

BRB No. 03-0734 BLA

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| GRADY G. BURSON |) | |
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| Claimant-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: 07/14/2004 |
| |) | |
| MAGOFFIN COAL, 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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Brett D. Davis (Chafin & Davis, P.S.C.), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (1999-BLA-0878) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a 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).¹ This case is before the Board for the fifth time.² Based on the date of

¹ 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

filing, the administrative law judge adjudicated this petition for modification pursuant to 20 C.F.R. Part 718 (2000). The administrative law judge found the newly submitted evidence insufficient to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(4) (2000), or a change in condition pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge that the evidence is insufficient to demonstrate the existence of total respiratory disability. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204(2000). 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*).

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.

² Claimant filed his original application for benefits on March 18, 1986. Director's Exhibit 2. This case had been appealed to the Board three times and subsequently remanded to the administrative law judge for further consideration. *Burson v. Magoffin Coal, Inc.*, BRB No. 00-0976 BLA (July 20, 2001)(unpub.). On March 12, 2002, the administrative law judge issued a Decision and Order on Remand Denying Benefits, again finding that the newly submitted evidence of record failed to establish total respiratory disability at Section 718.204(c)(4) (2000), or a change in condition at Section 725.310 (2000). On appeal, the Board again vacated the administrative law judge's decision and remanded the case for the administrative law judge to make findings pursuant to Section 718.204(c)(4) (2000) regarding total disability, and a change in condition pursuant to Section 725.310 (2000). *Burson v. Magoffin Coal, Inc.*, BRB No. 02-0454 BLA (Dec. 24, 2002)(unpub.).

After considering the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. Claimant contends that the administrative law judge erred by failing to credit the medical reports of Drs. Myers and Sundaram diagnosing total respiratory disability. Claimant specifically asserts that, contrary to the administrative law judge's findings, Drs. Myers and Sundaram were aware of the requirements of claimant's usual coal mine work, and because their opinions were based on the results of claimant's examination, medical history, objective tests, and x-ray readings, their opinions are adequately documented and reasoned. We reject claimant's assertion.

The record supports the administrative law judge's determination that although Drs. Myers and Sundaram were aware of the titles of claimant's former coal mine work, they did not indicate that they were familiar with the exertional requirements of these jobs which the administrative law judge found required only light to moderate exertion.³ Employer's Exhibits 1, 6; Claimant's Exhibit 1; Director's Exhibits 113, 124; Decision and Order at 7. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000);⁴ *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-25 (4th Cir. 1995) *rev=g*, 14 BLR 1-37 (1990)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

In weighing the evidence, the administrative law judge permissibly gave less weight to Dr. Myers' report as it was based on a pulmonary function study which was found invalid by reviewing physicians with superior qualifications, and failed to indicate any additional objective findings which supported the diagnosis of total respiratory disability. Director's Exhibit 113; Decision and Order at 6; *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); see *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Clark*, 12 BLR 1-149; *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). The administrative law judge also acted within his discretion, as the finder of fact, in finding Dr. Sundaram's opinion poorly reasoned, as this physician only indicated that he relied on claimant's non-qualifying pulmonary function studies and did not provide any other findings supportive of total disability, and was unaware

³ The record indicates that claimant worked in the strip mines as a truck driver, dozer operator and loader operator which involved sitting for ten hours a day. Director's Exhibit 9.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Kentucky. Director's Exhibit 3; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

of the specific requirements of claimant's coal mine work. Claimant's Exhibit 1; Employer's Exhibit 6; Decision and Order at 6-7; *Cornett*, 227 F.3d 569, 22 BLR 2-107; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Moreover, claimant's assertion of vocational disability based on his age, education and work experience does not support a finding of total disability or pulmonary disability compensable under the Act. *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Ramey v. Kentland-Elkhorn Coal Corp.*, 775 F.2d 485, 7 BLR 2-124 (6th Cir. 1995). The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when they are supported by substantial evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Therefore, we affirm the administrative law judge's weighing of the opinions of Drs. Myers and Sundaram, and the administrative law judge's finding that claimant has failed to establish a change in condition pursuant to Section 725.310 (2000). *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 296 (6th Cir. 1994). Consequently, we affirm the denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge