BRB No. 04-0217 BLA

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| JOHN R. FULKERSON | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| THE OHIO VALLEY COAL COMPANY | ) | DATE ISSUED: 11/18/2004 |
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| Employer-Respondent | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order – Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Thomas McK. Hazlett (Harper & Hazlett), St. Clairsville, Ohio, for claimant.

John C. Artz (Polito & Smock), Pittsburgh, Pennsylvania, for employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (02-BLA-0155) of Administrative Law Judge Gerald M. Tierney rendered 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] Claimant's previous application for benefits was denied by the district director on October 24, 1997, because claimant did not

[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.

establish any element of entitlement.[2] Director's Exhibit 19. On September 17, 1999, claimant filed the current application for benefits, which is considered a duplicate claim because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d) (2000); Director's Exhibit 1.

In a Decision and Order - Denying Benefits issued on August 22, 2001, Administrative Law Judge Robert J. Lesnick credited claimant with thirty-four years of coal mine employment,[3] and found that the evidence developed since the prior denial established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 22 at 10. Judge Lesnick further found that, because the new evidence also differed qualitatively from the evidence that was considered by the district director in 1997, claimant established a material change in conditions as required by 20 C.F.R. §725.309(d) (2000) and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). *Id*. Upon review of all of the record evidence, however, Judge Lesnick found that claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), or that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 22 at 11-12. Accordingly, Judge Lesnick denied benefits.

Claimant appealed to the Board, but subsequently moved to remand the case to the district director so that claimant could pursue modification proceedings pursuant to 20 C.F.R. §725.310 (2000). Consequently, the Board dismissed claimant's appeal and remanded the case to the district director. Director's Exhibit 23.

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[2] Claimant has filed three applications for benefits. His first application for benefits, filed July 28, 1981, was denied on August 28, 1990 by Administrative Law Judge Daniel Lee Stewart, who found that although claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) based on the true-doubt rule, claimant did not establish that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c),(b) (2000). Director's Exhibit 18 at 1, 6, 11. Claimant's second application for benefits, filed on July 18, 1997, was denied by the district director on October 24, 1997, based on a finding that claimant did not establish any element of entitlement. Director's Exhibit 19 at 2, 32. Claimant filed his third and current application for benefits on September 17, 1999. Director's Exhibit 1.

[3] The record indicates that claimant's coal mine employment occurred in Ohio. Director's Exhibit 18 at 194. 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, 1-202 (1989)(*en banc*).

While the case was pending before the district director, claimant submitted the medical opinion of Dr. Rasmussen, who reviewed the medical evidence of record and opined that claimant "suffer[s] a totally disabling respiratory insufficiency" due to pneumoconiosis. Director's Exhibit 24 at 3. Employer responded by submitting the medical opinions of Drs. Altmeyer and Fino. Director's Exhibits 26, 27. Dr. Altmeyer had previously examined claimant, and Dr. Fino had previously reviewed the medical evidence. Both physicians had concluded that claimant was not totally disabled by a respiratory or pulmonary impairment. Employer's Exhibits 1, 2. After reviewing Dr. Rasmussen's opinion submitted in connection with claimant's request for modification, both physicians again concluded that claimant retained the respiratory capacity to perform his usual coal mine employment. Director's Exhibits 26, 27.

The district director forwarded the case to the Office of Administrative Law Judges for a hearing. Director's Exhibit 29. Prior to the scheduled hearing, the parties requested a decision on the record, and Administrative Law Judge Gerald M. Tierney granted their request. Order Granting Request for Decision on the Record, Nov. 8, 2002.

In the Decision and Order - Denying Benefits that is the subject of this appeal, Judge Tierney (the administrative law judge) found that claimant did not establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000), and thus did not establish a basis for modification of the prior denial of benefits. Accordingly, the administrative law judge denied claimant's request for modification and denied benefits.

On appeal, claimant contends that the administrative law judge erred in relying on the opinions of Drs. Fino and Altmeyer, that claimant is not totally disabled, because these physicians misunderstood the physical requirements of claimant's usual coal mine employment and rendered opinions that were hostile to the Act and its implementing regulations. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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 a finding of

entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 725.310 (2000), claimant may, within a year of a final order, request modification of a denial of benefits. Modification may be granted if there are changed conditions or if there was a mistake in a determination of fact in the earlier decision. *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Drs. Altmeyer and Fino diagnosed a mild reduction in claimant's diffusing capacity, but concluded that claimant retained the respiratory capacity to perform his usual coal mine employment. Director's Exhibits 26, 27. Dr. Rasmussen diagnosed a totally disabling respiratory insufficiency based on claimant's diffusing capacity tests and based upon an exercise blood gas study that was performed in 1984. Director's Exhibit 24.

The administrative law judge indicated that he was not persuaded by Dr. Rasmussen's opinion because "[i]t contain[ed] undocumented commentary, speculation, and inconsistencies." Decision and Order at 3. The administrative law judge then set forth several specific instances from the opinion to demonstrate that Dr. Rasmussen's analysis was poorly reasoned and unsupported by the objective data of record. Decision and Order at 3-4. The administrative law judge concluded that Dr. Rasmussen's opinion was too poorly documented and reasoned to carry claimant's burden to establish a change in conditions or a mistake of fact.

Although it is claimant's burden to specify error in the decision below, *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983), claimant, who is represented by counsel, alleges no error in the administrative law judge's permissible weighing of Dr. Rasmussen's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983)(explaining that the administrative law judge assesses the reasoning of a medical opinion in light of its underlying objective data). Review of claimant's brief discloses no allegation of error in the administrative law judge's consideration of any evidence other than the reports of employer's medical experts, Dr. Altmeyer and Fino. Because the administrative law judge properly exercised his discretion to consider the quality of Dr. Rasmussen's opinion, *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993), we affirm the administrative law judge's finding that Dr. Rasmussen's report did not carry claimant's burden to establish a mistake in a determination of fact or change in conditions. *See* 20 C.F.R. §725.310 (2000); Decision and Order at 4. Consequently, we affirm the administrative law judge's decision denying benefits. In light of our disposition of this case, we need not address claimant's arguments that the opinions of Drs. Altmeyer and Fino were flawed.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge