BRB No. 14-0258 BLA

ROBERT P. HORAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLASCHAK COAL CORPORATION	)	
	)	DATE ISSUED: 10/30/2014
and	)	
	)	
SOMERSET CASUALTY INSURANCE 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 of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Robert P. Horan, Wilburton, Pennsylvania, *pro se*.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2011-BLA-06127) of Administrative Law Judge Theresa C. Timlin denying claimant's request to modify the denial of benefits on a claim filed pursuant to the provisions of the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on October 20, 2004.

In the initial decision, Administrative Law Judge Janice K. Bullard found that the evidence did not establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, Judge Bullard denied benefits. Director's Exhibit 40.

Pursuant to claimant's appeal, the Board affirmed Judge Bullard's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *R.H.* [*Horan*] *v. Blaschak Coal Corp.*, BRB No. 07-0971 BLA (Sept. 22, 2008) (unpub.). However, the Board vacated Judge Bullard's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), and remanded the case for further consideration. *Id.*

On remand, Judge Bullard found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Director's Exhibit 53. Accordingly, Judge Bullard again denied benefits. *Id.*

Pursuant to claimant's appeal, the Board affirmed Judge Bullard's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). *Horan v. Blaschak Coal Corp.*, BRB No. 09-0684 BLA (July 27, 2010) (unpub.). Accordingly, the Board affirmed Judge Bullard's denial of benefits. *Id.*

Claimant timely requested modification on January 21, 2011. Director's Exhibit 65. In a Decision and Order issued on March 28, 2014, Administrative Law Judge Theresa C. Timlin (the administrative law judge) found that the evidence did not establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge accordingly denied claimant's request for modification.

On appeal, claimant generally contends that the administrative law judge erred in denying his request for modification. Employer/carrier (employer) responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised 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, rational, and consistent with applicable law.[1] 33 U.S.C. §921(b)(3), as

[1] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United

incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

To establish entitlement 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986).

Section 725.310 provides that modification 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). Pursuant to a modification request, the administrative law judge has the authority to reconsider all the evidence for any mistake of fact, even the ultimate fact of entitlement. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-61-63 (3d Cir. 1995).

The administrative law judge considered the new evidence submitted on modification, and accurately noted that claimant submitted a November 15, 2010 pulmonary function study interpreted by Dr. Raymond Kraynak, as well as Dr. Kraynak's December 9, 2010 medical report.[2] Decision and Order at 5. Although the November 15, 2010 pulmonary function study produced qualifying values,[3] the administrative law judge permissibly found that it was entitled to no weight because it was invalidated by Dr. Hertz,[4] a Board-certified pulmonologist.[5] *Director, OWCP v. Siwiec*, 894 F.2d 635,

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States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] The administrative law judge noted that employer also submitted new evidence, including a transcript of Dr. Hertz's December 8, 2011 deposition testimony. Decision and Order at 5.

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

[4] Dr. Hertz invalidated the November 15, 2010 pulmonary function study because claimant was exhaling before the spirometry attempt had officially started on two attempts, and because there was "inadequate patient effort" on the third. Employer's Exhibit 1 at 21.

638, 13 BLR 2-259, 2-265 (3d Cir. 1990); Decision and Order at 5-6; Director's Exhibit 66. The new evidence does not include any other qualifying pulmonary function studies. We therefore affirm the administrative law judge's finding that the new pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge accurately found that the only new arterial blood gas study, a March 28, 2011 study submitted by employer, produced non-qualifying values. Decision and Order at 7; Employer's Exhibit 1. The administrative law judge also accurately found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 7. We therefore affirm the administrative law judge's findings that the new evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii).

The administrative law judge next considered the new medical opinion evidence. In a December 9, 2010 medical report, Dr. Kraynak noted that claimant gets short of breath with minimal exertion.[6] Director's Exhibit 68. Dr. Kraynak also indicated that claimant "had a worsening of his breathing condition due to his Black Lung." *Id.* The administrative law judge permissibly discounted Dr. Kraynak's opinion because it was based, in part, on the invalid November 15, 2010 pulmonary function study. *See Siwiec*, 894 F.2d at 639-40, 13 BLR at 2-267; *Street v. Consolidated Coal Co.*, 7 BLR 1-65, 1-67 (1984); Decision and Order at 10. Because Dr. Kraynak's opinion is the only new medical opinion in the record supportive of a finding of total disability, we affirm the administrative law judge's finding that the new medical opinion evidence does not establish total disability under 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the new evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that the claimant has not demonstrated a change in conditions justifying modification under 20 C.F.R. §725.310. *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Next, the administrative law judge reviewed the previously submitted evidence, Judge Bullard's 2009 Decision and Order on Remand, and the Board's 2009 Decision

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[5] While Dr. Hertz is Board-certified in Pulmonary Medicine and Internal Medicine, Employer's Exhibit 1 at 7, Dr. Kraynak is Board-eligible in Family Medicine. Director's Exhibit 68.

[6] Dr. Kraynak indicated that claimant cannot walk more than half a block or up several steps without stopping to regain his breath. Director's Exhibit 68.

and Order. After reviewing this evidence, along with the new evidence, the administrative law judge found that there was no mistake in a determination of fact regarding the previous finding that the evidence did not establish claimant's total disability under 20 C.F.R. §718.204(b)(2). Decision and Order at 4. Substantial evidence supports the administrative law judge's finding. Consequently, we affirm the administrative law judge's conclusion that there was no mistake in a determination of fact pursuant to 20 C.F.R. §725.310. We therefore affirm the administrative law judge's denial of claimant's request for modification.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge