BRB No. 97-0976 BLA

JOHN SELAK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WYOMING POCAHONTAS LAND	)	DATE ISSUED:
	)	
COMPANY	)	
	)	
Employer/Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Employer's Request for Modification of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Eileen S. Goodin (Barkin & Neff), Columbus, Ohio, for claimant.

John G. Paleudis (Hanlon, Duff, Paleudis & Estadt Co., LPA), St. Clairsville, Ohio, for the employer.

Jennifer U. Toth (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

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

PER CURIAM:

Employer[1] appeals the Decision and Order - Denial of Employer's Request for

Modification (96-BLA-1233) of Administrative Law Judge Thomas F. Phalen, Jr. rendered on a claim filed pursuant to the provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge denied employer's request for modification as he found that the evidence did not establish a mistake in fact in the prior Decision and Order or a change in conditions. The administrative law judge found, rejecting employer's contention, that the district director's refusal to order claimant to submit to a medical examination was not an abuse of discretion.

On appeal, employer contends that the prior finding of no rebuttal at Section 727.203(b)(2) constitutes a mistake in a determination of fact, that claimant's condition has changed and that the administrative law judge abused his discretion in refusing to order claimant to undergo a medical evaluation to determine the nature and extent of his epilepsy. Claimant responds, arguing that the administrative law judge's Decision and Order be affirmed. The Director, Office of Workers' Compensation Act addressing only the argument that the administrative law judge erred in denying employer's request to compel claimant to submit to a medical examination, urges affirmance of the decision.

I

This claim has an extensive procedural history, and has been before the Board on three prior appeals.[2] Claimant, who is now 82 years old, filed for benefits under the Act

on September 21, 1977. DX-1. After numerous adjudications before the administrative law judge and the Board, culminating in the Board's affirmance of an award of benefits under the interim criteria, 20 C.F.R. Part 727, *Selak v. Youghiogheny & Ohio Coal Co.*, BRB No. 92-1281 BLA (Nov. 3, 1993)(unpub.), employer appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the award. *Youghiogheny & Ohio Coal Co. v. Selak*, No. 93-4370 (6th Cir. Aug. 29, 1995)(unpub.); DX-44.

Employer's petition for modification centers on its allegations that the prior findings that the record failed to establish rebuttal of the interim presumption constituted a mistake in determination of fact or that claimant's condition has changed. In order to rebut the interim presumption pursuant to Section 727.203(b)(2), the party opposing entitlement must establish that a claimant is able to do his usual coal mine employment or comparable and gainful work, *viz*. that the claimant is not disabled by any reason. *See Peabody Coal Co. v. Ferguson*, No. 97-3050, 1998 WL 145246 at *1 (6th Cir. April 1, 1998); *York v. Benefits Review Board*, 819 F.2d 134, 137, 10 BLR 2-99, 2-103 (6th Cir. 1987).

Claimant's epilepsy-induced blackouts precluded rebuttal of the interim presumption pursuant to Section 727.203(b)(2).[3] On December 19, 1995, counsel for employer filed a petition for modification with the district director, *see* 33 U.S.C. §922; 20 C.F.R. §725.310, asserting that claimant was no longer disabled as demonstrated by his work with an assisted-living institution named the Inn at SharonBrooke. Employer averred that this evidence shows that claimant is no longer disabled by epilepsy because

he no longer suffers from blackouts, hence, the award should be reopened, either because a finding of entitlement constitutes a mistake in determination of fact or because claimant's post-award employment with SharonBrooke demonstrates a change in his physical condition, so that rebuttal of the interim presumption at Section 727.203(b)(2) is no longer precluded.[4]

Employer suggested that claimant had concealed his employment with the assisted living home, and requested that the Department of Labor order a medical evaluation to determine the nature and extent of claimant's epilepsy. *See* 20 C.F.R. §718.404. In the alternative, employer requested an offset against its compensation liability for amounts received by claimant in salary from the Inn at SharonBrooke. DX-47; *see* DXs-50, 52. The district director issued a "Proposed Decision and Order Denying Request for Modification" on May 10, 1996, DX-55, and on May 31, 1996, employer's request for modification was referred to the Office of Administrative Law Judges for a formal hearing. DX-58.

After a formal hearing, the administrative law judge rejected employer's modification petition. The administrative law judge found that claimant's employment with SharonBrooke did not prove that he retained the physical capacity to engage in his usual coal mine, or comparable and gainful, employment. The administrative law judge also rejected employer's assertion that the refusal by the district director to order claimant to attend a medical examination constituted an abuse of discretion. Finally, the administrative law judge, reviewing the administrative record as a whole, ruled that employer failed to prove either a mistake in determination of fact or a change in condition

and denied employer's request for modification. This appeal followed.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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). Upon consideration of the Decision and Order - Denial of Employer's Request for Modification, the administrative record as a whole as well as the arguments of counsel, we conclude that the administrative law judge's refusal to modify the award of benefits in this case is supported by substantial evidence, accords with applicable law and that his rulings do not constitute an abuse of discretion. We therefore affirm the Decision and Order - Denial of Employer's Request for Modification in all respects.

II

Employer argues that the Director abused his discretion by not ordering a new medical examination of claimant. Employer maintains that Section 718.404(b), 20 C.F.R. §718.404(b), of the Secretary's regulations mandates that claimant submit to a new medical examination, that the Director was required to develop medical evidence of claimant's current medical condition, and that the Sixth Circuit's decision in *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997) requires that a medical examination be provided by Director in order to avoid "manifest injustice."

These arguments are without merit. Although the Director is required by statute to provide a *claimant* with a complete pulmonary examination, 30 U.S.C. §923(b); 20

C.F.R. §§718.101; 718.404(b); *see Newman v. Director*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984); *Hall v. Director, OWCP*, 14 BLR 1-51, 1-54 (1990)(*en banc*); *see also Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87-93 (1994), there is no corollary mandate that the Director must assist employer in pursuing the defense of a claim or to develop evidence on modification. Although the district director concluded that a reexamination of claimant was not required in this case, his decision does not preclude employer from developing its case on modification. We do not address employer's argument that it has a right to an examination under Section 718.404(b) and the Director's response that employer did not comply with Section 718.404(b) by requesting claimant to submit to an examination upon reasonable notice.

Employer bears the burden of proof on modification. *Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-28, 1-34 (1996). In this instance, employer failed to develop the record on modification, relying instead on some perceived duty of the Director to develop its case. We agree with the Director that Section 718.404(b), which would require a claimant to submit to medical examinations in circumstances such as these, was written to facilitate modification; this provision exists to aid in discovery, and is available to employer to facilitate the presentation of its case on modification. Nowhere do the Secretary's regulations, and particularly the provision in question, prevent any party opposing entitlement on modification from relying on Section 718.404(b) to develop current medical evidence.

Employer's reliance on the court of appeals' decision in *Yeager* is misplaced. Although *Yeager* and related Sixth Circuit cases have emphasized the mandate for fair

procedure because of the change in the rebuttal law in the wake of *York*, *Yeager* is plainly inapposite to the case at bar. The instant employer's failure to develop the record on modification resulted either from inaction on its part or from a litigation decision to rely solely on claimant's testimony as to the nature and extent of his blackouts. Unlike the respondents in *Yeager* and its progeny, employer was on notice of its burden on rebuttal at Section 727.203(b)(2), *York*, as well as its complementary burden of proof on modification. *See Branham*, 20 BLR at 1-34; 20 C.F.R. §718.403.

Accordingly, we reject out of hand employer's challenge to the administrative law judge's finding that the district director was not required to order a medical examination of claimant. We hasten to observe that, although a party may seek to reopen an award on a continuous basis, and employer may thus attempt to compel claimant to undergo medical testing at its expense, attempts by a party to relitigate successive petitions for modification to cure deficiencies in its case have met with judicial disfavor. *See General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982); *McCord v. Cephas*, 174 U.S.App. D.C. 302, 306, 532 F.2d 1377, 1381 (1976). We share the view, reflected in these cases, that an attempt to rectify failed tactical judgment would almost never warrant a finding that reopening a claim would render justice under the Act.

III

We also hold that employer has failed to point out any error in the administrative law judge's application of the law to the facts of the instant case. Employer contends at length that the administrative law judge failed to grasp the crucial issue on modification, and erred in relying on claimant's testimony to arrive at a decision that modification

should be denied in this instance. We disagree.

Judged from the context of the Decision and Order, the administrative law judge clearly found that the record does not support a finding that claimant, due to any respite from blackout spells, or because of his employment at the Inn at SharonBrooke, now has the physical capacity to perform the exertional demands of his usual coal mine employment, or comparable and gainful work. Employer's arguments about the administrative law judge's evaluation of the testimony and resulting refusal to modify this claim are essentially requests that the Board either reweigh the evidence or intrude upon the administrative law judge's discretion to conclude that the extant record does not support modification. In short, the administrative law judge reasonably was not persuaded that claimant's epilepsy was no longer a threat to produce blackouts, especially given the lack of medical evidence that cliamant's epilepsy no longer exists. In addition, the administrative law judge observed that employer offered no medical evidence that claimant was no longer totally disabled and the administrative law judge found claimant's testimony too imprecise to support a finding of no total disability.

The administrative law judge is charged with the evaluation and weighing of the evidence, may draw appropriate inferences therefrom. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231, 18 BLR 2-290, 2-298 (6th Cir. 1994); *see also Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962). Because the administrative law judge's evaluation of the evidence is not "inherently incredible or patently unreasonable," *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied* 440 U.S. 911 (1979), and because the record provides substantial

evidence to support the administrative law judge's determination that reopening this claim would not be warranted, we affirm the Decision and Order - Denial of Employer's Request for Modification in all respects.[5]

Accordingly, the Decision and Order - Denial of Employer's Request for Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge