BRB No. 08-0277 BLA

F.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LODESTAR ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 12/19/2008
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, P.S.C., Pikeville, Kentucky, for claimant.

Stanley S. Dawson (Fulton & Devlin), Louisville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (05-BLA-5598) of Administrative Law Judge Robert D. Kaplan rendered 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 involves employer's request for

modification of the district director's award of benefits on a miner's claim filed on September 13, 2002.[1] Director's Exhibit 1. The administrative law judge credited claimant with thirty years of coal mine employment[2] based on the parties' stipulation, and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.

Considering the newly submitted evidence in conjunction with the earlier evidence, pursuant to employer's modification request, the administrative law judge found that although the review of the entire record established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, the evidence did not establish the existence of a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge concluded that employer had demonstrated a mistake in the ultimate determination of entitlement, pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his evaluation of the blood gas study and medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv).[3] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response in this 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

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[1] The district director awarded benefits on August 26, 2003. Director's Exhibit 36. Employer's request for a formal hearing on October 7, 2003, was untimely, as it was not made within the 30-day period allowed. Director's Exhibit 23. Employer requested, in the alternative, that its request be construed as a request for modification. *Id.* The district director denied employer's request for modification on November 3, 2004. Director's Exhibit 35. Employer requested a formal hearing and the case was transferred to the Office of the Administrative Law Judges on November 19, 2004. Director's Exhibit 36.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 2, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] We affirm the administrative law judge's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii), as unchallenged on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*,, 6 BLR 1-710 (1983).

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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant initially contends that the administrative law judge erred in finding that the blood gas studies were in "equipoise and do not support a finding of total disability" pursuant to 20 C.F.R. §718.204(b)(2)(ii). Claimant's Brief at 9. Claimant's argument lacks merit. The administrative law judge considered two blood gas studies. The initial study, performed by Dr. Baker on January 8, 2003, produced qualifying resting values.[4] Director's Exhibit 10. Dr. Baker did not conduct an exercise blood gas study. Subsequently, on April 3, 2004, Dr. Dahhan conducted both resting and exercise blood gas studies, which were submitted by employer in support of its request for modification. Director's Exhibit 31. The resting study produced qualifying values, while the exercise study produced non-qualifying values. Contrary to claimant's contention, while the administrative law judge stated that Dr. Dahhan's resting and exercise results were in equipoise, the administrative law judge concluded that when Dr. Dahhan's studies were considered together with Dr. Baker's study, "the arterial blood gas studies establish total disability." Decision and Order at 20. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that the blood gas study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), and, therefore, does not establish a basis for a finding of a mistake in fact.

Claimant next contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of total disability at 20 C.F.R. §718.202(b)(2)(iv), in that he improperly accorded diminished weight to the opinion of Dr. Baker. Claimant's Brief at 10-11. We disagree.

In considering the medical opinion evidence relevant to 20 C.F.R §718.204(b)(2)(iv), the administrative law judge found that Dr. Baker opined that claimant suffers from a totally disabling respiratory impairment, based on his qualifying resting blood gas studies. Decision and Order at 18-19. By contrast, Dr. Dahhan opined

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

that claimant retains the respiratory capacity to perform his usual coal mine work, and that his blood gas abnormalities are due to a cardiac condition, unrelated to coal mine employment.[5] Decision and Order at 18-19. The administrative law judge credited the opinion of Dr. Dahhan over the opinion of Dr. Baker to find that employer established a mistake in the prior finding of total disability, pursuant to 20 C.F.R. §§718.204(b)(2)(iv), 725.310.

Evaluating the medical opinions, the administrative law judge noted that in Dr. Baker's initial January 8, 2003 report, upon which the prior determination of claimant's entitlement was based, the physician noted the results of his physical examination and objective testing, including x-ray, pulmonary function studies, and a resting blood gas study. Based on this information, together with claimant's medical and employment histories, Dr. Baker diagnosed pneumoconiosis, chronic bronchitis, moderate resting arterial hypoxemia, and "? Histoplasmosis." Decision and Order at 14-15; Director's Exhibit 10. Dr. Baker concluded that claimant's degree of respiratory impairment was "moderate secondary to reduced [blood gas study values], chronic bronchitis, and Coal Workers' Pneumoconiosis 1/2." Decision and Order at 20; Director's Exhibit 10. In a clarification report dated September 3, 2004, Dr. Baker elaborated on his earlier opinion, stating:

> I feel each condition, in terms of his Coal Workers Pneumoconiosis, moderate resting arterial hypoxemia and chronic bronchitis, are related to his coal dust exposure and his coal dust exposure has been a significant contributing factor and a substantially contributing factor in each incidence. His pulmonary function studies do not show any impairment as they were within normal limits. So he may have a mild to moderate impairment based on his arterial blood gases, but on the basis of his pulmonary function studies, he could perform the work of a coal miner or comparable work in a dust-free environment.

Decision and Order at 21; Director's Exhibit 31. The administrative law judge noted that in a subsequent report dated September 3, 2005, however, Dr. Baker acknowledged that recent blood gas studies performed by claimant's treating physician "were within normal limits" and that "[t]his would suggest [claimant] could do the work of a coal miner . . . ." Decision and Order at 20; Employer's Exhibit 3.

[5] The administrative law judge also considered the opinion of Dr. Caffrey, finding, correctly, that the physician offered no definitive opinion on the issue of disability. Decision and Order at 20; Employer's Exhibit 5. Claimant does not challenge the administrative law judge's evaluation of Dr. Caffrey's opinion. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

On April 3, 2004, claimant was examined by Dr. Dahhan, at the request of employer. The administrative law judge noted that in a report dated April 8, 2004, based on physical examination, work and medical history, x-ray, pulmonary function studies, and both resting and exercise blood gas studies, Dr. Dahhan found that claimant "retain[ed] the respiratory capacity to continue his previous coal mine work or job of comparable physical demand." Director's Exhibit 31. Dr. Dahhan explained:

> [Claimant] has resting hypoxemia that subsided after exercise in the face of normal pulmonary mechanics including spirometry, lung volumes and diffusion capacity associated with cardiac enlargement indicating that the resting hypoxemia is due to a cardiac condition.

Decision and Order at 19-20; Director's Exhibit 31. During his deposition, Dr. Dahhan testified that while claimant's resting blood gas study values met the disability standards, the exercise values did not, and the pulmonary function study indicated no obstruction or restriction. Employer's Exhibit 2 at 4. Dr. Dahhan stated that claimant's normal pulmonary mechanics led him to conclude that claimant's reduced resting blood gas study values were not due to coal dust exposure. The physician explained that although a variety of conditions can affect oxygenation of the blood, including chest wall abnormality, obesity, and sleep apnea, the most frequent cause is congestive heart failure, a condition unrelated to coal dust exposure. Employer's Exhibit 2 at 5-6. Dr. Dahhan stated that while he could not definitively diagnose congestive heart failure without additional data, claimant's chest x-ray showed cardiac enlargement, and his EKG showed premature ventricular contractions, both of which could account for the blood gas abnormalities. Employer's Exhibit 2 at 6, 12.

The administrative law judge noted that Dr. Baker reviewed Dr. Dahhan's opinion, and other medical evidence of record, and prepared an additional report dated December 12, 2005. Decision and Order at 19. Dr. Baker countered Dr. Dahhan's opinion, that claimant's abnormal resting blood gas studies were due to a cardiac condition, stating that while Dr. Dahhan was a well qualified and respected physician, "sometimes a doctor's point of advocacy may take [precedence] over the total information." Claimant's Exhibit 3. Dr. Baker concluded:

> On the basis of his arterial blood gasses, he is totally and permanently disabled from working in the coal mine industry or occupations requiring a similar degree of exertion . . . .
>
> In summary, I feel he has Coal Workers Pneumoconiosis, category 1 on basis of 2000 ILO Classification. He has a disabling degree of resting arterial hypoxemia. He has a significant history of coal dust exposure and a minimal history of cigarette smoking. I feel his condition is significantly

> related to his coal dust exposure with both clinical and legal pneumoconiosis and it does cause a disabling arterial hypoxemia.

Claimant's Exhibit 3 at 4. The administrative law judge noted that in his deposition, Dr. Baker acknowledged that Dr. Dahhan's exercise blood gas studies were non-qualifying, as were all of the pulmonary function studies, but Dr. Baker reiterated his earlier conclusion that, based on the resting blood gas studies, claimant was totally disabled from working in coal mine employment. Decision and Order at 19; Employer's Exhibit 2. In his final report of record, dated May 17, 2006, Dr. Baker again noted that while the resting blood gas studies performed by himself and Dr. Dahhan met the standards for establishing disability, Dr. Dahhan's exercise blood gas study was non-qualifying. Dr. Baker stated that the non-qualifying exercise study, together with claimant's normal diffusion and normal pulmonary function studies, did "suggest a possible lack of relationship due to coal dust." Decision and Order at 19; Claimant's Exhibit 8 at 1. Dr. Baker further stated that he could "not explain why two blood gas studies were so abnormal and one was normal, unless it has to do with the machine that the test was performed on," but he acknowledged that both he and Dr. Dahhan had attested that their machines were accurate. Claimant's Exhibit 8 at 1. Dr. Baker also noted, but did not dispute, Dr. Dahhan's opinion that the resting blood gas abnormalities were cardiac in etiology, stating that there is "nothing that we can 'hang our hat on' to definitely exclude [claimant's] pneumoconiosis as a cause of the arterial oxygen abnormalities." Claimant's Exhibit 8 at 2-3. Thus, Dr. Baker concluded that claimant has clinical and legal pneumoconiosis, and that "on the basis of his arterial blood gas studies," he is totally and permanently disabled. Claimant's Exhibit 8 at 3.

Pursuant to a modification request, the administrative law judge has the authority to reconsider all the evidence for any mistake in fact. 20 C.F.R. §725.310; *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see King v. Jericol Mining, Inc*., 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001). In determining whether the medical opinion evidence established a mistake in the prior determination of entitlement, and thus a basis for modification of the award, the administrative law judge initially considered the reports of Dr. Baker, upon whose opinion the prior award was based. Decision and Order at 20. The administrative law judge noted, as set forth above, that while Dr. Baker initially diagnosed a moderate impairment, he subsequently stated, in his clarifying report dated September 3, 2004, that the results of his January 8, 2003 testing led him to conclude that claimant "*may have* a mild to moderate impairment based on his blood gases." Decision and Order at 21; Director's Exhibit 31 (emphasis added). Thus, the administrative law judge permissibly discounted Dr. Baker's earlier opinion because it was speculative and equivocal on the issue of total disability. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 21; Director's Exhibits 10, 32. Considering Dr. Baker's subsequent reports, submitted in response to

employer's request for modification, the administrative law judge noted that in his report of September 3, 2005, Dr. Baker opined that claimant was not totally disabled and that his blood gas studies were normal. The administrative law judge further noted, however, that in his deposition testimony and his reports of December 12, 2005 and May 17, 2005, Dr. Baker reverted to his earlier opinion that claimant was totally disabled, based on his arterial blood gas studies, but failed to reconcile his conclusion with Dr. Dahhan's non-qualifying exercise blood gas study results. Decision and Order at 20; Employer's Exhibit 3; Claimant's Exhibits 3, 8. Thus, the administrative law judge permissibly found that Dr. Baker's later opinions regarding total disability were inconsistent.[6] *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Decision and Order at 20.

By contrast, the administrative law judge credited the opinion of Dr. Dahhan, that claimant retains the respiratory capacity to perform his usual coal mine work, and that his blood gas abnormalities are due to a cardiac condition. Decision and Order at 20. Finding that Dr. Dahhan's opinion was based on claimant's employment and smoking histories, and the results of his physical examination and objective testing, including an abnormal EKG and x-ray evidence of cardiac enlargement, the administrative law judge permissibly concluded that Dr. Dahhan's opinion was "well-documented and reasoned" and entitled to substantial weight. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 20.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained whether the diagnoses contained therein constituted reasoned medical judgments, 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).

[6] In addition, contrary to claimant's contention, Dr. Sikder's opinion does not support Dr. Baker's opinion on the issue of total disability, as Dr. Sikder did not address whether claimant is disabled. Claimant's Brief at 10; Claimant's Exhibit 4; Director's Exhibit 31. Thus, there is no merit to claimant's contention that the administrative law judge failed to accord "proper weight" to Dr. Sikder's opinion as one of claimant's "family and treating physicians." Claimant's Brief at 1.

Moreover, we further affirm the administrative law judge's finding that the evidence, weighed together, did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), as it is supported by substantial evidence. *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

As the administrative law judge properly found that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement under 20 C.F.R. Part 718, a finding of entitlement is precluded, and we affirm both the administrative law judge's finding that a mistake in fact was established and his denial of benefits. *See Anderson*, 12 BLR 1-111.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge