



BRB No. 17-0434 BLA

| | | |
|-------------------------------|---|-------------------------|
| ANDREW L. CHEKAN |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| ROXCOAL INCORPORATED |) | |
| |) | DATE ISSUED: 05/16/2018 |
| and |) | |
| |) | |
| ROCKWOOD CASUALTY 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 Denying Benefits on Modification of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Modification (2016-BLA-5359) of Administrative Law Judge Natalie A. Appetta (the administrative law judge), rendered on a claim filed on April 28, 2011,¹ pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that there was no mistake in a determination of fact with regard to the prior denial of benefits. She further determined that the new evidence on modification did not establish a change in conditions, as it was insufficient to establish that claimant is totally disabled.² Accordingly, the administrative law judge denied modification pursuant to 20 C.F.R. §725.310, and she denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that claimant failed to establish a change in conditions, based on Dr. Fino's opinion, and therefore erred in denying the request for modification.³ Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response to claimant's appeal unless specifically requested to do so by the Board.

¹ On February 24, 2014, Administrative Law Judge Drew A. Swank denied benefits on the claim, finding that while claimant established the existence of pneumoconiosis, the evidence failed to establish total disability. Director's Exhibit 49. Claimant timely filed a request for modification. Director's Exhibit 50.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. As the administrative law judge found that claimant failed to establish total disability, she also found that claimant was not eligible for the Section 411(c)(4) presumption.

³ We affirm, as unchallenged, the administrative law judge's determination that there was no mistake in a determination of fact with regard to the prior denial of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and total disability due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310. Claimant contends that the administrative law judge erred in finding that he did not establish a change in conditions. Claimant specifically contends that the administrative law judge erred in finding Dr. Fino's opinion to be insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).⁵ Claimant's argument is rejected as it is without merit.

Dr. Fino examined claimant on March 17, 2016, in conjunction with claimant's modification request. Employer's Exhibit 1. Dr. Fino obtained a non-qualifying pulmonary function study and a non-qualifying blood gas study.⁶ *Id.*; see Decision and Order at 10. Dr. Fino stated:

When I examined this man in 2012, he had minimal reductions in the FVC and FEV1 but was not disabled. Now there is more reduction in the FVC

⁴ As claimant's last coal mine employment was in Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

⁵ We affirm, as unchallenged on appeal, the administrative law judge's findings that the new evidence on modification is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iii). See *Skrack*, 6 BLR at 1-711; Decision and Order at 11-12.

⁶ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields values that exceed those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

and in the FEV1. I certainly cannot rule out his clinical coal workers' pneumoconiosis as contributing to, and/or causing, his disability.

I would like to review additional pulmonary function studies in order to further assess the patient's condition.

Employer's Exhibit 1.⁷

The administrative law judge considered Dr. Fino's statements in 2016 to be "somewhat equivocal" and found that the physician "does not specifically conclude that claimant is totally disabled." Decision and Order at 18. Although claimant asserts that Dr. Fino's opinion is sufficient to establish that he is totally disabled, the Board considers claimant's argument to be a request that the Board reweigh the evidence which we are not empowered to do. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). It is within the purview of the administrative law judge to evaluate the evidence and make credibility determinations, and the Board will not substitute its judgment for that of the administrative law judge. See *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). We therefore affirm the administrative law judge's finding that Dr. Fino's opinion is insufficient to establish total disability and a change in conditions pursuant to 20 C.F.R. §725.310.

⁷ Dr. Fino previously examined claimant on March 27, 2012, and was deposed on September 25, 2013. Director's Exhibits 14, 37. Dr. Fino opined that the pulmonary function study showed only a minimal reduction in the FVC and FEV1 values, and that the blood gas study was normal. Director's Exhibit 14. He opined that claimant has no more than a mild respiratory impairment that would not preclude claimant from performing his usual coal mine employment, which Dr. Fino described as requiring eighty percent heavy manual labor and twenty percent moderate manual labor. Director's Exhibit 37.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge