BRB No. 10-0211 BLA

SILAS M. CAMERON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROBINSON PHILLIPS COAL COMPANY	)	
	)	DATE ISSUED: 12/15/2010
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 on Modification of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits on Modification (08-BLA-5320) of Administrative Law Judge Daniel L. Leland rendered on a subsequent claim filed pursuant to the provisions of Title IV of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)

(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). Claimant's prior application for benefits, filed on October 7, 1979, was finally denied on May 31, 1988, because claimant failed to establish the existence of a totally disabling respiratory impairment. Director's Exhibit 68 at 2. On March 8, 2004, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 2. Following a hearing, in a Decision and Order dated October 24, 2006, the administrative law judge credited claimant with twenty-nine years of coal mine employment,[1] but found that the medical evidence developed since the prior denial of benefits did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and thus, failed to establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

Claimant timely requested modification, alleging a mistake in a determination of fact. *See* 20 C.F.R. §725.310; Director's Exhibits 69, 73, 74. The district director denied modification, and claimant requested a hearing, which was held on June 9, 2009.

In a Decision and Order dated November 5, 2009, the administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and thus, did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge therefore found that claimant did not establish a mistake in a determination of fact in the prior decision under 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his evaluation of the blood gas study and medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv). Employer responds in support of the administrative law judge's denial of benefits. Claimant filed a reply brief reiterating the above allegations of error. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief relevant to the merits of entitlement.[2]

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[1] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 9, 13. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] The administrative law judge's findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii) are affirmed, as they are

The Board 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).

By Order dated September 13, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for claims filed after January 1, 2005, that were pending on or after March 23, 2010. The Director, claimant, and employer have responded, correctly asserting that Section 1556 does not apply to this case, because the present claim was filed before January 1, 2005.

To establish entitlement 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. 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). Claimant's prior claim was denied because he failed to establish that he was totally disabled. Director's Exhibit 68. Consequently, claimant had to submit new evidence establishing that he is totally disabled to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3). In considering a request for modification of the denial of a subsequent claim (which, as here, has been denied based upon a failure to establish a change in the applicable condition of entitlement), an administrative law judge must determine whether all of the evidence developed in the subsequent claim, including any new evidence submitted with the request for modification, establishes a change in the applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). If the evidence establishes a change in the applicable condition of entitlement, the administrative law judge must then consider the merits of the subsequent claim. *Hess*, 21 BLR at 1-143.

Claimant asserts that the administrative law judge erred in his evaluation of the blood gas study and medical opinion evidence relevant to the issue of total disability,

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unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). Specifically, claimant contends that the administrative law judge failed to recognize that the January 10, 2007, qualifying[3] exercise blood gas study is sufficient, absent contrary probative evidence, to establish the presence of a totally disabling respiratory impairment. Claimant also asserts that the administrative law judge erred in according less weight to the opinion of Dr. Rasmussen, that claimant's exercise blood gas study results indicate the presence of a totally disabling respiratory impairment, than to the contrary opinions of Drs. Crisalli and Hippensteel, that claimant retains the pulmonary capacity to perform his usual coal mine work. Claimant's arguments lack merit.

The administrative law judge reviewed the evidence submitted since the prior denial to determine whether it established total disability pursuant to 20 C.F.R. §718.204(b)(2).[4] Turning to the new blood gas studies, pursuant to 20 C.F.R.

[3] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(ii).

[4] The administrative law judge reviewed the results of blood gas studies performed on May 5, 2004, December 29, 2004, and April 11, 2005, originally submitted in claimant's subsequent claim, and the results of blood gas studies performed on January 7, 2007, and August 6, 2007, submitted with claimant's request for modification. Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge also reviewed the medical opinions of Drs. Forehand, Zaldivar, Rasmussen, Hippensteel, and Crisalli, originally submitted with claimant's subsequent claim, and the additional reports of Drs. Rasmussen, Hippensteel, and Crisalli, submitted on modification. Dr. Forehand examined claimant and performed objective testing, and opined that claimant has a totally disabling respiratory impairment. Director's Exhibit 13. Dr. Zaldivar examined claimant and administered objective tests, and opined that claimant has a pulmonary impairment that may be disabling. Director's Exhibit 51. Dr. Rasmussen examined and tested claimant, and reviewed available medical records, including the reports of Drs. Hippensteel and Crisalli. Dr. Rasmussen opined, based in part on his January 10, 2007 exercise blood gas study results, that claimant has a totally disabling respiratory impairment. Director's Exhibit 52; Claimant's Exhibits 1, 2, 6. Dr. Hippensteel reviewed medical records and opined that claimant has some respiratory impairment, but retains the respiratory capacity to perform his usual coal mine work. Director's Exhibit 40; Employer's Exhibit 4. Dr. Crisalli examined and tested claimant, and reviewed available medical records, including the reports of Drs. Rasmussen and Hippensteel. Director's Exhibits 28, 39; Employer's Exhibits 1, 8. Dr. Crisalli agreed with Dr. Hippensteel that claimant's respiratory impairment is not sufficient to preclude him from performing his usual coal mine work. Dr. Crisalli opined that the January 10,

§718.204(b)(2)(ii), the administrative law judge accurately noted that only the January 10, 2007, exercise blood gas study, administered by Dr. Rasmussen and submitted by claimant on modification, produced qualifying values. Decision and Order at 8. The administrative law judge further found, however, that the record contains conflicting evidence as to the significance of the January 10, 2007 exercise blood gas study results. Decision and Order at 8. While Dr. Rasmussen opined that the qualifying exercise blood gas study results evidenced a disabling pulmonary impairment, Drs. Crisalli and Hippensteel opined that the results indicate cardiac disease, and the concluded that claimant retains the respiratory capacity to perform his usual coal mine work. Director's Exhibits, 28, 39, 40, 52; Claimant's Exhibits 1, 2, 6; Employer's Exhibits 1, 4, 5, 8.

Contrary to claimant's assertion, the administrative law judge acknowledged 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 7. The administrative law judge found, however, that the better reasoned and documented medical opinion provided by Dr. Crisalli, as supported by that of Dr. Hippensteel, constituted "contrary probative evidence" demonstrating that claimant does not suffer from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), but rather, suffers from heart disease that is detected on a blood gas study when he exercises. Decision and Order at 8. The administrative law judge further found that, by contrast, Dr. Rasmussen's opinion, that claimant's qualifying blood gas study indicates the presence of a totally disabling respiratory impairment, was not well-reasoned or supported. Thus, contrary to claimant's argument, the administrative law judge did not rely on the "medical opinions about the etiology of [claimant's] impairment [to] negate the existence of impairment" demonstrated by the qualifying exercise blood gas study. Claimant's Brief at 4. Rather, the administrative law judge permissibly considered the physicians' opinions as to whether the qualifying portion of the blood gas study detected the presence of a respiratory impairment, or a cardiac impairment, in determining whether claimant established the existence of a totally disabling respiratory impairment. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993). Therefore, we affirm the administrative law judge's finding that the blood gas studies do not establish the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2)(ii).

We further conclude that substantial evidence supports the administrative law judge's credibility determinations pursuant to 20 C.F.R. §718.204(b)(2)(iv). Specifically, the administrative law judge permissibly found Dr. Crisalli's opinion to be well-reasoned,

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2007 exercise blood gas study results are indicative of cardiac disease. Employer's Exhibits 1, 8.

because he "provided several sound reasons" for concluding that claimant's decreased values on the January 10, 2007 exercise blood gas study reflect cardiac disease, and do not indicate the presence of a pulmonary problem or respiratory disability.[5] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Director's Exhibits 28, 39; Employer's Exhibits 1, 8. The administrative law judge rationally found that Dr. Rasmussen's contrary opinion was not as well-reasoned or supported, because it was based, in part, on Dr. Rasmussen's belief that claimant does not have a history of cardiac disease, a premise that is not supported by the record.[6] *See Church v. Eastern Associated Coal Co.*, 20 BLR 1-8 (1996); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); Decision and Order at 8; Claimant's Exhibits 2, 6. Moreover, contrary to claimant's assertion, in weighing the medical opinions relevant to the existence of total disability, the administrative law judge did not "fail[] to consider the evidence of marked impairment in diffusing capacity." Claimant's Brief at 4; Claimant's Reply Brief at 2. Rather, consistent with *Walker v. Director, OWCP*, 927 F.2d 181, 184-85, 15 BLR 2-16, 2-23-24 (4th Cir. 1991), the administrative law judge specifically acknowledged the physicians' discussions of the diffusing capacity results in his weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).[7]

[5] When deposed, Dr. Crisalli explained that Dr. Rasmussen's January 10, 2007 exercise blood gas study represents cardiac disease because "the oxygen pulse, which is the ratio of oxygen uptake to the heart rate, plateaued out" and the "ratio between the dead space and the title volume . . . is elevated and essentially the same both at rest, before exercise and during exercise." Employer's Exhibit 8 at 16-17. Dr. Crisalli explained that if the exercise limitation were a pulmonary impairment, he would expect the ratio to become worse. Employer's Exhibit 8 at 17.

[6] Dr. Hippensteel noted that the medical records he reviewed included x-rays from 2002 that were interpreted as showing evidence of congestive heart failure and atherosclerotic heart disease, and computed tomography scans from 2002 that revealed an enlarged heart. Director's Exhibits 12, 29, 40. Dr. Crisalli also reviewed the treatment records dating from 2002 to 2007, and the medical reports of Dr. Hippensteel, referencing claimant's history of cardiac disease, and Dr. Rasmussen, referencing claimant's usage of Digoxin. Claimant's Exhibit 1. In addition, Dr. Crisalli noted that claimant reported a history of congestive heart failure when he was examined on August 6, 2007. Employer's Exhibit 1.

[7] In *Walker*, the court held that an administrative law judge may not discredit a physician's disability opinion that is predicated on a diffusing capacity study, merely because that kind of test is not among those listed in the regulations as a method of establishing the existence of a totally disabling respiratory impairment. *Walker v. Director, OWCP*, 927 F.2d 181, 184-85, 15 BLR 2-16, 2-23-24 (4th Cir. 1991).

Decision and Order at 4, 5, 7. Because the administrative law judge's evaluation of the new medical opinion evidence pursuant to Section 718.204(b)(2)(iv) is supported by substantial evidence, it is affirmed.[8]

In weighing together the contrary probative evidence, pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge determined that the well-reasoned and supported opinion of Dr. Crisalli, as supported by the opinion of Dr. Hippensteel, outweighed the qualifying blood gas study evidence. Decision and Order at 8. Because we have affirmed the administrative law judge's decision to accord greatest weight to the opinion of Dr. Crisalli, as supported by Dr. Hippensteel, explaining that claimant does not have a totally disabling respiratory impairment, we also affirm the administrative law judge's finding that those opinions outweigh the qualifying blood gas study evidence. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-323; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty v. Danri Corp*., 16 BLR 1-11, 1-13-14 (1991); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*).

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences, *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-126, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). As it is supported by substantial evidence, we affirm the administrative law judge's finding that the new evidence developed since the prior denial, including the evidence submitted on modification, did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Therefore, we affirm the administrative law judge's finding that the new evidence did not establish a change in the applicable condition of entitlement, or a mistake in a determination of fact, and we affirm his denial of benefits pursuant to 20 C.F.R. §§725.309(d), 725.310. *See White*, 23 BLR at 1-3; *Hess*, 21 BLR at 1-143.

[8] The administrative law judge also reviewed the medical opinions of Drs. Forehand and Zaldivar originally submitted in the subsequent claim. He reiterated his prior finding that their opinions, while supportive of total disability, were unreasoned and entitled to little weight. Decision and Order at 7. Claimant does not challenge that determination on appeal. *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits on 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