BRB No. 07-0614 BLA

G.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PIONEER COAL CORPORATION, INCORPORATED	)	DATE ISSUED: 04/15/2008
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification and Benefits of Administrative Law Judge Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

G.S., Richlands, Virginia, *pro se*.

Timothy W. Gresham (Penn Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Modification and Benefits (2005-BLA-05527) of Administrative Law Judge Pamela Lakes Wood with respect to 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 is the fifth time that this case has been before the Board.[1] In its most recent Decision and Order, the Board affirmed a denial of benefits issued by Administrative Law Judge Edward Terhune Miller. The Board held that Judge Miller's determination that claimant did not establish a mistake in a determination of fact in the prior denial of his claim or a change in conditions pursuant to 20 C.F.R. §725.310 (2000) was rational and supported by substantial evidence.[2] *[G.S.] v. Pioneer Coal Corp.*, BRB

[1] Claimant filed an application for benefits on March 20, 1986. Director's Exhibit 1. Administrative Law Judge John H. Bedford issued a Decision and Order denying benefits on October 6, 1986. Director's Exhibit 91. Judge Bedford determined that claimant established the existence of pneumoconiosis, but did not prove that he had a totally disabling respiratory or pulmonary impairment. *Id*. The Board affirmed the denial of benefits. *[G.S.] v. Pioneer Coal Corp.*, BRB No. 90-1705 BLA (Oct. 23, 1991)(unpub.). The United States Court of Appeals for the Fourth Circuit vacated the denial of benefits and remanded the case for reconsideration of the evidence relevant to the issue of total disability under the proper standard. [*G.S.*] *v. Pioneer Coal Corp.*, No. 91-1234 (4th Cir. June 26, 1992). On remand, the case was assigned to Administrative Law Judge Robert L. Hillyard, who issued a Decision and Order denying benefits on June 11, 1993. Director's Exhibit 111. Judge Hillyard found that claimant failed to prove that he had a totally disabling respiratory or pulmonary impairment. *Id*. The Board affirmed the denial of benefits, *[G.S.] v. Pioneer Coal Corp.*, BRB No. 93-1830 BLA (July 26, 1994)(unpub.),and the Fourth Circuit affirmed the Board's Decision and Order, *[G.S.] v. Pioneer Coal Corp.*, No. 94-2044 (4th Cir. July 21, 1995). Claimant's request for modification on October 27, 1995 was denied by Judge Hillyard in a Decision and Order dated July 7, 1998. Director's Exhibit 176. The Board affirmed this denial. *[G.S.] v. Pioneer Coal Corp.*, BRB No. 98-1387 BLA (Sept. 20, 1999)(unpub.). The Board also rejected claimant's subsequent request for reconsideration. *[G.S.] v. Pioneer Coal Corp.*, BRB No. 98-1387 BLA (April 12, 2000)(unpub.). After claimant's appeal to the Fourth Circuit was dismissed for lack of jurisdiction on October 25, 2000, claimant filed a second modification request on May 8, 2001. Director's Exhibits 182, 185. In a Decision and Order issued on September 27, 2002, Administrative Law Judge Edward Terhune Miller denied claimant's request for modification. Director's Exhibit 202. The Board affirmed Judge Miller's Decision and Order. *[G.S.] v. Pioneer Coal Corp.*, BRB No. 03-0125 BLA (Sept. 17, 2003)(unpub.). Claimant filed a third request for modification on January 16, 2004. Director's Exhibit 209.

[2] 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). The amended version of 20 C.F.R. §725.310 does not apply to the request for modification in this case, as the claim was pending on January 19, 2001. 20 C.F.R. §725.2.

No. 03-0125 BLA (Sept. 17, 2003)(unpub.). Claimant filed a request for modification on January 16, 2004. Director's Exhibit 209. The district director issued a Proposed Decision and Order Denying Request for Modification on October 22, 2004. Director's Exhibit 218. Claimant requested a hearing, which was held before Administrative Law Judge Pamela Lakes Wood (the administrative law judge).

In her Decision and Order, the administrative law judge indicated that in light of claimant's request for modification, she was required to consider whether the prior denial of benefits contained a mistake in a determination of fact or whether the newly submitted evidence was sufficient to establish total disability – the element of entitlement previously adjudicated against claimant. The administrative law judge found that claimant did not satisfy the prerequisites for modification under Section 725.310 (2000) and denied benefits accordingly.

On appeal, claimant generally challenges the administrative law judge's findings on modification under Section 718.204(b)(2). Employer has responded, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a response brief unless requested to do so.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal 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 conclusions of law are rational, supported by substantial evidence, and in accordance with law.[3] 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 may establish modification by demonstrating either a change in conditions since the issuance of the previous denial or a mistake in a determination of fact in a previous denial. 20 C.F.R. §725.310(a) (2000). In considering whether a change in conditions has been established, an 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 at least one element of entitlement, which defeated entitlement in the prior decision. 20 C.F.R. §725.310 (2000); *see Betty B Coal Co. v.*

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

Director, OWCP [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

With respect to the issue of a mistake in a determination of fact, we affirm the administrative law judge's finding that Judge Miller's Decision and Order denying benefits did not contain any error. The administrative law judge rationally determined that Judge Miller's findings were well-reasoned and she concurred in his assessment that there was no mistake in a determination of fact in any of the prior denials. *Stanley*, 194 F.3d 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28; Decision and Order at 7.

Concerning the issue of a change in conditions, the administrative law judge correctly found that because claimant established only the existence of pneumoconiosis in the adjudication of his 1986 claim, total disability was the element of entitlement that claimant was required to establish in order to proceed with his claim on the merits. *Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28; Decision and Order at 7-8. The administrative law judge considered the newly submitted pulmonary function studies, blood gas studies, and medical opinions of record pursuant to 20 C.F.R. §718.204(b)(2).

Relevant to Section 718.204(b)(2)(i), the administrative law judge noted that the record contains newly submitted pulmonary function studies obtained on September 9, 2004 and March 21, 2005. Director's Exhibit 217; Employer's Exhibit 3. Claimant was seventy-four and seventy-five years old, respectively, when the pulmonary function studies dated September 9, 2004 and March 31, 2005 were conducted. Director's Exhibit 217; Employer's Exhibit 3. The ages covered by the table values set forth in Appendix B to 20 C.F.R. Part 718 end at seventy-one. In the present case, the administrative law judge rationally inferred that if the values that claimant produced exceeded the qualifying values for a seventy-one year old male, they would exceed the qualifying values for an older male. *See generally Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985); *see also Hubbell v. Peabody Coal Co.*, BRB No. 95-2233 BLA, slip op. at 7 n.7 (Dec. 20, 1996)(unpub.); Decision and Order at 10 n.15. Thus, the administrative law judge acted within her discretion as fact-finder in determining that these studies were insufficient to establish total disability pursuant to Section 718.204(b)(2)(i).

The administrative law judge also rationally determined that the newly submitted blood gas studies of record did not support a finding of total disability at Section 718.204(b)(2)(ii), as they produced values in excess of the qualifying values set forth in Appendix C to 20 C.F.R. Part 718. With respect to Section 718.204(b)(2)(iii), the administrative law judge correctly found that claimant could not prove that he is totally disabled under this subsection because the record contains no evidence that he is

suffering from cor pulmonale with right-sided congestive heart failure. We affirm, therefore, the administrative law judge's finding that claimant did not establish total disability under Section 718.204(b)(2)(ii) and (iii).

Under Section 718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinions of Drs. Husain, Vishakantaiah, Forehand, Fino, and Castle. Dr. Husain, one of claimant's treating physicians, diagnosed pneumoconiosis and indicated that claimant's pulmonary function studies exhibited a mixed obstructive and restrictive pattern. Director's Exhibit 209. Dr. Husain stated that claimant is disabled by his pneumoconiosis. *Id.* Dr. Vishakantaiah, also a treating physician, set forth conclusions virtually identical to those of Dr. Husain. Director's Exhibit 213. Dr. Forehand, another of claimant's treating physicians, diagnosed pneumoconiosis and stated that "[r]eturning to his last coal mining job would further jeopardize his lung health and risk respiratory impairment." Claimant's Exhibit 1. Dr. Fino examined claimant on September 9, 2004 and reviewed claimant's medical records. Employer's Exhibit 14. Dr. Fino concluded, based upon the results of the pulmonary function and blood gas studies, that claimant does not have a respiratory or pulmonary impairment. *Id.* Dr. Castle examined claimant on July 19, 2005 and reviewed claimant's medical records. Employer's Exhibit 7. Dr. Castle determined that claimant does not have a respiratory impairment from any cause. *Id.*

The administrative law judge reviewed this evidence and found that the medical opinions of Drs. Fino and Castle were "entitled to significant weight" based upon their qualifications as Board-certified pulmonologists and their experience. Decision and Order at 13. The administrative law judge also stated that the medical opinions of Drs. Husain, Vishakantaiah, and Forehand were entitled to "special consideration" under 20 C.F.R. §718.104(d) based upon their status as treating physicians. *Id.* The administrative law judge further indicated, however, that only Dr. Forehand treated claimant for a pulmonary condition. *Id.* In addition, the administrative law judge noted that Dr. Forehand is Board-certified in allergy and immunology and has extensive experience in treating miners for pulmonary conditions. *Id.* at 13-14. The administrative law judge concluded that:

> …[T]he opinions of Drs. Fino and Castle are well reasoned and documented while those of Drs. Husain and Vishakantaiah are essentially conclusory in nature, and Dr. Forehand has not squarely addressed the issue of [c]laimant's ability to perform his last coal mine work. Accordingly, I find that Dr. Fino's opinion and Dr. Castle's opinion are entitled to more weight because they were able to review more information, and more recent

> objective clinical data, concerning the [c]laimant's pulmonary condition, and they explained the basis for their opinions in detail.

Id. at 14.

We affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), as it is rational and supported by substantial evidence. The administrative law judge acted within her discretion as fact-finder in determining that the opinions of Drs. Husain and Vishakantaiah were entitled to diminished weight, despite their status as treating physicians, because they set forth their conclusions without explaining how they arrived at them. 20 C.F.R. §718.104(d)(5); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *see also Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). The administrative law judge also rationally found that Dr. Forehand's opinion did not contain a diagnosis of a totally disabling respiratory or pulmonary impairment, as Dr. Forehand merely advised against a return to coal mine employment. *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). With respect to the opinions in which Drs. Fino and Castle indicated that claimant does not have a respiratory or pulmonary impairment, the administrative law judge acted within her discretion in according them greater weight because they reviewed more recent medical information concerning claimant and provided a more detailed rationale for their opinions. *Akers*, 131 F.3d at 533, 21 BLR at 2-335; *Jarrell*, 187 F.3d at 389, 21 BLR at 647. We affirm, therefore, the administrative law judge's finding that claimant did not prove that he is totally disabled pursuant to Section 718.204(b)(2)(iv).

We also affirm the administrative law judge's determination that when considered as a whole, the newly submitted evidence, weighed in conjunction with the previously submitted evidence, is insufficient to establish total disability at Section 718.204(b)(2), as it is rational and supported by substantial evidence. Thus, we affirm the administrative law judge's finding that claimant did not establish a change in conditions under Section 725.310 (2000). Because we have affirmed the administrative law judge's findings that claimant has not demonstrated a mistake in a determination of fact in the prior denials or a change in conditions under Section 725.310 (2000), we must also affirm the denial of benefits. 20 C.F.R. §725.310 (2000); *Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge