BRB No 00-0554 BLA

STANLEY JONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
DANTE COAL 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-Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Michael J. Rutledge (Judith E. Kramer, Acting Solicitor of Labor; 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, United States Department of Labor.

Before: McGRANERY and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (98-BLA-0607) of Administrative Law Judge Daniel L. Leland 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 his application for benefits on October 19, 1979. Director's Exhibit 1. His claim is now before the Board for the fourth time. Previously, the Board discussed fully this claim's procedural history. *Jones v. Wolverine Mining Co*., BRB Nos. 93-1111 BLA, 93-1111 BLA-A (Jan. 30, 1995)(unpub.); Director's Exhibit 89. We now focus only on those procedural aspects relevant to the issues raised in this appeal of the administrative law judge's decision to grant claimant's request for modification and award benefits.

By the time of the Board's most recent decision in this claim, it was settled that claimant had failed to establish invocation of the interim presumption of total disability due to pneumoconiosis by means of chest x-rays establishing the existence of pneumoconiosis, pulmonary function studies yielding qualifying values, or by a reasoned medical opinion diagnosing a totally disabling respiratory impairment. *See* 20 C.F.R. §727.203(a)(1), (2), (4). The Board remanded the case for the administrative law judge to reconsider the additional question of whether claimant established invocation of the presumption by the blood gas study evidence of record pursuant to 20 C.F.R. §727.203(a)(3). *Jones v. Wolverine Mining Co.*, BRB Nos. 93-1111, 93-1111 BLA-A (Sep. 19, 1996)(Order on Reconsideration)(unpub.); Director's Exhibit 94.

On remand, the administrative law judge reweighed the six blood gas studies in the record and found that because the studies were predominantly non-qualifying,[2] they weighed against invocation of the presumption. Director's Exhibit 103. Accordingly, he denied benefits.

Thereafter, claimant submitted new medical evidence and timely requested modification of the denial, alleging a change in conditions. *See* 20 C.F.R. §725.310. In support of his position, claimant submitted pulmonary function studies yielding qualifying values, and the physical examination reports and deposition testimony of Dr. Roger Abrahams, who diagnosed claimant with totally disabling obstructive airways disease due to smoking and the inhalation of coal dust. Employer responded with the reports and testimony of Drs. James Castle and Gregory Fino, who concluded that claimant's obstructive respiratory impairment is due entirely to smoking. Dr. Fino agreed with Dr. Abrahams that claimant's obstructive impairment

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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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. §727.203(a)(2), (3). A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §727.203(a)(2), (3).

prevents him from performing his usual coal mine employment, whereas Dr. Castle opined that claimant is not disabled by his respiratory impairment.

Based upon the newly submitted, qualifying pulmonary function studies, and the disability assessments of Drs. Abrahams and Fino, the administrative law judge found that invocation of the interim presumption was established pursuant to Section 727.203(a)(2), (4), and that a change in conditions was therefore demonstrated. The administrative law judge additionally found that the opinions of Drs. Castle and Fino attributing all of claimant's respiratory impairment to smoking were based upon questionable reasoning and therefore did not carry employer's burden to rebut the presumption pursuant to Section 727.203(b)(3), (4). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer did not rebut the presumption of total disability due to pneumoconiosis. Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal. Employer has filed a reply brief reiterating its contentions, and claimant has responded to employer's reply. Additionally, claimant's counsel has filed a petition requesting a fee for services performed before the Board in the prior appeal, BRB Nos. 93-1111 BLA, 93-1111 BLA-A.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which all parties have responded. Claimant and the Director state that none of the regulations at issue in the lawsuit affects the outcome of this case. Employer, however, contends that two challenged regulations, 20 C.F.R. §718.201(c)(defining pneumoconiosis as a latent and progressive disease), and 20 C.F.R. §718.204(a)(specifying that a nonrespiratory disability is irrelevant to whether a miner is totally disabled due to pneumoconiosis), affect the outcome of this case.

Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. The administrative law judge in this case weighed the evidence based in part on the principle that pneumoconiosis is progressive. However, the outcome of the case is the same under both the existing law recognizing the progressive nature of pneumoconiosis, *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151,

11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Richardson v. Director, OWCP*, 94 F.3d 164, 167-68, 21 BLR 2-373, 2-379 (4th Cir. 1996), and 20 C.F.R. §718.201(c), which codifies existing law.[3] 65 Fed. Reg. 79937, 79971-72. Further review indicates that all but one of the physicians agree that claimant has a disabling impairment which is respiratory in nature, and only one physician, Dr. James Castle, believes that claimant suffers from a nonrespiratory or nonpulmonary disability. Employer's Exhibit 8 (diagnosing claimant totally disabled by heart disease and old age). However, the administrative law judge permissibly accorded Dr. Castle's opinion less weight for reasons unrelated to Dr. Castle's diagnosis of a nonrespiratory disability. *See discussion, infra*. Therefore, contrary to employer's assertion, 20 C.F.R. §718.204(a) is not implicated on this record. Additionally, based on our review, we conclude that none of the other challenged regulations affects the outcome of this case. Therefore, we will proceed with the adjudication of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 725.310 provides that a party may request modification of the award or denial of benefits within one year 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). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held pursuant to Section 725.310 that the administrative law judge has the authority to consider all of the evidence on modification to determine whether there has been a change in conditions or a mistake in a determination of fact, including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

The administrative law judge found and employer does not challenge that claimant established invocation of the presumption that he is totally disabled due to pneumoconiosis, and thus established a change in conditions by the newly

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[3] This case is governed by the entitlement criteria of 20 C.F.R. Part 727, which were not altered during the rulemaking proceedings. However, the Director notes correctly that 20 C.F.R. §727.203(c) provides that "the provisions of Part 718 . . . as amended from time to time, shall also be applicable to the adjudication of claims under this section." 20 C.F.R. §727.203(c). Because the amended definition of pneumoconiosis in 20 C.F.R. §718.201 is intended to implement the statutory definition of pneumoconiosis at 30 U.S.C. §902(b), the Director's point that the revised definition of 20 C.F.R. §718.201 could be implicated in a pending Part 727 claim is well taken.

submitted pulmonary function studies and medical opinions. Accordingly, we now turn to the administrative law judge's findings on rebuttal.

Claimant has been presumed totally disabled due to pneumoconiosis pursuant to Section 727.203(a)(2), (4). To rebut this presumption under subsection (b)(3), employer must rule out any causal connection between claimant's total disability and his coal mine employment. *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 804, 21 BLR 2-302, 2-313-14 (4th Cir. 1998); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123, 7 BLR 2-72 (4th Cir. 1984). To rebut this presumption under subsection (b)(4), employer must prove that claimant does not have pneumoconiosis, in either the clinical or legal sense. *See* 20 C.F.R. §727.202; *Barber v. Director, OWCP*, 43 F.3d 899, 901, 18 BLR 2-61, 2-66-67 (4th Cir. 1995).

In connection with his modification request, claimant was examined and tested by Dr. Abrahams, who is Board-certified in Internal Medicine and Pulmonary Disease. Based upon findings of a chronic, productive cough, moderate obstructive ventilatory impairment on pulmonary function study, negative chest x-ray, normal blood gas study, and wheezing and dyspnea on exertion, Dr. Abrahams diagnosed chronic obstructive airway disease. Claimant's Exhibits 1, 5. Dr. Abrahams considered claimant's past habit of smoking one pack of cigarettes a day for forty years,[4] and his thirty-three years of coal dust exposure, and concluded that claimant's obstructive disease is a combination of chronic obstructive pulmonary disease due to smoking, and obstructive airway disease due to industrial bronchitis from coal dust exposure. *Id*. Dr. Abrahams cited medical studies to support his view that the inhalation of coal dust causes chronic, permanent obstruction to airflow. *Id*.

Subsequently, Dr. Castle, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and reviewed medical evidence. Based upon findings of a negative chest x-ray, moderate airway obstruction, and normal blood gas study, Dr. Castle concluded that claimant does not have coal workers' pneumoconiosis and that his airway obstruction is related solely to smoking. Employer's Exhibits 8, 15, 18. Dr. Castle disagreed with Dr. Abrahams's opinion that claimant's inhalation of coal dust caused industrial bronchitis, which in turn left claimant with chronic airway obstruction. Dr. Castle stated that industrial bronchitis is a temporary condition of cough and mucus production which abates shortly after removal from coal dust. Dr. Castle reasoned that since claimant left the mining industry in 1981, he would have no "ongoing physiologic abnormalities associated with industrial bronchitis," and concluded that his airway obstruction is related to smoking. Employer's Exhibit 8 at 12; *see also* Employer's Exhibit 18 at 10-11, 15, 28.

[4] Claimant informed the examining physicians that he quit smoking in 1978. Claimant's Exhibits 1, 5; Employer's Exhibit 8.

Thereafter, Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record. Dr. Fino stated that there was insufficient evidence to justify a diagnosis of simple coal workers' pneumoconiosis, and concluded that claimant's pulmonary function studies showed an obstructive ventilatory abnormality due to smoking. Dr. Fino stated that a form of obstructive lung disease known as industrial bronchitis temporarily affects working miners, but resolves within six months of leaving the mines. Employer's Exhibit 10 at 15, 17 at 31, 19 at 7-9. Dr. Fino also noted that obstructive lung disease can arise from coal workers' pneumoconiosis, but only in the presence of significant fibrosis. Dr. Fino further stated that the presence of reversible obstruction involving claimant's small airways was consistent with smoking and asthma.

After setting forth the physicians' qualifications and opinions, the administrative law judge found that Drs. Castle and Fino provided persuasive reasoning as to why claimant does not have clinical pneumoconiosis, but did not provide similarly persuasive reasoning as to why claimant's disabling obstructive impairment is unrelated to coal mine employment. Specifically, in view of Dr. Abraham's opinion that claimant's coal dust inhalation caused permanent damage, the administrative law judge was troubled by Dr. Castle's and Dr. Fino's reasoning that industrial bronchitis disappears completely once coal dust exposure ceases and leaves behind no permanent obstructive impairment. Because the administrative law judge believed that he must be guided by the principle that pneumoconiosis is a progressive and irreversible disease, he accorded less weight to the opinions of Drs. Castle and Fino. Accordingly, he found that their opinions did not establish rebuttal pursuant to Section 727.203(b)(3) or (4).

Employer contends that the administrative law judge provided an invalid reason for discounting the opinions of Drs. Castle and Fino that claimant's disabling obstructive lung disease was unrelated to coal mine employment. We disagree. The administrative law judge accurately determined that Drs. Castle and Fino based their opinions, in part, on their belief that absent significant clinical coal workers' pneumoconiosis, obstruction related to coal dust inhalation is essentially temporary and causes no permanent damage. Employer's Exhibits 8, 10, 15, 17-19. The administrative law judge appropriately took into account the opinion of the equally-qualified Dr. Abraham on this point, *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), and permissibly considered both that pneumoconiosis is recognized as a progressive disease, *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988), and that coal dust inhalation causes permanent damage. *See Richardson v. Director, OWCP*, 94 F.3d 164, 167-68, 21 BLR 2-373, 2-379 (4th Cir. 1996), citing *Plesh v. Director, OWCP*, 71 F.3d 103, 108, 20 BLR 2-30, 2-40 (3d Cir. 1995).

Employer argues that the administrative law judge erroneously assumed that all diseases potentially included within "legal pneumoconiosis" are progressive, despite the testimony of Drs. Castle and Fino that industrial bronchitis is not progressive.[5] Employer's argument ignores the evidence of progression which was before the administrative law judge--recent, qualifying pulmonary function studies and medical opinions assessing a totally disabling respiratory impairment--which prompted him to find that a change in conditions had occurred. Moreover, employer did not build the kind of record necessary to challenge the legislative assumption of progressivity underlying the entire federal black lung program. *See Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113, 2-129-30 (7th Cir. 1997)(*en banc* rehearing). The administrative law judge is not bound to accept the opinion or theory of any medical expert, but must evaluate the evidence, weigh it, and draw his own conclusions. *Underwood v Elkay Mining Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-2-28 (4th Cir. 1997). The administrative law judge has done so here utilizing the proper legal standards. *See Massey, supra*; *Barber, supra*. His findings are rational, in accordance with law, and are supported by substantial evidence. Therefore, we affirm the administrative law judge's findings that rebuttal was not established pursuant to Section 727.203(b)(3), (4).[6]

Claimant's counsel has submitted a complete, itemized statement requesting a fee for services performed in the prior appeal pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $3000.00 for 30 hours of legal services at an hourly rate of $100.00. As the fee petition appears to be in order, the fee requested and hourly rate are not excessive, and no objections to the fee petition have been received, counsel is awarded a fee of $3000.00 to be paid directly to him by employer. 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

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[5] Medical opinions must be assessed "with an ear sensitive to conflicting meanings ascribed to the same words by . . . doctors, as well as to . . . differences in phraseology among doctors themselves." *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 761, 21 BLR 2-587, 2-601 (4th Cir. 1999). Here, although the dispute between the doctors centers on the term "industrial bronchitis," it is clear that the doctors define this term differently. Dr. Abraham includes within "industrial bronchitis" any lasting, chronic obstruction related to coal dust inhalation, Claimant's Exhibit 5 at 8, 16, a condition which another physician might instead label "chronic bronchitis." By contrast, Drs. Castle and Fino define "industrial bronchitis" solely as temporary cough and sputum production. Employer's Exhibits 18 at 15, 19 at 7. Notwithstanding the doctors' differing use of the term "industrial bronchitis," the administrative law judge recognized the real issue in dispute, which was whether "coal dust exposure can cause a permanent obstructive impairment." Decision and Order 10.

[6] Employer does not challenge the administrative law judge's finding that benefits should commence as of April, 1995, the month of onset of total disability due to pneumoconiosis. *See* 20 C.F.R. §§725.503(b), 727.302. Accordingly, the administrative law judge's finding is affirmed.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is affirmed and claimant's counsel is awarded a fee of $3000.00.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge