

BRB No. 09-0481 BLA

WARNER CALLAHAN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS’)	DATE ISSUED: 02/04/2010
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Denying Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

Sarah M. Hurley (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Modification and Denying Benefits (2008-BLA-05192) of Administrative Law Judge Kenneth A. Krantz (the administrative law judge) 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). Initially, the administrative law judge credited claimant with thirty years of coal mine employment, as supported by the evidence of record, and noted that this case involved a second request for modification, dated January 2, 2002, of the denial

of claimant's November 25, 1993 claim.¹ The administrative law judge determined that the newly submitted evidence, considered in conjunction with the old evidence of record, was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(4) and 718.203(b) and, therefore, was sufficient to establish a change in conditions, thereby establishing a basis for modification pursuant to 20 C.F.R. §725.310 (2000).² Turning to the merits of entitlement based on all of the evidence, however, the administrative law judge found that it did not establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Claimant contends that, given the medical opinions of Drs. Alam and

¹ Claimant filed his claim for benefits on November 25, 1993. The claim was denied by the district director on January 5, 1995, based on the determination that claimant established none of the requisite elements of entitlement under 20 C.F.R. Part 718. Director's Exhibits 1, 35. Following transfer of the case to the Office of Administrative Law Judges, Administrative Law Judge Frank Marsden denied benefits on April 26, 1996. Director's Exhibit 42. The Board affirmed Judge Marsden's denial of benefits in a Decision and Order issued April 9, 1997. Director's Exhibit 54. Claimant requested modification of the denial of benefits on June 10, 1997, which was denied by the district director on October 7, 1998. Director's Exhibits 56, 77. The case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Daniel Roketenetz. Judge Roketenetz denied claimant's request for modification and denied the claim, finding that claimant failed to establish either a change in conditions or a mistake in a determination of fact. Director's Exhibit 85. In a Decision and Order issued on May 24, 2001, the Board affirmed Judge Roketenetz's denial of benefits. Director's Exhibit 86. Claimant filed a second request for modification on January 2, 2002, which was denied by the district director on February 12, 2002. Director's Exhibits 87, 89. Subsequent to the transfer of the case to the Office of Administrative Law Judges, Administrative Law Judge Rudolf L. Jansen remanded the case to the district director for further development of the responsible operator issue. Director's Exhibit 94. The case was subsequently returned to the Office of Administrative Law Judges and assigned to Administrative Law Judge Kenneth A. Krantz (the administrative law judge).

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969. 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 in cases, such as the present one, in which the claim was pending on the effective date of the new regulations.

Sundaram, as well as the other evidence of record, claimant has established a totally disabling respiratory impairment at Section 718.204(b)(2)(iv). In addition, claimant contends that this case does not involve a request for modification pursuant to 20 C.F.R. §725.310 (2000) but, rather, involves a duplicate claim pursuant to 20 C.F.R. §725.309 (2000). In response, the Director, Office of Workers' Compensation Programs (the Director), agrees with claimant that the administrative law judge erred in his evaluation of the medical opinion evidence pursuant to Section 718.204(b)(2)(iv), and urges that the case be remanded to the administrative law judge for further consideration of the evidence.³

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.⁴ 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 establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, it must be established that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was 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*).

Initially, we reject claimant's general contention that the administrative law judge erred in treating this case as a request for modification pursuant to Section 725.310 (2000) because claimant's second request for modification was not filed within one year after the claim was first denied. *See* Claimant's Brief at 2. Contrary to claimant's contention, modification is available at any time before one year from the final denial of a claim. 20 C.F.R. §725.310(a) (2000); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227,

³ We affirm the administrative law judge's findings that the existence of pneumoconiosis arising out of coal mine employment was established under 20 C.F.R. §§718.202(a)(4), 718.203(b), that a change in conditions was established at 20 C.F.R. §725.310 (2000), and that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ As claimant's coal mine employment was in Kentucky, the Board will apply the law 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 Exhibit 2.

18 BLR 2-290 (6th Cir. 1994); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Because the current request for modification was filed on January 2, 2002, within one year of the Board's May 23, 2001 Decision and Order affirming the denial of the claim, the administrative law judge properly treated this case as a request for modification pursuant to Section 725.310 (2000), and not as a duplicate claim pursuant to Section 725.309 (2000). 20 C.F.R. §§725.309 (2000), 725.310 (2000); *Gross*, 23 BLR at 1-14; Director's Exhibits 86, 87.

Addressing the allegations of error with regard to the administrative law judge's denial of benefits, claimant and the Director contend that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish total disability under Section 718.204(b)(2)(iv). Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the new medical opinions of Drs. Alam and Sundaram.⁵ The administrative law judge found that Dr. Sundaram opined that claimant was unable to perform his usual coal mine employment from a respiratory standpoint. Decision and Order at 17; Director's Exhibit 87. Regarding Dr. Alam's opinion, the administrative law judge found that Dr. Alam diagnosed only a mild pulmonary impairment, based on his pulmonary function testing. Decision and Order at 17; Director's Exhibit 98. Finding Dr. Sundaram and Dr. Alam to be equally qualified, the administrative law judge credited Dr. Alam's opinion over the opinion of Dr. Sundaram, because he found that Dr. Alam's opinion was better reasoned and documented than Dr. Sundaram's opinion. Decision and Order at 17. The administrative law judge, therefore, found that the new medical opinion evidence failed to establish that claimant was totally

⁵ Based on his March 26, 2008 examination of claimant, Dr. Alam opined that claimant has chronic bronchitis with emphysema and chronic dyspnea with an etiology of tobacco abuse, obesity, arthritis and coal mine dust exposure. Director's Exhibit 98. In addition, Dr. Alam diagnosed a mild pulmonary impairment, based on claimant's FEV₁ yielding a value about 60% of predicted, but further opined that claimant was totally disabled as a result of the totality of his medical problems. *Id.* Of the total disability, Dr. Alam stated that 15% of claimant's impairment was related to coal dust exposure and the remaining impairment was due to his history of tobacco abuse, obesity, arthritis and deconditioning. *Id.*

Dr. Sundaram examined claimant on December 13, 2001 and diagnosed coal workers' pneumoconiosis due to exposure to coal dust over 34 years. Director's Exhibit 87. In addition, Dr. Sundaram opined that claimant's FEV₁ or FVC is between 79% and 55% of predicted and that the pulmonary impairment is due to exposure to coal dust over 34 years. *Id.* Dr. Sundaram also opined that claimant is not physically capable, from a pulmonary standpoint, of doing his usual coal mine employment due to shortness of breath with limited activity. *Id.*

disabled. And, noting that the old evidence also was insufficient to establish total disability, the administrative law judge found that claimant failed to establish total disability under Section 718.204(b)(2)(iv). *Id.*

In challenging the administrative law judge's findings, claimant states that, "given the opinions of Drs. Alam and Sundaram, as well as, the other evidence throughout the record, including claimant's testimony, it is obvious that he suffers from a total disabling respiratory impairment arising out of his coal mine employment." Claimant's Brief at 3. The Director argues that the case should be remanded to the administrative law judge for further consideration of the medical opinion evidence. Specifically, the Director contends that the administrative law judge should have compared Dr. Alam's diagnosis of a mild pulmonary impairment with the exertional requirements of claimant's usual coal mine employment. Director's Letter in Response to Claimant's Appeal at 5. In addition, the Director contends that the administrative law judge should reconsider his finding that Dr. Sundaram "did not state the reason or cause for his determination that [c]laimant is unable to return to coal mine employment[.]" arguing that Dr. Sundaram provided an explanation and that the administrative law judge must reconsider this opinion in light of the entirety of Dr. Sundaram's statements. *Id.*

There is merit to claimant's contentions. In this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, a physician's assessment of a *mild* pulmonary impairment, if credited, can support a finding of total disability, depending upon the exertional requirements of claimant's usual coal mine employment. *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Herein, the administrative law judge noted that Dr. Alam diagnosed a mild pulmonary impairment but, without further discussion or explanation, concluded that Dr. Alam's opinion was not a diagnosis of total disability. Specifically, after setting forth Dr. Alam's diagnosis, the administrative law judge stated that "I find that Dr. Alam's opinion is better reasoned and documented than Dr. Sundaram's. Therefore, the newly submitted evidence fails to show that the Claimant is totally disabled from a respiratory standpoint." Decision and Order at 17.

However, in light of Dr. Alam's diagnosis of a mild pulmonary impairment, the administrative law judge is required to compare the opinion on the degree of respiratory impairment diagnosed, with the exertional requirements of claimant's usual coal mine work. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd*, 9 BLR 1-104 (1986) (*en banc*). In order to do so, the administrative law judge must make a specific finding as to the nature of claimant's usual coal mine work and the physical requirements associated with that work.⁶ *See Stanley v.*

⁶ The administrative law judge noted that claimant testified that, during the course of his thirty years of underground coal mine employment, he did various jobs, including

Eastern Assoc. Coal Corp., 6 BLR 1-1157 (1984). It is claimant's burden to establish the exertional requirements of his usual coal mine employment to provide a basis of comparison for the administrative law judge to evaluate a medical assessment and reach a conclusion regarding total disability. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Because the administrative law judge has made no finding as to the exertional requirements of claimant's usual coal mine work, we vacate his finding that the evidence is insufficient to establish that claimant is totally disabled, and remand the case for further consideration pursuant to Section 718.204(b)(2). *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *McMath*, 12 BLR at 1-10; *Budash*, 9 BLR at 1-51.

Moreover, we vacate the administrative law judge's finding that the opinion of Dr. Sundaram is not credible, based on his finding that the physician did not state the reason or cause for his opinion that claimant was not capable, from a respiratory standpoint, of doing his usual coal mine employment. Decision and Order at 17. A review of the record shows that Dr. Sundaram checked the box stating that claimant had a pulmonary impairment based on his pulmonary function study results, and also opined that claimant was unable, from a respiratory standpoint, to perform his usual coal mine employment due to shortness of breath with limited activity. Director's Exhibit 87. The administrative law judge has, therefore, mischaracterized Dr. Sundaram's opinion. Accordingly, we vacate the administrative law judge's finding regarding Dr. Sundaram's opinion and remand the case for the administrative law judge to reevaluate the entirety of Dr. Sundaram's opinion and to provide a more detailed explanation for his findings. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Consequently, on remand, the administrative law judge must first render a specific finding as to claimant's usual coal mine employment, and then reconsider whether the medical opinion evidence is sufficient to establish that claimant is totally disabled from his usual coal mine employment by a respiratory or pulmonary impairment. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124. Thereafter, if necessary, the administrative law judge must also weigh the evidence and determine whether claimant has satisfied his burden of establishing that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). 20 C.F.R. §718.204(c); *see also Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 214 (2002) (*en banc*).

loading coal by hand, cutting coal, running a loader and driving a shuttle car. Claimant also testified that he worked underground eight hours a day for five to six days a week. Decision and Order at 4; Hearing Transcript at 8-9.

Accordingly, the administrative law judge's Decision and Order Granting Modification and Denying Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge