U.S. Department of Labor

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

BRB No. 15-0235 BLA

CHARLES T. AKERS, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, LLC	)	DATE ISSUED: 04/20/2016
	)	
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 Denying Benefits Upon Request for Modification of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Charleston, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits Upon Request for Modification (2012-BLA-06043) of Administrative Law Judge Theresa C. Timlin (the administrative law judge) rendered on a subsequent claim filed on August 8, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[1] This claim was initially adjudicated by Administrative Law Judge

Adele Higgins Odegard. Judge Odegard found that, because the claim was a subsequent claim, claimant must first demonstrate the presence of a totally disabling respiratory impairment, the condition of entitlement previously adjudicated against him, in order to have his claim considered on the merits. *See* 20 C.F.R. §725.309.[2] Because she found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), she further found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and denied benefits. The Board affirmed Judge Odegard's decision.[3] *See Akers v. U.S. Steel Mining Co*., BRB No. 10-0694 BLA (Aug. 5, 2011)(unpub.). Claimant filed a timely request for modification on December 9, 2011. After review of the record and the decisions of Judge Odegard and the Board, the administrative law judge found that claimant failed to establish that a mistake in a determination of fact had been made in the prior decisions denying benefits. Turning to the new evidence submitted with claimant's request for modification, the administrative law judge found that it failed to demonstrate that one of the applicable conditions of entitlement had changed since the denial of the previous claim. Accordingly, the administrative law judge denied claimant's request for modification

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[1] Claimant filed his first claim for benefits on June 10, 2002. That claim was denied by the district director on August 28, 2003, because claimant failed to establish any of the requisite elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 1. Claimant filed a second claim on October 28, 2005, which was denied by the district director on May 4, 2006, because claimant, while establishing the existence of pneumoconiosis arising out of coal mine employment, failed to establish a totally disabling respiratory impairment. Claimant took no action with regard to the denial of this claim.

[2] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

[3] The Board affirmed, as unchallenged on appeal, Administrative Law Judge Adele Higgins Odegard's finding of twenty-eight years of coal mine employment, and her finding that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iii). *See Akers v. U.S. Steel Mining Co*., BRB No. 10-0694 BLA (Aug. 5, 2011)(unpub.); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge further noted that the parties stipulated that claimant had twenty-eight years of coal mine employment. Decision and Order at 2 n.3, 3.

pursuant to 20 C.F.R §725.310, *see Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998), and denied benefits.

On appeal, claimant contends that the administrative law judge erred in not finding a totally disabling respiratory impairment established by the blood gas study and medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv) and total respiratory disability established pursuant to 20 C.F.R. §718.204(b) overall. Claimant asserts that he is, therefore, entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(4)(2012), and that employer has not rebutted the presumption.[4] Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

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.[5] 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 finding that a mistake in a determination of fact was not made in the prior decision denying benefits, the administrative law judge concluded that Judge Odegard properly found that a totally disabling respiratory impairment was not established. Regarding the objective testing, the administrative law judge noted that Judge Odegard properly found that the pulmonary function study evidence was uniformly non-qualifying, and that, while a single exercise blood gas study was qualifying, the "at rest" blood gas studies were non-qualifying. Further, the administrative law judge found that Judge Odegard properly credited the 2009 opinions of Drs. Zaldivar and Hippensteel, that claimant does not have a totally disabling respiratory impairment, as reasoned, because they were based on a thorough understanding of "the exertional requirements of claimant's coal mine employment."[6] Decision and Order at 5. In finding that a change in

[4] Section 411(c)(4) provides that, if a miner establishes at least fifteen years of qualifying coal mine employment and the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4)(2012).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 5.

[6] The administrative law judge also noted that Judge Odegard's determination as to total respiratory disability had been reviewed and affirmed by the Board. Decision and Order at 5.

conditions was not established, the administrative law judge found that the November 29, 2011 blood gas study and Dr. Zaldivar's May 30, 2013 report, submitted with claimant's request for modification, also failed to establish total respiratory disability. The administrative law judge found that Dr. Zaldivar explained why the results of the 2011 qualifying exercise blood gas study were not credible. Additionally, the administrative law judge noted that Dr. Zaldivar reiterated his 2009 opinion that claimant was not precluded from performing the exertional requirements of his usual coal mine employment because of a total respiratory disability. Employer's Exhibit 1. In sum, the administrative law judge found that claimant failed to establish a basis for modifying the prior denial of benefits.

In challenging the administrative law judge's finding that claimant failed to show that a mistake in a determination of fact was made in the prior denial of benefits, claimant contends that the administrative law judge erred in crediting the March 2009 opinion of Dr. Hippensteel[7] and the August 2009 opinion of Dr. Zaldivar[8] as reasoned.[9]

[7] Dr. Hippensteel conducted a physical examination, objective testing and reviewed additional medical evidence in the record, and opined that claimant had a mild restriction on pulmonary function testing, but that it was not sufficient to prevent claimant from performing his usual coal mine employment, which the doctor stated was as a dispatcher and involved mental stress but required "no physical labor." Employer's Exhibit 1. Dr. Hippensteel stated that the mild restrictive pulmonary impairment is related to claimant's hiatal hernia and obesity, which compress his lung volumes. *Id*. Dr. Hippensteel opined that while claimant's respiratory condition did not prevent him from performing his usual coal mine employment, nonetheless, from a "whole man" standpoint, claimant was unable to return to his coal mine employment due to his prior stroke and cardiac condition. *Id*.

[8] Dr. Zaldivar conducted a physical examination, objective testing and a review of existing medical records and reported that, from a pulmonary standpoint, claimant was not disabled from performing his usual coal mine employment as a dispatcher, which the doctor described as sedentary. Employer's Exhibit 2. However, Dr. Zaldivar further stated that, from a "whole man" standpoint, claimant is severely impaired and unable to perform his usual coal mine employment, due to his cardiovascular disease, diabetes and other medical problems not related to his respiratory condition. *Id*. at 6; Decision and Order at 2, 5, 7-8.

[9] We interpret claimant's contention that Drs. Zaldivar and Hippensteel attributed claimant's total disability to non-respiratory causes without considering the effect of claimant's coal mine employment on his disability to be that the doctors did not adequately consider whether claimant has a totally disabling respiratory impairment. Claimant's Brief at 6 (unpaginated). Contrary to claimant's contention, however, Judge Odegard determined that the 2009 opinions of Drs. Zaldivar and Hippensteel, that

The determination of whether a medical opinion is reasoned is within the administrative law judge's discretion. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2- 323 (4th Cir. 1998); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1977). In this case, the administrative law judge properly found that the evidence submitted in the claim before Judge Odegard, namely the non-qualifying pulmonary function studies, the non-qualifying "at rest" blood gas studies and the reasoned opinions of Drs. Zaldivar and Hippensteel, outweighed the single qualifying exercise blood gas study. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). Consequently, the administrative law judge rationally found that Judge Odegard did not err in finding that the evidence before her failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, properly concluded that a mistake in a determination of fact was not made in the previous decision denying benefits.

In challenging the administrative law judge's finding that claimant failed to show that a change in conditions was established, claimant contends that the administrative law judge erred in rejecting the November 29, 2011 qualifying exercise blood gas study, while crediting Dr. Zaldivar's May 30, 2013 report stating that the results of that blood gas study were of "little significance."[10] Decision and Order at 8. Contrary to claimant's argument, however, the administrative law judge permissibly credited Dr. Zaldivar's 2013 opinion that, given claimant's essentially sedentary job, the blood gas studies did not demonstrate total respiratory disability.[11] Further, she found that Dr. Zaldivar had an

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claimant does not have a total respiratory disability, were supported by their findings on physical examination and objective testing. Additionally, Judge Odegard noted that the doctors' opinions were supported by claimant's symptoms and history and their knowledge of the exertional requirements of claimant's usual coal mine employment. *See* Judge Odegard's Decision and Order at 9-12.

[10] Contrary to claimant's argument, the administrative law judge did not require that all of the blood gas studies show disabling results in order to establish total respiratory disability. *See* Claimant's Brief at 6-7. Rather, she properly weighed all of the relevant evidence together in finding that total respiratory disability was not established. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). Further, contrary to claimant's assertion, the administrative law judge recognized that pursuant to Section 718.204(b)(2), "[i]n the absence of contrary probative evidence," a qualifying objective study "shall establish" the existence of a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2); Decision and Order at 6-7.

[11] Additionally, the administrative law judge considered that claimant's 2011 blood gas study did not include the name of the facility, or the name or signature of the

accurate understanding of the minimal exertional requirements of claimant's work as a dispatcher, which was supported by claimant's own testimony.[12] *Id.*; 20 C.F.R. §718.204(b)(2)(ii); *Fields*, 10 BLR at 1-21. Thus, the administrative law judge properly concluded that the new evidence submitted on modification did not establish total respiratory disability and did not, therefore, establish a change in conditions. *See Hess*, 21 BLR at 1-143.

The administrative law judge properly evaluated all of the relevant evidence, and found that it failed to establish total respiratory disability. The administrative law judge's finding that claimant failed to establish a basis for modifying the prior denial of benefits is, therefore, affirmed. *See* 20 C.F.R. §§725.309, 725.310; *Hess*, 21 BLR at 1-143. Consequently, we reject claimant's contention that he is entitled to invocation of the Section 411(c)(4) presumption.[13] *See* 30 U.S.C. §921(c)(4). Additionally, because claimant has failed to establish total respiratory disability, an essential element of entitlement pursuant to 20 C.F.R. Part 718, he is not entitled to benefits thereunder.[14]

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supervising physician as required under 20 C.F.R. §718.105(c). Decision and Order at 7-8 n.6; Claimant's Exhibit 1 (on modification). The administrative law judge also noted that claimant's 2008 qualifying exercise blood gas test had involved only three minutes of exercise, but claimant was "able to walk for five minutes before becoming short of breath" in his 2011 blood gas testing. Decision and Order at 8. Further the administrative law judge noted that Judge Odegard found that "the physician who administered the 2008 test characterized the exercise portion as equivalent to shoveling the belt." *Id.* As claimant does not contest these additional bases for the administrative law judge's conclusion, they are affirmed. *Skrack*, 6 BLR at 1-711.

[12] The administrative law judge's finding that claimant's job as a dispatcher was sedentary, with "minimal exertional requirements," and that Dr. Zaldivar adequately understood its exertional requirements, is affirmed as unchallenged on appeal. Decision and Order at 7-8; *Skrack*, 6 BLR at 1-711.

[13] Because claimant has not established total respiratory disability, we need not address his argument that employer's evidence was "legally insufficient" to rebut the Section 411(c)(4) presumption. Claimant's Brief at 6-7; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[14] In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). Failure to establish any one

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(en banc).