BRB No. 04-0253 BLA

CYRIL M. CICULYA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEDDO HIGHLAND COAL COMPANY	)	DATE ISSUED: 10/29/2004
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Andrew C. Onwudinjo (Krasno, Krasno & Onwudinjo), Pottsville, Pennsylvania, for claimant.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

Claimant appeals the Decision and Order Denying Benefits (02-BLA-0412) of Administrative Law Judge Janice K. Bullard (the administrative law judge) rendered on a

claim filed[1] 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).[2] The administrative law judge credited claimant with fourteen years coal mine employment,[3] as stipulated by the parties, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) (2000), as also stipulated by the parties and supported by the evidence of record, and thus found the evidence sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310.[4] Reviewing all of the evidence of record, however, the administrative law judge found that claimant failed to establish total disability due to a pulmonary or respiratory impairment at 20 C.F.R. §718.204(c) (2000), and therefore denied benefits.

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[1] Claimant filed a claim for benefits on January 9, 2001. On May 24, 2001, the district director found that the evidence failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(c) (2000), and denied the claim. Director's Exhibit 19. Claimant filed a timely petition for modification on November 2, 2001, and on April 16, 2002, the district director issued a proposed decision granting the petition for modification. Director's Exhibit 35. Employer challenged the district director's decision and requested a formal hearing. Director's Exhibit 35. The case was subsequently assigned to the administrative law judge and a hearing was held on April 9, 2003. Following the hearing, employer stipulated to the existence of pneumoconiosis arising out of coal mine employment. The administrative law judge awarded benefits in a Decision and Order dated November 18, 2003, which is the subject of the instant appeal.

[2] 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.

[3] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 2; Decision and Order at 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[4] In determining whether claimant established a change in conditions pursuant to Section 725.310, 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).

On appeal, claimant contends that the administrative law judge erred in her analysis of the medical evidence relevant to whether claimant established total disability due to a pulmonary or respiratory impairment. The Director, Office of Workers' Compensation Programs (the Director) responds, asserting that Dr. Corazza's report fails to address the critical inquiry under Section 718.204(c) (2000): whether claimant has a pulmonary impairment which, of itself, is totally disabling. The Director argues that if the Board affirms the administrative law judge's finding that the evidence of record fails to establish total disability, then the Director will not have satisfied his obligation under Section 413(b) of the Act to provide claimant with a complete pulmonary evaluation. In that event, the Director argues the case must be remanded for him to provide claimant with a complete pulmonary evaluation.[5] Employer has not filed a brief in the 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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. If a claimant merely alleges that the ultimate fact of entitlement was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "There is no need for a smoking gun factual error, changed conditions or startling new evidence."), *see Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62 (3d Cir. 1995), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). Moreover, the United States Court of Appeals for the Third Circuit has held that pursuant to a petition for modification, the administrative law judge must review all evidence of record, both newly submitted evidence and evidence previously in the record, and determine whether there was any mistake of fact made in the prior adjudication, including the ultimate fact, *see Keating*, 71 F.3d at 1123, 20 BLR at 2-63.

[5] The administrative law judge's findings that claimant has fourteen years of coal mine employment, that he established the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) (2000), and, therefore, established a change of conditions pursuant to Section 725.310, but failed to established the existence of total disability pursuant to 20 C.F.R. §718.204(c)(3) (2000) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

Claimant initially challenges the administrative law judge's weighing of the pulmonary function study evidence at 20 C.F.R. §718.204(c)(1) (2000) on the merits of the claim. Claimant specifically asserts that in finding three of the five pulmonary function studies of record to be invalid, the administrative law judge improperly relied on pertinent invalidation reports of Dr. Levinson. Claimant's Brief at 3-10. We disagree. In finding Dr. Corazza's February 19, 2001 pulmonary function study invalid, the administrative law judge permissibly credited Dr. Levinson's opinion, that these test results were invalid due to suboptimal effort, on the grounds that Dr. Levinson's opinion was more consistent with the evidence of record that contained subsequent and higher test results, on other pulmonary function studies also performed by Dr. Corazza. *Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990)(an administrative law judge may find a pulmonary function study that produces higher results to be more reliable than studies that produce lower results.); Director's Exhibit 13; Employer's Exhibit 2; Decision and Order at 6, *citing Andruscavage v. Director, OWCP*, No. 9303291, slip op. at 9-10 (3d Cir. Feb. 22, 1994). In addition, in finding Dr. Mariglio's August 13, 2001 pulmonary function study invalid, the administrative law judge permissibly credited Dr. Levinson's unrefuted opinion that these test results were invalid because this pulmonary function test did not reflect the requisite three efforts, and, therefore, was non-conforming. *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *see also Mangifest v. Director, OWCP*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); Director's Exhibits 21, 33; Decision and Order at 6-7. Similarly, the administrative law judge acted within her discretion in finding Dr. Hertz's January 23, 2002 pulmonary function study to be invalid because both Drs. Levinson and Simelaro indicated that the test was technically flawed. *Siwiec*, 894 F.2d at 635, 13 BLR at 2-259; Claimant's Exhibits 7, 8, 10; Employer's Exhibit 3; Decision and Order at 7-8. The administrative law judge also properly weighed the remaining valid studies of record, namely Dr. Corazza's April 4, 2001 non-qualifying pulmonary function study and Dr. Levinson's December 11, 2001 study which qualified pre-bronchodialators. Specifically, the administrative law judge properly found the valid, conflicting pulmonary function study evidence to be "in equipoise" and, therefore, determined that claimant failed to establish total disability at Section 718.204(c)(1) (2000). *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(holding that it is claimant's burden to establish total disability due to pneumoconiosis by a preponderance of the evidence); Director's Exhibits 12, 32; Decision and Order at 7-8.

Claimant further asserts that the administrative law judge erred by not finding that the blood gas study evidence alone established that claimant has a totally disabling respiratory impairment. Claimant's Brief at 3. Claimant's argument lacks merit. While the administrative law judge found that the blood gas study evidence at Section 718.204(c)(2) (2000) supported a finding of total disability, she properly weighed this evidence with the like and unlike evidence at Section 718.204(c)(1)-(3) (2000) in determining that the totality of the relevant evidence failed to establish a totally disabling respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); Director's Exhibits 11, 22, 23; Employer's Exhibit 1; Decision and Order at 9, 11.

In challenging the administrative law judge's findings under Section 718.204(c)(4) (2000), claimant argues that the administrative law judge improperly credited the medical opinion of Dr. Levinson over the contrary opinions of Drs. Dittman, Simelaro and Hertz; further failed to consider the opinions of Drs. Corazza and Mariglio; and erred in failing to find that claimant's use of supplemental oxygen is sufficient evidence to establish that claimant has a totally disabling respiratory impairment. Claimant's Brief at 3-10.

Claimant's contentions lack merit. Contrary to claimant's argument, the administrative law judge permissibly accorded less weight to the contrary opinions of Drs. Hertz,[6] Simelaro and Dittman because they each relied on a pulmonary function study which she permissibly found to be invalid. *Siwiec*, 894 F.2d at 635, 13 BLR at 2-259; Claimant's Exhibits 4-8, 10; Director's Exhibit 13; Employer's Exhibits 2, 15; Decision and Order at 9-11. Moreover, regarding claimant's use of supplemental oxygen, while the administrative law judge properly noted claimant's oxygen use, she properly refrained from drawing any medical conclusion from this evidence. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); Decision and Order at 3.

We find, however, some merit in claimant's argument that Dr. Levinson's opinion, that claimant does not have any evidence of *industrial* pulmonary disease and is not totally disabled due to pneumoconiosis, does not clearly address the critical element of

[6] The administrative law judge additionally found that she could not accord additional weight to Dr. Hertz based on his qualifications because the physician's curriculum vitae is not contained in the record. The Board notes, however, that as claimant correctly asserts, Dr. Hertz testified that he is Board-certified in internal medicine and pulmonary disease. Claimant's Exhibit 4 at 4-6; Decision and Order at 10. Ultimately, the administrative law judge permissibly accorded less weight to Dr. Hertz's opinion on other grounds. *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n. 4 (1983).

entitlement at Section 718.204(c)(4) (2000), which is whether claimant suffers from a totally disabling respiratory impairment, regardless of cause. 20 C.F.R. §718.204(c) (2000); Director's Exhibit 31; Employer's Exhibit 2; Decision and Order at 9. In addition, we note that, as claimant correctly contends, in considering the medical evidence at Section 718.204(c)(4) (2000), the administrative law judge did not discuss the opinions of Drs. Corazza or Mariglio. Director's Exhibits 9, 25. The administrative law judge must consider all relevant evidence on the issue of disability, including all medical opinions that are phrased in terms of total disability, provide a medical assessment of physical abilities, and/or identify exertional limitations. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-44 (1985)(en banc), *aff'd on recon.*, 9 BLR 1-104 (1986)(en banc); *DeFelice v. Consolidation Coal Co.*, 5 BLR 1-275 (1982). As the administrative law judge failed to consider the opinions of Drs. Corazza and Mariglio at Section 718.204(c)(4) (2000), the administrative law judge's Decision and Order fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §§919(d) and 30 U.S.C. §932(a), that the administrative law judge consider all of the relevant evidence and provide reasoning in support of her findings on all issues.

In considering on remand Dr. Corazza's opinion, that "the combination of systolic hypertension, pneumoconiosis, and deafness would make coal mine employment unsuitable" for claimant, the administrative law judge must determine whether this medical opinion is sufficient to meet the Director's obligation to provide claimant with a complete pulmonary evaluation. Director's Exhibit 9. In order to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim as required by the Act and regulations, *see* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(en banc), the Director must provide a medical opinion that addresses all of the elements of entitlement. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

In light of the above-referenced errors, we vacate the administrative law judge's findings at Section 718.204(c)(4) (2000) and remand this case for the administrative law judge to reconsider all of the medical opinion evidence, and to consider specifically the sufficiency of the reports of Drs. Levinson and Corazza. Should the administrative law judge find, on remand, that Dr. Corazza's report is insufficient to meet the Director's burden, she must remand the case to the district director to provide claimant an opportunity to substantiate his claim by means of a complete, credible pulmonary evaluation at no expense to claimant as required by the Act, 30 U.S.C. §923(b); 20 C.F.R.

§§718.101, 718.401, 725.405(b).[7] *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[7] We note that in light of the administrative law judge's finding that claimant established the existence of pneumoconiosis, should the administrative law judge, on remand, reach the issue of disability causation at 20 C.F.R. §718.204(b), she must make findings to comport with *Soubik v. Director, OWCP*, 366 F.3d 226, 234, BLR (3d Cir. 2004).