BRB No. 07-0315 BLA

C.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 11/30/2007
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Leroy Lewis (Law Office of Phillip Lewis), Hyden, Kentucky, for claimant.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-BLA-05587) of Administrative Law Judge Adele Higgins Odegard on a request for modification of the denial of his subsequent 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's original claim was denied by Administrative Law Judge Daniel L. Stewart on October 24, 1990, for failure to prove any element of entitlement; Director's Exhibit 15 at 30, 30, 42; and the Benefits Review Board (the Board) affirmed the denial of benefits on October 16, 1992. Director's Exhibit 15 at 3. After claimant filed a subsequent claim on February 7, 2001, the Director, Office of Workers' Compensation Programs (the Director), conceded the existence of pneumoconiosis arising out of claimant's thirty years of coal mine employment. Thus, a change in an applicable condition of entitlement was

demonstrated pursuant to 20 C.F.R. §725.309(d). On November 20, 2002, Administrative Law Judge Joseph E. Kane denied claimant's subsequent claim on the ground that the evidence failed to establish a totally disabling respiratory impairment, Director's Exhibit 21, and the Board affirmed the denial of benefits.[1] Director's Exhibit 29. Within one year of the Board's decision, claimant requested modification. Director's Exhibit 30. Judge Odegard (the administrative law judge) found that there had been no mistake of fact in Judge Kane's finding of no total disability, and that new evidence submitted in support of modification failed to establish that claimant had become totally disabled since Judge Kane's 2002 denial of benefits. 20 C.F.R. §725.310(c). Accordingly, benefits were denied.

As claimant does not challenge the administrative law judge's determination that there was no mistake of fact in Judge Kane's finding that total disability was not established, the scope of this appeal is limited to whether the administrative law judge correctly determined that the newly submitted evidence failed to establish a change in conditions. 20 C.F.R. §725.310(c). Claimant contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Director responds, urging affirmance of the denial of benefits.[2]

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 by 30

---

[1] Administrative Law Judge Joseph E. Kane considered only the newly submitted evidence consisting of one invalid pulmonary function study, one non-qualifying arterial blood gas study, and Dr. Baker's opinion that claimant was not totally disabled. Although the Benefits Review Board found that Judge Kane erred in failing to consider all the evidence of record in determining if total disability was established, this error was deemed harmless, as the evidence submitted in the prior claim was previously found to be insufficient to establish total disability. Director's Exhibit 29 at 2-5.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that Judge Kane had not made a mistake of fact pursuant to 20 C.F.R. §725.310; and that the newly-submitted evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal* Co., 6 BLR 1-710 (1983).

[3] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate, by a preponderance of the evidence, that he suffers from pneumoconiosis arising out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In order for claimant to succeed in his request for modification, he had to establish that he suffers from a totally disabling respiratory impairment, as it is the element of entitlement previously adjudicated against him. Director's Exhibit 29. Requests for modification, pursuant to Section 725.310(c), require, in pertinent part, the administrative law judge to "consider whether any additional evidence submitted by the parties demonstrates a change in condition." 20 C.F.R. §725.310(c). In determining whether a "change in conditions" is established, the fact-finder must conduct an independent assessment of all evidence submitted subsequent to the prior denial and consider it in conjunction with the previously submitted evidence to determine if the weight of the new evidence is sufficient to demonstrate an element of entitlement previously adjudicated against the claimant. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-611 (1994).

On appeal, claimant argues that the administrative law judge erred in finding that the weight of the newly submitted evidence fails to establish that he is totally disabled.[4] Specifically, claimant argues that the administrative law judge erred in not according greater weight to Dr. Cornett's opinion because she is claimant's treating physician.[5] Claimant's Brief at 3. Contrary to claimant's argument, however, the mere fact that a physician is an individual's treating physician does not mandate assigning controlling weight to that medical opinion; the administrative law judge must assess the credibility of a treating physician's opinion on its merits. 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002). In reviewing the newly submitted medical opinions of record, the administrative law judge adequately examined

[4] The newly submitted evidence consists of the opinions of Drs. Cornett and Rasmussen, and one non-qualifying pulmonary function test.

[5] Claimant does not dispute the administrative law judge's finding that the results of the new pulmonary function study do not support a finding of total respiratory disability. 20 C.F.R. §718.204(b)(2)(i).

and discussed the opinion of Dr. Cornett as it relates to total disability,[6] and rationally concluded that the medical opinion failed to carry claimant's burden pursuant to Section 718.204(b)(2)(iv). Decision and Order at 9-10; Claimant's Exhibit 1; 20 C.F.R. §718.104(d)(5); *Williams*, 338 F.3d at 509, 22 BLR at 2-640, (6th Cir. 2003); *Groves*, 277 F.3d at 834, 22 BLR at 2-326 (6th Cir. 2002). The administrative law judge found Dr. Cornett's opinion to be "vague [and] not thoroughly reasoned," and permissibly discounted the opinion, as Dr. Cornett failed to cite any objective evidence supporting her conclusion of total disability, did not explain what an "exacerbation" was or what level of physical activity would induce "exacerbation," and did not indicate that she understood the physical demands of claimant's usual coal mine employment. Decision and Order at 9-10; Claimant's Exhibit 1; *see Williams*, 338 F.3d at 509, 22 BLR at 2-640 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Therefore, contrary to claimant's assertion, in a proper exercise of her discretion, the administrative law judge fully addressed the opinion of Dr. Cornett and rationally found that it was entitled to little weight. Decision and Order at 10. Moreover, as the objective evidence of record produced non-qualifying results, the administrative law judge rationally accorded substantial weight to Dr. Rasmussen's consultative opinion that claimant did not suffer from a totally disabling pulmonary impairment. Decision and

---

[6] Dr. Cornett's opinion stated:

> While [claimant's] pulmonary function studies have been interpreted from time to time as normal, I do not believe this is a true indication of his physical condition given that the chronic obstructive pulmonary disease evident by chest x-ray and clinical examination can vary from time to time with an exacerbation being expected when engaged in physical activity.
>
> [I]t is my opinion within the realm of reasonable medical probability that [claimant] does indeed suffer from chronic obstructive pulmonary disease which has been primarily caused by his exposure to dust in the underground mining industry. …
>
> I believe [claimant] to be unable to return to work as a coal miner or any other comparable work due to his pulmonary disease.

Claimant's Exhibit 1.

Order at 10; Director's Exhibit 38; *see Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n. 1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *King v. Cannelton Industries*, 8 BLR 1-146 (1985). We thus affirm the administrative law judge's findings that the weight of the newly submitted medical opinion evidence was insufficient to establish the existence of a totally disabling pulmonary impairment pursuant to Section 718.204(b)(iv), as supported by substantial evidence.

Because claimant failed to establish total disability at Section 718.204(b), the element of entitlement previously adjudicated against claimant, we affirm the administrative law judge's denial of modification and benefits at 20 C.F.R. §725.310(c).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge