BRB No. 06-0531 BLA

ELMER LEE SHANNON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED: 04/30/2007
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
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 Request for Modification of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Elmer Lee Shannon, Jewell Ridge, Virginia, *pro se.*

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., 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 Denying Request for Modification (04-BLA-37) of Administrative Law Judge Alice M. Craft rendered on a 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).[1] Claimant filed this claim on November 13, 1984. Director's Exhibit 1. It is now before the Board for the fourth time. The Board discussed previously this claim's procedural history.[2] In this decision we shall discuss only that procedural history related to the administrative law judge's decision to deny claimant's latest modification request.

In a Decision and Order on Remand issued on June 14, 1995, Administrative Law Judge Clement J. Kichuk denied benefits, finding that claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 43. Between 1995 and 2000, claimant filed three consecutive modification requests, each of which was denied by an administrative law judge because claimant did not establish total disability. Director's Exhibits 44, 65, 82, 83, 99. His third modification request was denied on April 22, 2002, by Administrative Law Judge Stuart A. Levin. Director's Exhibits 83, 99.

Claimant appealed Judge Levin's denial to the Board, but while the appeal was pending, claimant filed a fourth request that his case be remanded for modification proceedings. Director's Exhibits 102, 107. Accordingly, the Board dismissed claimant's appeal, and remanded the case to the district director for consideration of claimant's request for modification.[3] *Shannon v. Dominion Coal Corp.*, BRB No. 02-582 BLA (Sept. 9, 2002)(unpub.); Director's Exhibit 108.

The claim was referred to Administrative Law Judge Alice M. Craft (the administrative law judge), who noted that employer contested whether claimant has pneumoconiosis arising out of his coal mine employment, issues that were determined in prior decisions and that were not disturbed by the Board.[4] Consequently, the

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] *Shannon v. Dominion Coal Corp.*, BRB No. 92-1385 BLA (May 25, 1994)(unpub.); *Shannon v. Dominion Coal Corp.*, BRB No. 89-294 BLA (June 7, 1991)(unpub.); Director's Exhibits 34, 40.

[3] The Board summarily denied employer's motion for reconsideration. *Shannon v. Dominion Coal Corp.*, BRB No. 02-582 BLA (Oct. 30, 2002)(unpub.); Director's Exhibit 110.

[4] In reviewing employer's first appeal of the initial award of benefits in 1991, the Board had affirmed, as unchallenged on appeal, Administrative Law Judge Clement J.

administrative law judge found that the issue before her was whether claimant established that he is totally disabled due to a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Upon review of the record, the administrative law judge found that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment. The administrative law judge, therefore, found that claimant did not establish a change in conditions or mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

On appeal, claimant generally challenges the administrative law judge's denial of his modification request. Employer responds in support of the denial. 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 to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial 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 be entitled 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).

Section 725.310 (2000) provides that a party may request modification of an award or denial of benefits 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) (2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge has the authority to reconsider all the evidence for any mistake of fact. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In determining whether modification is based on a change in conditions, an administrative law judge must perform an independent assessment of the newly submitted evidence, considered in conjunction with

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Kichuk's findings that claimant established the existence of pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). *Shannon v. Dominion Coal Corp.*, BRB No. 89-294 BLA (June 7, 1991)(unpub.), slip op. at 2 n. 2; Director's Exhibit 34.

the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge reasonably found that the eleven pulmonary function studies of record did not establish total disability, since there were no valid, qualifying pulmonary function studies.[5] *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23, 1-24 (1993); 20 C.F.R. §718.103(c); Decision and Order at 5-8, 15; Director's Exhibits 8, 9, 27, 50, 54, 55, 59, 72, 77, 94, 95, 97, 113, 114, 119, 123. Therefore, we affirm the administrative law judge's finding that total disability was not established by the pulmonary function studies pursuant to 20 C.F.R. §718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge rationally found that claimant's blood gas studies did not establish a totally disabling respiratory or pulmonary impairment. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); Decision and Order at 8-10, 15; Director's Exhibits 11, 25-27, 44, 50, 54, 56, 66, 70, 72, 77, 85, 94, 113, 114, 123; Claimant's Exhibit 1. As the administrative law judge found, of twenty-seven studies administered between 1984 and 2003, five studies, performed between 1991 and 1994, produced qualifying values. As the administrative law judge further noted, none of the sixteen studies done after 1994 was qualifying. Consequently, we affirm the administrative law judge's finding that total disability was not established by a preponderance of the blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge found that total disability was not established by evidence of cor pulmonale with right-sided congestive heart failure. Substantial evidence supports this finding. As the administrative law judge noted, Dr. Doupnik, claimant's treating physician, stated only that claimant suffers from cor pulmonale. Director's Exhibit 56; *see Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37, 1-39 (1989)(holding that a medical opinion diagnosing cor pulmonale but not right-sided congestive heart failure is insufficient to establish total disability). Moreover, the administrative law judge found that Dr. Hippensteel provided a "well-reasoned explanation" based on test results, that claimant's right ventricular function is normal. Decision and Order at 16. We therefore affirm the

[5] 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, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). A "nonqualifying" study exceeds those values.

administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge discussed and weighed all the medical opinions of record. The administrative law judge accurately stated that Drs. Schmidt, Patel, and Nikfar did not address whether claimant is totally disabled. Director's Exhibits 70, 71, 112, 114; Claimant's Exhibit 1. Further, the administrative law judge reasonably gave no weight to Dr. Baxter's December 26, 1984 report of claimant's disability, because it was simply Dr. Baxter's interpretation of the qualifying pulmonary function studies he performed, studies which were later invalidated. *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984); Decision and Order at 10-11, 15; Director's Exhibits 8, 10, 55.

Additionally, the administrative law judge permissibly found that Dr. Sargent's opinion was not definitive, because Dr. Sargent restricted claimant to light or sedentary work in a November 14, 1985 report, but later testified that he doubted that claimant was disabled from his last coal mine employment. *See United States Steel Mining Co., v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 390, 21 BLR 2-639, 2-650, 2-651 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 11, 15-16; Director's Exhibits 25 at 2, 27 at 2, 29 (Dr. Sargent's deposition at 15), 112, 114.

Further, the administrative law judge acted within her discretion in giving Dr. Narayanan's opinion little weight. *See Jarrell*, 187 F.3d at 390, 21 BLR at 2-650, 2-651; *Justice*, 11 BLR at 1-94; Decision and Order at 13-15. Specifically, substantial evidence supports the administrative law judge's finding that Dr. Narayanan's April 14, 2004 opinion was ambiguous as to whether claimant had a totally disabling respiratory or pulmonary impairment, or was instead totally disabled by a combination of "multiple" medical problems. Claimant's Exhibit 1. Additionally, the administrative law judge correctly found that Dr. Narayanan did not address whether claimant is totally disabled, in his April 9, 2003 report. Director's Exhibits 117, 128.

The administrative law judge found that Dr. Hippensteel's opinion that claimant does not have a totally disabling respiratory or pulmonary impairment, as supported by Dr. Garzon's opinion to the same effect, outweighed Dr. Doupnik's opinion that claimant is totally disabled. Decision and Order at 11-14, 16; Director's Exhibits 26, 28, 29 (Dr. Garzon's deposition at 14-15), 30 at 12-13, 54, 59 (Dr. Hippensteel's 1997 deposition at 28-29), 77, 85, 94, 96 (Dr. Hippensteel's 2001 deposition at 30-32), 100, 112, 123. The administrative law judge explained that she could find "little reason to credit Dr. Doupnik's opinion over that of Dr. Hippensteel," even though Dr. Doupnik is claimant's treating physician. Decision and Order at 16. The administrative law judge reasonably considered that Dr. Doupnik has no special qualifications, while Dr. Hippensteel "is a

well-qualified pulmonologist."[6] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275, 2-276 (4th Cir. 1997); Decision and Order at 16. Additionally, the administrative law judge reasonably accorded greater weight to Dr. Hippensteel's opinion because it was consistent with the objective testing, and was supported by Dr. Garzon's opinion, which was also consistent with the objective testing. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, the administrative law judge acted within her discretion to find that, although Dr. Doupnik is claimant's treating physician, his opinion was outweighed by a better documented and reasoned opinion. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-188, 22 BLR 2-564, 2-571, 2-572 (4th Cir. 2002); 20 C.F.R. §718.104(d)(5). We therefore affirm the administrative law judge's finding that total disability was not established by the medical opinions pursuant to 20 C.F.R §718.204(b)(2)(iv).

Because substantial evidence supports the administrative law judge's findings that total disability was not established,[7] we affirm the administrative law judge's findings that claimant did not establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Thus, the administrative law judge's denial of claimant's request for modification, and the denial of benefits, are affirmed.

[6] The record reflects that Dr. Hippensteel is Board certified in internal medicine and pulmonary disease, while Dr. Doupnik is a family practitioner. Director's Exhibits 30 (Dr. Doupnik's deposition at 3), 54.

[7] We affirm the administrative law judge's finding that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, because the record contains no evidence of complicated pneumoconiosis. Decision and Order at 15.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge