BRB No. 11-0224 BLA

ALBERT HALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/29/2011
	)	
PEABODY COAL COMPANY	)	
	)	
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 on Modification Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Albert Hall, Marissa, Illinois, *pro se.*

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Modification Denying Benefits (07-BLA-5762) of Administrative Law Judge Jeffrey Tureck rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves claimant's request for modification of the denial of a claim filed on August 11, 2005. Director's Exhibit 2. Initially, the district director denied the claim on August 4, 2006, because claimant did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 28. Subsequently, claimant

filed an untimely hearing request of that denial on September 18, 2006, that was treated as a request for modification. Director's Exhibits 33, 37, 39; *see* 20 C.F.R. §725.310. The district director denied claimant's request for modification on March 8, 2007, because claimant again failed to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 46. Claimant requested a hearing and the case was assigned to Judge Tureck (the administrative law judge), whose Decision and Order, issued on November 17, 2010, is the subject of this appeal. Director's Exhibit 54.

In his decision, the administrative law judge credited claimant with thirty-three years of coal mine employment, as stipulated by the parties.[1] The administrative law judge properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Noting that the existence of a totally disabling respiratory impairment is a threshold requirement for invocation of the amended 411(c)(4) presumption, the administrative law judge first considered whether total disability was established. Decision and Order at 3. The administrative law judge found that a review of the previously submitted evidence did not reveal a mistake in a determination of fact in the prior finding that claimant is not totally disabled pursuant to 20 C.F.R. §§718.204(b)(2), 725.310. The administrative law judge further found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b), and, therefore, did not establish a change in conditions pursuant to 20 C.F.R. §725.310. Consequently, the administrative law judge concluded that claimant failed to establish grounds for invocation of the amended Section 411(c)(4) presumption, or a basis for modification

[1] The record reflects that claimant's coal mine employment was in Illinois. Hearing Transcript at 28. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

under 20 C.F.R. §725.310. Decision and Order at 5. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 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).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310, provides that a miner may, at any time before one year after the denial of a claim, file a request for modification of the denial of benefits. 33 U.S.C. §922; 20 C.F.R. §725.310; *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 539, 22 BLR 2-429, 2-440 (7th Cir. 2002) (Wood, J., dissenting). An administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

The administrative law judge initially addressed whether the previously submitted evidence established total respiratory disability pursuant to Section 718.204(b)(2).[2] The

[2] The administrative law judge assumed that claimant established a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and considered the claim on its merits. Decision and Order at 3. Contrary to employer's argument, the administrative law judge was not required to make a preliminary

administrative law judge properly found that, as all of the previously submitted pulmonary function studies and blood gas studies were nonqualifying,[3] they did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (ii). 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 3; Director's Exhibits 9, 27. Additionally, the administrative law judge accurately found that the previously submitted evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence of cor pulmonale with right-sided congestive heart failure, and did not establish claimant's entitlement to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, as there is no evidence of complicated pneumoconiosis. 20 C.F.R. §§718.204(b)(2)(iii); 718.304; Decision and Order at 3 and n.5; Director's Exhibits 9, 27. Lastly, as the previously submitted medical opinions of Drs. Tuteur and Istanbouly attributed claimant's impairment to heart problems, and not pulmonary problems,[4] the administrative law judge rationally concluded that this evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Beatty v. Danri Corp.*, 49 F.3d 993, 1002, 19 BLR 2-136, 2-154 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16, 1-21 (1994); *White v. Director, OWCP*, 7 BLR 1-348, 1-353 (1984); Decision and Order at 3; Director's Exhibits 9, 27.

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determination regarding whether claimant had established a basis for modification of the district director's denial of benefits before reaching the merits of entitlement. Employer's Brief at 8 n.3. Rather, the Board has recognized that such a determination is subsumed in the administrative law judge's decision on the merits. The Board has held that an administrative law judge is not constrained by any rigid procedural process in adjudicating claims in which modification of the district director's decision is sought. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*¸ 17 BLR 1-9 (1992). The administrative law judge, therefore, was authorized to address the merits of claimant's claim without first addressing whether the evidence was sufficient to establish modification of the district director's denial of the claim.

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). A "nonqualifying" study exceeds those values.

[4] Dr. Tuteur, in his report dated June 21, 2006, stated that claimant's hypertension with associated diastolic dysfunction "fully accounts" for claimant's mild exercise intolerance, occasional cough, and wheezing. Director's Exhibit 27 at 3. Dr. Istanbouly, in his report dated January 17, 2006, indicated that claimant has no pulmonary impairment, and that any worsening of the miner's respiratory status is mainly due to cardiac dysfunction. Director's Exhibit 9 at 5.

Considering the new evidence submitted on modification, the administrative law judge found that it, too, did not establish total respiratory disability pursuant to Section 718.204(b)(2). In so finding, the administrative law judge determined that all of the newly submitted pulmonary function and blood gas studies, including those submitted with claimant's treatment notes, produced nonqualifying results and, thus, did not establish total respiratory disability pursuant to Section 718.204(b)(2)(i) or (ii). 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 3-4; Director's Exhibit 39; Employer's Exhibits 11, 27, 28, 30; Claimant's Exhibit 5. Moreover, the evidence submitted on modification contains no evidence of cor pulmonale with right-sided congestive heart failure or complicated pneumoconiosis and, thus, claimant cannot establish total respiratory disability pursuant to Section 718.204(b)(2)(iii), or entitlement through the irrebuttable presumption set forth at Section 718.304. 20 C.F.R. §§718.204(b)(2)(iii); 718.304; Employer's Exhibits 25 at 85; 26 at 22.

Finally, the administrative law judge considered the newly submitted opinions of Drs. Sanjabi, Chiu, Cohen, Renn, and Tuteur, together with claimant's hospital and treatment records, and found that they did not establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 3-4. Specifically, the administrative law judge reasonably found that Dr. Sanjabi's opinion, that claimant should avoid further coal mine dust exposure, is not an opinion that claimant is totally disabled, since a physician's prohibition against work in dusty environments is not tantamount to his concluding that the miner is totally disabled. *See Migliorini v. Director, OWCP*, 898 F.2d 1292, 1296, 13 BLR 2-418, 2-425 (7th Cir. 1990), *cert. denied*, 498 U.S. 958 (1990); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988); Decision and Order at 3; Director's Exhibit 39. Moreover, the administrative law judge acted within his discretion in finding that Dr. Sanjabi's opinion was unexplained and, thus, not entitled to any weight. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 3; Director's Exhibit 39. The administrative law judge rationally found that Dr. Chiu's opinion, that claimant suffers from shortness of breath, is not an opinion of total disability, since Dr. Chiu did not characterize the severity of claimant's shortness of breath or opine that it is disabling. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245, 1-247 (1985); *Clay v. Director, OWCP*, 7 BLR 1-82, 1-84 (1984); Decision and Order at 3; Claimant's Exhibit 4. The administrative law judge also accurately found that the newly submitted opinions of Drs. Cohen, Renn, and Tuteur, that claimant is not totally disabled, and the hospital and treatment records, which are silent as to claimant's respiratory disability, do not support a finding of total respiratory disability. *See Sacolick v. Rushton Mining Co.*, 6 BLR 1-930, 1-933 (1984); Decision and Order at 3-4; Employer's Exhibits 4-6, 8-9, 20-21, 25-28, 31; Claimant's Exhibit 5. Moreover, the administrative law judge acted within his discretion in according great weight to the newly submitted opinions of Drs. Renn and Tuteur because they were well explained and consistent with the medical evidence of record. *See Shelton v. Old Ben Coal Co.*, 933

F.2d 504, 507, 15 BLR 2-116, 2-120 (7th Cir. 1991); Decision and Order at 4; Employer's Exhibits 9, 25, 26.

Thus, after a consideration of the previously submitted evidence, and the newly submitted evidence on modification, the administrative law judge found that it did not establish that claimant has a totally disabling respiratory impairment. Decision and Order at 9. Because it is supported by substantial evidence, the administrative law judge's finding that claimant did not establish total respiratory disability pursuant to Section 718.204(b)(2) is affirmed. As claimant did not establish total respiratory disability pursuant to Section 718.204(b)(2), a prerequisite for invoking the amended Section 411(c)(4) presumption, and for establishing entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of claimant's request for modification and concomitant denial of benefits. *See Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order on Modification 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