BRB No. 09-0206 BLA

D.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/17/2009
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

D.S., London, Kentucky, *pro se.*

Michelle S. Gerdano (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (07-BLA-6062) of Administrative Law Judge Alice M. Craft rendered on a subsequent 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 April 9, 2001.[1] Director's Exhibit 3. In the initial decision, Administrative

[1] Claimant's first claim, filed on September 7, 1995, was denied as abandoned on November 25, 1996. Director's Exhibit 1. Claimant filed a second claim on August 3, 1998, which was denied by the district director on March 16, 1999, because no element of entitlement was established. Director's Exhibit 2.

Law Judge Joseph E. Kane found that the concession of the existence of pneumoconiosis by the Director, Office of Workers' Compensation Programs (the Director), established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of the claim, Judge Kane found that the evidence did not establish that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 38. Accordingly, Judge Kane denied benefits. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. [*D.S.*] *v. Director, OWCP*, BRB No. 05-0499 BLA (Nov. 8, 2005)(unpub.); Director's Exhibit 41. Claimant appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the Board's decision on October 4, 2006. [*D.S.*] *v. Director, OWCP*, No. 05-4540, 2006 WL 2827676 (6th Cir. Oct. 4, 2006); Director's Exhibit 44.

On December 6, 2006, claimant timely requested modification. *See* 20 C.F.R. §725.310; Director's Exhibit 46. The district director denied modification on June 28, 2007, and claimant timely requested a hearing, which was held on June 12, 2008. Director's Exhibits 51, 52, 55.

Administrative Law Judge Alice M. Craft (the administrative law judge), credited claimant with eight years of coal mine employment[2] pursuant to the parties' stipulation. Decision and Order at 3. The administrative law judge reiterated that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d), as the Director conceded the existence of pneumoconiosis. In considering the claim on the merits, the administrative law judge found that the evidence of record did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, finding no basis established to modify the prior denial, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director responds, urging affirmance of the denial of benefits.

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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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

[2] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 1, 4, 10. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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). The administrative law judge on modification has the authority "to reconsider all the evidence for any mistake of fact or change in conditions." *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), the administrative law judge accurately determined that the pulmonary function studies and blood gas studies of record, dated January 29, 1999 and December 7, 2001, produced nonqualifying[3] values, and that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 13; Director's Exhibits 2, 23. We therefore affirm the administrative law's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical reports of Drs. Baker, Chatterjee, and Morris, and the treatment records of Dr. Villaran. In a report dated January 29, 1999, Dr. Baker reported that claimant's pulmonary function and blood gas studies were normal, and that claimant had a "mild" or "minimal" impairment that left him with the respiratory capacity to perform the work of a miner. Director's Exhibit 2. In a medical report dated December 7, 2001, Dr. Baker reported that claimant's pulmonary function and blood gas studies were normal, and that claimant had "minimal" or "no" impairment, and retained the respiratory capacity to perform the work of a miner. Director's Exhibit 19. In a letter dated September 12, 2003, Dr. Baker reported that although claimant's chest x-ray was positive for pneumoconiosis, his pulmonary function study was normal. Claimant's Exhibit 2. Dr. Baker reviewed claimant's pulmonary medications and noted that claimant has ischemic

[3] 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 and C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

heart disease. *Id*. In a November 13, 2004 letter to a Department of Labor claims examiner, Dr. Baker stated that although claimant has pneumoconiosis, "he has no impairment. . . . He could do the work of a miner or comparable work in a dust free environment as he has only a class 1 or 0% impairment . . . ." Director's Exhibit 33. Finally, in a letter dated November 29, 2005, Dr. Baker indicated that claimant has coal workers' pneumoconiosis with chronic bronchitis as well as severe ischemic heart disease, and he reiterated that claimant's pulmonary function studies are normal. Dr. Baker noted that the primary cause of claimant's shortness of breath is his heart disease, but opined that claimant's coal workers' pneumoconiosis "may have played an etiological role in making his heart disease worse."[4] Director's Exhibit 42. Dr. Baker concluded that "claimant is currently totally and permanently disabled . . . due to his heart disease but should have no further exposure to coal dust, rock dust or similar noxious agents . . . as his condition could worsen." *Id*.

In a letter dated November 21, 2005, Dr. Chatterjee, one of claimant's treating cardiologists, noted that claimant suffers from "multiple medical problems including coronary artery disease, severe cardiomyopathy . . . chronic obstructive pulmonary disease, hypertension, prior myocardial infarction, [and] history of congestive heart failure. . . ." Director's Exhibit 42 at 9. Dr. Chatterjee reported that claimant's cardiac catheterization "revealed severe 3-vessel coronary artery disease which could not be addressed surgically," and opined that "I do not feel he could possibly be gainfully employed and would consider him to be totally, permanently disabled." Director's Exhibit 42. In a letter dated May 1, 2008, Dr. Morris, claimant's treating physician, stated that claimant's "black lung disease (pneumoconiosis) was a preexisting condition" that contributed to his subsequent heart problems. Claimant's Exhibit 1. Dr. Morris opined that claimant is "permanently and completely disabled secondary to this chronic lung disease, black lung (pneumoconiosis)." *Id*.

---

[4] Dr. Baker stated that:

> [T]hose with bronchitis and inflammation of the lung have increased values for inflammatory chemicals . . . which ha[ve] been shown to cause an increase[d] rate of ischemic heart disease. . . . [C]urrent data suggest there is a greater percentage of people with chronic lung disease who have heart disease than those who do not have chronic lung disease. So I feel this is possibly . . . compounding his problem from his heart disease, and may have played an etiological role in making his heart disease worse.

Director's Exhibit 42.

In treatment records dated March 28-30, 2005, Dr. Villaran documented claimant's hospitalization for respiratory failure due to heart disease, chronic obstructive pulmonary disease, and possible coal workers' pneumoconiosis. Director's Exhibit 49.

In considering the foregoing evidence, the administrative law judge found that Dr. Baker consistently stated that claimant has minimal impairment that is not totally disabling. The administrative law judge noted that although Dr. Baker checked the box for a "mild" impairment in his 1999 report, and checked "no" impairment in his 2001 report, there was no inconsistency in his overall opinion that claimant retains the respiratory capacity to perform his last coal mine employment. This finding was reasonable and it is supported by substantial evidence. *See Director, OWCP v. Rowe,* 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149, 1-155 (1989) (*en banc*). Further, as the administrative law judge found, Dr. Baker repeatedly noted that claimant's pulmonary function studies are normal, and, although he stated that pneumoconiosis may have compounded claimant's heart disease, he opined that claimant's disability is due to heart disease. The administrative law judge acted within her discretion in determining that Dr. Baker's opinion was well-documented and well-reasoned. *See Rowe,* 710 F.2d at 255, 5 BLR at 2-103; *Clark,* 12 BLR at 1-155; *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987). Additionally, the administrative law judge noted correctly that Dr. Baker's statement, that claimant should have no further exposure to coal dust or any agent that could worsen his condition, does not constitute a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Moreover, the administrative law judge permissibly found that the diagnoses of severe heart disease, by Drs. Villaran and Chatterjee, supported Dr. Baker's conclusion that claimant is disabled because of his severe heart disease, not because of any impairment of his lungs. *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988). Substantial evidence supports the administrative law judge's permissible credibility determination, and the Board is not authorized to reweigh the evidence. *Anderson,* 12 BLR at 1-113.

Additionally, the administrative law judge permissibly found Dr. Morris's opinion, that claimant is disabled due to chronic lung disease, to be undocumented and unreasoned, as Dr. Morris did not identify any objective testing or other basis for her conclusion, and she did not address claimant's heart condition. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams,* 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Rowe,* 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-22. Therefore, 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.

In his letter filed with the Board, claimant argues that the administrative law judge did not adequately consider the lay testimony of claimant and his daughter that his breathing problems are due to the condition of his lungs, not his heart. Claimant's Letter at 2. The administrative law judge considered this testimony, but found that the medical evidence did not establish total respiratory disability. Decision and Order at 14. The applicable regulation provides that "[i]n the case of a living miner's claim, a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony." 20 C.F.R. §718.204(d)(5). Since the administrative law judge found that the medical evidence in this case did not establish total disability, she did not err in declining to credit the lay testimony of claimant and his daughter. *See* 20 C.F.R. §718.204(d)(5); *Madden v. Gopher Mining Co.*, 21 BLR 1-122, 1-125 (1999).

Thus, we affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2). As claimant failed to establish total disability, an essential element of entitlement in a miner's claim under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of modification and her denial of benefits. *See* 20 C.F.R. §725.310; *Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

_____

ROY P. SMITH
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge

_____

JUDITH S. BOGGS
Administrative Appeals Judge