

BRB No. 08-0352 BLA

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| K.C. |) | |
| (Widow of R.C.) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| SOUTHERN OHIO COAL COMPANY |) | DATE ISSUED: 01/26/2009 |
| |) | |
| Employer-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Decision and Order on Remand – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Christopher C. Russell (Porter, Wright, Morris & Arthur, LLP), Columbus, Ohio, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand – Denying Benefits (2003-BLA-5432) of Administrative Law Judge Joseph E. Kane on a living miner's claim filed

¹ Claimant is the widow of the miner, R.C., who died on April 19, 2001. Director's Exhibit 3A. This case involves a request for modification of the denial of the miner's January 25, 1994 duplicate claim. Director's Exhibits 1, 55. In addition, claimant filed a survivor's claim on August 27, 2001. Director's Exhibit 1A.

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 case is before the Board for the second time.² In his original Decision and Order, the administrative law judge found that the instant case incorporates a request for modification of the denial of the miner's 1994 duplicate claim and claimant's 2001 survivor's claim. Based on the miner's January 25, 1994 filing date and the August 27, 2001 filing date of the survivor's claim, the administrative law judge adjudicated both claims under 20 C.F.R. Part 718. The administrative law judge also credited the miner with thirty-two years of coal mine employment. Addressing the miner's claim, the administrative law judge found that the newly submitted medical evidence was insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, insufficient to establish a change in conditions or mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).³ Accordingly, the administrative law judge denied the request for modification in the miner's claim. With regard to the survivor's claim, the administrative law judge found the medical evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

Claimant appealed the denial of benefits in both the miner's claim and the survivor's claim to the Board, which affirmed the denial of benefits in both claims.⁴ [*K.C.*] *v. Southern Ohio Coal Co.*, BRB No. 04-0347 BLA (Dec. 21, 2004)(unpub.).

² The procedural history in the miner's claim was fully set out in the Board's 2004 Decision and Order, and is incorporated by reference herein. [*K.C.*] *v. Southern Ohio Coal Co.*, BRB No. 04-0347 BLA (Dec. 21, 2004)(unpub.).

³ 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. The amendments to the regulations at 20 C.F.R. §725.310 do not apply to claims, such as this, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

⁴ The Board affirmed the administrative law judge's finding that the newly submitted medical evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, thus, insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). [*K.C.*] *v. Southern Ohio Coal Co.*, BRB No. 04-0347 BLA, slip op. at 5, 7 (Dec. 21, 2004)(unpub.). In addition, the Board affirmed the administrative law judge's finding that there was no mistake in a determination of fact pursuant to Section 725.310 (2000), as unchallenged on appeal. *Id.*, slip op. at 4 n.3. Consequently, the Board affirmed the administrative law judge's denial of claimant's request for modification in the miner's denied duplicate claim.

Claimant further appealed the denial of benefits to the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises. The Sixth Circuit court vacated the denial of benefits in the miner's claim, holding that the administrative law judge erred in weighing the medical opinion of Dr. Baker on the issue of total respiratory disability pursuant to Section 718.204(b)(2)(iv). [*K.C.*] v. *Southern Ohio Coal Co.*, No. 05-3133, 2006 WL 3409880 (6th Cir. Nov. 27, 2006)(unpub.). The court, however, affirmed the administrative law judge's weighing of Dr. Holley's medical opinion relevant to Section 718.204(b)(2)(iv). *Id.* Therefore, the court remanded the case for the administrative law judge to reconsider Dr. Baker's medical opinion pursuant to Section 718.204(b)(2). *Id.* However, with regard to the survivor's claim, the court held that the administrative law judge properly found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) and, thus, affirmed the denial of benefits in the survivor's claim.⁵ *Id.*

On remand, the administrative law judge noted the instructions of the Sixth Circuit court and re-evaluated Dr. Baker's medical opinion, finding that Dr. Baker's opinion is insufficient to establish total disability because it is based on inaccurate documentation and also because Dr. Baker does not adequately explain his finding of total disability pursuant to Section 718.204(b)(2)(iv). The administrative law judge further found that the medical evidence is insufficient to establish that total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, found the new evidence insufficient to establish a change in conditions pursuant to Section 725.310 (2000). Accordingly, the administrative law judge denied the request for modification in the miner's claim and, thus, denied benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits, arguing that the administrative law judge erred in finding the evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish disability causation pursuant to Section 718.204(c). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a substantive response unless requested to do so by the Board.

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,

⁵ By Order dated March 22, 2007, the Board remanded the case to the administrative law judge for further consideration consistent with the opinion of the United States Court of Appeals for the Sixth Circuit. [*K.C.*] v. *Southern Ohio Coal Co.*, BRB No. 04-0347 BLA (Mar. 22, 2007)(Order)(unpub.).

and in accordance with applicable law.⁶ 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).

The Sixth Circuit court, in vacating the administrative law judge’s denial of benefits in the miner’s claim, held that the administrative law judge erred in weighing the medical opinion of Dr. Baker on the issue of total respiratory disability pursuant to Section 718.204(b)(2)(iv). The court held that the administrative law judge’s rejection of Dr. Baker’s opinion diagnosing total disability because it was based on a non-qualifying pulmonary function study is at odds with the regulations set forth at Section 718.204(b)(2).⁷ [*K.C.*], 2006 WL 3409880, slip op. at 4. In particular, the court held that because the administrative law judge focused on the inadequacies of each of the individual tests administered by Dr. Baker, *i.e.*, the pulmonary function study, blood gas study and chest x-ray, in rejecting Dr. Baker’s opinion, his decision is contrary to Section 718.204(b)(2)(iv) and cannot be affirmed. *Id.*, slip op. at 5-6, *citing Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000) (doctor was entitled to base a reasonable opinion of total disability on non-qualifying objective study results). Rather, the court noted that, in addition to administering a physical examination and the full range of objective tests set forth in his report, Dr. Baker noted the miner’s employment and medical histories, as well as the miner’s symptoms including difficulty breathing, attacks of wheezing, dyspnea, orthopnea, chest pain, and that it was from these findings that Dr. Baker opined that the miner did not retain the respiratory capacity to perform his usual coal mine employment. *Id.*, slip op. at 10. Therefore, the court held that because the factors relied on by Dr. Baker are very similar to the factors relied on by the physicians in *Cornett*, and a doctor may diagnose total disability notwithstanding

⁶ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant’s last coal mine employment was in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibit 2.

⁷ Section 718.204(b)(2)(iv) provides, in pertinent part:

Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, ... total disability may nonetheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner’s respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv).

non-qualifying results, the administrative law judge erred in rejecting Dr. Baker's opinion because it was based on a non-qualifying pulmonary function study. *Id.*, slip op. at 11. Consequently, the court remanded the case for further consideration of the evidence consistent with this holding.

On remand, the administrative law judge set forth the Sixth Circuit court's holding and instructions, and in re-evaluating the evidence, found that the opinion of Dr. Baker is insufficient to establish that the miner was not capable, from a respiratory standpoint, of performing his usual coal mine employment because it was based on inaccurate documentation and because Dr. Baker failed to adequately discuss his conclusions. Decision and Order on Remand at 7. Initially, the administrative law judge found that Dr. Baker relied on an inaccurate pulmonary function study in determining that the miner had a moderate respiratory impairment. The administrative law judge concluded that because Dr. Baker's documentation is inaccurate, it detracts from his opinion, and, thus, that opinion is insufficient to establish total disability. Decision and Order on Remand at 5-6.

The administrative law judge further found, however, that even if Dr. Baker's opinion was based on accurate documentation, it is still insufficient to establish total respiratory disability because Dr. Baker failed to adequately explain how the diagnosed moderate respiratory impairment would have affected the miner's ability to perform his usual coal mine employment. Decision and Order on Remand at 6. The administrative law judge found that Dr. Baker failed to compare his finding of a moderate pulmonary impairment with the exertional requirements of the miner's usual coal mine employment. *Id.* Specifically, the administrative law judge found that while Dr. Baker may have "considered the miner's employment history generally, his report indicates that he had no more than a cursory knowledge of the miner's duties." *Id.* Moreover, the administrative law judge found that, based on the exertional requirement of the miner's usual coal mine employment, he is unable to infer that the miner is totally disabled from performing his usual coal mine employment. Decision and Order on Remand at 7. Consequently, the administrative law judge found that, while a moderate impairment may be sufficient to establish total disability, the evidence in this case, including Dr. Baker's opinion and his reliance on documentation other than a pulmonary function study, is insufficient to reach that conclusion. *Id.* Therefore, the administrative law judge found that the newly submitted evidence is insufficient to establish that the miner was totally disabled pursuant to Section 718.204(b)(2)(iv).

In challenging the administrative law judge's denial of benefits, claimant raises several allegations of error with the administrative law judge's findings regarding Dr. Baker's opinion. Initially, claimant contends that the administrative law judge erred in finding that Dr. Baker's pulmonary function study results are inaccurate, arguing that the administrative law judge failed to consider that Dr. Baker relied on a different set of

predicted values than those set forth in the Department of Labor regulations, values which support his finding of a moderate pulmonary impairment.⁸ Claimant's Brief at 13. Claimant further contends that even if the higher percentages calculated by the administrative law judge are used, they still may be found to be supportive of a finding of a moderate impairment and a finding that the miner is not capable of performing his usual coal mine employment, citing *Manning Coal Corp. v. Wright*, 257 Fed.Appx. 836, 2007 WL 2088862 (6th Cir. 2007)(unpub.). Claimant's Brief at 14.

Claimant further contends that the administrative law judge erred in rejecting Dr. Baker's opinion, based on his determination that Dr. Baker did not compare his finding of a moderate pulmonary impairment with the physical limitations of the miner's usual coal mine employment and that Dr. Baker did not address the exertional requirements of the miner's last coal mine employment. *Id.* Claimant contends that Dr. Baker was aware of the exertional requirements of the miner's usual coal mine employment because Dr. Baker noted the jobs the miner performed during his employment in the coal mines, *i.e.*, performed labor, ran a loading machine, loaded coal and worked as a foreman. Therefore, based on the definitions of the exertional requirements contained in the Department of Labor's *Dictionary of Occupational Titles* for each of the positions held by the miner, claimant contends that "one can see that Dr. Baker was aware that Mr. [C] performed work ranging from the medium to the very heavy level of exertion." Claimant's Brief at 15. In addition, claimant contends that Dr. Baker was not required to discuss the limitations that the miner's pulmonary impairment would have had on his ability to perform his last coal mine employment, because the administrative law judge could reasonably infer disability based on a comparison of the findings of the physician and the miner's last coal mine employment. Consequently, claimant contends that Dr. Baker's opinion is well-reasoned and documented and supports a finding that the miner is totally disabled.

We disagree. The administrative law judge, in evaluating the opinion of Dr. Baker in light of the Sixth Circuit court's holding, found that Dr. Baker diagnosed that the miner had a moderate impairment and indicated that the miner was totally disabled by responding "no" to the question of whether the miner retains the respiratory capacity to

⁸ Claimant contends that Dr. Baker used the values set forth in the *Guide to the Evaluation of Permanent Impairment*, American Medical Association, 3rd Edition, Tables 2-7, pp. 118-123. However, as set forth in the Board's prior Decision and Order, because the Board's review authority does not permit consideration of evidence not properly submitted into the record before the administrative law judge, if claimant believes that this evidence will support his claim for benefits, then he may file a request for modification with the district director pursuant to 20 C.F.R. §725.310 (2000). [*K.C.*] *v. Southern Ohio Coal Co.*, BRB No. 04-0347 BLA (Dec. 21, 2004)(unpub.).

perform his usual coal mine employment. Decision and Order on Remand at 6; Director's Exhibit 58. However, he found that Dr. Baker's opinion did not support this conclusion because Dr. Baker failed to compare his diagnosis of a moderate impairment with the exertional requirement of the miner's job duties, which were not included in Dr. Baker's opinion. *Id.*

Contrary to claimant's contention, merely because Dr. Baker recited the miner's job titles, and the *Dictionary of Occupational Titles* includes descriptions of the exertional requirements of these positions, it is not obvious that Dr. Baker was aware that the miner's job required medium or heavy levels of exertion. Specifically, Dr. Baker, in noting the miner's employment history, set forth the general job titles of the miner's last employment in the coal mines, stating that the miner's job titles were "labor, run loading machine, loaded coal, foreman," but did not include any additional description of the physical demands of these positions. Director's Exhibit 58. Moreover, Dr. Baker did not provide any physical limitations on the miner that would prevent him from performing his usual coal mine employment, such as limitations on walking, climbing stairs or lifting. *Id.* The administrative law judge therefore rationally found that while Dr. Baker may have "considered the miner's employment history generally, his report indicates that he had no more than a cursory knowledge of the miner's duties." Decision and Order on Remand at 6; *see 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, the administrative law judge reasonably exercised his discretion in finding that this case is distinguishable from *Cornett* because the physicians in *Cornett*, while relying on similar medical factors in rendering their opinions that the miner's mild impairment was totally disabling, were also aware of the particular exertional requirements of the miner's job duties, noting that Mr. Cornett was required to lift 50 pounds more than 100 times per day. Herein, Dr. Baker provided only a general employment history and did not discuss the specific physical requirements of the miner's job duties, nor did he provide any specific physical limitations, the result of which would prevent the miner from performing his usual coal mine employment. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *DeFelice v. Consolidation Coal Co.*, 5 BLR 1-275 (1982); *see also McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). We, therefore, affirm the administrative law judge's finding that Dr. Baker's opinion, that the miner's moderate pulmonary impairment resulted in the miner not being able, from a respiratory standpoint, to perform his usual coal mine employment, is not sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) because Dr. Baker fails to adequately explain how the totality of his report supports this conclusion. Likewise, we reject claimant's contention that the administrative law judge could have inferred disability by comparing the findings of Dr. Baker with the miner's last coal mine employment, as Dr. Baker's opinion does not contain a specific medical assessment of the miner's physical abilities, or limitations thereon, from which the administrative law judge could infer that the miner's moderate impairment would prevent him from

performing his usual coal mine employment. *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *DeFelice*, 5 BLR at 1-277.

Because the administrative law judge provided a valid basis for finding that Dr. Baker's medical opinion is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), we need not address claimant's other allegations of error with regard to the administrative law judge's weighing of Dr. Baker's opinion. See *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); see also *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Therefore, in light of the Board's prior affirmance of the administrative law judge's finding that the remainder of the newly submitted medical evidence is insufficient to establish total disability, [*K.C.*], BRB No. 04-0347 BLA, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2). Consequently, we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions pursuant to Section 725.310 (2000).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge