BRB No. 00-0936 BLA

CECIL D. FLETCHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL ENERGY CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE 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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe, Farmer, Williams & Rutherford), Norton, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Edward Waldman (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-1098) of Administrative Law Judge Daniel J. Roketenetz 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).[1] Claimant filed a claim on February 8, 1988. In the initial Decision and Order, Administrative Law Judge Clement J. Kichuk credited claimant with at least thirty-seven years of coal mine employment and found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). Judge Kichuk further found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). Judge Kichuk, however, found that the evidence was insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Accordingly, Judge Kichuk denied benefits. By Decision and Order dated February 22, 1993, the Board affirmed Judge Kichuk's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(1) (2000) and 718.203(b) (2000) as unchallenged on appeal. *Fletcher v. National Energy Corp.*, BRB No. 90-1749 BLA (Feb. 22, 1993) (unpublished). The Board also affirmed Judge Kichuk's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(3).[2] *Id.* The Board also affirmed Judge Kichuk's finding that

[1]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 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The Board did not directly address whether Judge Kichuk's finding pursuant to 20 C.F.R. §718.204(c)(4) (2000) was affirmable. *Fletcher v. National Energy Corp.*, BRB No. 90-1749 BLA (Feb. 22, 1993) (unpublished).

the evidence was insufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Id.* The Board, therefore, affirmed Judge Kichuk's denial of benefits. *Id.* The United States Court of Appeals for the Fourth Circuit affirmed the Board's decision. *Fletcher v. National Energy Corp.*, No. 93-1345 (4th Cir. May 18, 1994) (unpublished).

Claimant subsequently requested modification of his denied claim. Finding that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000), Judge Kichuk found that the evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Judge Kichuk further found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Judge Kichuk, therefore, denied claimant's request for modification.

Claimant filed an appeal with the Board. While his appeal was pending, claimant notified the Board that he had filed a second motion for modification with the district director. By Order dated June 21, 1986, the Board dismissed claimant's appeal and remanded the case to the district director for modification proceedings.[3] *Fletcher v. National Energy Corp.*, BRB No. 96-1089 BLA (June 21, 1996) (Order)(unpublished).

Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), Administrative Law Judge Paul F. Sutton denied claimant's second request for modification. Claimant filed an appeal of Judge Sutton's Decision and Order with the Board. Claimant also requested that the Board treat his "Notice of Appeal" as a motion to reinstate any previous appeals that he had filed. By Order dated December 4, 1997, the Board reinstated claimant's appeal of Judge Kichuk's May 2, 1996 Decision and Order (BRB No. 96-1089 BLA) and consolidated it with claimant's appeal of Judge Sutton's October 24, 1997 Decision and Order (BRB No. 98-0345 BLA).

By Decision and Order dated December 16, 1998, the Board affirmed Judge Kichuk's findings that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Fletcher v. National Energy Corp.*, BRB Nos. 96-1089 BLA and 98-0345 BLA (Dec. 16, 1998) (unpublished). Since Judge Kichuk

[3]The Board informed claimant that the case would be reinstated only if claimant requested reinstatement. *Fletcher v. National Energy Corp.*, BRB No. 96-1089 BLA (June 21, 1996)(Order)(unpublished). The Board further informed claimant that his request for reinstatement had to be filed with the Board within thirty days from the date the decision on modification was issued and had to be identified by the Board's docket number BRB No. 96-1089 BLA. *Id.*

properly found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000), the Board affirmed Judge Kichuk's finding that the evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *Id.* The Board also affirmed Judge Kichuk's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). *Id.* The Board, therefore, affirmed Judge Kichuk's denial of benefits. *Id.*

In regard to Judge Sutton's decision, the Board affirmed Judge Sutton's finding that the evidence was insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304 (2000). *Fletcher v. National Energy Corp.*, BRB Nos. 96-1089 BLA and 98-0345 BLA (Dec. 16, 1998) (unpublished). The Board further affirmed Judge Sutton's findings that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). The Board, therefore, affirmed Judge Sutton's finding that the evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *Id.* The Board also affirmed Judge Sutton's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). *Id.* The Board, therefore, affirmed Judge Sutton's denial of benefits. *Id.*

Claimant subsequently filed a third request for modification of his denied claim. Finding that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000),[4] Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) found that the evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge further found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge, therefore, denied claimant's request for modification. *Id.* On appeal, claimant contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence was insufficient to establish total disability. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.[5]

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[4]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out 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), is now found at 20 C.F.R. §718.204(c).

[5]Inasmuch as no party challenges the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 16, 2001, to which all of the parties have responded. Claimant contends that the revised regulations set out at 20 C.F.R. §718.201(a) and (c) affect the outcome of the instant case. Employer and the Director assert that the regulations at issue in the lawsuit do not affect the outcome of this case.

Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Section 718.201(a) does not affect the disposition of the instant case because the existence of pneumoconiosis is not in dispute. 20 C.F.R. §718.201(a). Similarly, Section 718.201(c) does affect the disposition of the instant case because the progressivity of pneumoconiosis is not at issue. 20 C.F.R. §718.201(c). Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §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 of entitlement which defeated entitlement in the prior decision.[6] *See 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). In the prior decisions, Judges Kichuk and Sutton found that the newly submitted evidence was insufficient to establish total disability and was, therefore, insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The Board affirmed the findings of Judges Kichuk and Sutton. Consequently, the issue properly before the

[6]Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.310, these revisions only apply to claims filed after January 19, 2001.

administrative law judge was whether the newly submitted evidence was sufficient to establish total disability.

Inasmuch as no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(3) (2000), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see* 20 C.F.R. §718.204(b)(2)(i), (ii) and (iii).

Claimant contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability. In finding the newly submitted medical opinion evidence insufficient to establish total disability, the administrative law judge credited the opinions of Drs. McSharry and Fino that claimant did not suffer from a totally disabling respiratory impairment over Dr. Robinette's contrary opinion because the opinions of Drs. McSharry and Fino were better supported by the evidence of record. Decision and Order at 10-11; Director's Exhibit 115; Claimant's Exhibit 1; Employer's Exhibits 5, 17-19.

Claimant initially argues that the administrative law judge, in considering the cause of claimant's total disability, should have considered the fact that Dr. McSharry is not a B reader. We disagree. The administrative law judge did not address the cause of claimant's total disability. The issue before the administrative law judge was whether the newly submitted medical opinion evidence was sufficient to establish a totally disabling respiratory impairment, regardless of cause. A physician's qualification as a B reader[7] has no relevance to his competence in evaluating the extent of a miner's respiratory impairment.

[7]A "B reader" is a physician who has demonstrated proficiency in evaluating chest x-rays for quality and in the use of the ILO-U/C classification for interpreting chest x-rays for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. 20 C.F.R. §718.202(a)(ii)(E); 42 C.F.R. §37.51.

Claimant also contends that the administrative law judge erred in discrediting Dr. Robinette's opinion. The administrative law judge, given the particular facts in this case, properly discredited Dr. Robinette's finding of a totally disabling respiratory impairment because the pulmonary function and arterial blood gas studies that he administered on October 11, 1999 were non-qualifying.[8] Decision and Order at 10. Moreover, the administrative law judge permissibly credited the opinions of Drs. McSharry and Fino that claimant did not suffer from a totally disabling respiratory impairment over Dr. Robinette's contrary opinion because the opinions of Drs. McSharry and Fino were better supported by the objective evidence. *See Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982); Decision and Order at 10. We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4)(2000). *See* 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability, we also affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *Nataloni, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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[8]Non-qualifying test results may be relevant to the overall evaluation of a claimant's condition **if** a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985); *see also Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). However, in the instant case, Dr. Robinette characterized claimant's non-qualifying October 11, 1999 pulmonary function study as being a "normal spirometry" and interpreted the results of claimant's non-qualifying October 11, 1999 arterial blood gas study as "probably normal." Employer's Exhibit 15. Thus, the administrative law judge reasonably found that Dr. Robinette's finding of a totally disabling respiratory impairment was called into question by the non-qualifying results of claimant's October 11, 1999 pulmonary function and arterial blood gas studies. Decision and Order at 10-11.

Although Dr. Robinette based his finding of total disability upon claimant's low diffusion capacity from an October 11, 1999 study, Drs. Fino and McSharry questioned the reliability of the study. Employer's Exhibits 18, 19.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge