BRB No. 07-0990 BLA

L.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	DATE ISSUED: 09/30/2008
	)	
and	)	
	)	
LIBERTY MUTUAL SURETY	)	
	)	
Employer/Surety-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Living Miner's Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Harold B. Culley Jr. (Culley & Wissore), Raleigh, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer/surety.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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:

Old Ben Coal Company, through its surety, Liberty Mutual Surety (employer), appeals the Decision and Order Awarding Living Miner's Benefits (2004-BLA-155) of Administrative Law Judge William S. Colwell (the administrative law judge) 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] On June 28, 2002, Administrative Law Judge Robert L. Hillyard awarded benefits, finding that claimant was entitled to invoke the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(4) (2000), and that the evidence was insufficient to establish rebuttal under 20 C.F.R. §727.203(b)(1)-(4) (2000). Director's Exhibit 48. Employer appealed, and the award was affirmed by the Board.[2] [*L.M.*] *v. Old Ben Coal Co.*, BRB No. 02-0735 BLA (Jul. 31, 2003)(unpub.); Director's Exhibit 50. Within one year of the Board's decision, employer filed a timely request for modification on May 4, 2004. Director's Exhibit 55. In support of its modification request, employer submitted the results of pulmonary function and arterial blood gas studies conducted on July 27, 2004, and the medical opinion of Dr. Repsher. Employer's Exhibits 2-4, 6. The district director denied modification and the case was assigned to the administrative law judge.

In his Decision and Order Awarding Living Miner's Benefits (Decision and Order) issued on August 29, 2007, the administrative law judge considered the same medical evidence that was reviewed by Judge Hillyard and concluded that there had been no mistake in a determination of fact in Judge Hillyard's findings. Decision and Order at 2-4. The administrative law judge also considered the newly submitted evidence, in conjunction with the prior evidence, and found that it failed to show a change in conditions or a mistake in a determination of fact, or any improvement in claimant's totally disabling respiratory condition that would "render Judge Hillyard's June 2002 Decision erroneous." Decision and Order at 13. Accordingly, the administrative law

[1] We note that claimant died on September 15, 2004. Employer's Exhibit 1.

[2] This case has a long and protracted procedural history, which was fully set out in the Board's 2003 Decision and Order, and is incorporated by reference herein. [*L.M.*] *v. Old Ben Coal Co.*, BRB No. 02-0735 BLA (Jul. 31, 2003)(unpub.); Director's Exhibit 50.

judge denied employer's request for modification pursuant to 20 C.F.R. §725.310 (2000).[3]

On appeal, employer contends that the administrative law judge erred in failing to find either a mistake in a determination of fact or a change in conditions based on the newly submitted medical evidence. Employer maintains that because the 2004 pulmonary function testing, CT scan, and report by Dr. Repsher establish that claimant does not have legal pneumoconiosis or a totally disabling respiratory or pulmonary impairment, the administrative law judge erred in failing to find that Judge Hillyard's award of benefits was erroneous. Employer specifically challenges the administrative law judge's finding that the July 27, 2004 pulmonary function study was qualifying for total disability based on the Part 727 regulations, which do not account for claimant's advanced age at the time of the test. Employer also contends that the study "clearly indicates a substantial improvement in claimant's pulmonary condition from 1998, a finding that is completely contrary to the undisputed principle that pneumoconiosis is progressive and irreversible." Employer's Petition for Review and Brief at 16. Employer further challenges the weight the administrative law judge assigned the conflicting CT scan evidence, and his finding that the opinion of Dr. Repsher, that claimant does not suffer from chronic obstructive pulmonary disease (COPD) or any respiratory impairment, was not well-reasoned.

Claimant responds, urging affirmance of the administrative law judge's findings pursuant to Section 725.310 (2000) and his award of benefits. Claimant specifically asserts that Dr. Repsher is biased. Employer replies, urging the Board to reject claimant's allegation of bias. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's appeal. The Director urges the Board to reject employer's contention that the objective evidence shows an improvement in claimant's condition when considered under the 20 C.F.R. Part 718 criteria, noting that because the Part 727 regulations are applicable to this claim, the administrative law judge correctly concluded that there had been no change in claimant's disabling respiratory condition. The Director also contends that the administrative law judge acted properly in assigning Dr. Repsher's opinion little weight.

[3] 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 (2008). The amendments to the regulations at 20 C.F.R. §725.310 do not apply to claims, such as this, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2. Where a former version of the regulation remains applicable we will cite to the 2000 edition of the Code of Federal Regulations.

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.[4] 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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by Section 725.310 (2000), a party may request modification of the terms of an award or denial of benefits within one year on the grounds that a change in conditions has occurred or a mistake in a determination of fact was made in the prior decision. *See* 20 C.F.R. §725.310 (2000). Because employer initiated modification proceedings in this case, employer bears the burden of persuasion in establishing a basis for modification of Judge Hillyard's award of benefits. *Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27, 1-34 (1996).

Initially, we reject employer's contention that the administrative law judge erred in concluding that the newly submitted CT scan evidence did not reveal a change in conditions or a mistake in fact in Judge Hillyard's prior determination that claimant had COPD. The administrative law judge properly noted that the evidence submitted on modification included two interpretations of a July 27, 2004 CT scan. Dr. Gatla, a Board-certified radiologist, read the scan as showing COPD, while Dr. Repsher, a B reader, read the scan as showing no evidence of COPD. Employer's Exhibits 3, 4. Contrary to employer's assertion, the administrative law judge permissibly credited Dr. Gatla's reading over Dr. Repsher's reading since he found that Dr. Gatla was better qualified and "trained to interpret CT scans as well as chest x-rays." Decision and Order at 13; *see* 20 C.F.R. §718.202(a)(1)(ii)(C), (E); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-34, 1-37 (1991)(*en banc*).

Employer also seeks modification on the ground that the recent medical evidence from 2004 fails to show that claimant is totally disabled from a respiratory or pulmonary impairment. In this regard, employer relies on the July 27, 2004 pulmonary function study, which shows an improvement in claimant's condition when considered against the predicted values and percentages for a 91 year old miner under the Part 718 regulations. Employer's Brief at 13, 14, 21-22. Specifically, employer contends that the administrative law judge erred in only considering the pulmonary function study values under the Part 727 guidelines and not considering the miner's age as required under the

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit as the miner's coal mine employment was in Illinois. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

Part 718 guidelines, as set forth at 20 C.F.R. Part 718, Appendix B. Employer's Brief at 21-22. We disagree.

Contrary to employer's contention, the administrative law judge properly considered the pulmonary function study evidence under the criteria set forth at Section 727.203 (2000), as this claim was filed on January 25, 1980, prior to the effective date of the Part 718 regulations. *See* 20 C.F.R. §718.2. The administrative law judge found that the July 27, 2004 pulmonary function study yielded qualifying pre-bronchodilator and post-bronchodilator FEV1 values, but that it was not possible to determine whether the overall study was qualifying because MVV values were not provided, as required under Section 727.203(a)(2) (2000). 20 C.F.R. §727.203(a)(2) (2000); Decision and Order at 14; Employer's Exhibit 4. Therefore, the administrative law judge properly found that, under the Section 727.203 (2000) criteria, which do not include consideration of claimant's age at the time of the test, the July 27, 2004 pulmonary function study does not establish a change in claimant's condition or a mistake in a determination of fact. 20 C.F.R. §727.203(a)(2) (2000); Decision and Order at 14. Because employer bears the burden of persuasion on modification, the administrative law judge rationally found that the newly submitted pulmonary function study, while incomplete, nonetheless yielded qualifying FEV1 values, and therefore, is insufficient to establish a change in conditions or a mistake in a determination of fact in Judge Hillyard's 2002 decision. *Branham*, 20 BLR at 1-34; Decision and Order at 14.

Similarly, we see no merit in employer's contention that the administrative law judge erred in his consideration of the blood gas study evidence. As noted by the administrative law judge, although the newly submitted 2002 and 2004 blood gas studies yielded non-qualifying values for total disability, there has been no change in conditions, as the prior blood gas study evidence considered by Judge Hillyard also yielded non-qualifying values. Decision and Order at 14; Employer's Exhibits 4, 5.

Additionally, employer argues that the administrative law judge erred in finding Dr. Repsher's opinion, that claimant does not have COPD or any respiratory impairment, to be insufficiently reasoned. We disagree. The administrative law judge properly noted that Dr. Repsher "relie[d] heavily" on the results of the July 27, 2004 pulmonary function test in rendering his opinion, Decision and Order at 13, and that his description of that test as "super normal" did not comport with the administrative law judge's finding that the test was qualifying for total respiratory disability pursuant to the Part 727 regulations. Decision and Order at 15; Employer's Exhibit 2. Moreover, the administrative law judge noted that Dr. Repsher made equivocal statements as to the reliability of the CT scans for diagnosing COPD, although he relied on that evidence in reaching his opinion that claimant did not have COPD. Thus, because the credibility of the medical experts is within the discretion of the administrative law judge, and he permissibly found that Dr. Repsher's opinion was not sufficiently reasoned or documented, we affirm his decision to

accord Dr. Repsher's opinion less weight. *See Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992, 23 BLR 2-302, 2-313 (7th Cir. 2005); *Blakeley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192, 2-207 (7th Cir. 2001); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Lastly, we reject employer's contention that the administrative law judge erred in failing to find that claimant had a pre-existing disability pursuant to *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995).[5] As noted by the administrative law judge, although Dr. Repsher opined that claimant was totally disabled due to his advanced age, underlying heart disease, and other infirmities associated with age, Employer's Exhibit 2, Dr. Repsher's opinion does not establish that claimant was totally disabled by any of those non-respiratory conditions "*before* he developed totally disabling coal workers' pneumoconiosis." Decision and Order at 16 (emphasis in the original). Furthermore, the administrative law judge properly found that "the fact that claimant continued to age and develop cancer toward the end of his life" does not demonstrate a mistake in Judge Hillyard's determination that claimant "was totally disabled due to coal workers' pneumoconiosis at the time of the hearing in the claim." Decision and Order at 14-15. Employer has failed to rebut the presumption where the evidence establishes that claimant was disabled, at least in part, due to pneumoconiosis. *Zeigler Coal Co. v. OWCP* [*Griskell*], 490 F.3d 609, 618, 24 BLR 2-38, 2-54 (7th Cir. 2007). Thus, we affirm the administrative law judge's finding that claimant's non-respiratory conditions do not preclude entitlement to benefits under *Foster*. Decision and Order at 16.

In this case, the administrative law judge considered the evidence submitted by employer in support of its modification request, in conjunction with the old evidence, and found that it was insufficient to establish a change in conditions. In addition, the administrative law judge found that the evidence of record was not sufficient to establish a mistake in a determination of fact in Judge Hillyard's 2002 decision. Because employer, as the party seeking to modify the award of benefits, bears the burden of persuasion, we affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to demonstrate a basis for modification pursuant to Section 725.310 (2000). *Branham*, 20 BLR at 1-34.

[5] The United States Court of Appeals for the Seventh Circuit in *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995) and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), held that a claimant cannot satisfy his burden of establishing total disability due to pneumoconiosis if he is totally disabled from a pre-existing non-respiratory disability.

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's Benefits 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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REGINA C. McGRANERY
Administrative Appeals Judge