BRB No. 08-0386 BLA

F.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY, INCORPORATED	)	DATE ISSUED: 02/10/2009
	)	
and	)	
	)	
CONNECTICUT INDEMNITY COMPANY	)	
	)	
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 of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2006-BLA-05660) of Chief Administrative Law Judge John M. Vittone denying benefits 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 a claim for benefits on September 1, 1987. Director's Exhibit 39. In a Decision and Order issued on December 30, 1992, Administrative Law Judge Charles W. Campbell determined that claimant established the existence of pneumoconiosis, but that the evidence of record did not support a finding of total disability. Accordingly, benefits were denied. *Id.*

Claimant filed three subsequent requests for modification, all of which were denied. *Id.* Before the hearing requested by claimant following the district director's denial of his third modification, claimant filed a Motion for Withdrawal of his claim, which the district director granted. *Id.* Claimant then filed a second application for benefits. Director's Exhibit 1. After the district director denied the claim, claimant requested a hearing and the case was transferred to the Office of Administrative Law Judges (OALJ) for assignment to Administrative Law Judge Thomas F. Phalen, Jr.. Judge Phalen remanded the case to the district director for further evidentiary development. Director's Exhibit 42. Upon return of the case to the OALJ, it was reassigned to Chief Administrative Law Judge John M. Vittone (the administrative law judge), who held a hearing on January 24, 2007.

In the Decision and Order that is the subject of the present appeal, the administrative law judge initially determined that the claim filed on September 1, 1987 was still viable, as the district director erred in granting claimant's Motion to Withdraw. Based upon this finding, the administrative law judge also determined that claimant's third request for modification was still pending. Pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge found that claimant did not establish a change in conditions or a mistake in a determination of fact with respect to the prior denials, which were based upon claimant's failure to prove that he is totally disabled.[1] The administrative law judge further determined that the prior dispositions contained a mistake of fact, however, as the newly submitted evidence of record did not support a finding of pneumoconiosis. The administrative law judge denied benefits accordingly.

Claimant argues on appeal that the administrative law judge did not properly consider the evidence relevant to 20 C.F.R. §§718.202(a)(1), (4), and 718.204(b)(2)(iv). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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[1] The amended version of 20 C.F.R. §725.310 does not apply in this case, as the claim was pending on the effective date of the new regulations. 20 C.F.R. 725.2; Director's Exhibit 39.

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that the district director erred in granting claimant's Motion to Withdraw

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.[3] 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant may establish a basis for modification by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310 (2000). In considering whether a change in conditions has been established pursuant to Section 725.310 (2000), 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 that defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The United States Court of Appeals for the Sixth Circuit has held that a claimant need not allege a specific error in order for an administrative law judge to grant a request for modification based upon a mistake in fact, inasmuch as the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits, contained within a case. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994).

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the claim filed on September 1, 1987, and his findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] As claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 2, 39.

Claimant contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Baker, Fino, Dahhan, Hussain, Branscomb and Rosenberg. Dr. Baker, claimant's treating physician, provided medical opinions dated April 19, 2000, February 12, 2001, June 8, 2003, and December 7, 2004. Director's Exhibits 39 at 54 and 88, 40 at 178 and 180. Dr. Baker diagnosed a moderate ventilatory impairment and resting hypoxemia and indicated that claimant is unable to perform the work of a coal miner or similar labor. Director's Exhibit 40 at 180. Dr. Fino reviewed claimant's medical records and stated that claimant's objective studies show no impairment in pulmonary function or oxygen transfer. Director's Exhibit 39 at 12. Dr. Fino opined that claimant is capable of performing "the requirements of his last job." *Id*. Dr. Dahhan examined claimant on March 13, 2001 and September 8, 2003 and reviewed claimant's medical records. Director's Exhibits 39 at 8, 40 at 200. Dr. Dahhan indicated that claimant retains the capacity to perform his previous coal mining work or a comparable job. *Id*. Dr. Hussain examined claimant on October 3, 2001 and December 7, 2005. Director's Exhibits 8, 40 at 7. Based upon his 2005 examination, Dr. Hussain indicated that claimant suffers from a moderate impairment. *Id*. Dr. Branscomb reviewed claimant's medical records and determined that the objective studies supported a determination that claimant does not suffer from any respiratory disease. Director's Exhibit 40 at 221. Dr. Rosenberg also performed a record review and reached the same conclusions. Employer's Exhibit 3.

The administrative law judge acknowledged that Dr. Baker is claimant's treating physician, but determined that his opinion was "of little probative value" under Section 718.204(b)(2)(iv), as Dr. Baker stated that the symptoms of claimant's respiratory difficulties "resolve easily with treatment." Decision and Order at 16, quoting Director's Exhibit 40 at 178. The administrative law judge found that Dr. Hussain's opinion was also "of little probative value," on the ground that Dr. Hussain's diagnosis of a moderate impairment was premised upon a pulmonary function study obtained while claimant was in congestive heart failure. Decision and Order at 16. With respect to the opinions in which Drs. Fino, Dahhan, Branscomb and Rosenberg indicated that claimant does not have a respiratory or pulmonary impairment, the administrative law judge determined that they were entitled to greater weight than the opinions of Drs. Baker and Hussain, as they were well-reasoned and well-documented. *Id*. at 17. The administrative law judge concluded that the newly submitted evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) and that the prior denials did not contain a mistake in a determination of fact on the issue of total disability. *Id*.

Claimant initially asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of

any respiratory impairment. Claimant's Brief at 6, citing *Taylor v. Evans & Gambrel Coal Co., Inc.*, 12 BLR 1-83 (1988); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant specifically maintains:

> The claimant's usual coal mine work included being a roof bolter, shuttle car operator, scoop operator and miner operator. It can be reasonably concluded that such duties, as well as the medical opinion of Dr. Baker, involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, as well as the medical opinion of Dr. Baker (who did diagnose a minimal impairment), it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. Judge Vittone made no mention of the claimant's usual coal mine work in conjunction with Dr. Baker's opinion of disability.

Id. Claimant also contends that because pneumoconiosis is a progressive disease and it was initially diagnosed several years ago, "it can therefore be concluded" that he has become totally disabled by it. *Id*. at 7.

We hold that claimant's arguments are without merit. Medical or other advice that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). With respect to Dr. Baker's opinion, the administrative law judge was not required to compare his finding of a respiratory impairment to the exertional requirements of claimant's usual coal mine employment, as the administrative law judge rationally determined that Dr. Baker's diagnosis of an impairment was not well-reasoned in light of his statement that claimant's symptoms are completely ameliorated by treatment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986); Decision and Order at 17. The administrative law judge also acted within his discretion as fact-finder in according greatest weight to the opinions of the physicians who stated that claimant has no respiratory or pulmonary impairment on the grounds that they are better reasoned and better supported by the objective evidence of record. *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 17. We also reject claimant's contention, which is unsupported by medical or legal authority, that pneumoconiosis is a progressive disease that must have worsened, thereby affecting his ability to perform his usual coal mine employment. An administrative law judge's

finding on the issue of total disability must be based solely upon the medical evidence of record. *White v. New White Coal Co., Inc*., 23 BLR 1-1, 1-7 n.8 (2004).

Because claimant raises no other specific challenge to the administrative law judge's weighing of the newly submitted medical opinion evidence as to total disability, we affirm the administrative law judge's finding that neither the newly submitted evidence nor the evidence considered in conjunction with the prior denials is sufficient to establish total disability pursuant to Section 718.204(b)(2). Based upon claimant's failure to establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718, an award of benefits is precluded.[4] *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[4] In light of this disposition, we need not address claimant's allegations of error regarding the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order 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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JUDITH S. BOGGS
Administrative Appeals Judge