BRB No. 08-0156 BLA

D. M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/30/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Myron K. Allenstein (Allenstein & Allenstein, LLC), Gadsden, Alabama, for claimant.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (07-BLA-5230) of Administrative Law Judge Ralph A. Romano denying benefits 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 claimant's request for modification of the denial of a subsequent claim that was filed on May 30, 2002.[1] Director's Exhibit 3. In

[1] Claimant's first claim for benefits, filed on April 24, 2000, was finally denied on June 29, 2000, because claimant failed to establish any element of entitlement. Director's Exhibit 1.

the initial decision, Administrative Law Judge Gerald M. Tierney credited claimant with five years and ten months of coal mine employment,[2] and found that the new evidence established the existence of pneumoconiosis and therefore demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Upon review of the merits of the claim, however, Judge Tierney found that the evidence failed to establish that claimant's pneumoconiosis arose out of his coal mine employment or that he was totally disabled by a respiratory or pulmonary impairment. *See* 20 C.F.R. §§718.203, 718.204(b)(2). Pursuant to claimant's appeal, the Board affirmed the denial of benefits. [*D.M.*] *v. Director, OWCP*, BRB No. 04-0870 BLA (July 29, 2005) (unpub.); Director's Exhibit 46. Thereafter, claimant's appeal to the United States Court of Appeals for the Eleventh Circuit was dismissed as untimely. Director's Exhibits 47, 54. On April 3, 2006, claimant timely requested modification of the denial of benefits and submitted additional evidence. *See* 20 C.F.R. §725.310; Director's Exhibits 53, 55.

Upon review of the record on modification, Administrative Law Judge Ralph A. Romano (the administrative law judge), credited claimant with eight years and two months of coal mine employment. Further, the Director, Office of Workers' Compensation Programs (the Director), stipulated, and the administrative law judge found, that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Additionally, the administrative law judge found that the evidence established that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Because claimant established both a greater length of coal mine employment than was found previously, and that his pneumoconiosis arose out of coal mine employment, the administrative law judge granted modification of the prior decision on those issues. However, the administrative law judge further determined that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge found no basis to modify the prior denial on the total disability issue, and he denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that it did not establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] Further, claimant argues generally that truck drivers who are

[2] The record indicates that claimant's last coal mine employment occurred in Alabama. Director's Exhibits 1, 12. Accordingly, the Board will apply the law of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that total disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

exposed to coal dust should be credited with coal mine employment.[4] The Director responds, urging affirmance of the denial of benefits.

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 entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

Section 725.310 provides that modification of an award or denial of benefits may be granted on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). A change in conditions may be established if the administrative law judge determines that new evidence, considered in conjunction with that submitted previously, establishes an element of entitlement that was not established in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Further, the administrative law judge on modification has the authority "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *U.S.X. Corp. v. Director, OWCP*, [*Bridges*], 978 F.2d 656, 658, 17 BLR 2-29, 2-31 (11th Cir. 1992), quoting *O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254 (1971).

Claimant contends that the administrative law judge erred in determining that the medical opinion of Dr. Jett, claimant's treating physician, did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant contends that Dr. Jett's opinion was

[4] As noted by the Director, Office of Workers' Compensation Programs, the administrative law judge credited claimant with coal mine employment for his time spent in coal hauling work, and thus, the reason for claimant's argument is not clear. Claimant's brief on this point discusses caselaw regarding the "miner" status of coal transportation workers under the Act, but does not relate this discussion to any specific coal mine employment findings that were made by the administrative law judge. Claimant's Brief at 19-24. Therefore, and because we herein affirm the denial of benefits based on the administrative law judge's finding that total disability was not established, we need not address claimant's argument on this issue.

reasoned and documented, and that the administrative law judge failed to provide sufficient reasons for according the opinion little weight. We disagree.

After determining that none of the objective tests of record supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii), the administrative law judge discussed the conflicting opinions of Drs. Shad and Jett. In a report dated July 29, 2002, Dr. Shad, based on a physical examination, work and medical histories, and "normal" objective studies, concluded that claimant has no impairment. Director's Exhibit 11. In a letter dated October 31, 2003, Dr. Jett, claimant's treating physician, stated that claimant is unable to do any work due to respiratory disease, that his respiratory disease exacerbates his coronary artery disease, and that he is totally disabled due to a combination of the pulmonary disease and the coronary artery disease. Claimant's Exhibit 1. During his deposition dated August 3, 2006, Dr. Jett testified that claimant has been unable to do any significant work due to his respiratory disease since 2002 or 2003. Claimant's Exhibit 2 at 7. Dr. Jett stated that claimant's pulmonary function studies of 2002 and 2003 indicated mild to moderate obstructive pulmonary disease. *Id.* at 9. Dr. Jett further stated that claimant's respiratory problems significantly contribute to his disability and preclude his ability to drive a truck. *Id.* at 12.

The administrative law judge found that Dr. Jett's opinion was inadequately explained and was outweighed by Dr. Shad's contrary opinion. Specifically, the administrative law judge noted that Dr. Jett's treatment records did not indicate any treatment for pulmonary problems. Decision and Order at 6; Director's Exhibit 53. In considering Dr. Jett's deposition testimony, the administrative law judge noted further that the physician failed to explain his finding that claimant's mild to moderate obstructive pulmonary disease would limit claimant from performing his coal mine employment, despite the non-qualifying[5] pulmonary function studies. The administrative law judge further noted that it was not clear what Dr. Jett's opinion would have been had he considered the non-qualifying pulmonary function study results of October 2005. The administrative law judge also found that, although Dr. Jett stated that respiratory problems prevented claimant from performing his duties as truck driver, the doctor failed to discuss the basis for his conclusions, and thus, his opinion was not sufficiently reasoned or supported. By contrast, the administrative law judge found that Dr. Shad's opinion, that claimant has no impairment, was better supported, and outweighed that of Dr. Jett.

[5] A "qualifying" objective study yields values that are equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Contrary to claimant's contention, the administrative law judge acted within his discretion when he accorded little weight to Dr. Jett's opinion because the doctor failed to adequately explain and document his conclusion that claimant was totally disabled. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 991, 23 BLR 2-213, 2-238 (11th Cir. 2004); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Further, the administrative law judge considered Dr. Jett's status as claimant's treating physician, but permissibly chose not to accord greater weight to his opinion on this basis, because the administrative law judge found that the opinion was not as well reasoned or supported as was the contrary opinion of Dr. Jett. *See* 20 C.F.R. §718.104(d)(5); *Clark*, 12 BLR at 1-155. Thus, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), as it is supported by substantial evidence. We therefore affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2).

As the administrative law judge properly found that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement in a miner's claim under Part 718, we affirm both the administrative law judge's denial of modification and his denial of benefits. *See* 20 C.F.R. §725.310; *Anderson*, 12 BLR at 1-112. Therefore, as noted above, we need not reach claimant's argument regarding the administrative law judge's finding as to the length of claimant's coal mine employment, as error on that issue, if any, would be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order 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