BRB No. 01-0262 BLA

PAUL COOK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Request for Modification of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Request for Modification (1999-BLA-1338) of Administrative Law Judge Robert L. Hillyard 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 claim has been before the

[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, 725, 726 (2001).

Pursuant to a lawsuit challenging revision to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001).

Board previously and involves a request for modification on a duplicate claim.[2] Considering the newly submitted evidence, the administrative law judge determined that claimant failed to establish that he is totally disabled, and thus, a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge further found that based on his review of the record, there was no mistake in a determination of fact in the prior denial pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge's weighing of the medical opinions is erroneous. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the decision.

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[2]The relevant procedural history is contained in our previous decision in this case. *See Cook v. Director, OWCP*, BRB No. 97-0816 BLA (Mar. 10, 1998)(unpub.). In *Cook*, *supra*, the Board affirmed the administrative law judge's findings that the newly submitted evidence failed to establish total disability pursuant to 20 C.F.R.
§718.204(c)(1) - (3)(2000) as these findings were unchallenged on appeal. The Board further affirmed the administrative law judge's weighing of the evidence pursuant to 20 C.F.R. §718.204(c)(4)(2000), and affirmed the finding that claimant failed to establish a change in condition or mistake in fact pursuant to 20 C.F.R. §725.310 (2000). *See Cook*, *supra*. Claimant subsequently requested reconsideration of the decision, which the Board denied. *Cook v. Director, OWCP*, BRB No. 97-0816 BLA (Order on recon.)(Sep. 2, 1998)(unpub.). On May 28, 1999, claimant submitted a report by Dr. Ballard Wright and requested modification. Director's Exhibit 50.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2001). 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*).

In determining whether claimant has established modification pursuant to 20 C.F.R. §725.310 (2000), the 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 the element or elements of entitlement which defeated entitlement in the prior decision. *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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). In addition, the United States Court of Appeals for the Fourth Circuit has held that a claimant's allegation of a general error is sufficient to require the administrative law judge to reconsider the entire record in addressing whether there was a mistake in a determination of fact pursuant to Section 725.310. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

After consideration of the administrative law judge's Decision and Order, and the issue raised on appeal, we hold that the administrative law judge's findings are rational and in accordance with law. The administrative law judge found that claimant's previous claim was denied for failure to establish totally disabling pneumoconiosis and considered the newly submitted evidence which consisted of medical opinions by Drs. Hendrickson, Reid and Wright. Decision and Order at 7 - 8. Dr. Reid stated that he had treated claimant on numerous occasions for black lung and that claimant suffers from frequent respiratory infections and shortness of breath. Director's Exhibit 58. The administrative law judge properly determined that Dr. Reid did not provide an opinion regarding disability, and thus, found that the opinion could not establish a worsening in claimant's condition. *See* 20 C.F.R. §§ 718.204(b)(2)(iv), 725.310 (2001).[3]

[3]The administrative law judge applied the total disability regulation set forth

The administrative law judge then considered Dr. Hendrickson's opinion that claimant is totally disabled because of his shortness of breath. Decision and Order at 7; Director's Exhibit 52. The administrative law judge found that the physician failed to explain why claimant's shortness of breath would prevent him from doing his previous coal mine employment and permissibly accorded little weight to the opinion as it is conclusory and unsupported. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also U.S. Steel Mining Co., Inc. v. Director, OWCP* [Jarrell], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Lastly, the administrative law judge considered Dr. Wright's opinion that claimant does not have the physical capacity to perform coal mining or similar work that involves heavy manual labor under arduous conditions. Decision and Order at 7; Claimant's Exhibits 2, 3. The administrative law judge rationally accorded little weight to the opinion as Dr. Wright failed to explain the basis for his opinion that claimant's shortness of breath was totally disabling and did not explain his conclusion that claimant is totally disabled despite the non-qualifying pulmonary function study results he obtained. *See Hicks, supra*; *Akers, supra*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark, supra*.

We reject claimant's contention that the administrative law judge was required to give determinative weight to the opinions of Drs. Reid, Hendrickson and Wright because they are claimant's treating physicians. *See Grizzle v. Pickands Mather and Co./Chisolm Mines*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). The administrative law judge is required to determine whether an opinion is reasoned before he credits it; thus, claimant's contention that the opinions of Drs. Wright and Hendrickson are uncontradicted, and therefore entitled to determinative weight, is without merit. *See Hicks, supra*; *Akers, supra*; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). 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. *See Clark*, *supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). As the administrative law judge properly considered the medical

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at 20 C.F.R. 718.204(c)(2000). After revision of the regulations, the total disability regulation is now set forth at 20 C.F.R. §718.204(b)(2)(2001).

opinion evidence relevant to Section 718.204(b)(iv)(2001), we affirm his conclusion that claimant failed to establish total disability pursuant to this subsection.

Inasmuch as we have affirmed the administrative law judge's consideration of the medical opinion evidence, we affirm his finding that claimant failed to establish a change in conditions. Moreover, the administrative law judge properly considered the record as a whole and found that there is no mistake in a determination of fact. *See Jessee, supra*. Thus, we affirm the administrative law judge's finding that claimant failed to establish a basis for modification pursuant to Section 725.310 (2000) .

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge