U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0601 BLA

RONALD K. DUFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNICORN MINING, INCORPORATED	)	
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY/CHARTIS	)	DATE ISSUED: 08/23/2017
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Upon Request for Modification of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Ronald K. Duff, Grundy, Virginia.

Tighe A. Estes and Brian W. Davidson (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

Kathleen H. Kim (Nicholas C. Geale, Acting Solicitor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits Upon Request for Modification (2014-BLA-05927) of Administrative Law Judge Scott R. Morris rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case involves claimant's request for modification of the denial of his claim filed on April 19, 2010.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with seventeen years of underground coal mine employment, but found that claimant failed to establish that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, failed to invoke the rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found that the evidence was insufficient to establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at Section

[1] Claimant filed his application for benefits on April 19, 2010. Director's Exhibit 2. In a Decision and Order issued on January 4, 2013, Administrative Law Judge Adele Higgins Odegard denied benefits because claimant failed to establish that he suffers from a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), or from complicated pneumoconiosis pursuant to 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Claimant appealed and employer cross-appealed the denial of benefits to the Board, which affirmed Judge Odegard's Decision and Order. *Duff v. Unicorn Mining Inc.*, BRB Nos. 13-0203 BLA and 13-0203 BLA-A (Sep. 26, 2013) (unpub.); Director's Exhibit 92. Claimant requested modification of the denial of benefits on February 11, 2014. Director's Exhibit 94.

[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 in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Accordingly, the administrative law judge found that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 and denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer/carrier responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter response brief, arguing that the administrative law judge erred in his consideration of the pulmonary function study evidence submitted in support of modification.

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[3] 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 pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment 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 an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (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(a). When a request for modification is filed, "any mistake may be corrected, 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); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

[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 Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). See 20 C.F.R. §718.304.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 has been established. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

Pursuant to Section 718.304(a), the administrative law judge reviewed the x-ray evidence of record and permissibly accorded greater weight to the interpretations of physicians who possessed dual qualifications as Board-certified radiologists and B readers. Decision and Order on Modification at 15-16; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). The administrative law judge determined that the evidence previously considered by Administrative Law Judge Adele Higgins Odegard consisted of three interpretations of an April 6, 2010 x-ray and six interpretations of a June 16, 2010 x-ray,[4] while the evidence submitted in support of modification consisted of one interpretation of an October 17, 2013 x-ray and one interpretation of a June 29, 2015 x-ray.

Noting that the April 6, 2010 x-ray was interpreted as positive for both simple and complicated pneumoconiosis by dually-qualified Dr. Alexander, as positive for simple pneumoconiosis by Dr. Lockey, a B reader, and as completely negative by dually-qualified Dr. Wiot, the administrative law judge found that this x-ray was inconclusive as

[4] The June 16, 2010 x-ray was read for film quality only by Dr. Barrett. Director's Exhibit 11.

to the presence of complicated pneumoconiosis.[5] Decision and Order on Modification at 16; Director's Exhibits 9a, 57, Employer's Exhibit 6.

The administrative law judge determined that Dr. Alexander was the only dually-qualified physician who unequivocally interpreted the June 16, 2010 x-ray as positive for complicated pneumoconiosis, as dually-qualified Dr. Miller found a Category A large opacity but could not rule out malignancy, and dually-qualified Drs. Shipley, Ahmed, Groten, and Meyer found no evidence of complicated pneumoconiosis. Decision and Order on Modification at 16; Director's Exhibits 10, 14, 39, 54-56. The administrative law judge permissibly discounted Dr. Miller's interpretation as equivocal, *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000); *Melnick*, 16 BLR at 1-37, and rationally found that Dr. Alexander's positive interpretation was outweighed by the negative interpretations of four equally-qualified physicians. *Id.*; *see Dixon*, 8 BLR at 1-346.

Lastly, the administrative law judge determined that Dr. DePonte, a dually-qualified physician, interpreted the October 17, 2013 and June 29, 2015 x-rays submitted in support of modification as negative for complicated pneumoconiosis. Decision and Order at 16-17; Claimant's Exhibits 1, 2. Because the administrative law judge properly conducted both a qualitative and quantitative assessment of the x-ray interpretations of record, and his credibility determinations are supported by substantial evidence, we affirm his finding that the x-ray evidence of record was insufficient to establish the presence of complicated pneumoconiosis pursuant to Section 718.304(a). *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

Because the record contains no biopsy evidence, we also affirm the administrative law judge's determination that claimant failed to establish complicated pneumoconiosis pursuant to Section 718.304(b). Decision and Order on Modification at 17.

Pursuant to Section 718.304(c), the administrative law judge reviewed the July 7, 2010 medical report of Dr. Alam and the treatment records of Dr. Ajjarapu, who each

[5] Contrary to the administrative law judge's finding, Dr. Alexander interpreted the April 6, 2010 x-ray as positive for simple pneumoconiosis, but not complicated pneumoconiosis. Director's Exhibit 9a. As the administrative law judge ultimately concluded that the x-ray evidence was insufficient to establish complicated pneumoconiosis, however, his mischaracterization of Dr. Alexander's interpretation is harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

diagnosed complicated pneumoconiosis.[6] Decision and Order on Modification at 17; Director's Exhibits 10, 52; Claimant's Exhibit 3. Finding that Drs. Alam and Ajjarapu[7] based their diagnoses of complicated pneumoconiosis on Dr. Alexander's positive interpretation of the June 16, 2010 x-ray, which the administrative law judge determined was outweighed by the negative interpretations of record, the administrative law judge permissibly concluded that claimant failed to establish complicated pneumoconiosis pursuant to Section 718.304(c). Decision and Order on Modification at 17; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003). Because there is no other medical evidence supportive of a finding of complicated pneumoconiosis, we affirm the administrative law judge's determination that claimant failed to establish invocation of the irrebuttable presumption set forth at Section 718.304, as supported by substantial evidence.

Total Respiratory Disability

The administrative law judge reviewed the evidence previously considered by Judge Odegard and properly found that it was insufficient to establish either total disability pursuant to Section 718.204(b)(2)(i)-(iii) or a mistake in a determination of fact pursuant to Section 725.310: the pulmonary function studies obtained on April 6, 2010, June 16, 2010, February 28, 2011, and January 30, 2012 and the blood gas study obtained

[6] The administrative law judge also determined that the record contains Dr. Tiu's CT scan report dated November 14, 2014, which was interpreted as showing chronic obstructive pulmonary disease, centrilobular emphysema, focal areas of scarring, and multiple scattered nodules, but did not diagnose complicated pneumoconiosis. Decision and Order on Modification at 17; Claimant's Exhibit 5.

[7] In her treatment note dated April 29, 2011, Dr. Ajjarapu indicated that "[c]hest x-ray B reading done on October 27, 2010, showed complicated pneumoconiosis A, small opacities compatible with pneumoconiosis category T/Q, profusion 2/2." Director's Exhibit 52. The record does not contain an x-ray obtained on October 27, 2010, but Dr. Miller interpreted the June 16, 2010 x-ray on October 27, 2010 as positive for Category A complicated pneumoconiosis and 2/2 t/q simple pneumoconiosis, but could not rule out malignancy. Director's Exhibit 14. While the administrative law judge incorrectly stated that Dr. Ajjarapu's diagnosis was based on Dr. Alexander's positive interpretation of the June 16, 2010 x-ray, the error is harmless because the administrative law judge also found that Dr. Miller's x-ray interpretation of complicated pneumoconiosis was both equivocal and outweighed by the negative x-ray interpretations of record. Decision and Order on Modification at 16-17; *see Larioni*, 6 BLR at 1-1278.

on June 16, 2010 all produced non-qualifying results,[8] and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order on Modification at 9-11; Director's Exhibits 9a, 10, 50, 51. The administrative law judge also permissibly found that claimant failed to establish total disability pursuant to Section 718.204(b)(2)(iv) or a mistake in a determinations of fact pursuant to Section 725.310 because Dr. Alam, the only physician who opined that claimant was totally disabled, did not provide a reasoned explanation as to how the reduced FEV1 value from the non-qualifying pulmonary function study he performed would preclude claimant from performing his usual coal mine employment. Decision and Order on Modification at 12; Director's Exhibit 10; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). As substantial evidence supports the administrative law judge's findings, they are affirmed.

In reviewing the new evidence submitted in support of modification, the administrative law judge determined that a January 22, 2013 pulmonary function study contained in claimant's treatment records produced non-qualifying values; a February 28, 2014 pulmonary function study contained in claimant's treatment records produced qualifying values; and a June 29, 2015 pulmonary function study produced qualifying values. Claimant's Exhibit 4; Employer's Exhibit 15. The administrative law judge found that the two pulmonary function studies contained in claimant's treatment records were in equipoise, and that the June 29, 2015 pulmonary function study was outweighed by a preponderance of the earlier, non-qualifying studies. Decision and Order on Modification at 9-10, 12-13. Thus, the administrative law judge concluded that claimant failed to establish a change in conditions pursuant to Section 725.310.

The Director argues that the administrative law judge erred in finding that the newly submitted pulmonary function study evidence was insufficient to establish total respiratory disability. The Director avers that, despite the administrative law judge's acknowledgment that the two most recent pulmonary function studies dated February 28, 2014 and June 29, 2015 yielded qualifying values and that neither test was found invalid or non-conforming, the administrative law judge "simply credited the earlier non-qualifying [pulmonary function studies] based on numerical superiority" to conclude that the preponderance of the pulmonary function study evidence was insufficient to establish total respiratory disability. Director's Letter Brief at 3. The Director maintains that the

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

administrative law judge's observation that "no doctor explained the qualifying results" was improper because "if valid and conforming, those results stand on their own and may establish disability independently." *Id.* Because the administrative law judge failed to provide a rational reason for his conclusion that the more recent, qualifying tests failed to demonstrate total respiratory disability, the Director asserts that the administrative law judge's Section 718.204(b)(2)(i) determination cannot be affirmed. The Director's argument has merit.

When analyzing the newly submitted pulmonary function studies contained in the treatment records, the administrative law judge observed that the January 22, 2013 and February 28, 2014 tests "were conducted approximately one year apart, and that the technician commented that [c]laimant had good effort and cooperation on both tests." Decision and Order on Modification at 13. Because the January 22, 2013 test was non-qualifying, whereas the February 28, 2014 test was qualifying, the administrative law judge concluded that these tests were "in equipoise," and thus, "inconclusive as to total disability." *Id.* The administrative law judge recognized in a footnote that claimant's pulmonary function studies "have steadily deteriorated over the course of 2010 to the most recent pulmonary function test in 2015," but declined to credit the most recent, qualifying studies because they had neither been addressed in medical reports nor "otherwise explained," and "none of the physicians who offered an opinion in this matter had the benefit of reviewing the new pulmonary function testing." Decision and Order on Modification at 13 n.12.

It is well established that a qualifying, conforming pulmonary function study shall constitute *prima facie* evidence that a miner is totally disabled pursuant to Section 718.204(b)(2), absent competent medical evidence that the test is not valid. *See* 20 C.F.R. §718.204(b)(2) ("In the absence of contrary, probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993). Contrary to the administrative law judge's assessment, there is no requirement that a qualifying pulmonary function study must be "otherwise explained," or reviewed by physicians who proffered total disability opinions, as long as the record contains no medical evidence calling into question the validity and reliability of the tests. Decision and Order on Modification at 13 n.12; *see e.g., Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). Further, as noted by the Director, the administrative law judge's admission that claimant's pulmonary function studies demonstrated "a steady deterioration" in his pulmonary condition from 2010 to 2015 is consistent with the premise that pneumoconiosis may be a latent and progressive disease. *See Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-85 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Director's Letter Brief at 3. Hence, the recency of the pulmonary function studies is a salient factor that the

administrative law judge should have considered in his weighing of the conflicting studies of record. *See Henning v. Peabody Coal Co.*, 7 BLR 1-753, 1-754-755 (1985). In light of the absence of any medical evidence challenging the validity and reliability of the qualifying pulmonary function studies in this case, and the absence of a rational explanation for crediting the earlier, non-qualifying pulmonary function studies, we must vacate the administrative law judge's Section 718.204(b)(2)(i) determination and remand the case for further consideration.

On remand, the administrative law judge must reassess the pulmonary function study evidence at Section 718.204(b)(2)(i), and then determine whether the weight of the relevant evidence, like and unlike, is sufficient to establish total respiratory disability under Section 718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*). If the administrative law judge finds that claimant has established total respiratory disability, claimant would be entitled to invocation of the Section 411(c)(4) presumption, and the administrative law judge should further determine whether employer has established rebuttal of the presumption.

Accordingly, the Decision and Order Denying Benefits Upon Request for Modification of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge