BRB No. 12-0371 BLA

DIONIGI RASI	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	DATE ISSUED: 03/26/2013
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 of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Thomas P. Maroney, Charleston, West Virginia, for claimant.

Paul E. Frampton (Bowles Rice McDavid Graff & Love), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (09-BLA-05218) of Administrative Law Judge Robert B. Rae denying claimant's request for modification of a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§904-944 (Supp. 2011) (the Act).[1] This case, involving a duplicate claim filed on January 21,

[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 (2010). All citations to the regulations, unless otherwise noted, refer to the amended

1987, is before the Board for the sixth time.[2] After the Board remanded this case to the Office of Administrative Law Judges for the third time,[3] Administrative Law Judge Clement J. Kichuk, in a Decision and Order on Remand dated May 10, 2001, found that the new evidence (*i.e.*, the evidence submitted subsequent to the district director's 1983 denial of benefits) did not establish total disability pursuant to 20 C.F.R. §718.204(b). Judge Kichuk, therefore, found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000).[4] Accordingly, Judge Kichuk denied benefits.

Pursuant to claimant's appeal, the Board affirmed Judge Kichuk's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). *Rasi v. Eastern Assoc. Coal Corp.*, BRB Nos. 01-0717 BLA and 01-0717 BLA-A (June 13, 2002) (unpub.). The Board, therefore, affirmed Judge Kichuk's denial of benefits. *Id*.

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regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 version of the Code of Federal Regulations.

[2] The full procedural history of this case is set forth in the Board's decision in *Rasi v. Eastern. Assoc. Coal Corp.*, BRB Nos. 01-0717 BLA and 01-0717 BLA-A (June 13, 2002) (unpub.).

[3] Claimant's previous claim, filed on July 26, 1983, was finally denied on December 8, 1983, because claimant failed to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 29.

[4] Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996). The district director denied claimant's 1983 claim because he found that the evidence did not establish that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 29. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the new evidence had to support a finding of total disability pursuant to 20 C.F.R. §718.204(b).

Claimant timely requested modification on August 13, 2002. In a Decision and Order dated June 8, 2006, Administrative Law Judge Edward Terhune Miller found that the new evidence (*i.e.*, the evidence submitted subsequent to Judge Kichuk's 2001 Decision and Order on Remand) did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and was, therefore, insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2010), or a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Judge Miller also found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, Judge Miller denied benefits.

Pursuant to claimant's appeal, the Board affirmed Judge Miller's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). *Rasi v. Eastern Assoc. Coal Corp.*, BRB No. 06-0718 BLA (June 28, 2007) (unpub.). The Board, therefore, affirmed Judge Miller's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* The Board further affirmed Judge Miller's determination that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). *Id.* The Board, therefore, affirmed Judge Miller's denial of benefits.[5] *Id.*

Claimant timely requested modification for a second time on September 19, 2008. In a Decision and Order dated March 22, 2012, Administrative Law Judge Robert B. Rae (the administrative law judge) found that the evidence did not establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge also found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge, therefore, denied claimant's request for modification.

On appeal, claimant contends that the administrative law judge erred in finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not 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).

[5] The Board subsequently denied claimant's motion for reconsideration. *Rasi v. Eastern Assoc. Coal Corp.*, BRB No. 06-0718 BLA (Nov. 30, 2007) (Order) (unpub.).

To establish entitlement to benefits under 20 C.F.R. Part 718, a miner must establish that he has pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement.[6] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the new 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); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In his 2006 Decision and Order denying benefits, Judge Miller found that claimant failed to establish a material change in conditions because the new evidence did not establish total disability. Consequently, the relevant issue before the administrative law judge was whether the new evidence (*i.e.*, the evidence submitted subsequent to Judge Miller's 2006 Decision and Order) was sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000), thereby establishing a change in conditions at 20 C.F.R. §725.310 (2000). *See* 20 C.F.R. §§725.309(d) (2000), 725.310 (2000); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998); *Kingery*, 19 BLR at 1-11; *Nataloni*, 17 BLR at 1-84; *Kovac*, 14 BLR at 1-158.

Claimant argues that the administrative law judge erred in finding that the new evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b), and therefore, erred in finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Claimant initially contends that the administrative law judge erred in finding that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). We disagree. The administrative law judge accurately noted that the two new pulmonary function studies, conducted on April 8, 2009 and April 7, 2010, are non-qualifying,[7] both before and after the

[6] Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. The recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to the claim in this case because it was filed before January 1, 2005.

[7] A qualifying pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

administration of a bronchodilator. Decision and Order at 12; Claimant's Exhibit 4; Employer's Exhibit 4. We, therefore, affirm the administrative law judge's finding that the new pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Claimant also argues that the administrative law judge erred in finding that the new medical opinion evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[8] The administrative law judge considered the new medical opinions submitted by Drs. Krishnan, Zaldivar, and Rosenberg. Dr. Krishnan opined that claimant is totally disabled from a pulmonary standpoint. Claimant's Exhibit 5. Conversely, Drs. Zaldivar and Rosenberg each opined that, from a respiratory standpoint, claimant is not totally disabled from performing his usual coal mine employment. Employer's Exhibits 4, 5.

Claimant argues that the administrative law judge erred in finding that Dr. Krishnan's opinion was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2(iv). We disagree. The administrative law judge credited the opinions of Drs. Rosenberg and Zaldivar over that of Dr. Krishnan because he found that the opinions of Drs. Rosenberg and Zaldivar are more consistent with the objective evidence.[9]

[8] Because claimant does not challenge the administrative law judge's findings that the new evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 12.

[9] Dr. Rosenberg reviewed the medical evidence, including pulmonary function study results from 2004 and 2008. Employer's Exhibit 5. The administrative law judge noted that Dr. Rosenberg opined that claimant's pulmonary function studies have been "normal," except for a mild reduced diffusing capacity." Decision and Order at 15. The administrative law judge further noted that Dr. Rosenberg interpreted the results as revealing "at worst a mild degree of airflow obstruction associated with reversibility." *Id.* The administrative law judge noted that Dr. Zaldivar observed that claimant's FEV1 and FVC values from the non-qualifying April 7, 2010 pulmonary function study were at or above 100% of the predicted values. Decision and Order at 14; Employer's Exhibit 4. The administrative law judge noted that Dr. Zaldivar interpreted claimant's pulmonary function study as "normal or at worse [sic] . . . . represent[ing] a minimal airway obstruction." *Id.* Conversely, the administrative law judge noted that Dr. Krishnan interpreted claimant's non-qualifying April 8, 2009 pulmonary function study (a study that revealed even higher FEV1 and FVC values than that obtained by Dr. Zaldivar) as demonstrating a moderate obstructive impairment. Decision and Order at 15; Claimant's Exhibit 5.

Decision and Order at 14-15. An administrative law judge may properly credit the medical opinions that he determines are better supported by the objective evidence of record. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence, as a whole, is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the new evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's findings that the new evidence does not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) and, therefore, does not establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *See* 20 C.F.R. §§725.309(d) (2000), 725.310 (2000); *Hess*, 21 BLR 1-143; *Kingery*, 19 BLR at 1-11; *Nataloni*, 17 BLR at 1-84; *Kovac*, 14 BLR at 1-158.

Because claimant does not challenge the administrative law judge's finding that there not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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