

BRB No. 08-0862 BLA

K.C.)
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 Claimant-Petitioner)
)
 v.)
)
 CHAPPERAL COAL CORPORATION)
)
 and)
)
 BUSINESS & MERCHANTILE) DATE ISSUED: 09/17/2009
 INSURANCE MUTUAL, INCOPORATED)
)
 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 – Denial of Modification of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Modification (2005-BLA-5396) of Administrative Law Judge Richard T. Stansell-Gamm rendered 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). Claimant filed an initial claim for benefits on January 29, 2001, which was denied by the district director on May 24, 2002. The district director found that claimant established the existence of pneumoconiosis, but denied the claim on the ground that the evidence was insufficient to establish a total respiratory disability. On November 21, 2002, claimant submitted additional evidence and requested reconsideration of the denial which was treated as a request for modification. In a Proposed Decision and Order dated May 22, 2003, the district director awarded benefits. The employer requested a hearing, and the case was transferred to the Office of Administrative Law Judges.

A hearing was held on November 28, 2007. In his Decision and Order issued on September 4, 2008, the administrative law judge credited claimant with at least seven and one-half years of coal mine employment and found that claimant's last coal mine employment, driving coal trucks, involved a moderate level of exertion. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge determined that the newly submitted evidence failed to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), and, thus, he found that claimant failed to demonstrate a change in conditions. Based on his review of the entire record, the administrative law judge also found that there was no mistake in a determination of fact with regard to the denial of benefits. Accordingly, the administrative law judge denied claimant's request for modification pursuant to 20 C.F.R. §725.310 and denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find a change in conditions pursuant to 20 C.F.R. §725.310. Claimant asserts that the administrative law judge erred in weighing the medical opinions of Drs. Fannin, Walsh, Rogers, Broudy and Rosenberg as to whether he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.¹

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

¹ We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination as to the length of coal mine employment, and his findings that employer is the responsible operator, that claimant timely filed his claim, that claimant's last coal mine job was as a coal truck driver, and that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner’s claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of 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), a miner may, at any time before one year after the denial of a claim, file a request for modification of the denial of benefits. A miner may establish a basis for modification in his or her claim by establishing either a change in conditions or a mistake in a determination of fact.³ *See* 20 C.F.R. §725.310. In considering whether a change in conditions has been established pursuant to 20 C.F.R. §725.310, 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. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). In this case, the district director denied benefits because claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b). Therefore, in order to establish modification based on a change in conditions under 20 C.F.R. §725.310, claimant was required to submit new evidence to establish that he has a totally disabling respiratory or pulmonary impairment.

The administrative law judge first evaluated whether claimant was able to demonstrate a change in conditions by establishing a totally disabling respiratory impairment through new evidence “developed since the record on [claimant’s] pulmonary capacity closed just before February 2002.” Decision and Order at 12. The

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant’s coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director’s Exhibit 2.

³ Because claimant does not challenge the administrative law judge’s finding that there was no mistake in a determination of fact pursuant to 20 C.F.R. §725.310, it is affirmed. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

administrative law judge noted that newly submitted medical record included four pulmonary function studies dated February 14, 2002, April 13, 2003, March 16, 2004 and January 15, 2008, none of which are qualifying for total disability.⁴ Decision and Order at 14. Similarly, the administrative law judge noted that while claimant had one qualifying blood gas study dated February 25, 2002, the remaining six arterial blood gas studies dated February 14, 2002, February 26, 2002, April 14, 2003, June 30, 2004, January 15, 2008 and January 28, 2008, were non-qualifying for total disability. *Id.* at 15.

The administrative law judge also considered the opinions of five physicians and medical records from Pikeville Medical Center. The record reflects that claimant was treated by Dr. Fannin from September 2000 to October 2007 for coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD). Director's Exhibit 40. Dr. Fannin was aware of claimant's prior employment as a roof bolter, but noted that claimant's last coal mine employment was as a laborer. Claimant's Exhibit 6; Director's Exhibit 29. In a report dated October 25, 2002, Dr. Fannin reported that claimant had a chest x-ray identifying a 5 millimeter nodule, that there was a positive lung biopsy for coal workers' pneumoconiosis, and that an arterial blood gas study performed on February 25, 2002, showed hypercapnia. Director's Exhibit 29. Dr. Fannin opined that claimant was completely disabled as evidenced by his persistent coughing, dyspnea, shortness of breath and the results of the pathology report dated February 25, 2002. Dr. Fannin further explained on January 12, 2004, that claimant was totally disabled based on "severe chronic dyspnea worsened by exertion." Director's Exhibit 40 at 156. He also made similar findings in a report dated December 2, 2004. *Id.* at 2.

In a November 23, 2004 report, Dr. Fannin opined that based on the results of the February 25, 2002 arterial blood gas test, along with a February 14, 2002 pulmonary function study, which produced a diminished FEV₁/FVC value of 78 percent of predicted, claimant was "totally and permanently impaired from all forms of gainful employment." Claimant's Exhibit 1. Dr. Fannin prepared additional reports dated January 23, 2006, February 22, 2007 and January 29, 2008, in which he opined that claimant was completely disabled as evidenced by "persistent chronic dyspnea [and] shortness of breath." Claimant's Exhibits 3, 4, 6. In each of these reports, Dr. Fannin referenced the results of the February 14, 2002 pulmonary function study and the February 25, 2002 arterial blood gas test to support his conclusions. *Id.*

⁴ A "qualifying" pulmonary function study or arterial 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. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

In a report dated October 22, 2002, Dr. Walsh indicated that he had examined claimant on February 13, 2002, February 25, 2002, March 6, 2002, and October 22, 2002. Director's Exhibit 40. Dr. Walsh noted that claimant's last coal mine employment was as a laborer. *Id.* at 37. Dr. Walsh opined that the February 25, 2002 arterial blood gas test demonstrated hypercapnia and further concluded that claimant was fully disabled as he "[h]as significant black lung by pathology combined with findings of severe dyspnea and shortness of breath" *Id.* at 39, 40. In a January 23, 2006 supplementary report, Dr. Walsh repeated his earlier findings. Claimant's Exhibit 3.

In a report dated January 18, 2005, Dr. Rogers indicated that he treated the miner from "January 17, 2002 to present." Claimant's Exhibit 2. Dr. Rogers check-marked a box on the form indicating that claimant had clinical pneumoconiosis, that he was totally disabled due to pneumoconiosis and that claimant did not have the respiratory capacity to perform the work of a coal miner. *Id.* When asked to provide the rationale, including objective and clinical findings to support his conclusion, Dr. Rogers wrote, "He has physical findings, laboratory and pathological findings consistent with coal workers['] pneumoconiosis." *Id.* In a letter dated November 8, 2007, Dr. Rogers stated that claimant had "CT directed needle biopsy of coal worker's [sic] pneumoconiosis with evidence of involvement of his lung by the biopsy." Claimant's Exhibit 5. Dr. Rogers noted that claimant was "symptomatic and short of breath." *Id.*

Dr. Broudy examined claimant on April 14, 2003 and opined that there was no radiographic evidence of coal workers' pneumoconiosis. Director's Exhibit 40 at 61. He noted that the pulmonary function study obtained during his examination was normal, even though it was performed with "less than optimal effort" by claimant. He further indicated that the arterial blood gas study results were normal "except for elevation of carboxy hemoglobin indicating continued exposure to smoke." *Id.* at 60-61. Dr. Broudy opined that claimant "does retain the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor." *Id.* at 61.

Dr. Broudy examined claimant a second time on January 15, 2008. Employer's Exhibit 3 at 1. He described that claimant worked as a roof bolter and general laborer for fourteen years, and then worked for five years driving an above ground truck. *Id.* He again diagnosed that there was no evidence of coal workers' pneumoconiosis and that claimant was not totally disabled as a pulmonary function study and arterial blood gas test, both done on January 15, 2008, "easily exceed the minimum federal criteria for disability in coal workers." *Id.* at 3.

Dr. Rosenberg prepared a report on January 23, 2008. based on his review of the medical record. Employer's Exhibit 4. He opined that claimant did not suffer from either "medical or legal" pneumoconiosis. *Id.* He stated that "from a functional perspective, [claimant] has no significant obstructions or restrictions, despite pulmonary

function tests having been performed with incomplete efforts.” He further noted that claimant’s “oxygenation is well preserved.” *Id.* at 5-6. Dr. Rosenberg concluded that claimant “is not disabled from a pulmonary perspective from performing his previous coal mining job or other similarly arduous types of labor.” *Id.* at 6. In an addendum issued on March 6, 2008, Dr. Rosenberg addressed the findings of Dr. Fannin’s January 29, 2008 report, and opined that the objective tests “outlined revealed no evidence of restriction, and [that claimant’s] oxygenation was normal on various blood gases.” Employer’s Exhibit 13.

In weighing the conflicting medical opinion evidence, the administrative law judge first noted that the Pikesville Medical Center treatment records did not address whether claimant was totally disabled. Decision and Order at 22. He then determined that the opinions of Drs. Fannin and Walsh, that claimant is totally disabled, were entitled to less weight because of “incomplete documentation” and “insufficient reasoning” as they did not consider other medical documentation in the record and based their conclusion on an incorrect assessment of claimant’s last coal mine employment. Decision and Order at 23-24. The administrative law judge accorded less weight to Dr. Rogers’s opinion, that claimant is totally disabled, because his conclusion was “insufficiently reasoned and has little probative value” because he provided a “terse conclusion” and failed to discuss the objective medical evidence. *Id.* at 24. In contrast to the opinions of claimant’s treating physicians, the administrative law judge found the opinions of Drs. Broudy and Rosenberg, that claimant is not totally disabled, to be well-reasoned, well-documented and consistent with the objective medical tests. *Id.* at 24-25. Thus, the administrative law judge credited the opinions of Drs. Broudy and Rosenberg and found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant asserts that the administrative law judge erred in failing to give controlling weight to the opinions of Drs. Fannin, Walsh, and Rogers, that he is totally disabled, based on their status as treating physicians. *Id.* Contrary to claimant’s assertion, however, the United States Court of Appeals for the Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2003). Rather, the Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.*

The administrative law judge reasonably accorded less weight to Dr. Fannin’s opinion that claimant is totally disabled. The administrative law judge noted that while “Dr. Fannin was clearly well positioned as a treating physician to render a probative assessment of [claimant’s] pulmonary capacity[,]” the doctor “did not explain the basis for his disability finding in light of other “significant medical documentation in the record.” Decision and Order at 24. For instance, the administrative law judge noted that

while Dr. Fannin based his disability diagnosis on the results of the arterial blood gas study dated February 25, 2002, “which showed excessive retention of CO₂,” Dr. Fannin did not consider “the other six arterial blood gas studies from February 2002 to January 2008 [which] did not show this abnormal condition and did not reach the total disability thresholds.” *Id.* Moreover, the administrative law judge found that while Dr. Fannin “highlighted the decreased FEV₁/FVC ratio as a basis for his pulmonary impairment conclusion, Dr. Fannin compared that test result to the labor associated with [claimant’s] work [as] a roof bolter and coal mine laborer” and not claimant’s last coal mine job as a coal truck driver. Decision and Order at 24, *see also* Hearing Transcript at 42. Thus, because “Dr. Fannin did not address whether the reduced pulmonary function test ratio also disabled [claimant] from driving a coal truck,” the administrative law judge properly found that Dr. Fannin’s opinion was “insufficiently reasoned” to support claimant’s burden of proof pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 23, 24; *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Rowe v. Director, OWCP*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

The administrative law judge also permissibly assigned less weight to Dr. Walsh’s opinion, that claimant is totally disabled from performing his usual coal mine work, because he found that Dr. Walsh’s opinion suffered from “similar documentation and reasoning shortfalls” as the opinion of Dr. Fannin. Decision and Order at 24; *see Odom*, 342 F.3d at 492, 22 BLR at 2-622; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. The administrative law judge noted that “in highlighting the one abnormal arterial blood gas study showing total disability, Dr. Walsh did not address why that one abnormal test helped establish [claimant’s] disability, considering his other six near-normal arterial blood gas studies.” Decision and Order at 24. The administrative law judge further noted that Dr. Walsh also “based his total disability assessment on the labor associated with [claimant’s] work as an underground coal miner rather than as a coal truck driver.” Decision and Order at 24. In addition, the administrative law judge acted within his discretion in giving less weight to Dr. Rogers’s “terse conclusion that [claimant] is disabled” since Dr. Rogers’s opinion was “absent any discussion of the underlying objective medical evidence to support his finding.” *Id.* at 24; *see Clark* at 1-155.

In contrast to the opinions of claimant’s treating physicians, the administrative law judge permissibly found that the opinions of Drs. Broudy and Rosenberg, that claimant is not totally disabled from performing his usual coal mine work as a truck driver, were reasoned and documented and better supported by the objective evidence of record. Decision and Order at 24-25; *see Clark*, 12 BLR at 1-155. Additionally, the administrative law judge properly noted that while “Dr. Broudy only assessed [claimant’s] pulmonary capacity to engage in the labor of an underground coal miner, his

opinion also demonstrates that [claimant] retained the pulmonary capacity to handle the less strenuous work of driving a coal truck.” Decision and Order at 24.

In this case, the administrative law judge properly considered the factors set forth at 20 C.F.R. §718.104(d), and weighed the physicians’ opinions, taking into consideration how the underlying documentation and reasoning supported their conclusions. *Williams*, 338 F.3d at 513, 22 BLR at 2-647. In so doing, he permissibly found that the opinions of Drs. Fannin, Walsh and Rogers, diagnosing total disability, were not as well-reasoned as the contrary opinions of Drs. Broudy and Rosenberg, that claimant is not totally disabled. Decision and Order at 25; *see Odom*, 342 F.3d at 492, 22 BLR at 2-622; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Therefore, contrary to claimant’s assertion, the administrative law judge permissibly determined that the opinions of Drs. Fannin, Walsh and Rogers were not well-documented or reasoned and were not entitled to enhanced weight, based solely on the doctors’ status as claimant’s treating physicians. *Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Clark*, 12 BLR at 1-155.

The Sixth Circuit has repeatedly held that it is for the administrative law judge, as factfinder, to decide whether a report is sufficiently documented and reasoned because such a determination is essentially a credibility matter within the purview of the administrative law judge. *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Thus, we affirm, as supported by substantial evidence, the administrative law judge’s finding pursuant to 20 C.F.R. §718.204(b)(2)(iv), that the newly submitted medical opinions were insufficient to establish that claimant is totally disabled by a respiratory or pulmonary impairment.

Because we affirm the administrative law judge’s finding that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b), based on the newly submitted evidence of record, we affirm his finding that claimant failed establish a change in conditions pursuant to 20 C.F.R. §725.310 and the denial of benefits. *See Kingery*, 19 BLR at 1-11; *Nataloni*, 17 BLR at 1-84.

Accordingly, the Decision and Order – Denial of Modification of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge