BRB No. 12-0407 BLA

NEAL BLANKENSHIP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/19/2013
	)	
ISLAND CREEK COAL COMPANY, INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Neal Blankenship, Oakwood, Virginia, *pro se*.[1]

Ashley M. Harman (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2010-BLA-5414) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge), denying claimant's request for modification and denying

[1] M. Seth O'Quinn, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. O'Quinn is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

benefits on a subsequent claim[2] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). In his initial Decision and Order, issued on August 30, 2007, the administrative law judge credited claimant with at least twenty-three years of coal mine employment.[3] The administrative law judge found that claimant established total disability based on the new arterial blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii), and therefore established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). 2007 Decision and Order at 9. Considering all of the evidence of record, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Upon review of claimant's appeal, the Board affirmed the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis. Therefore, the Board affirmed the denial of benefits.[4] *N.B.* [*Blankenship*] *v. Island Creek*

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[2] Claimant filed two previous claims, each of which was finally denied. Director's Exhibit 1. His most recent prior claim, filed on June 28, 1995, was denied by Administrative Law Judge Jeffrey Tureck, because claimant did not establish total disability. *Id.* The Board subsequently affirmed the denial of benefits. *Blankenship v. Island Creek Coal Co.*, BRB No. 97-0241 BLA (Oct. 9, 1997) (unpub.). Claimant thereafter requested modification, which Administrative Law Judge Richard A. Morgan denied, finding that claimant did not establish the existence of pneumoconiosis or total disability. *Id.* Claimant appealed, and the Board affirmed Judge Morgan's finding that claimant did not establish the existence of pneumoconiosis. *Blankenship v. Island Creek Coal Co.*, BRB No. 99-1194 BLA (Oct. 31, 2000) (unpub.). Claimant appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the Board's decision. *Blankenship v. Island Creek Coal Co.*, No. 00-2430 (4th Cir. May 18, 2001). Claimant filed his third and present claim on February 4, 2004. Director's Exhibit 3.

[3] Claimant's coal mine employment was in Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Because the Board affirmed the administrative law judge's finding that claimant did not establish pneumoconiosis, a necessary element of entitlement, it did not address employer's argument, raised in its cross-appeal, that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *N.B.* [*Blankenship*] *v. Island Creek Coal Co.*, BRB Nos. 07-0988 BLA/A, slip op. at 3, 8 (Aug. 26, 2008) (unpub.).

Coal Co., BRB Nos. 07-0988 BLA/A (Aug. 26, 2008) (unpub.). Thereafter, claimant timely requested modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 74.

In addressing claimant's request for modification, the administrative law judge reviewed the evidence and the prior decisions. The administrative law judge found that the x-ray evidence and medical opinion evidence established the existence of clinical pneumoconiosis,[5] pursuant to 20 C.F.R. §718.202(a)(1),(4). Weighing all of the relevant evidence together, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[6] In light of this finding, the administrative law judge found that claimant established that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge, therefore, considered the merits of claimant's 2004 claim.

The administrative law judge found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). The administrative law judge then found that he made a second mistake of fact in his 2007 Decision and Order, when he found that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), but without having considered the contrary probative medical evidence contained in the record. Considering the contrary probative medical evidence on modification, in the form of medical opinion evidence, the administrative law judge found that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment. Decision and Order at 27. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the findings of the administrative law judge if they are supported by substantial

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[5] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[6] Although the administrative law judge found that the evidence established the existence of clinical pneumoconiosis, he found that the evidence did not establish the existence of legal pneumoconiosis. Decision and Order at 20.

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).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

An administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

After finding that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment, the administrative law judge reviewed the evidence of record to determine whether the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge accurately found that none of the fifteen pulmonary function studies of record yielded qualifying values pursuant to 20 C.F.R. §718.204(b)(2)(i).[7] Decision and Order at 25-26; Director's Exhibits 1, 14, 17, 19, 56; Employer's Exhibit 1. Additionally, the administrative law judge correctly noted that there was no evidence of cor pulmonale with right-sided congestive heart failure, under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 22.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered the fifteen arterial blood gas studies of record, which were administered between March 7, 1984 and October 20, 2009. Decision and Order at 23-24; Director's Exhibits 1, 14, 17, 56, 57, 74; Claimant's Exhibit 1. The administrative law judge accurately noted that, while only one of the resting blood gas study results and one of the exercise blood gas study results were qualifying from the tests administered from 1984 through 1998, the

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[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

five most recent blood gas studies conducted at exercise were qualifying.[8] *Id.* at 24. The administrative law judge next turned to the opinions of three physicians who presented conflicting interpretations of claimant's qualifying exercise blood gas studies, pursuant to 20 C.F.R. §718.204(b)(2)(iv). In evaluating those medical opinions,[9] the administrative law judge found that Drs. Forehand and Kennedy attributed claimant's oxygenation deficiency, reflected in his qualifying exercise blood gas studies, to a respiratory impairment due to pneumoconiosis. *Id.* at 18. The administrative law judge also considered Dr. Hippensteel's contrary opinion, that the impairment reflected in claimant's qualifying blood gas studies is not respiratory or pulmonary in nature, but rather, reflects that claimant has significant coronary artery disease. *Id.* at 14-18.

The administrative law judge credited Dr. Hippensteel's opinion over the contrary opinions of Drs. Forehand and Kennedy, finding that Dr. Hippensteel based his opinion

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[8] Both the March 9, 2004 and June 9, 2004 blood gas studies were non-qualifying on the resting portion of the test, but qualifying on the exercise portion of the test. Director's Exhibits 14, 57. The January 11, 2005 and July 7, 2009 blood gas studies yielded qualifying values on both the resting and exercise portions of the test. Director's Exhibits 17, 74. The October 20, 2009 blood gas study yielded non-qualifying results at rest, but qualifying values when claimant exercised. Claimant's Exhibit 1.

[9] Dr. Forehand, who is Board-certified in Pediatrics, Allergy, and Immunology, examined claimant, conducted objective tests, reviewed other medical records, and noted that claimant's last coal mine job was setting jacks on a long wall miner. Director's Exhibits 1, 11, 57, 74. Based on claimant's exercise-induced hypoxemia shown on his arterial blood gas studies, and a June 8, 2009 echocardiogram that "demonstrated overall normal ventricular ejection," Dr. Forehand concluded that claimant's "cardiorespiratory impairment was due, at least in part, to his pulmonary status." Director's Exhibit 74. Dr. Kennedy, who is Board-certified in Internal Medicine and Cardiovascular Disease, concluded that claimant has coal workers' pneumoconiosis, and stated that he suspected that claimant's shortness of breath "is primarily secondary to [his] underlying lung dis[ease] . . . ." *Id.* Therefore, Dr. Kennedy recommended a right and left catheterization "to assess given positive stress." *Id.* Dr. Hippensteel, who is Board-certified in Internal Medicine and Pulmonary Disease, examined claimant, conducted objective tests, reviewed other medical records, and noted that claimant's last job as a long wall jack setter entailed "heavy manual labor." Director's Exhibits 1, 14, 56; Employer's Exhibits 1, 4, 5. Although Dr. Hippensteel diagnosed pneumoconiosis, he concluded that claimant "does not have significant intrinsic pulmonary impairment from any cause," but that claimant's impaired "cardiac function with exercise . . . is the cause for his deteriorating gas exchange . . . ." Employer's Exhibits 1, 5. Therefore, Dr. Hippensteel opined that claimant is not totally disabled from a respiratory or pulmonary standpoint. *Id.*

on a more comprehensive review of evidence pertaining to claimant's pulmonary and cardiac systems. *Id.* at 19. The administrative law judge also found that Dr. Hippensteel is better qualified than Dr. Forehand, and that Dr. Hippensteel provided a well-reasoned opinion explaining that claimant's qualifying blood gas studies reflect a totally disabling cardiac impairment. Further, the administrative law judge determined that Dr. Kennedy was equivocal in his assessment that claimant's shortness of breath is related to an underlying respiratory condition. *Id.* at 20. In light of the above, the administrative law judge found that the evidence did not establish that claimant has a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2).

Upon review, we conclude that substantial evidence supports the administrative law judge's credibility determinations. Specifically, the administrative law judge permissibly found the opinions of Drs. Forehand and Kennedy to be outweighed by the contrary opinion of Dr. Hippensteel, which he found to be better reasoned, and supported by the objective evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149, 1-155 (1989) (en banc); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); Director's Exhibits 1, 14, 56; Claimant's Exhibit 1; Employer's Exhibits 4, 5. Further, the administrative law judge properly took into account the relative qualifications of the physicians in according greater weight to the opinion of Dr. Hippensteel. *See Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge also acted within his discretion in according less weight to Dr. Kennedy's opinion, finding that Dr. Kennedy expressed his opinion, that claimant's oxygenation impairment may be related to his lung disease, "in less than certain terms," Decision and Order at 20, and did not sufficiently explain how he reached his opinion. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 391, 21 BLR 2-639, 2-653 (4th Cir. 1999); *Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). Because the administrative law judge's evaluation of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv) is supported by substantial evidence, it is affirmed.

In weighing together the contrary probative evidence, pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge determined that the well-reasoned and supported opinion of Dr. Hippensteel outweighed the qualifying blood gas study evidence. Decision and Order at 27. Because we have affirmed the administrative law judge's decision to rely on Dr. Hippensteel's well-reasoned and documented opinion, that claimant does not have a totally disabling respiratory impairment, we also affirm the administrative law judge's permissible finding that Dr. Hippensteel's opinion outweighs the blood gas study evidence. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-323; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999);

Beatty v. Danri Corp., 16 BLR 1-11, 1-13-14 (1991); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Because it is supported by substantial evidence, the administrative law judge's finding that claimant did not establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) is affirmed. As claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), a necessary element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of claimant's request for modification, and the denial of benefits. *See Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge