BRB No. 14-0226 BLA

FINLEY DAVIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	
	)	
and	)	
	)	
JAMES RIVER SERVICES CORPORATION	)	DATE ISSUED: 11/19/2014
	)	
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 Denying Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Asher, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-05464) of Administrative Law Judge Peter B. Silvain, Jr., 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 claim involves claimant's request for modification of the denial of a claim that was filed on October 21, 1998.

This case has previously been before the Board.[1] In its most recent Decision and Order, the Board affirmed Administrative Law Judge John M. Vittone's findings that claimant's initial claim, filed on October 21, 1998, was still pending and that, therefore, claimant's later application for benefits, filed on July 9, 2003, constituted a request for modification pursuant to 20 C.F.R. §725.310, rather than a subsequent claim, pursuant to 20 C.F.R. §725.309. *F.D.* [*Davis*] *v. Bledsoe Coal Corp.*, BRB No. 08-0752 BLA, slip op. at 6 (July 21, 2009) (unpub.). The Board further held that, based on the district director's mistaken belief that the claim being adjudicated was a 2003 subsequent claim, the parties had been improperly constrained by the evidentiary limitations applicable to claims filed after January 19, 2001. Thus, the Board vacated Judge Vittone's factual findings and remanded the case for further proceedings, unrestrained by evidentiary limitations. *Id.*

On remand, Administrative Law Judge Peter B. Silvain, Jr. (the administrative law judge) credited claimant with thirty years of coal mine employment.[2] Decision and Order at 4. Considering the evidence submitted since the denial of claimant's 1998 claim, the administrative law judge found that claimant established the existence of clinical, but not legal, pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). *Id.* at 7-10, 38. The administrative law judge thus found that claimant had established a change in conditions with respect to the pneumoconiosis element of entitlement.[3] *Id.* at 10. However, considering all the relevant evidence of record, the administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *Id.* at 44. Accordingly, the administrative law judge denied claimant's request to modify the prior denial of benefits. *Id.* at 45.

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[1] The entire procedural history from 1998-2009 is summarized in the Board's previous Decision and Order. *F.D.* [*Davis*] *v. Bledsoe Coal Corp.*, BRB No. 08-0752 BLA (July 21, 2009) (unpub.).

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] In a Decision and Order issued on August 25, 2000, Administrative Law Judge Robert L. Hillyard denied claimant's 1998 claim because the evidence did not establish the existence of pneumoconiosis or that claimant was totally disabled. Director's Exhibit 40 at 19.

On appeal, claimant contends that the administrative law judge erred in his evaluation of the pulmonary function study and medical opinion evidence in finding that claimant failed to establish total disability. Employer/carrier responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a substantive response.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Section 725.310 provides that modification may be granted on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). Pursuant to a modification request, the administrative law judge has the authority to reconsider all the evidence for any mistake of fact, even the ultimate fact of entitlement. *Consolidation Coal Co. v. Worrell*, 27 F.3d 277, 18 BLR 2-290 (6th Cir. 1994).

Claimant initially asserts that the administrative law judge erred in his evaluation of the pulmonary function study evidence in finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Claimant specifically contends that "the qualifying[4] pulmonary function study provided by Dr. Craven[5] on January 25, 2011 . . . is the most recent, valid, study in the record and should have therefore been the most probative." Claimant's Brief at 4-5. We disagree. The administrative law judge considered all of the pulmonary function studies of record, correctly noting that the

[4] A "qualifying" pulmonary function 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, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] Claimant subsequently clarified that the January 25, 2011 pulmonary function study was performed by a physician at the Stone Mountain Respiratory Clinic, and not by Dr. Craven.

January 25, 2011 study yielded qualifying results. However, the administrative law judge further correctly noted that the 2011 study had been invalidated by Dr. Vuskovich, in part, for poor effort. Decision and Order at 40; Employer's Exhibit 15. In addition, the administrative law judge noted that a December 30, 2010 pulmonary function study, interpreted by Dr. Jarboe, produced non-qualifying results, with good effort and cooperation. Decision and Order at 40; Employer's Exhibit 4. Contrary to claimant's assertion, while an administrative law judge may give more weight to more recent pulmonary function studies, *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990), he is not required to do so. *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983); *see also Taylor v. Director*, OWCP, 9 BLR 1-22, 1-23 (1986). Here, the administrative law judge permissibly found that Dr. Vuskovich's opinion, that the qualifying 2011 pulmonary function study was the result of poor effort, was corroborated by the nearly contemporaneous, non-qualifying pulmonary function study dated December 30, 2010, and called into question the probative value of the January 25, 2011 pulmonary function study. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Baker v. North American Coal Corp.*, 7 BLR 1-79, 1-81 (1984); Decision and Order at 40-41; Employer's Exhibits 4, 15. As claimant makes no other specific challenge to the administrative law judge's weighing of the pulmonary function study evidence, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). 20 C.F.R. §802.211.

Claimant also argues that the administrative law judge erred in his evaluation of the medical opinion evidence relevant to total disability at 20 C.F.R. §718.204(b)(2)(iv). Considering all of the medical opinion evidence of record, the administrative law judge initially accorded less weight to the medical opinions developed prior to 2007, including those of Drs. Hussain, Baker, and Rasmussen, diagnosing total disability, because they were less probative of claimant's current condition. Decision and Order at 8, 42-44. In contrast, the administrative law judge accorded the greatest weight to the December 20, 2010 medical opinion of Dr. Rosenberg, that claimant is not totally disabled, as the most persuasive, recent medical opinion of record. Decision and Order at 42-44. Claimant does not challenge the weight accorded to Dr. Rosenberg's opinion. Rather, claimant contends that the administrative law judge erred in discounting the opinions of Drs. Hussain, Baker, and Rasmussen. Specifically, claimant asserts that the administrative law judge failed to consider their opinions in light of the exertional requirements of claimant's usual coal mine employment. Claimant's Brief at 5. We disagree. The administrative law judge permissibly found that the probative value of the opinions of Drs. Hussain, Baker, and Rasmussen, dating from 2001, 2004, and 2006, respectively, was diminished by the amount of time that had elapsed since these opinions were expressed. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creel Collieries*, 23 BLR 1-29, 1-35 (2004);

Workman v. Eastern Associated Coal Corp., 23 BLR 1-22, 1-27 (2004); Decision and Order at 8, 42-44. Consequently, the administrative law judge was not required to compare the exertional requirements of claimant's usual coal mine employment with these physicians' opinions.

We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting claimant's ability to perform his usual coal mine employment. Claimant's Brief at 6. An administrative law judge's findings cannot be based on assumptions, but must rather be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). Therefore, as claimant makes no further specific challenge to the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), we affirm the administrative law judge's finding that claimant failed to establish total disability based on the medical opinion evidence at Section 718.204(b)(2)(iv). 20 C.F.R. §802.211.

In light of our affirmance of the administrative law judge's finding that the evidence of record does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of claimant's request for modification.[6] 20 C.F.R. §725.310(a); *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2; *see Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

[6] The administrative law judge's finding that claimant did not establish total disability encompasses a finding that there was no mistake in a determination of fact in the prior proceeding. *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), *modifying* 14 BLR 1-156 (1990).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge