BRB No. 97-1257 BLA

WILLIAM O'DONNELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SPLIT VEIN COAL COMPANY	)	DATE ISSUED:
	)	
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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

William O'Donnell, Lost Creek, Pennsylvania, *pro se*.

James E. Pocius and Joan M. Sullivan (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-1237) of Administrative Law Judge Paul H. Teitler 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). This case is before the Board for the third time.[1]

[1] Claimant originally filed for benefits on January 26, 1983, and claimant took no further action after the case was administratively denied. On August 3, 1987, claimant filed a second application for benefits. Following the hearing on the claim, an administrative law judge denied benefits and claimant appealed to the Board. The Board affirmed the denial of benefits. *O'Donnell v. Split Vein Coal Co.*, BRB No. 89-1881 BLA (Nov. 30, 1990) (unpub.). The administrative law judge denied a

The administrative law judge, in the instant case, stated that this is a motion for modification filed pursuant to 20 C.F.R. §725.310 and that it would therefore be considered under the standard set forth in *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). Decision and Order at 11. The administrative law judge noted that the miner's previous claim was denied because it was found that claimant failed to establish total disability due to pneumoconiosis. *Id.* After reviewing the newly submitted evidence, the administrative law judge held that claimant again failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Decision and Order at 14. Accordingly, benefits were denied. In the instant appeal, claimant generally assails the administrative law judge's finding that the evidence failed to establish total disability due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond to this appeal.

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 Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under Part 718, 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9

---

subsequent motion for modification of his Decision and Order, and claimant appealed this determination to the Board. The Board affirmed the administrative law judge's denial. *O'Donnell v. Split Vein Coal Co.*, BRB No. 93-0734 BLA (Sept. 21, 1994)(unpub.). Claimant filed another motion for modification, which again was denied by the administrative law judge. Claimant then filed the instant appeal to the Board.

BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Failure to establish any one of these elements precludes entitlement. *Id*. Additionally, in determining whether claimant has established a change in conditions pursuant to Section 725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *See Keating, supra*; *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

With respect to Section 718.204(c), the administrative law judge, in the instant case, determined that although claimant established the presence of pneumoconiosis arising out of coal mine employment, the evidence of record failed to establish that he is totally disabled. Decision and Order at 14. The administrative law judge noted that on modification four pulmonary function studies, one blood gas study and two medical reports were admitted into evidence. Decision and Order at 3-10. The administrative law judge credited the two invalidations of the pulmonary function study conducted on January 26, 1995 by Dr. Kraynak. Dr. Kaplan and Dr. Levinson, both of whom are board certified in internal and pulmonary medicine,[2] found the results of the pulmonary function study not to be indicative of claimant's respiratory capacity based on his poor effort. Additionally, Dr. Kaplan noted a lack of documentation of proper calibration of the spirometer. Director's Exhibit 90; Employer's Exhibit 7 at pp.15-16. The administrative law judge credited the invalidation reports of Drs. Levinson and Kaplan on the basis that these physicians possess superior qualifications in that they are board certified in internal medicine and pulmonary diseases and because they provided "detailed and well-reasoned" clinical rationale to support their conclusions.[3] Decision and Order at 12. Inasmuch as the administrative law judge in this case properly exercised his discretion as fact-finder in crediting the opinion of physicians with superior qualifications, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), and permissibly found their opinions to be better reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *see also Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), we affirm the administrative law judge's finding that the qualifying pulmonary function study of January 26, 1995 was properly invalidated. With respect to the pulmonary function study performed on September 14, 1995, the administrative law judge noted that although the post-bronchodilator values obtained were qualifying, the physician who conducted the study noted claimant's poor cooperation. Based on this finding,

[2] Dr. Kaplan is also certified in critical care medicine. *See* Director's Exhibit 97.

[3] Dr. Kraynak is only Board eligible in family medicine. Director's Exhibit 36.

the administrative law judge properly found the study insufficient to establish total disability. Decision and Order at 13; *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Thus, we affirm his finding that the pulmonary function study of September 14, 1995 failed to establish total disability. Finally, with respect to the pulmonary function study evidence, the administrative law judge correctly found that not only did the reports of November 21, 1995 and March 9, 1996 yield non-qualifying results, they were properly invalidated for their failure to provide MVV results.[4] *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987). Thus, we affirm the administrative law judge's findings pursuant to Section 718.204(c)(1) as they are supported by substantial evidence.

Considering the newly submitted blood gas study evidence, the administrative law judge properly found that the values obtained on the study were non-qualifying under Appendix C of 20 C.F.R. Part 718. Decision and Order at 13; Director's Exhibit 95. The administrative law judge also properly found that no evidence of cor pulmonale was submitted into evidence. Decision and Order at 13. Therefore, we affirm the administrative law judge's findings that the newly submitted evidence fails to establish total disability pursuant to Section 718.204(c)(2), (3).

In addressing whether a change in conditions was established at Section 718.204(c)(4), the administrative law judge fully considered the medical opinions admitted into evidence on modification by Drs. Levinson and Simelaro, who are both board-certified in internal and pulmonary medicine. The administrative law judge rationally concluded that Dr. Simelaro's opinion was insufficient under Section 718.204(c)(4) as the doctor's "opinion of the inadvisability of returning to coal mine employment because of pneumoconiosis is not the equivalent of a finding of total disability." *Taylor v. Evans & Gramble Co.*, 12 BLR 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984); *Brusetto v. Kaiser Steel Corp.*, 7 BLR 1-422 (1984); Decision and Order at 13-14. Further, the administrative law judge noted that Dr. Simelaro based his opinion on non-qualifying pulmonary function studies. Decision and Order at 14; Claimant's Exhibits 1, 3, 4, 18; Director's Exhibit 84. In contrast, the administrative law judge found that Dr.

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

Levinson's opinion of no total disability to be well-reasoned and documented. Dr. Levinson's opinion is based upon two physical examinations, a non-qualifying blood gas study, two non-qualifying pulmonary function studies and the doctor's review of the other pulmonary function studies conducted at the behest of Dr. Simelaro. Inasmuch as an administrative law judge may properly accord greater weight to a medical opinion found to be more compatible with the underlying medical documentation of record, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *McMath, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), we affirm the administrative law judge's finding that the evidence failed to establish total disability pursuant to Section 718.204(c)(4) as it is supported by substantial evidence. Inasmuch as claimant has failed to demonstrate total disability pursuant to 20 C.F.R. §718.204(c) by the newly submitted evidence, we affirm the administrative law judge's determination that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310.

In considering whether a mistake of fact occurred, the administrative law judge concluded that the previous denial was correctly issued, stating that "my review of the record and the prior decisions does not reveal any mistake of fact" was made in the adjudication of claimant's prior claims. Decision and Order at 11. Although the administrative law judge properly assessed the newly submitted evidence on modification, the administrative law judge is required to review the entire evidentiary record, not merely the newly submitted evidence in determining whether a mistake of fact was made pursuant to Section 725.310. *See Keating, supra; Nataloni, supra; Kovac, supra*. The administrative law judge's conclusory statement that no mistake of fact was made in the previous decisions is not sufficient to meet his obligation, under the regulations and under the Act, of carefully considering each part of the evidence and weighing the evidence accordingly. *See* 20 C.F.R. §725.477(b); *Keating, supra*. The administrative law judge's conclusory statement also fails to comport with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), by omitting from the determination of the issue sufficient analysis and findings of fact to demonstrate that all relevant evidence of record was weighed. Inasmuch as the administrative law judge failed to review the record in its entirety, he failed to carry out his responsibilities pursuant to 20 C.F.R. §725.310. Where the finder of fact fails to properly carry out his adjudicatory responsibilities, the Board may not "fill in the gaps" by performing prohibited fact-finding. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99, 2-103 (6th Cir. 1983). Therefore, we vacate the administrative law judge's mistake of fact determination and remand this case for the administrative law judge to assess the record in its entirety.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge