

BRB No. 97-0704 BLA

JOSEPH STEFAN)

Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order - Denial of Third Request for Modification of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

C. Douglas Ames (Elliott, Heller, Maas, Moro and Magill Co., L.P.A.), Youngstown, Ohio, for claimant.

Jill M. Otte (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Third Request for Modification (96-BLA-0841) of Administrative Law Judge Robert L. Hillyard 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). Claimant filed an application for benefits in 1981. Director's Exhibit 1. Benefits were denied by the claims examiner. Director's Exhibit 19. Claimant again filed for benefits on November 21, 1984. Director's Exhibit 2. On May 1, 1985, the district director denied benefits. Director's Exhibit 23. Claimant filed another application for benefits on May 13, 1985, Director's Exhibit 3, and on June 7, 1985, the case was transferred to the Office of Administrative Law Judges, Director's Exhibit 28.

After holding a hearing, the administrative law judge issued a Decision and Order - Denial of Benefits on July 28, 1986. The administrative law judge credited claimant with fourteen years and ten months of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that claimant's pneumoconiosis arose out of his coal mine employment. The administrative law judge found, however, that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Decision and Order - Denial of Benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's denial of benefits. *Stefan v. Director, OWCP*, BRB No. 86-2117 BLA (July 22, 1988)(unpub.); see Director's Exhibit 31. The Board subsequently granted claimant's motion for reconsideration, but denied the relief requested. *Stefan v. Director, OWCP*, BRB No. 86-2117 BLA (Oct. 25, 1988)(unpub. Order); see Director's Exhibit 32.

On May 11, 1989, claimant filed another application for benefits. Director's Exhibit 33. The claims examiner denied benefits, and claimant thereafter requested a hearing. The case was transferred to the Office of Administrative Law Judges, Director's Exhibit 44, and on March 22, 1990, the administrative law judge issued a Decision and Order - Denial of Request for Modification. The administrative law judge noted that his length of coal mine employment determination constituted the law of the case, and that claimant had not submitted any medical evidence that supported his petition for modification. The administrative law judge also determined that there was no mistake in a determination of fact in the prior decision. Decision and Order - Denial of Request for Modification; see Director's Exhibit 45. Claimant appealed to the Board. While the appeal was pending, claimant filed a petition for modification, Director's Exhibit 51, and on September 26, 1991, the Board issued an Order remanding the case to the district director pursuant to claimant's petition for modification. Director's Exhibit 52.

The claims examiner denied benefits. Director's Exhibit 56. The case was transferred to the Office of Administrative Law Judges on May 15, 1992, Director's Exhibit 58, and after holding a hearing, the administrative law judge issued a Decision and Order - Denial of Request for Modification (1993 Decision and Order). The administrative law judge adopted his prior length of coal mine employment finding, and determined that modification was not established based on a mistake in a determination of fact or by a change in conditions. 1993 Decision and Order; see Director's Exhibit 59.

On appeal, the Board affirmed the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment, and that the evidence was insufficient to demonstrate total respiratory disability pursuant to Section 718.204(c)(1) and (c)(2). However, the Board vacated the administrative law judge's decision and remanded the case for a complete credible

pulmonary examination. *Stefan v. Director, OWCP*, BRB No. 93-1556 BLA (Apr. 21, 1994)(unpub.); see Director's Exhibit 60.

Subsequently, the administrative law judge issued his Decision and Order - Denial of Third Request for Modification (1997 Decision and Order) on January 31, 1997. It is from this Decision and Order that claimant now appeals. The administrative law judge again credited claimant with fourteen years and ten months of coal mine employment and reviewed the evidence submitted since the 1993 Decision and Order. The administrative law judge found that the newly submitted x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). He noted, however, that this finding does not establish a change in conditions inasmuch as the existence of pneumoconiosis previously had been established. The administrative law judge then found that none of the newly submitted evidence established total disability pursuant to Section 718.204(c). Accordingly, the administrative law judge determined that claimant did not establish modification based on a change in conditions. The administrative law judge also determined that modification based on a mistake in a determination of fact was not established. Accordingly, benefits were denied.

On appeal, claimant asserts that the administrative law judge erred in finding the pulmonary function study evidence and the medical opinion evidence insufficient to demonstrate total disability and a change in conditions. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's 1997 Decision and Order.¹

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant asserts that the administrative law judge erred by finding that none of the pulmonary function studies yielded qualifying values. Claimant contends that the

¹ The administrative law judge's finding that modification is not established based on a mistake in a determination of fact, and his finding that total disability is not demonstrated pursuant to 20 C.F.R. §718.204(c)(2) and (c)(3), are not challenged on appeal. These findings are therefore affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

results of the 1992 pulmonary function study administered by Dr. Bermudez yielded qualifying values and are sufficient to establish a change in conditions. Further, claimant maintains that the administrative law judge improperly relied upon the more recent evidence, in violation of *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993) and *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

In considering the newly submitted evidence, the administrative law judge properly found that none of the pulmonary function studies yielded qualifying values. Director's Exhibits 61, 72, 73. Therefore, we affirm the administrative law judge's finding that total disability is not demonstrated pursuant to Section 718.204(c)(1). We also reject claimant's assertion that the 1992 pulmonary function study administered by Dr. Bermudez establishes a change in conditions. This evidence, dated March 3, 1992, was considered by the administrative law judge in his 1993 Decision and Order, see 1993 Decision and Order at 5; Director's Exhibit 59, and therefore cannot establish a change in conditions since the prior denial. See *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Claimant also contends that the administrative law judge improperly relied upon the more recent evidence in his analysis of the evidence at Section 718.204(c)(4) and erred by relying on Dr. Katzman's opinion.

We reject claimant's contention and affirm the administrative law judge's reliance on the more recent evidence as more probative of claimant's current pulmonary condition. See *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411 (1984); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982). We also affirm the administrative law judge's finding that Dr. Katzman's opinion is well-reasoned and documented, see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and hold that the administrative law judge permissibly determined that this opinion is entitled to determinative weight as he found it in conformity with the objective medical evidence, see *Wetzel v. Director, OWCP*, 8 BLR 1-138 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985). Further, we hold that the administrative law judge permissibly accorded less weight to the opinion authored by Dr. Bermudez in 1996, inasmuch as the administrative law judge found that he did not have a complete picture of claimant's current condition. See *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Sexton, supra*; *Coffey, supra*.

We reject claimant's contention that the administrative law judge's reliance on the more recent evidence at Section 718.204(c)(1) and (c)(4) constitutes a misapplication of the holdings in *Woodward* and *Adkins*. The holdings in *Woodward* and *Adkins* apply to the weighing of evidence in determining the existence of pneumoconiosis pursuant to Section 718.202(a), not to the administrative law judge's weighing of the evidence regarding total disability pursuant to Section 718.204(c). In addition, we note that *Woodward* and *Adkins* are not binding in this case arising within

the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989). Accordingly, we affirm the administrative law judge's findings pursuant to Section 718.204(c)(4).

Inasmuch as we affirm the administrative law judge's finding that claimant has not established modification based on a change in conditions or a mistake in a determination of fact, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order - Denial of Third Request for Modification, is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge