BRB No. 04-0921 BLA

TERRY L. SCOTT	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
KOCHER COAL COMPANY	)	
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	DATE ISSUED: 07/15/2005
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Maureen E. Herron (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

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

PER CURIUM:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-0215) of Administrative Law Judge Janice K. Bullard rendered on a claim[1] filed pursuant to the

[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.

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] Claimant's initial claim, filed on March 22, 1993, has previously been before the Board. Director's Exhibits 1, 80. In a Decision and Order dated May 17, 1995, Administrative Law Judge Paul H. Teitler credited claimant with eleven and three quarter years of coal mine employment[3] and found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) (2000), 718.203(b) (2000), but insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, benefits were denied. Claimant appealed, and in *Scott v. Kocher Coal Co.*, BRB No. 95-1660 BLA (Nov. 22, 1996) (unpub.), the Board affirmed the denial of benefits. Director's Exhibit 80.

On May 9, 1997, claimant requested modification, and in a decision dated March 15, 1999, Judge Teitler denied claimant's request on the grounds that claimant had not established the existence of a totally disabling respiratory impairment, and, therefore, had not established a mistake in fact or a change in conditions since the prior denial. Accordingly, benefits were denied.[4] Director's Exhibits 81, 87, 88, 121. On September

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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 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 this 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. 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] Claimant appealed to the Board but subsequently requested that his claim be remanded to the district director in order to pursue modification. Director's Exhibits 122, 127.

9, 1999, claimant submitted a request for modification, together with additional evidence. Director's Exhibit 132. In a decision dated March 22, 2001, Administrative Law Judge Ralph A. Romano found the evidence insufficient to establish the existence of a totally disabling respiratory impairment, and thus insufficient to establish a mistake in fact or a change in conditions since the prior denial. Director's Exhibit 159. Accordingly, benefits were again denied.[5] On February 18, 2002, claimant submitted his most recent request for modification, together with additional evidence, alleging several specific mistakes of fact in the prior decision, and further alleging a change in conditions since the prior denial. Director's Exhibit 171. In a decision dated June 22, 2004, currently before the Board, Administrative Law Judge Janice K. Bullard (the administrative law judge) initially found that claimant failed to establish the alleged mistakes of fact in the prior decision. The administrative law judge further found, however, that the evidence was sufficient to establish the existence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (3), and, thus, sufficient to establish a mistake in fact or a change in conditions since the prior denial pursuant to 20 C.F.R. §718.310 (2000).[6] Director's Exhibit 159. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in allowing claimant to submit excess evidence into the record, and further erred in her analysis of the medical evidence relevant to whether claimant established total disability due to a pulmonary or respiratory impairment. Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director) has 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).

[5] Again, claimant appealed to the Board but subsequently requested that his claim be remanded to the district director in order to pursue modification. Director's Exhibits 161, 166.

[6] We note that the administrative law judge's decision contains citations to the prior regulatory provisions. While the administrative law judge correctly noted that the revised regulations at 20 C.F.R. Part 725 are inapplicable to this claim on modification, *see* 20 C.F.R. §725.2, the revised regulations at 20 C.F.R. Part 718, with the exception of the second sentence of Section 718.204(a), are applicable to this claim. *See* 20 C.F.R. §718.2.

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.

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).

Employer challenges the administrative law judge's weighing of the pulmonary function study evidence pursuant to 20 C.F.R. §§718.204(b)(2)(i), 725.310 (2000). In finding that the pulmonary function studies supported the existence of a totally disabling respiratory impairment, the administrative law judge considered the numerous opinions regarding the validity of the three newly submitted studies, all of which produced qualifying results, and she credited two of the three studies as valid. Claimant's Exhibit 7; Director's Exhibits 180, 181; Decision and Order at 6-9.

Employer asserts that the administrative law judge erred in allowing claimant to submit excessive rebuttal evidence in response to Dr. Dittman's opinion regarding the validity of the January 3, 2002 pulmonary function study. Employer's Brief at 3-4. Initially, we note that as the administrative law judge properly observed, the regulations at 20 C.F.R. §725.2 specifically provide that the revised evidentiary limitations set forth at 20 C.F.R. §725.414 do not apply to pending claims, such as the instant one, which was filed before the effective date of the new regulations and kept alive through modification requests. *See* 20 C.F.R. §725.2; Hearing Transcript at 22. In addition, we note that while the hearing transcript reflects that employer objected to claimant being allowed to obtain and submit a second rebuttal report, on appeal employer fails to identify with specificity the medical report to which he is now objecting, stating only that claimant was given

permission to submit reports from Dr. Kraynak "and an additional physician." Hearing Transcript at 17; Employer's Brief at 4. Moreover, a review of the hearing transcript reveals that all of the medical opinions offered by claimant concerning the January 3, 2002 pulmonary function study, and considered by the administrative law judge in her decision, were offered without objection by employer's counsel. Hearing Transcript at 14-17. Thus, it is unclear from the record whether any additional rebuttal evidence was actually submitted by claimant. The limited scope of the Board's review of an administrative law judge's Decision and Order necessarily requires a petitioner to identify specific legal or factual errors therein. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, we reject employer's allegation of error as providing no specific basis to invoke the Board's review of the administrative law judge's admission of evidence into the record. *Sarf*, 10 BLR at 1-121.

Employer further asserts that in finding Dr. Kraynak's January 3, 2002 qualifying pulmonary function study to be valid, the administrative law judge failed to identify the physicians whose opinions she found entitled to the most weight. Employer's Brief at 4. We disagree. In determining the validity of the January 3, 2002 study, the administrative law judge properly found that, in addition to Dr. Kraynak's[7] opinion that his study was valid, Drs. Michos and Prince, both Board-certified internists and pulmonologists, and Drs. Venditto and Simelaro, both Board-certified internists and chest specialists, all opined that the results of the January 3, 2002 pulmonary function study were acceptable, while, in contrast, only Dr. Dittman, a Board-certified internist and medical examiner, and Dr. Levinson, a Board-certified internist and pulmonologist, found the study invalid. Claimant's Exhibits 9, 13, 22; Director's Exhibits 118, 147, 149, 173, 187, 188; Employer's Exhibit 3. As the administrative law judge considered both the quantity of the medical opinions and the qualifications of the physicians, we hold that her determination in this case, that Dr. Kraynak's January 3, 2002 study is valid, is reasonable as supported by the weight of the evidence. *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Cf. Trent*, 11 BLR at 1-26; *Minton v. Director, OWCP*, 6 BLR 1-670 (1983); Decision and Order at 7.

Employer next asserts that in finding Dr. Kraynak's August 29, 2003 qualifying pulmonary function study to be valid, the administrative law judge again failed to explain why she credited the opinions of those physicians who validated the test, over the opinions of the physicians who concluded that the test was invalid, when the weight of the evidence supports a finding that the test was invalid. Employer's Brief at 4. Again, we disagree. The administrative law judge noted that Dr. Hertz, a Board-certified internist, medical examiner and critical care physician, and Dr. Dittman, a Board-certified internist and medical examiner, both opined that the August 29, 2003 pulmonary function

[7] Dr. Kraynak is Board-eligible in family medicine. Director's Exhibit 149.

study was invalid due to evidence of hesitation at the beginning of the flow on exhalation. Employer's Exhibit 1; Director's Exhibit 3 at 13; Decision and Order at 8, 10. In addition, Dr. Levinson, a Board-certified internist and pulmonologist, invalidated the August 29, 2003 study because claimant's exhalation was not preceded by maximal inspiration, the MVV curves indicated inconsistent effort and the FVC curves indicated a significant gap between inhalation and exhalation, suggesting that claimant was disconnected from the spirometer. Employer's Exhibit 2; Decision and Order at 8. The administrative law judge also noted that, in contrast, in addition to Dr. Kraynak's opinion that his August 29, 2003 study showed good effort and a "crisp beginning of exhalation," Drs. Simelaro and Venditto, both Board-certified internists and chest specialists, disagreed with the opinions of Drs. Hertz, Dittman and Levinson and opined that the test was valid. Claimant's Exhibits 14-16, 21-23; Decision and Order at 8-9. Dr. Simelaro explained that if superimposed on one another, the spirometry patterns would match up exactly, which they would not do if there had been any hesitation by claimant. Claimant's Exhibit 23. The physician further explained that while he agreed with Dr. Levinson that there was a gap between inhalation and exhalation, because obstruction is based on exhalation and not inhalation, how long it took a patient to inhale did not in any way affect the exhalation as long as maximum inhalation was performed, which, in this case, it had been. Claimant's Exhibit 23. The administrative law judge further noted that Dr. Venditto also disagreed with Dr. Levinson as to the significance of any gap between inspiration and exhalation, explaining that as the inspiration flow volume loop is traditionally done after the expiratory loop, it should not be interpreted as affecting the expiratory flow volume loop at all. Claimant's Exhibit 23; Decision and Order at 8. Contrary to employer's arguments, in finding that the August 29, 2003 pulmonary function study was a valid indication of impairment, the administrative law judge reviewed all of the relevant evidence, noted that both Drs. Simelaro and Venditto are also highly qualified experts, and the administrative law judge permissibly accorded greatest weight to the opinion of Dr. Simelaro because she found his explanation of the significance of the discrepancies observed by Drs. Levinson, Hertz and Dittman, to be well-reasoned and supported by the explanations of Dr. Venditto, and thus, more persuasive. *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); Decision and Order at 9. In assessing the medical reports, an administrative law judge is not bound to accept the opinion of any medical expert, but may weigh the medical evidence and draw his or her own inferences. *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

Employer also contends that as the newly submitted arterial blood gas study results were non-qualifying, the administrative law judge erred by stating that the blood gas study evidence "does support a finding that claimant is totally disabled" pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 10; Employer's Brief at 5. Employer's contention is without merit. As a review of the administrative law judge's entire decision reveals that she specifically noted that the blood gas study produced non-

qualifying results, and she subsequently explicitly stated that her finding that claimant has a totally disabling respiratory impairment was based on "the pulmonary function evidence together with the medical opinion evidence," we conclude that the administrative law judge's statement, as it appears in her decision, contains an editorial error and was intended to state that the blood gas study evidence does *not* support a finding that claimant is totally disabled. Director's Exhibit 180; Decision and Order at 9, 12.

In challenging the administrative law judge's findings under Section 718.204(b)(2)(iv), employer argues that the administrative law judge improperly credited the medical opinion of Dr. Kraynak, that claimant has a totally disabling respiratory impairment, over the contrary opinion of Dr. Dittman, based on her erroneous weighing of the pulmonary function study evidence at Section 718.204(b)(2)(i). Employer's Brief at 5. Contrary to employer's argument, the administrative law judge permissibly found the credibility of Dr. Dittman's conclusion that claimant has no pulmonary impairment, to be undermined by the physician's opinion that all of the qualifying pulmonary functions studies of record are invalid, which is contrary to the administrative law judge's affirmable finding at Section 718.204(b)(2)(i). *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In addition, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Kraynak, who she acknowledged possesses lesser qualifications than Dr. Dittman, in part because he had treated claimant, and because she found his opinion better supported by the objective evidence of record, including the valid, qualifying pulmonary function study evidence. *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 10. As the administrative law judge properly considered "the qualifications of the competing physicians and the quality of their respective reasoning," *Kramer*, 305 F.3d at 211, 22 BLR at 2-481, we affirm the administrative law judge's determination that the medical opinion evidence supports a finding of total disability.

Therefore, as the administrative law judge properly considered all of the evidence together, and permissibly concluded that the pulmonary function study evidence together with the medical opinion evidence supports a finding that claimant has a totally disabling respiratory impairment, *see Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), we affirm the administrative law judge's finding that claimant established a change in conditions since the prior denial. 20 C.F.R. §§718.204(b), 725.310; *see Keating*, 71 F.3d at 1123, 20 BLR at 2-63. Finally, we affirm as unchallenged the administrative law judge's additional finding, that the evidence of record is sufficient to establish that claimant's disability is due to his

pneumoconiosis. *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); Decision and Order at 12.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge