BRB No. 13-0125 BLA

GARRY L. SWANK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FKZ COAL, INCORPORATED	)	
	)	DATE ISSUED: 10/23/2013
and	)	
	)	
AMERICAN MINING 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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (11-BLA-5857) of Administrative Law Judge Lystra A. Harris denying claimant's request for modification of a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a claim filed on July 31, 2003. After two

previous decisions by two other administrative law judges, Administrative Law Judge Theresa C. Timlin issued a Decision and Order on June 30, 2010, wherein she addressed claimant's request for modification.[1] Judge Timlin found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310. However, Judge Timlin found that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Timlin denied benefits.

While claimant's appeal was pending before the Board, claimant filed a motion to remand, informing the Board that he was pursuing a request for modification. In response, the Board dismissed claimant's appeal and remanded the case for modification proceedings. *Swank v. FKZ Coal, Inc.*, BRB No. 10-0638 BLA (Nov. 30, 2010) (Order) (unpub.).

In a Decision and Order dated November 28, 2012, Administrative Law Judge Lystra A. Harris (the administrative law judge) found that claimant failed to establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that claimant did not establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[2] 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 under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the

[1] The full procedural history of this case is set forth in the administrative law judge's November 28, 2012 decision. Decision and Order at 3.

[2] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Pursuant to 20 C.F.R. §725.310, a claimant may, within a year of a final order, request modification of a denial of benefits. The administrative law judge has the authority to reconsider all the evidence for any mistake in fact, including whether the ultimate fact of entitlement was wrongly decided. *See Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-63 (3d Cir. 1995).

Moreover, the Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310, an administrative law judge is obligated to perform an independent assessment of the new 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. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *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 her 2010 Decision and Order denying benefits, Judge Timlin found that claimant failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the relevant issue before the administrative law judge was whether the new evidence (*i.e.*, the evidence submitted subsequent to Judge Timlin's 2010 Decision and Order) was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. *Kingery*, 19 BLR at 1-11; *Nataloni*, 17 BLR at 1-84; *Kovac*, 14 BLR at 1-158.

Claimant argues that the administrative law judge erred in finding that the new evidence does not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and, therefore, erred in finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. Claimant also argues that the administrative law judge erred in not finding that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge considered the new medical opinions and deposition testimony submitted by Drs. Kraynak and Hertz. Dr. Kraynak opined that claimant's totally disabling pulmonary impairment is due to coal workers' pneumoconiosis. Director's Exhibit 116; Claimant's Exhibit 1. Conversely, Dr. Hertz opined that claimant's totally disabling pulmonary impairment is not due to coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Hertz opined that claimant's totally disabling pulmonary impairment is due to chronic obstructive pulmonary disease due to cigarette smoking, and to obesity. *Id.*

Before addressing the new evidence submitted on modification, the administrative law judge reviewed Judge Timlin's finding, in her June 30, 2010 Decision and Order, that the evidence did not establish that claimant's total disability was due to pneumoconiosis. Judge Timlin considered, *inter alia*, Dr. Kraynak's earlier August 7, 2008 medical report and December 3, 2009 deposition testimony. Director's Exhibit 109. In his earlier report, Dr. Kraynak opined that claimant's total disability was due to coal workers' pneumoconiosis based, in part, upon the results of claimant's May 16, 2009 pulmonary function study. Director's Exhibits 100, 101. Dr. Kraynak opined that the study showed a significantly reduced FVC value, which the doctor interpreted as demonstrating a restrictive defect. Director's Exhibit 101 at 10. Judge Timlin, however, found that the May 16, 2009 pulmonary function study was invalid due to claimant's less than optimal effort, and was not representative of claimant's pulmonary condition. Director's Exhibit 109. Because Dr. Kraynak's opinion regarding the cause of claimant's respiratory disability was primarily based upon the invalid pulmonary function study,[3] Judge Timlin found that Dr. Kraynak's disability causation opinion was entitled to little weight. *Id.*

In considering Dr. Kraynak's most recent disability causation opinion, the administrative law judge found that Dr. Kraynak failed to indicate whether his opinion continued to be based, in part, upon the results of the invalidated May 16, 2009 pulmonary function study:

> When asked in his January 27, 2012 deposition whether he "primarily" relied on his own pulmonary function study . . . which [Judge] Timlin deemed to be invalid in rendering his opinion, Dr. Kraynak averred that he "reviewed all the records when arriving at [his] conclusion, both positive and negative." I find Dr. Kraynak's answer to the question of whether he relied upon an invalid study to be equivocal and non-responsive.

Decision and Order at 9-10.

The administrative law judge further noted that Judge Timlin found that Dr. Hertz's disability causation opinion was better reasoned than that of Dr. Kraynak because Dr. Hertz relied upon "valid pulmonary function testing." Decision and Order at 10. Finally, the administrative law judge noted that Judge Timlin credited Dr. Hertz's disability causation opinion over that of Dr. Kraynak, based upon Dr. Hertz's superior

[3] Administrative Law Judge Theresa C. Timlin also noted that Dr. Kraynak relied upon the results of a June 13, 2008 arterial blood gas study, which the doctor himself found to be deficient. Director's Exhibit 109.

qualifications.[4] *Id.* The administrative law judge found that Judge Timlin did not err in finding that Dr. Hertz's opinion was better reasoned than that of Dr. Kraynak. The administrative law judge also found, based on a *de novo* review of the evidence, that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Claimant argues that the administrative law judge failed to make specific findings with respect to the acceptance and/or rejection of the new evidence submitted in connection with claimant's current request for modification. Claimant's Brief at 7. We disagree. After noting that Judge Timlin accorded less weight to Dr. Kraynak's disability causation opinion, because it was based upon an invalid pulmonary function study,[5] the administrative law judge found that Dr. Kraynak's 2012 deposition testimony failed to establish that his current disability causation opinion was no longer based, in part, upon the invalid pulmonary function study results. Decision and Order at 9-10. It is the function of the administrative law judge to evaluate the physicians' opinions, s*ee Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986), and the Board will not substitute its inferences for those of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). As the administrative law judge properly considered Dr. Kraynak's disability causation opinion, and explained her reason for discrediting it,[6] we affirm her finding that the evidence does

[4] Judge Timlin accurately noted that, while Dr. Kraynak is Board-eligible in Family Medicine, Dr. Hertz is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 109.

[5] Because claimant does not challenge Judge Timlin's finding that claimant's May 16, 2009 pulmonary function study is invalid, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] Claimant argues that the administrative law judge failed to properly consider Dr. Kraynak's status as claimant's treating physician. Contrary to claimant's argument, while a treating physician's opinion may be due additional deference, there is no *per se* rule that a treating physician's opinion must always be accorded the greatest weight. *See Soubik v. Director, OWCP*, 366 F.3d 226, 236, 23 BLR 2-82, 2-101 (3d Cir. 2004). Here, the administrative law judge properly considered Dr. Kraynak's status as claimant's treating physician pursuant to the factors set forth at 20 C.F.R. §718.104(d), but permissibly found his opinion was undermined by his reliance upon invalid pulmonary function study results. Decision and Order at 9-10; 20 C.F.R. §718.104(d); *see Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20-21 (3d Cir. 1997); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[7] We, therefore, affirm the administrative law judge's findings that claimant failed to establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[7] Because Dr. Kraynak's opinion is the only opinion supportive of a finding that claimant's total disability is due to pneumoconiosis, we need not address the administrative law judge's findings regarding the weight that she accorded to Dr. Hertz's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).