 11. Accordingly, Judge Mosser denied benefits.

claimant with four years of coal mine employment. Decision and Order at 4-5. In considering claimant's request for modification, the administrative law judge found the evidence submitted since the denial of claimant's current claim was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 10-12. Consequently, the administrative law judge found the newly submitted evidence insufficient to establish a change in conditions. The administrative law judge further found that a review of the entire record does not reveal a mistake of fact in the determination that claimant is not totally disabled from a respiratory standpoint. Decision and Order at 12. Accordingly, the administrative law judge denied benefits. In response to claimant's appeal, the Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In this case which involves a request for modification of a denied duplicate claim, the administrative law judge must consider whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to Section 725.309(d)

Claimant filed his current application for benefits on July 15, 1997, which was denied by the district director on December 30, 1997. Director's Exhibits 1, 16. Following transfer to the Office of Administrative Law Judges, Administrative Law Judge Daniel J. Roketenetz denied benefits in a Decision and Order dated August 25, 1999. Director's Exhibit 28. Judge Roketenetz credited claimant with four years of coal mine employment and adjudicated the claim under Part 718. Finding that the prior claim was denied based on Judge Mosser's finding that claimant did not establish total disability, Judge Roketenetz reviewed the newly submitted evidence and found that it was insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) (1999), and, thus, that claimant failed to establish a material change in conditions pursuant to Section 725.309(d) (1999). Director's Exhibit 28 at 6. Consequently, Judge Roketenetz denied benefits. Claimant filed a request for modification of Judge Roketenetz's denial of benefits on May 12, 2000 which is the subject of the current appeal. Director's Exhibit 31.

(2000). 20 C.F.R. §725.309(d) (2000); *Hess v. Director, OWCP*, 21 BLR 1-141 (1998); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *see also Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Initially, the administrative law judge credited claimant with four years of coal mine employment, based on the parties' stipulation to at least four years of coal mine employment and his weighing of the documentary evidence of record. Decision and Order at 3-4. Specifically, the administrative law judge found that the relevant evidence of record included Social Security Administration (SSA) earnings statements dated from 1951 through 1997, employment forms, pay stubs, affidavits from co-workers and claimant's testimony. Decision and Order at 4; Director's Exhibits 2, 3, 4, 8, 23. Finding that the SSA earnings statements show two years of coal mine employment as well as pay records establishing another two years, and that claimant's testimony was inconsistent and not able to be reconciled with the documentary evidence,[3] the administrative law judge credited claimant with four years of coal mine employment. Decision and Order at 4-5; Director's Exhibits 2, 4, 8, 23. Because the administrative law judge acted reasonably in relying on the documentary evidence of record in crediting claimant with four years of coal mine employment, we affirm this finding. *See Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In addressing the merits of entitlement, the administrative law judge found that the pulmonary function study evidence was insufficient to demonstrate total disability pursuant to Section 718.204(b)(2)(i). Decision and Order at 11. Specifically, the administrative law judge found that the record contains one pulmonary function study submitted since the prior denial; this study dated April 28, 1998 produced qualifying pre-bronchodilator results but non-qualifying post-bronchodilator results; and the administrative law judge accorded greater weight to the post-bronchodilator results as being more indicative of claimant's true respiratory capacity.[4] Decision and Order at 10-11; Director's Exhibit 40. The Director states that the administrative law judge erred in finding that this April 28, 1998 ventilatory study produced non-qualifying results following administration of the bronchodilator medication, but contends that the study yielded qualifying results both before and after the administration of bronchodilators. Director's July 21, 2003 Letter at 2. However, the Director further argues that this error

[3] The administrative law judge noted that claimant testified at the hearing that his memory is not clear regarding his past employment. Decision and Order at 4; Hearing Transcript at 16-17, 31.

[4] 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).

is harmless because this pulmonary function study does not conform to the regulations at 20 C.F.R. §718.103(b)(5) and, therefore, cannot as a matter of law be credited. *Id*. Contrary to the Director's contention, as this evidence was developed prior to January 19, 2001, the effective date of the revised Black Lung regulations, the quality standards set forth at Section 718.103(b) are not mandatory but rather the studies are presumed to be conforming absent evidence to the contrary and, therefore, the administrative law judge must reconsider this evidence. Compare 20 C.F.R. §718.103(a), (c) (2000) with 20 C.F.R. §718.103(b)(5), (c); *cf. Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990). Consequently, as the administrative law judge's consideration of the pulmonary function study evidence is not complete, we vacate his Section 718.204(b)(2)(i) finding and remand the case for the administrative law judge to consider all of the relevant evidence. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). Specifically, on remand, the administrative law judge must reconsider the April 28, 1998 pulmonary function study, addressing the Director's contention that the study is not conforming and thus entitled to no weight as well as his argument that this study yielded qualifying values after the administration of the bronchodilator medication.

Furthermore, we affirm the administrative law judge's finding that the blood gas study evidence was insufficient to demonstrate total disability pursuant to Section 718.204(b)(2)(ii). The administrative law judge, in discussing the blood gas study evidence, states that the record contains two new blood gas studies submitted since the prior denial, of which one produced qualifying values and the other produced non-qualifying values. Decision and Order at 11; Director's Exhibit 40. Consequently, the administrative law judge found the blood gas study evidence to be in equipoise and, thus, insufficient to demonstrate total disability. *Id*. As set forth in his recitation of the evidence, the administrative law judge found that the record additionally contains a blood gas study dated July 31, 1997, submitted in conjunction with the 1997 duplicate claim, which also yielded non-qualifying results. Decision and Order at 7; *see* Director's Exhibits 10, 12. Since substantial evidence supports the administrative law judge's finding that the newly submitted evidence does not support a finding that claimant is totally disabled under Section 718.204(b)(2)(ii), we affirm this finding. S*ee generally Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

In addition, the administrative law judge found that the medical opinion evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv).[5] The administrative law judge, in discussing the

[5] We affirm the administrative law judge's finding that the record contains no evidence of cor pulmonale with right-sided congestive heart failure and, therefore, total disability was not demonstrated pursuant to Section 718.204(b)(2)(iii). Decision and Order at 11; 20 C.F.R. 718.204(b)(2)(iii).

evidence relevant to Section 718.204(b)(2)(iv), weighed only the two new reports by Dr. Raithatha dated July 24, 1999 and August 2, 2000, finding that they are entitled to little weight as the physician did not explain the bases for his diagnoses. Decision and Order at 11. However, as set forth in his recitation of the evidence, the record also contains the medical report of Dr. Westerfield dated July 31, 1997, in which the physician diagnosed a mild impairment and stated that claimant retains the pulmonary capacity to perform his usual coal mine employment. Decision and Order at 8; Director's Exhibit 11.

Within his discretion as trier-of-fact, the administrative law judge reasonably found that the opinions of Dr. Raithatha were insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), as the physician failed to adequately explain the underlying documentation upon which his diagnoses were based. Decision and Order at 11; Director's Exhibits 29, 35; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 1483 (2003); *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc)*. Furthermore, Dr. Raithatha's statement that further exposure to coal dust would cause claimant's condition to worsen is insufficient to establish a totally disabling respiratory or pulmonary impairment. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd*, 9 BLR 1-104 (1986)(*en banc*).

Lastly, we decline to remand the case to the administrative law judge for consideration of Dr. Westerfield's opinion as the physician stated that claimant retains the respiratory capacity to perform the work of a coal miner and, therefore, this opinion would be insufficient to carry claimant's burden at Section 718.204(b)(2)(iv). 20 C.F.R. §718.204(b)(2)(iv); *see Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Consequently, as the administrative law judge rationally found the only new opinions supportive of claimant's burden to be insufficient to establish a totally disabling respiratory impairment, we affirm his finding that claimant has not demonstrated total disability based on the medical opinion evidence.

On remand, the administrative law judge must consider all of the newly submitted pulmonary function study evidence in determining whether claimant has established a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(i) and thus has established either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310 (2000); *Hess*, 21 BLR 1-141; *see also Ross*, 42 F.3d 993, 19 BLR 2-10; *Worrell*, 27 F.3d 227, 18 BLR 2-290.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent 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