

BRB No. 11-0837 BLA

HOWARD N. SIZEMORE)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 09/14/2012
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Modification and Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, PSC), Asher, Kentucky, for claimant.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification and Denying Benefits (2010-BLA-05277) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a subsequent claim¹ filed pursuant to the provisions of the Black Lung Benefits Act,

¹ Claimant filed an initial claim for benefits on February 2, 1987, which was finally denied by Administrative Law Judge Gerald M. Tierney on November 13, 1992, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a duplicate claim on January 17, 1995, which was denied by Administrative Law Judge Michael O'Neill on March 11, 1998, because claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (1997). *Id.* The denial was affirmed by the Board in *Sizemore v. Director*,

30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).² This case is before the Board for a second time. The relevant procedural history is as follows. On July 30, 2007, Administrative Law Judge Alice M. Craft issued a Decision and Order Denying Benefits. The Board affirmed, as unchallenged by the parties, Judge Craft's findings that claimant has pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and her findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *H.S. [Sizemore] v. Director, OWCP*, BRB No. 07-0926 BLA, slip op. at 2 n.2, 4-5 (July 28, 2008) (unpub.).

Claimant filed a request for modification on August 4, 2009. Director's Exhibit 43. The case was assigned to Judge Johnson (the administrative law judge), who issued a Decision and Order Denying Modification and Denying Benefits on August 29, 2011, which is the subject of this appeal. The administrative law judge credited claimant with approximately sixteen years of coal mine employment, as agreed by the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge considered the evidence on modification, in conjunction with the evidence previously submitted in the subsequent claim, and determined that claimant failed to establish total disability. Thus, the administrative law judge concluded that claimant did not demonstrate a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge further determined that there was no mistake in a determination of fact in Judge Craft's decision denying benefits. Accordingly, the administrative law judge found that claimant failed to establish a basis for modification under 20 C.F.R. §725.310 and benefits were denied.

On appeal, claimant argues that the administrative law judge erred in weighing the medical evidence and in finding that claimant did not establish a change in conditions pursuant to 20 C.F.R. §725.310. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.

OWCP, BRB No. 98-0866 BLA (Mar. 19, 1999) (unpub.). *Id.* Claimant took no further action until he filed the current subsequent claim on January 3, 2002. Director's Exhibit 2.

² The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, based on the filing date of the current subsequent claim.

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.³ 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 pursuant to the regulations at 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his disability is 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 entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements that defeated entitlement in the prior decision. *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). The administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also King v. Jericol Mining, Inc.*, 246 F.3d 822, 825, 22 BLR 2-305, 2-310 (6th Cir. 2001).

In this case, Judge Craft previously denied benefits on the merits of the claim because claimant was unable to establish a totally disabling respiratory or pulmonary impairment. The administrative law judge noted that the newly submitted evidence on modification consisted of a positive reading for pneumoconiosis of an x-ray dated March 18, 2009, and the results of a pulmonary function study conducted on March 15, 2010. Decision and Order Denying Modification and Denying Benefits at 6; *see* Director's Exhibit 42; Claimant's Exhibit 1. The administrative law judge found that since claimant previously established that he has pneumoconiosis, the new x-ray did not establish a

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See* 33 U.S.C. 921(c); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

change in conditions. Decision and Order Denying Modification and Denying Benefits at 6. The administrative law judge further determined that because the March 15, 2010 pulmonary function study was non-qualifying⁴ for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), claimant did not establish a change in conditions, based on the newly submitted modification evidence. *Id.* The administrative law judge also reviewed the evidence available to Judge Craft and found that there was no mistake in a determination of fact with regard to her finding that claimant was not totally disabled. *Id.*

Claimant challenges the administrative law judge's finding that he did not establish a change in conditions.⁵ Claimant asserts that the administrative law judge was required to consider the physical requirements of his usual coal mine work in conjunction with the medical reports assessing disability. Claimant's Brief at 3, citing *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Taylor v. Evans & Gambrel Coal Co.*, 12 BLR 1-83 (1988); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant states, "[i]t can be reasonably concluded that" his usual coal mine work as an equipment operator involved being exposed "to heavy concentrations of dust on a daily basis" and that:

[t]aking into consideration the claimant's condition against such duties, in conjunction with the opinion of Dr. Baker and the recent pulmonary function studies which reveal a severe impairment, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 3.

Contrary to claimant's argument, however, the administrative law judge properly found that the March 15, 2010 pulmonary function study is non-qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and that claimant provided no additional evidence on modification to establish total disability. The administrative law judge cannot rely upon a comparison of the exertional requirements of claimant's work

⁴ A qualifying pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B. A non-qualifying study yields values that exceed those in the tables. 20 C.F.R. §718.204(b)(2)(i).

⁵ We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant did not establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

with his non-qualifying pulmonary function studies to establish a totally disabling respiratory and pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv), without a diagnosis of some respiratory or pulmonary impairment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000). There is none in this case. Dr. Baker's opinion that claimant should avoid further exposure to coal dust also is not equivalent to a diagnosis of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor*, 12 BLR at 1-88.

Additionally, we reject claimant's argument that because pneumoconiosis is a progressive and irreversible disease, the administrative law judge erred in failing to find that his condition has worsened to the point that he is now totally disabled. Contrary to claimant's assertion, the administrative law judge's finding of total disability must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8. (2004).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because the administrative law judge properly found that the newly submitted evidence on modification, considered in conjunction with the previously submitted evidence, did not establish that claimant is totally disabled, we affirm the administrative law judge's finding that claimant failed to prove a change in conditions pursuant to 20 C.F.R. §725.310. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant did not establish a basis for modification at 20 C.F.R. §725.310, and we affirm the denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge