BRB No. 04-0321 BLA

NORMAN S. LUCAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 08/25/2004
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Iftin Mohamed (Krasno, Krasno & Onwudinjo Law Offices), Washington, D.C., for claimant.

Barry J. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (02-BLA-0345) of Administrative Law Judge Janice K. Bullard 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] This case was previously before the Board.[2] Claimant

[1] The Department of Labor 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.

[2] Claimant originally filed a claim on May 1, 1980, which was denied by the district director on July 2, 1981. Director's Exhibits 1, 32. Claimant filed a second claim on November 10, 1981, which the district director treated as a request for modification. Director's Exhibit 36. Following a formal hearing, Administrative Law Judge A. A. Simpson, Jr. denied benefits on April 23, 1985. Director's Exhibits 1, 45. Although the parties stipulated to the existence of pneumoconiosis arising out of coal mine employment, Judge Simpson found that claimant failed to establish total disability pursuant to 20 C.F.R.§ 718.204(c) (2000). Director's Exhibit 45. On appeal, the denial was affirmed by the Board, *Lucas v. Director, OWCP*, BRB No. 85-1182 BLA (May 22, 1987) (unpub.), and the United States Court of Appeals for the Third Circuit, *Lucas v. Director, OWCP*, No. 87-3476 (3rd Cir. Jan. 28, 1998) (unpub). Director's Exhibits 55, 59.

While the case was pending before the Third Circuit, claimant filed a request for modification on December 27, 1987, which was held in abeyance by Judge Simpson and reinstated after the Third Circuit issued its decision on January 28, 1998. Director's Exhibits 56, 58. The modification request was denied on November 6, 1989 by Administrative Law Judge Thomas W. Murrett on the basis that claimant failed to establish that he was totally disabled. Director's Exhibit 73.

A second modification request was filed by claimant on October 5, 1990. Director's Exhibits 81, 84. That request was denied on October 19, 1992 by Administrative Law Judge Robert D. Kaplan. Director's Exhibit 111. On appeal, the Board affirmed in part and vacated in part Judge Kaplan's decision. The case was remanded for further consideration of the evidence at 20 C.F.R. §718.204(c)(4) (2000). *Lucas v. Director, OWCP*, BRB No. 93-0455 BLA (Nov. 30, 1994) (unpub.); Director's Exhibit 117. On July 26, 1995, Judge Kaplan issued a Decision and Order Upon Remand denying benefits because claimant was found not to be totally disabled. Director's Exhibit 121.

Claimant filed a request for modification, which was again denied by Judge Kaplan on March 26, 1997. Director's Exhibit 145. Claimant appealed to the Board and the denial was affirmed. *Lucas v. Director, OWCP*, BRB No. 97-0934 BLA (Apr. 9, 1998) (unpub.); Director's Exhibit 150. The Board also denied claimant's motion for reconsideration. Director's Exhibit 152.

filed a request for modification on September 5, 2001,[3] which was denied by the district director on March 25, 2002. Director's Exhibits 193, 203. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing, which was held on June 5, 2003. Director's Exhibit 207. The administrative law judge considered the newly submitted evidence and determined that claimant failed to establish that he was totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that claimant failed to establish a mistake in a determination of fact or a change in conditions at 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.[4] Claimant appeals, arguing that the administrative law judge erred in finding the medical opinion evidence insufficient to prove his total disability at 20 C.F.R. §718.204(b)(2) and therefore that he established a "material change in conditions" under 20 C.F.R. §725.309 (2000). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

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).

Claimant then filed his fourth modification request on June 19, 1998. Administrative Law Judge Ainsworth Brown issued a Decision and Order Denying Modification on April 12, 2001. Director's Exhibits 53, 189. Judge Brown determined that the record before him established that claimant was not totally disabled, and that there had been no change in conditions or mistake in a determination of fact with respect to the prior denial of benefits. Director's Exhibit 189. Claimant appealed to the Board; the appeal was later dismissed at claimant's request, and the case was remanded to the district director for consideration of claimant's September 5, 2001 modification request. Director's Exhibits 193, 194.

[3] The amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

[4] The administrative law judge found that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii) and (iii). Those findings are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arises out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.* Claimant mistakenly argues that the administrative law judge erred in finding that he failed to establish a material change in conditions at 20 C.F.R. §725.309(d) (2000). The record reflects that the administrative law judge properly considered claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000) because claimant kept the original claim alive.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The United States Court of Appeals for the Third Circuit held, in *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), that in ruling on a petition for modification, the administrative law judge must determine whether the record demonstrates a change in conditions since the prior decision or a mistake in a determination of fact in the prior decision, even where no specific allegation of either has been made by claimant. Furthermore, in determining whether claimant has established a basis for modification pursuant to Section 725.310 (2000), 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. *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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

In this case, the administrative law judge properly determined, "I find this newly submitted evidence in conjunction with the previously submitted evidence is insufficient to establish that the Claimant is totally disabled, or that he has established either a mistake in fact or a change in condition from the prior denial as affirmed by the Benefits Review Board." Decision and Order at 8. Specifically, in weighing the medical evidence at Section 718.204(b)(2)(iv),[5] the administrative law judge properly assigned greatest probative weight to Dr. Sherman's opinion that claimant is not totally disabled because

[5] The provision pertaining to total disability, previously set out at 20 C.F.R.§718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

Dr. Sherman's opinion was better supported by the objective evidence, namely the non-qualifying pulmonary function and arterial blood gas studies. *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In contrast, the administrative law judge found that the reports prepared by Drs. Tavaria and Kruk were brief and conclusory as to claimant's medical condition, and therefore insufficiently documented or reasoned.[6] *See generally Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge also noted that Dr. Kruk did not provide any clinical support for his findings, and that Dr. Tavaria's opinion was inconsistent with the objective evidence. Decision and Order at 8. Decision and Order at 8; Director's Exhibit 211. These findings were proper and within the administrative law judge's discretion as the trier of fact. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Further, claimant specifically relies on the opinions of Drs. Kruk and Tavaria, arguing that Dr. Tavaria's opinion is "the most probative" on the issue of total disability because he is claimant's treating physician. Claimant's Brief at 5. Claimant's contention lacks merit. It is the duty of the administrative law judge to determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The Board will not reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge, in this instance, rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Clark v. Karst-Robins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46; *Fuller*, 6 BLR 1-1291; Decision and Order at 9; Director's Exhibits 61, 62. The administrative law judge recognized Dr. Tavaria as claimant's treating physician, *see* Decision and Order at 7, and provided a rational reason for finding Dr. Tavaria's opinion to be cursory and insufficient to meet claimant's burden of proof. 20 C.F.R. §718.104(d); *see Balsavage v. Director, OWCP*,

[6] In considering Dr. Tavaria's opinion, the administrative law judge found that the physician submitted "brief statements… usually no more than a sentence or two," opining that claimant is totally and completely disabled by pneumoconiosis. Decision and Order at 7. Similarly, the administrative law judge described Dr. Kruk's "brief one-page report dated April 19, 2000" wherein he opined that "little had changed over the past several years. If anything, [claimant's] breathing is worse as expected." *Id.* The administrative law judge noted that Dr. Kruk reiterated his prior opinion that claimant was totally disabled by pneumoconiosis. Claimant's Exhibits 1-4; Director's Exhibits 196, 198, 206; Decision and Order at 7.

295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark*, 12 BLR 1-149; Decision and Order at 9.

Based on the foregoing, we affirm the administrative law judge's findings at Section 718.204(b)(2)(iv).[7] Because the administrative law judge properly determined that claimant is not totally disabled pursuant to Section 718.204(b)(2), we also affirm his finding that claimant failed to establish a ground for modification pursuant to Section 725.310 (2000). *Keating*, 71 F.3d at 1118, 20 BLR at 2-53.

[7] The Director, Office of Workers' Compensation Programs, correctly points out that the administrative law judge erred in relying on the opinion of Dr. Mariglio as corroborative of Dr. Sherman's opinion. Dr. Mariglio opined that claimant had mild impairment but did not address whether claimant was totally disabled or whether the mild impairment would prevent claimant from performing his usual coal mine employment. Director's Exhibit 29. Because Dr. Mariglio's report is also insufficient to satisfy claimant's burden of proof, the administrative law judge's error in this regard is harmless as it cannot affect the outcome of the case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). In any event, claimant does not purport to rely upon Dr. Mariglio's opinion.

Accordingly, the Decision and Order of the administrative law judge denying claimant's request for modification and the claim for benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge