BRB No. 13-0037 BLA

In the matter of CLAIR H. SNYDER	)	
Claimant-Petitioner	)	
v.	)	
KOCHER COAL COMPANY	)	DATE ISSUED: 10/30/2013
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, On Request for Modification of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Bethlehem, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits, On Request for Modification (2011-BLA-05060) of Administrative Law Judge Adele Higgins Odegard, issued pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The relevant procedural history is as follows. Claimant filed a subsequent claim on September 20, 2000.[2] In a Decision and Order dated August 13, 2002, Administrative Law Judge Paul H. Teitler denied benefits. Claimant filed three timely requests for modification, each of which was denied. Claimant first filed a request for modification on December 24, 2002, which was denied by Administrative Law Judge Janice K. Bullard on August 25, 2004. Claimant's second request for modification was denied by Administrative Law Judge Ralph A. Romano on September 7, 2006. Director's Exhibit 130. Claimant filed a third request for modification on August 17, 2007, which was also denied by Judge Bullard on March 31, 2009. Director's Exhibits 131, 172.

On March 3, 2010, claimant filed his fourth request for modification. Director's Exhibit 173. In a Decision and Order issued on September 27, 2012, which is the subject of this appeal, Judge Odegard (the administrative law judge) determined that the evidence on modification did not support a finding that claimant was totally disabled. Thus, the administrative law judge found that claimant failed to satisfy his burden to demonstrate a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The administrative law judge further determined that claimant did not establish a basis for modification of the denial of his subsequent claim under 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.[3]

On appeal, the administrative law judge's finding that claimant was not totally disabled is challenged. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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[1] Claimant died on February 12, 2011. Claimant's Exhibit 1. His claim for miner's benefits is being pursued by his surviving children, Robin Snyder and Karen Roberts. *See* Hearing Transcript at 5.

[2] Claimant filed an initial claim for benefits on October 2, 1990, which was denied by Administrative Law Judge Paul H. Teitler in a Decision and Order issued on January 20, 1998. Director's Exhibit 1. Judge Teitler found that while claimant established the existence of pneumoconiosis, he failed to establish total disability. *Id.*

[3] Based on the filing date of the subsequent claim, amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), is not applicable.

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In this subsequent claim, claimant must establish that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final."[5] 78 Fed. Reg. 59102, 59118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based."[6] 20 C.F.R. §725.309(c)(4). Because claimant's prior claim was denied for failure to establish total disability, claimant must prove, based on the newly submitted evidence, that he is totally disabled in order to obtain a review of the merits of his claim. Additionally, because this case involves a request for modification of the denial of a subsequent claim, the administrative law judge was required to consider whether the evidence developed in the subsequent claim, in conjunction with the evidence submitted with the request for modification, establishes a change in an applicable condition of entitlement. *See Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998). The administrative law judge was also required to consider whether there was any mistake in a determination of fact with regard to the prior denial of claimant's subsequent claim. *See* 20 C.F.R. §725.310; *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

The administrative law judge determined that the new evidence on modification

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2.

[5] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59102, 59118 (Sept. 25, 2013).

[6] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.202, 718.203, 718.204 Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

did not establish total disability. Decision and Order at 21. She further concluded there was no mistake in a determination of fact with respect to the prior denial of claimant's subsequent claim for failure to establish total disability, or the denial of any of claimant's modification requests. *Id.* Claimant's counsel asserts that the administrative law judge's Decision and Order fails to satisfy the Administrative Procedure Act (APA) because she "failed to provide [an] adequate explanation and rationale for rejecting two qualifying pulmonary function studies" demonstrating total disability.[7] Claimant's Brief in Support of Petition for Review (unpaginated) at [3]. Claimant's counsel also argues that the administrative law judge did not give proper weight to the opinion of his treating physician, Dr. Kraynak, that claimant was totally disabled.[8] We reject these assertions of error as they are without merit.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that there were two pulmonary function studies submitted in conjunction with claimant's current modification request. The administrative law judge noted correctly that while each study is qualifying for total disability under the regulations,[9] "the validity of both of these tests is disputed."[10] Decision and Order at 6. Specifically, Dr. Kraynak examined

[7] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[8] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iii). *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).

[9] A "qualifying" pulmonary function test yields results that are equal to, or less than, the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" test yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[10] The Third Circuit has held that, when considering the pulmonary function study evidence, the administrative law judge must determine whether the studies are in substantial compliance with the quality standards. *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). If a study does not precisely conform to the quality standards, but is in substantial compliance, the administrative law judge must determine whether it constitutes credible evidence of claimant's pulmonary function. *Siwiec*, 894 F.2d at 638, 13 BLR at 2-265. In accomplishing this task, the administrative law judge must rely

claimant on November 5, 2009, and obtained a qualifying pulmonary function study.[11] Dr. Michos reviewed the November 5, 2009 study at the request of the Department of Labor (DOL) and indicated the results were "not acceptable," because of "less than optimal effort, cooperation and comprehension." Director's Exhibit 177. Dr. Levinson also invalidated the November 5, 2009 pulmonary function study on the grounds that: 1) the tracings of the flow-volume loops revealed a "gap between a point in inspiration and prior to exhalation so that the patient was disconnected from the spirometer during that time," thereby resulting in values that are "falsely low;" 2) the test revealed "multiple areas of notching" during inspiration so that claimant's "breathing was interrupted, not continuous;" and 3) the "MVV curves indicate variable and inconsistent effort so that [claimant] did not exert a maximal and sustained effort for 12 to 15 seconds, as required."[12] Employer's Exhibit 4 at 16-17.

With regard to the May 5, 2010 pulmonary function study, both Dr. Levinson, the administering physician, and Dr. Kaplan, opined that the study was invalid. Dr. Levinson opined that this study did not represent claimant's true pulmonary capacity because claimant did not give "maximal effort." Employer's Exhibit 4 at 14. He explained that there were "multiple interruptions during the course of exhalation," and that "[t]here was excessive variability of the FEV1s . . . by at least 180 [millimeters]." *Id*. at 15. Dr. Levinson explained that the study did not satisfy the regulatory requirement that the "FEV1 should not vary by more than 100 [millimeters] or 5 [percent] of the largest

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upon the medical evidence and cannot substitute his or her opinion for that of the medical experts. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

[11] Dr. Kraynak testified that "the two largest [FEV1]s varied by 0.03 liters, well within the 100 millimeter guidelines" required by the regulations, that the "flow loops are uniform and consistent," and that the MVV tracings are within the regulatory guidelines. Claimant's Exhibit 3 at 7.

[12] In response to Dr. Levinson's opinion, Dr. Kraynak prepared a written statement, indicating that he personally administered the November 5, 2009 test and would attest to the fact that "there was no disconnect" from the spirometer, that he did not detect interrupted and non-continuous breathing, and that the MVV curves show good effort. Claimant's Exhibit 4. He stated that it would be impossible to obtain the "less than 100 [millimeter]" variation in the FEV1 range if Dr. Levinson's opinion was true. *Id*.

FEV1." *Id.* Moreover, Dr. Levinson stated that the "MVV tracings indicated variable and inconsistent effort[.]" *Id.*

Dr. Kaplan stated that the May 5, 2010 pulmonary function study was invalid because "the duration of [claimant's] forced expiratory efforts was insufficient [as the regulations] require a minimum duration of effort of five seconds, and [claimant's] longest effort was [four and one-half] seconds." Employer's Exhibit 2. Dr. Kraynak, however, also reviewed the results of the May 5, 2010 pulmonary function study and opined that it was valid and indicated that claimant was totally disabled by a respiratory impairment. Claimant's Exhibit 3.

In resolving the conflict in the evidence regarding the validity of the pulmonary function studies, the administrative law judge relied on the qualifications of the physicians. She determined that because Drs. Michos, Levinson and Kaplan are all Board-certified in pulmonary medicine, while Dr. Kraynak is not Board-certified in any specialty, the former physicians are more qualified to "assess the validity of any specific test from an examination of the 'tracings' and 'flow-volume loops.'" Decision and Order at 8. The administrative law judge specifically gave controlling weight to Dr. Levinson's opinion because she determined that the "flow-volume loops and tracings of the tests" supported "Dr. Levinson's comments about 'gaps' and 'multiple areas of notching.'" *Id.* She concluded that Dr. Kraynak's opinion did not adequately address "the substance of Dr. Levinson's critiques" with regard to the validity of either pulmonary function study. *Id.*

The administrative law judge concluded that "neither pulmonary function test was valid." Decision and Order at 9. The administrative law judge further noted, however, that even if both of the qualifying pulmonary function studies were technically valid, the pulmonary function study evidence was insufficient to establish total disability because "the weight of the evidence" establishes that claimant "did not demonstrate 'good cooperation;' rather, his effort was determined to be subpar on both the test of [November 5, 2009] and the test of [May 5, 2010]." *Id.* at 9-10.

Because the administrative law judge thoroughly discussed the weight accorded the pulmonary function study evidence, we reject claimant's assertion that her Decision and Order does not satisfy the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Furthermore, as the administrative law judge has discretion to assess the credibility of the medical experts, we affirm the administrative law judge's reliance on the qualifications of the medical experts, as a basis for resolving the conflict in the evidence, and her decision to accord less weight to Dr. Kraynak's opinion and controlling weight to the opinions of Drs. Michos, Levinson and Kaplan regarding the credibility of the pulmonary function studies. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Clark v.*

Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989) (en banc). Therefore, we affirm the administrative law judge's finding that the pulmonary function study evidence, submitted in conjunction with claimant's most recent request for modification, is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i).

Relevant to 20 C.F.R. §718.204(b)(2)(iv), we also reject claimant's counsel's argument that the administrative law judge did not give proper weight to Dr. Kraynak's opinion, that claimant is totally disabled, based on Dr. Kraynak's status as claimant's treating physician. In *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004), the United States Court of Appeals for the Third Circuit held that a treating physician's opinion is assumed to be more valuable than that of a non-treating physician. *Soubik*, 366 F.3d at 226, 23 BLR at 2-101. However, the court has also indicated that automatic preferences are disfavored. *See Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Rather, the administrative law judge must examine the reasoning underlying the treating physician's opinion, prior to giving it deference. *See* 20 C.F.R. §718.104(d); *Mancia*, 130 F.3d at 590-1, 21 BLR at 2-238; *Lango*, 104 F.3d at 577, 21 BLR at 2-20-21.

In this case, the administrative law judge found that Dr. Kraynak offered the only opinion on modification that claimant is totally disabled. The administrative law judge properly assessed the credibility of Dr. Kraynak's opinion in light of the regulatory factors at 20 C.F.R. §718.104(d) and explained why she gave his disability findings little weight:

> The picture that Dr. Kraynak painted, in his most recent medical opinion and deposition, was of an individual who was in poor respiratory health, with severe shortness of breath. However, I must note that I am troubled by the lack of documentation in the record of Dr. Kraynak's observations. Even though Dr. Kraynak stated he saw the Claimant at least once per month, there are no medical treatment notes of record, and Dr. Kraynak did not testify about his specific observations at any of these visits.

Decision and Order at 15.

Claimant's counsel does not identify specific error with regard to the administrative law judge's determination that Dr. Kraynak's opinion is not sufficiently documented and reasoned on the issue of total disability. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Because the administrative law judge has discretion to assess the credibility of the medical experts, we affirm the administrative law judge's decision to accord Dr. Kraynak's opinion little weight, and her finding that claimant failed to establish total disability pursuant to 20

C.F.R. §718.204(b)(2)(iv).[13] *See* 20 C.F.R. §718.104(d); *Mancia*, 130 F.3d at 590-1, 21 BLR at 2-238; *Lango*, 104 F.3d at 577, 21 BLR at 2-20-21; *Clark*, 12 BLR at 1-155. We further affirm, as supported by substantial evidence, the administrative law judge's overall finding, based on her review of all of the record evidence in support of this subsequent claim, that claimant was not totally disabled.[14] We therefore affirm the administrative law judge's findings that claimant failed to demonstrate a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(c), and a basis for modification of the denial.

[13] Contrary to claimant's contention, the administrative law judge properly found that Dr. Levinson's opinion does not support a finding of total disability. Although Dr. Levinson stated that claimant is "totally disabled from returning to his coal mine work based upon his cardiac condition," he specifically stated that"[f]rom a pulmonary standpoint alone, . . . [claimant] would be able to return to his prior work in the mines." Employer's Exhibit 4 at 20, 24; Decision and Order at 14.

[14] Because we have affirmed the administrative law judge's finding that the evidence is insufficient to establish total disability, an essential element of entitlement, it is not necessary that we address claimant's arguments relevant to the issue of disability causation at 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order Denying Benefits, On Request for Modification is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge