BRB No. 06-0634 BLA

JOHN C. GLASSIC	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/30/2007
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Request for Modification and Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Request for Modification and Denying Benefits (05-BLA-0040) of Administrative Law Judge Paul H. Teitler 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).[1] Claimant filed

[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 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.

this claim on July 2, 1997. Director's Exhibit 1. It is now before the Board for the fourth time. The Board discussed previously this claim's full procedural history.[2] In this decision we shall discuss only that procedural history related to the administrative law judge's decision to deny claimant's modification request and deny benefits.

In a Decision and Order on Remand issued on September 20, 2002, Administrative Law Judge Ralph A. Romano found that the medical opinion evidence established that claimant is totally disabled by a respiratory or pulmonary impairment,[3] but did not establish that his total disability is due to pneumoconiosis. Director's Exhibit 82. Accordingly, Judge Romano denied benefits.

Upon review of claimant's appeal, the Board affirmed the finding that claimant did not establish that his total disability is due to pneumoconiosis. The Board therefore affirmed the denial of benefits.[4] *Glassic v. Director, OWCP*, BRB No. 03-0219 BLA (Nov. 14, 2003)(unpub.); Director's Exhibit 92. The Board summarily denied claimant's motion for reconsideration. *Glassic v. Director, OWCP*, BRB No. 03-0219 BLA (Jan. 29, 2004)(unpub.); Director's Exhibit 94.

Thereafter, claimant timely requested modification pursuant to 20 C.F.R. §725.310 (2000), and submitted additional medical evidence. Director's Exhibit 95. The claim was referred to Administrative Law Judge Paul H. Teitler (the administrative law judge), who noted that the Director, Office of Workers' Compensation Programs (the Director), continued to contest the issue of total disability. Accordingly, the administrative law judge found that the issues before him were whether claimant established that he is totally disabled, and whether his total disability is due to pneumoconiosis.

Upon review of the record, the administrative law judge 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). Consequently, the administrative law judge

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[2] *Glassic v. Director, OWCP*, BRB No. 03-0219 BLA (Nov. 14, 2003)(unpub.); *Glassic v. Director, OWCP*, BRB No. 01-0661 BLA (Apr. 25, 2002)(unpub.); *Glassic v. Director, OWCP*, BRB No. 99-0636 BLA (Aug. 31, 2000); Director's Exhibits 62, 75, 92.

[3] By that point in the claim proceedings, the Director, Office of Workers' Compensation Programs (the Director), had conceded the existence of pneumoconiosis arising out of claimant's coal mine employment. Director's Exhibit 62.

[4] Because the Board affirmed on this ground, it did not address the Director's argument that substantial evidence did not support the finding that claimant was totally disabled. *Glassic*, slip op. at 2, 3.

determined that, "[t]o the extent that the prior determinations concluded that total disability had been established . . . they were based on mistakes of fact" under 20 C.F.R. §725.310 (2000), and "should be modified to reflect that total disability has not been established." Decision and Order at 9-10. Since claimant did not establish total disability, the administrative law judge found that he necessarily did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied claimant's request for modification, and denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the pulmonary function studies and medical opinions when he found that total disability was not established. Claimant further asserts that the administrative law judge did not explain why he found Judge Romano's previous finding of total disability to be mistaken. The Director responds in support of the administrative law judge's denial of claimant's request for modification.[5]

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 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).

Section 725.310 (2000) provides that 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) (2000). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that the administrative law judge has the authority to reconsider all the evidence for any mistake of fact. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-61-63 (3d Cir. 1995).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that the presence of a totally disabling respiratory or pulmonary impairment was not established pursuant to 20 C.F.R. §718.204(b)(2)(ii),(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), claimant argues that the administrative law judge had "no basis" to credit a non-qualifying pulmonary function study over three qualifying studies.[6] Claimant's Brief at 5. This argument lacks merit.

Contrary to claimant's contention, the administrative law judge permissibly credited Dr. Michos's opinion that the pulmonary function studies administered on March 5, 1998 and April 6, 1998 were invalid because they did not conform to the applicable quality standards. *See* 20 C.F.R. §718.103(c) (2000); *Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993). The administrative law judge considered Dr. Kraynak's disagreement with these invalidations, but rationally deferred to Dr. Michos's conclusion "based on his high qualifications as a pulmonary specialist."[7] Decision and Order at 6; *see Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988). Additionally, the administrative law judge permissibly discounted the qualifying values of the June 29, 1998 study, because they were disparately low compared to the values obtained on the other studies of record. *Baker v. North American Coal Corp.*, 7 BLR 1-79, 1-80 (1984).

Finally, the administrative law judge reasonably declined to credit Dr. Kraynak's opinion that the July 29, 1997, non-qualifying pulmonary function study administered by Dr. Green was invalid. Specifically, the administrative law judge considered Dr. Kraynak's opinion that the non-qualifying test results may reflect claimant coughed or added inhalation in some way. He also considered Dr. Green's notation stating only that claimant gave a fair effort on the test. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-149-50 (1990). Based on Dr. Green's notation, the administrative law judge was persuaded that any problems on the July 29, 1997 study were due to claimant's cooperation level, not to coughing or inhalation. The administrative law judge reasoned that, "with good effort, [c]laimant could have demonstrated only higher values" on the non-qualifying study. Decision and Order at 5. This was a valid reason to find the July 29, 1997, non-qualifying pulmonary function study to be reliable. *Anderson v. Youghiogheny and Ohio Coal Co.*, 7 BLR 1-152, 1-154 (1984). Therefore, we affirm the

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "nonqualifying" study exceeds those values.

[7] The record reflects that Dr. Kraynak is Board-eligible in family medicine, and Dr. Michos is Board-certified in internal medicine and pulmonary disease. Director's Exhibits 23, 27.

administrative law judge's finding that total disability was not established by the pulmonary function studies pursuant to 20 C.F.R. §718.204(b)(2)(i).

Claimant argues that the administrative law judge provided "innocuous reasons" for discrediting the opinions that claimant is totally disabled. Claimant's Brief at 5. We disagree. Drs. Kraynak, Simelaro, and Prince opined that claimant is totally disabled.[8] Claimant's Exhibits 4, 5, 7. The administrative law judge reasonably accorded little weight to Dr. Simelaro's opinion, because it was based on unreliable pulmonary function studies. *See Siwiec*, 894 F.2d at 639-40, 13 BLR at 2-267; *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984). Additionally, the administrative law judge rationally accorded no weight to Dr. Prince's statement that a "disabling respiratory condition has been established," Claimant's Exhibit 7 at 2, because Dr. Prince provided no basis for his finding. *See Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

Further, the administrative law judge acted within his discretion in finding that, although Dr. Kraynak was claimant's treating physician, his opinion was outweighed by a better documented opinion. *See* 20 C.F.R. §718.104(d); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). Specifically, the administrative law judge found that Dr. Kraynak relied on invalid pulmonary function studies, he did not perform blood gas studies, and provided no objective support for his opinion that claimant's condition worsened. *See Siwiec*, 894 F.2d at 639-40, 13 BLR at 2-267; *Lucostic*, 8 BLR at 1-47. By contrast, the administrative law judge found that Dr. Green had relied on a valid, non-qualifying pulmonary function study and a non-qualifying blood gas study when he opined that claimant has no evidence of respiratory disease. Director's Exhibit 11. Under these circumstances, the administrative law judge reasonably found Dr. Kraynak's opinion outweighed by Dr. Green's "better documented" opinion. Decision and Order at 9; *see* 20 C.F.R. §718.104(d)(5); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). We therefore affirm the administrative law judge's finding that total disability was not established by the medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant contends that the administrative law judge did not explain why he found that Judge Romano's previous finding of total disability was mistaken. To the contrary, the administrative law judge explained why he found that mistakes were made:

> To the extent that the prior determinations concluded that total disability had been established, I find they were based on mistakes of fact,

[8] The administrative law judge accurately noted that another physician, Dr. Kruk, evaluated claimant for cardiac disease, but did not address whether claimant is totally disabled by a respiratory or pulmonary impairment. Claimant's Exhibit 1.

> specifically that the July 29, 1997 pulmonary function study was not a valid assessment of [c]laimant's pulmonary capacity and that Dr. Green's opinion, based upon such study, did not outweigh Dr. Kraynak's contrary findings. . . . [U]pon reconsideration of the record and the findings set forth above, I find the prior denial should be modified to reflect that total disability has not been established.

Decision and Order at 9-10. The administrative law judge had the authority to rethink the prior factual findings. *Keating*, 71 F.3d at 1123, 20 BLR at 2-63. As discussed above, substantial evidence supports his finding that total disability was not established. We therefore reject claimant's contention, and affirm the administrative law judge's finding pursuant to 20 C.F.R. §725.310 (2000).

Accordingly, the administrative law judge's Decision and Order-Denying Request for Modification and Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge