BRB No. 07-0551 BLA

B.N.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RONALD BUSH COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 03/26/2008
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Bethlehem, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (06-BLA-0030) of Administrative Law Judge Paul H. Teitler awarding 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). This case involves claimant's request for modification of the denial of a duplicate claim that was filed on August 6, 1999.

Claimant initially filed a claim for benefits on January 4, 1983. Director's Exhibit 60. The district director denied the claim on June 6, 1983 because claimant did not establish that he was totally disabled. *Id.* There is no indication that claimant took any further action in regard to his 1983 claim.

Claimant filed a duplicate claim on August 6, 1999. Director's Exhibit 1. In a Decision and Order dated January 10, 2002, Administrative Law Judge Ainsworth H. Brown found that the evidence did not establish that claimant was totally disabled, and thus did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 70. Accordingly, Judge Brown denied benefits. *Id.*

Claimant filed a request for modification on August 28, 2002. Director's Exhibit 82. In a Decision and Order dated October 9, 2003, Administrative Law Judge Robert D. Kaplan found that the evidence did not establish that claimant was totally disabled, and therefore did not establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 123. Judge Kaplan also found that there was no mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). *Id.* Accordingly, Judge Kaplan denied benefits. Pursuant to claimant's appeal, the Board affirmed Judge Kaplan's denial of claimant's request for modification. *[B.N.] v. Ronald Bush Coal Co.*, BRB No. 04-0155 BLA (Sept. 29, 2004)(unpub.). The Board denied claimant's motion for reconsideration. *[B.N.] v. Ronald Bush Coal Co.*, BRB No. 04-0155 BLA (May 5, 2005)(unpub.).

On May 16, 2005, claimant filed a second request for modification and submitted additional evidence. Director's Exhibit 139. In a Decision and Order dated March 8, 2007, Administrative Law Judge Paul H. Teitler (the administrative law judge) noted that employer stipulated that claimant suffered from pneumoconiosis arising out of his coal mine employment. The administrative law judge next found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge also found that the evidence established that "the applicable condition of entitlement ha[d] changed since the prior denial." Decision and Order at 11; *see* 20 C.F.R. §725.309(d)(2000). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b) and, therefore, erred in finding that the evidence established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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. 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 order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, and the subsequent claim is filed prior to January 20, 2001, 20 C.F.R. §725.2(c), the subsequent 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, within whose jurisdiction this case arises, had held that pursuant to 20 C.F.R. §725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id.* Claimant's prior claim was denied because the record did not establish the presence of a totally disabling respiratory or pulmonary impairment. Therefore, claimant must submit new evidence establishing he is totally disabled to obtain review of the merits of his claim.

As noted, claimant requested modification of Judge Kaplan's previous determination that the new evidence did not establish total disability. Accordingly, the administrative law judge reconsidered whether the new evidence established that claimant is totally disabled. Decision and Order at 3-4, 11; *see* 20 C.F.R. §§725.309(d)(2000), 725.310(2000); *see Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998).

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)-(iii). Decision and Order at 6. Because no party challenges these findings, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In considering whether the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge

considered the new medical opinions of Drs. Fisk and Hertz.[1] In a July 26, 2004 letter, Dr. Fisk, who is Board-certified in Internal Medicine and Pulmonary Disease, noted that claimant had normal sized lungs and good air flow. Director's Exhibit 141. However, Dr. Fisk interpreted claimant's nocturnal oximetry test performed in claimant's home on May 10, 2004 as revealing "gas exchange abnormalities and exercise desaturation."[2] Claimant's Exhibit 1. Dr. Fisk, therefore, concluded that claimant had a "major problem with oxygenation." Director's Exhibit 141. Dr. Fisk also noted that claimant required oxygen at night and would likely need oxygen on a twenty-four hour basis in the future. *Id.*

In a subsequent letter dated September 4, 2006, Dr. Fisk opined that:

> [Claimant] is unable to return to his previous [coal mine employment] since he is barely able to walk without supplemental oxygen and had to give up his job delivering papers by car because of his impairment. His function

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[1] Drs. Kruk and Lupold also submitted medical opinions in connection with claimant's second request for modification. The administrative law judge accorded little weight to Dr. Kruk's April 19, 2006 report because he found that Dr. Kruk relied, in part, on the results of an invalid pulmonary function study. Decision and Order at 9. The administrative law judge further found that Dr. Lupold's report was largely based on Dr. Fisk's opinion. Because the administrative law judge found that Dr. Lupold's opinion regarding claimant's pulmonary status primarily restated Dr. Fisk's findings, the administrative law judge found that Dr. Lupold's April 27, 2006 report did not provide a separate medical opinion report for consideration of the issue of total disability. *Id.* No party challenges the administrative law judge's consideration of the opinions of Drs. Kruk and Lupold, which we therefore affirm. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] Dr. Fisk interpreted claimant's May 10, 2004 nocturnal oximetry test as follows:

> Nocturnal oximetry was recorded at home over five hours and 40 minutes of valid sampling time. It is not known how much of this time the patient was asleep. Baseline awake saturation was 90%, and saturation drifted under 90% for 77% of the record. There were occasional drops into the upper 70% range. This pattern is more typical of lung disease and hypoventilation than obstructive sleep apnea. The patient is clearly a candidate for oxygen at 2 L/min. Oxygen has been ordered from the home care company. The patient may need oxygen during the day as well due to lung disease.

Claimant's Exhibit 14.

> has improved mildly because of medications and he has remained out of heart failure, probably because of supplemental oxygen at night.

Claimant's Exhibit 14. Dr. Fisk opined that claimant's hypoxemia revealed on his May 10, 2004 nocturnal oximetry test was consistent with that caused by lung disease rather than obstructive sleep apnea. *Id.*

Dr. Hertz, who is Board-certified in Internal Medicine and Pulmonary Disease, examined claimant on August 21, 2005. In a report dated September 16, 2005, Dr. Hertz opined that claimant was not totally disabled due to coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Hertz explained that:

> [Claimant's] pulmonary function test remains completely normal. I would fully expect that if he had significant and disabling coal workers' pneumoconiosis, there would be significant abnormalities in his pulmonary function testing, and specifically a decreased vital capacity consistent with a restrictive ventilatory defect. [Claimant] has a borderline pO2 on room air at rest. After exercise, the pO2 actually increases from 62 to 65. Again, I would fully expect that with significant and disabling coal workers' pneumoconiosis, [claimant's] oxygen level and pO2 would drop with exercise. Given that [claimant's] pO2 actually rises with exercise [there] is significant evidence that he does not have disabling coal workers' pneumoconiosis. Furthermore, based on the patient's pO2 at rest and with exercise, [claimant] would not qualify by Medicare standards for home oxygen therapy at this point in time.

Employer's Exhibit 1.

After reviewing Dr. Fisk's April 4, 2005 report, Dr. Hertz noted that:

> Dr. Fisk . . . comments on home nocturnal oximetry recording, which shows nighttime oxygen desaturation [in] the 80-90% range. I would consider this nighttime hypoxemia to be a possible indicator of sleep-disordered breathing or sleep apnea, and not any indication at all of disabling coal workers' pneumoconiosis.

Employer's Exhibit 3.

During an April 4, 2006 deposition, Dr. Hertz opined that claimant was not totally disabled, or seriously impaired, by coal workers' pneumoconiosis. Employer's Exhibit 4 at 18. Dr. Hertz based this opinion on claimant's normal chest on physical examination and the results of claimant's pulmonary function and arterial blood gas studies. *Id.* at 18-

19. Dr. Hertz opined that, from a pulmonary standpoint, claimant was capable of returning to his prior coal mine employment. *Id.* at 19.

Additionally, after reviewing Dr. Fisk's September 4, 2006 letter, Dr. Hertz stated that:

> I disagree with Dr. Fisk that [claimant] is totally disabled by coal workers' pneumoconiosis. [Claimant] had pulmonary function testing ordered by Dr. Fisk . . . back in April 2005, and the pulmonary function test was completely normal. The patient had repeat pulmonary function testing . . . on August 13, 2005, and again this pulmonary function test was also completely normal with a forced vital capacity of 3.54, 97% and an FEV1 of 2.72, 110%. If [claimant] were totally disabled by coal workers' pneumoconiosis, I would fully expect to see a significant impairment in his pulmonary function test, and specifically an impaired forced vital capacity, which is not the case on either of the [two] pulmonary function tests in 2005.
>
> [Claimant] also had arterial blood gas studies done at rest and with exercise . . . on August 13, 2005. With exercise, [claimant's] PO2 actually increased from 62 to 65. I again would fully expect that if [claimant] had disabling coal workers' pneumoconiosis, then he will have worsening oxygenation and hypoxemia with exercise in room air and not the improved PO2 as was noted back in August 2005. As I have stated earlier, I will judge an arterial blood gas [study] pre and post exercise to be a gold standard as far as any evidence for exercise-induced hypoxemia, and more accurate than an oximetry test.
>
> I also disagree with Dr. Fisk that the patient's nocturnal oximetry tracing back in May 2004, absolutely rules out sleep-disordered breathing or sleep apnea. A full polysomnography in a certified sleep center would be the gold standard test to definitively rule out sleep apnea, and I would not rely . . . [upon] a mere nocturnal strip tracing . . . .
>
> My review of Dr. Fisk's letter has not changed my opinion that [claimant] is not totally disabled by coal workers' pneumoconiosis.

Employer's Exhibit 26.

Noting Dr. Fisk's status as claimant's treating physician, the administrative law judge stated that, in the absence of contrary probative evidence, he was required to accept Dr. Fisk's statement with regard to the issue of whether claimant is totally disabled due to pneumoconiosis. Decision and Order at 9. The administrative law judge found that Dr.

Fisk's opinion was well-reasoned, and that Dr. Fisk's contrary opinion did not outweigh it. Consequently, the administrative law judge found that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 9-10. Weighing all of the relevant new medical evidence together, the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 10.

Employer contends that the administrative law judge erred in finding that Dr. Fisk's opinion supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer specifically argues that the administrative law judge erred in finding that Dr. Fisk's opinion was sufficiently reasoned. We agree. The administrative law judge found that Dr. Fisk relied upon, and provided a reasoned basis for crediting the results of, claimant's oximetry tests over the contrary objective studies of record. Decision and Order at 10. The administrative law judge, however, failed to explain the basis for this finding. Specifically, the administrative law judge did not set forth Dr. Fisk's explanation for why the results of claimant's nocturnal oximetry study were more credible than the results of claimant's non-qualifying pulmonary function and arterial blood gas studies. Such an explanation is warranted, considering that Dr. Hertz opined that exercise blood gas studies are "the gold standard" and are more reliable than oximetry tests; the administrative law judge noted that Dr. Fisk did not respond to this point. Employer's Exhibits 3, 26; Decision and Order at 9. The administrative law judge also failed to explain how Dr. Fisk's interpretation of claimant's nocturnal oximetry study, as demonstrating nocturnal hypoxemia and exercise desaturation, supported a finding that claimant was totally disabled from a pulmonary standpoint. Consequently, the administrative law judge's analysis of the medical opinion evidence does not comport with the requirements of the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must 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 on the record." 5 U.S.C. §557(c)(3)(A), 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

The administrative law judge noted that "Dr. Fisk also provided a reasoned basis for why the results of [claimant's] tests showed total disability due to pneumoconiosis rather than a sleep-disorder or obstructive sleep apnea . . . ." Decision and Order at 10. However, Dr. Fisk's statement addresses the cause of claimant's pulmonary impairment, rather than the extent of claimant's pulmonary impairment. The cause of a miner's pulmonary impairment is properly addressed at 20 C.F.R. §718.204(c), not 20 C.F.R. §718.204(b).

The administrative law judge further noted that he was persuaded by the fact that Dr. Fisk had initially prescribed oxygen for claimant only at night, but subsequently prescribed oxygen for claimant on a twenty-four hour basis for even minimal exertion. Decision and Order at 10. We agree with employer that the administrative law judge failed to explain how Dr. Fisk's prescription for oxygen supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Moreover, the administrative law judge did not address Dr. Hertz's comments questioning the medical necessity of oxygen therapy in claimant's case.[3]

We also agree with employer that the administrative law judge erred in automatically according greater weight to Dr. Fisk's opinion based upon his status as claimant's treating physician. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5). On remand, the administrative law judge should reconsider whether Dr. Fisk's opinion, regarding the extent of claimant's pulmonary impairment, is 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).

Employer also argues that the administrative law judge erred in his consideration of Dr. Hertz's opinion. Although the administrative law judge acknowledged that Dr. Hertz's opinions were "well supported and well reasoned," the administrative law judge concluded that Dr. Hertz's opinion was "not sufficient to outweigh Dr. Fisk's conclusions in this case." Decision and Order at 10. The administrative law judge erred in failing to provide any basis for questioning Dr. Hertz's opinion, that claimant was capable, from a pulmonary standpoint, of performing his previous coal mine employment. *See Wojtowicz*, 12 BLR at 1-165.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and remand the case further consideration. Consequently, we also vacate the administrative law judge's findings that the evidence established a change in conditions pursuant to 20 C.F.R. §725.310 (2000) and a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000).

On remand, the administrative law judge should address whether the new evidence (*i.e.*, the evidence submitted subsequent to Judge Kaplan's denial of claimant's first

[3] In his September 16, 2005 report, Dr. Hertz noted that, based on claimant's arterial blood gas study values, claimant "would not qualify by Medicare standards for home oxygen therapy at this point in time." Employer's Exhibit 1.

request for modification) is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310 (2000). If the administrative law judge, on remand, finds that claimant has established a basis for modification via a change in conditions pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge must next consider whether all of the evidence submitted subsequent to the denial of claimant's 1983 claim is sufficient to establish total disability, thereby establishing a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[4] *Swarrow*, 72 F.3d at 317, 20 BLR at 2-94.

Should the administrative law judge, on remand, find that the evidence establishes a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), he must consider claimant's 1999 claim on the merits, based on a weighing of all of the evidence of record. *Swarrow*, 72 F.3d at 318, 20 BLR at 2-96. These findings would include a separate consideration of whether the evidence establishes that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

[4] If the new evidence does not establish a change in conditions, the administrative law judge should consider whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and 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

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge