BRB No. 13-0158 BLA

KENNETH LAWSON, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/19/2013
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Phyllis L. Robinson, Manchester, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2009-BLA-5913) of Administrative Law Judge John P. Sellers, III (the administrative law judge), denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a claim filed on June 1, 2005. Director's Exhibit 2. In the initial Decision and Order issued on October 1, 2007, Administrative Law Judge Kenneth A. Krantz found that the evidence established the existence of pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). Judge Krantz further 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)(2). Accordingly, Judge Krantz denied benefits.

Claimant appealed, but later requested modification while his appeal was pending before the Board. Director's Exhibits 75, 81. Accordingly, the Board dismissed claimant's appeal and remanded the case to the district director for modification proceedings. Director's Exhibit 82. Subsequently, claimant's case was referred to the Office of Administrative Law Judges. Director's Exhibit 104.

In a Decision and Order dated December 18, 2012, the administrative law judge credited claimant with thirty years of coal mine employment,[1] pursuant to the parties' stipulation. Decision and Order at 3; Hearing Tr. at 26-27. The administrative law judge considered the evidence originally submitted and the evidence submitted on modification, and found that claimant did not establish the existence of complicated pneumoconiosis, and therefore did not invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found no change in conditions or mistake of fact to support modification of the denial of benefits. *See* 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's exclusion of a biopsy report and a medical report. Further, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2)(iv).[2] Employer responds in support of the administrative law judge's evidentiary rulings, and his denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

[1] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 7, 8. 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).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A party may request modification of an award or denial of benefits within one year, 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). In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet- General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc*., 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994).

Claimant's sole challenge to the administrative law judge's finding that the claimant did not establish complicated pneumoconiosis is that the administrative law judge erred in excluding a biopsy report from Dr. Spencer, one of claimant's treating physicians. Claimant's contention lacks merit. On August 10, 2012, approximately one year after the record closed, claimant moved to file "newly discovered evidence," including a biopsy report from Dr. Spencer. Motion to File Newly Discovered Evidence. After considering claimant's motion and employer's objection thereto, the administrative law judge declined to admit the report, noting that the evidentiary record was closed, and that the development of new evidence, or the submission of evidence developed post-hearing, was not permitted. The question of whether to reopen the record in this case was a procedural matter within the administrative law judge's discretion. *Troup v. Reading Anthracite Coal Co*., 22 BLR 1-11, 1-21 (1999) (en banc). Claimant has demonstrated no abuse of discretion by the administrative law judge in declining to reopen the record. Furthermore, as claimant, who is represented by counsel, alleges no other error regarding the administrative law judge's finding that the evidence did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, this finding is affirmed. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Powell, Jarboe, Repsher, Spagnolo, Spencer, and Alam regarding whether claimant is totally disabled by a respiratory or pulmonary impairment.

Drs. Powell, Jarboe, Repsher, and Spagnolo opined that claimant is not totally disabled by a respiratory or pulmonary impairment. Director's Exhibits 14, 24, 61, 62, 71; Employer's Exhibits 1, 2. In his report, Dr. Spencer, claimant's treating physician from October 2004 until at least February 2008, noted that claimant has shortness of breath upon moderate exertion and opined that claimant does not retain the respiratory capacity to perform the work of a coal miner.[3] Director's Exhibits 27, 80. Similarly, Dr. Alam, claimant's treating pulmonologist since 2005, opined in a medical report that, "[l]ooking at his x-ray[,] [claimant] is permanently disabled from a pulmonary point of view . . . ." Director's Exhibit 84. However, at a subsequent deposition, Dr. Alam testified, "Now, if you ask me if [claimant] is completely disabled from a pulmonary point of view, my answer is no." Employer's Exhibit 3 at 15. Dr. Alam further explained that he could not determine whether claimant could do an eight or ten hour shift in underground mining without administering a cardiopulmonary exercise test to claimant.[4] *Id.*

While noting the treating relationship between claimant and Drs. Spencer and Alam, the administrative law judge accorded "less probative weight" to Dr. Spencer's opinion, and "little probative weight" to Dr. Alam's opinion. Decision and Order at 29-30. The administrative law judge found that Dr. Spencer relied on claimant's shortness of breath and arthritis to diagnose total disability, and that his opinion therefore lacked supporting objective medical evidence of a respiratory impairment and was not well-documented. *Id.* at 29. The administrative law judge found that Dr. Alam's opinion also lacked supporting medical documentation and was inconsistent, as the physician appeared to believe that claimant could not return to his coal mine work because of his pneumoconiosis, yet conceded that claimant is not totally disabled from a pulmonary perspective. *Id.* at 30. Therefore, the administrative law judge determined that the opinions of Drs. Spencer and Alam were not as well-reasoned or documented as the opinions of Drs. Powell, Jarboe, Repsher, and Spagnolo. The administrative law judge, therefore, concluded that the medical opinion evidence did not establish total disability.

Claimant contends that the administrative law judge erred in failing to find the existence of a totally disabling respiratory or pulmonary impairment established based on the opinions of his treating physicians, Drs. Spencer and Alam. Claimant's Brief at 6-9.

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[3] On a form generated in connection with claimant's application for Social Security disability insurance benefits, Dr. Spencer noted that claimant "has reached the point where he will have to avoid further dust exposure and is unable to work any longer on his knees." Director's Exhibit 95 at 26.

[4] On cross-examination, Dr. Alam stated that claimant could not do coal mine work, based on his arthritis, positive x-ray, work history, and physical examination. Employer's Exhibit 3 at 15-17.

We disagree. The determination of whether a medical opinion is adequately reasoned and documented is committed to the discretion of the administrative law judge. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). An administrative law judge is not required to accord greater weight to the opinion of a treating physician, based on that status alone. *See* 20 C.F.R. §718.104(d)(5). Rather, the opinions of treating physicians get the deference they deserve based on their power to persuade. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002). Because Drs. Spencer and Alam did not adequately support their total disability opinions with reference to medical evidence in the record, the administrative law judge permissibly found that their diagnoses were not sufficiently documented. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 29-32. Consequently, we reject claimant's contention that the administrative law judge erred in failing to accord the opinions of Drs. Spencer and Alam greater weight, based upon their status as claimant's treating physicians. As substantial evidence supports the administrative law judge's credibility determinations regarding the opinions of Drs. Spencer and Alam, 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). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Anderson v. Valley Camp of Utah, Inc*. 12 BLR 1-111, 1-113 (1989).

Finally, claimant contends that the administrative law judge erred in excluding an August 23, 2011 medical report by Dr. Baker, submitted by claimant in response to a deposition by Dr. Spagnolo. Claimant's Brief at 3-4. Claimant has not explained how any error committed by the administrative law judge in excluding Dr. Baker's report prejudiced his case. The administrative law judge did not rely on Dr. Spagnolo's deposition testimony in finding that the opinions of Drs. Spencer and Alam were not well-documented and therefore, unpersuasive on the issue of total disability. *See* Decision and Order at 28-30. In light of the above, and as claimant alleges no prejudice resulting from the administrative law judge's decision to exclude Dr. Baker's medical report, any error committed by the administrative law judge would be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984). Therefore, we need not address claimant's allegation that the administrative law judge improperly excluded Dr. Baker's report.

The administrative law judge permissibly found that claimant did not establish that he has a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2).[5] As claimant failed to establish total disability, a necessary element of

[5] The administrative law judge correctly determined that the rebuttable presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4), a provision contained within the recent amendments to the Act, does not apply to this claim because claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). We therefore

entitlement in a miner's claim under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of claimant's modification request and affirm the denial of benefits. 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.

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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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JUDITH S. BOGGS
Administrative Appeals Judge

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reject claimant's contention that the administrative law judge erred in failing to find that claimant invoked the presumption. Claimant's Brief at 5, 10-11.