

BRB No. 04-0331 BLA

MICHAEL HOYSOCK)

Claimant-Petitioner)

v.)

) DATE ISSUED: 10/26/2004

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

) DECISION and ORDER

Appeal of Decision and Order Denying Benefits of Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sarah M. Hurley (Howard Radzely, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-BLA-00071) of Administrative Law Judge Janice K. Bullard 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). This case involves a request for modification of a

duplicate claim.¹ After noting the Director's stipulation of thirteen years of coal mine employment, the administrative law judge considered the evidence to determine whether claimant could establish a change in condition by establishing that he is totally disabled pursuant to 20 C.F.R. §§718.204 and 725.310. The administrative law judge found that the new pulmonary function studies, blood gas study and medical opinions submitted on modification failed to establish total disability. Thus, benefits were denied.

On appeal, claimant contends that the administrative law judge erred by failed to adequately review the record evidence pertaining to whether a mistake in a determination of fact exists in the prior decision. Claimant also contends that the administrative law judge erred in finding that a change in conditions has not been established because, contrary to her factual determination, the newly submitted pulmonary function studies have qualifying values and establish a totally disabling respiratory impairment. In addition, claimant contends that the administrative law judge's findings regarding the medical opinions are erroneous and that the administrative law judge failed to discuss the issue of causation. The Director responds in a Motion to Remand, urging the Board to vacate the administrative law judge's findings regarding the pulmonary function studies

¹ Claimant filed his first claim on September 6, 1988. On November 21, 1988, the district director denied the claim for failing to establish any element of entitlement. No further action was taken on the claim. Director's Exhibit 12.

Claimant filed his subsequent claim on February 20, 1998. Director's Exhibit 1. The claim was denied by the district director on August 27, 1998 and claimant requested a hearing. Director's Exhibit 10. On March 18, 1999, Administrative Law Judge Romano denied benefits, finding that claimant had established a material change in conditions and pneumoconiosis arising out of coal mine employment, but that the evidence did not establish total disability. Claimant appealed to the Board, which vacated the administrative law judge's total disability findings regarding the pulmonary function studies and medical opinions and remanded the case for further consideration of the evidence. *Hoysock v. Director, OWCP*, BRB No. 99-0738 BLA (Apr. 13, 2000)(unpub.).

On remand, the administrative law judge denied benefits, again finding that claimant had failed to establish total disability. Claimant appealed to the Board, which affirmed the denial of benefits. *Hoysock v. Director, OWCP*, BRB No. BRB No. 01-0106 BLA (Oct. 19, 2001)(unpub.).

Claimant requested modification on September 26, 2002. On October 19, 2002, the district director denied benefits, finding that claimant failed to establish that he is totally disabled. Claimant requested a hearing before an administrative law judge.

and remand the case to the administrative law judge to make a factual determination of claimant's height. The Director also urges the Board to vacate the administrative law judge's findings regarding the medical opinions because they are premised on his consideration of the pulmonary function studies.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we consider claimant's contention that the administrative law judge erred in her consideration of the pulmonary function studies. The administrative law judge found that four of the five pulmonary function studies submitted since the prior denial are qualifying. Decision and Order at 6. The administrative law judge noted that Dr. Levinson invalidated Dr. M. Kraynak's September 24, 2002 study, although four other physicians found the test acceptable. The administrative law judge also found that Dr. Prince validated the January 22, 2003 abnormally low results obtained by Dr. Corazza, who himself questioned the results. The administrative law judge then noted that Dr. R. Kraynak's tests, administered on February 10, 2003 and February 24, 2003, produced qualifying values "with varying numbers, despite the difference of mere days between testing." *Id.* The administrative law judge found the evidence "troubling" because the validity of two of the qualifying tests was in question. The administrative law judge then found that the most recent test, dated April 16, 2003, did not produce qualifying results. The administrative law judge found that high values are more reliable than low values where disparate results exist and found that the pulmonary functions studies do not reveal a pattern consistent with the progressive and irreversible disease of pneumoconiosis. According more weight to the most recent test, the administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

We agree with claimant that these findings cannot be affirmed. First, the administrative law judge's finding that claimant's April 16, 2003 pulmonary function study, based on claimant's height as 71 inches, did not produce qualifying values, is not correct. *See* 20 C.F.R. §718.204(b)(2)(i)(B). At a height of 71 inches, the FEV₁ value of 1.94 meets the standard and the MVV value of 62.09 is below the standard, which makes the study qualifying. *Id.* Second, when considering the initial claim, Administrative Law Judge Romano took the average of three reported and determined that claimant's height is 69.2 inches. Director's Exhibit 26. The current administrative law judge, without acknowledging this earlier determination, assumed that claimant is 71 inches, the height reported on all of the studies submitted on modification. Decision and Order at 4-7. In light of the significant difference in the recorded heights in the record, and its resulting impact on whether a test is qualifying or not, the administrative law judge must make a

finding as to claimant's actual height. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). Therefore, we vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(i) and remand the case for the administrative law judge to determine claimant's height and reconsider the pulmonary function studies.

Regarding the medical opinions, the administrative law judge accorded little weight to Dr. Prince's opinions, finding that they were not well-reasoned or documented. The administrative law judge found that Dr. Prince did not examine claimant and reviewed only pulmonary function tests, which he validated in a cursory fashion, including a test which yielded values that were a third of most of the other tests. Decision and Order at 9. The administrative law judge explained her determination to give less weight to Dr. Kruk's opinion: the doctor had relied on the April 16, 2003 study, which the administrative law judge found to be non-qualifying; and the doctor's opinion that claimant's condition had deteriorated in the past year was based solely on claimant's subjective complaints and was contradicted by the April 2003 study which showed increased values. The administrative law judge also gave less weight to the opinions of both Drs. R. and M. Kraynak because they failed to explain the variation in their pulmonary function studies including the most recent non-qualifying study. The administrative law judge accorded the greatest weight to the opinion of Dr. Corazza because he questioned the validity of claimant's "clearly substandard efforts" on January 22, 2003 and found only mild hypoxemia on a blood gas study, a test which is not effort dependent.

Claimant raises several allegations of error with respect to the administrative law judge's consideration of the medical opinions. We decline to consider these individually, however, in light of our determination to vacate the administrative law judge's findings at Section 718.204(b)(2)(iv) because they are premised upon the administrative law judge's findings regarding the pulmonary function studies, in particular the determination that the April 16, 2003 study is non-qualifying. On remand, the administrative law judge must reconsider all of the medical opinions, including a medical opinion by Dr. Venditto, which the administrative law judge did not weigh in her analysis of the medical opinions.

Lastly, on remand, the administrative law judge must consider the evidence submitted since the filing of the duplicate claim to determine whether claimant has established a basis for modification by a mistake in fact or change in conditions. 20 C.F.R. §725.310; *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge