BRB No. 00-0642 BLA

DALLAS D. POWERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYER'S SERVICE CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Dallas D. Powers, Dante, Virginia, *pro se*.[1]

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Helen H. Cox (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

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the decision of Administrative Law Judge Joeseph E. Kane. In a letter dated March 24, 2000, the Board stated that claimant would be considered to be representing himself on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-1276) of Administrative Law Judge Joseph E. Kane denying benefits on a claim[2] 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).[3] The administrative law judge credited claimant with at least ten years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. §410.490 and Parts 727 and 410, Subpart D.[4] The administrative law judge found the newly submitted evidence insufficient to establish

[2]Claimant filed a claim for benefits on December 17, 1973. Director's Exhibit 1. On March 27, 1981, Administrative Law Judge Phillip J. Lesser issued a Decision and Order awarding benefits, Director's Exhibit 59, which the Board affirmed in part and vacated in part, and remanded the case for further consideration, *Powers v. Clinchfield Coal Co.*, BRB No. 81-0729 BLA (Jan. 18, 1985)(unpub.). On December 8, 1986, Judge Lesser issued a Decision and Order on Remand awarding benefits, Director's Exhibit 78, which the Board vacated and remanded for further consideration, *Powers v. Clinchfield Coal Co.*, BRB No. 86-3306 BLA (Oct. 29, 1990)(unpub.). On remand, the case was transferred to Administrative Law Judge Frederick D. Neusner, who issued a Decision and Order denying benefits on January 8, 1993. Director's Exhibit 94. In response to claimant's appeal, the Board affirmed in part and vacated in part the denial of benefits of Judge Neusner, and remanded the case for further consideration. *Powers v. Clinchfield Coal Co.*, BRB No. 95-1708 BLA (Oct. 30, 1996)(unpub.). On August 13, 1997, Judge Neusner issued a Decision and Order on Remand denying benefits. Director's Exhibit 119. Claimant filed a request for modification on February 19, 1998. Director's Exhibit 121.

[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 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.

[4]The regulations contained in 20 C.F.R. Parts 410 and 727 are not affected by the recent amendments to the regulations.

invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). Further, the administrative law judge found that claimant is not entitled to benefits pursuant to 20 C.F.R. §410.490 and Part 410, Subpart D. Consequently, the administrative law judge found the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310(2000). The administrative law judge also found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310(2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in response to claimant's appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court 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 March 2, 2001, to which employer and the Director have responded. Both the Director and employer filed briefs indicating that the amended regulations would not affect the outcome of the case. Claimant has not filed a brief in response to the Board's Order.[5] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into

[5]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310(2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the instant case, the administrative law judge stated that the prior administrative law judge "determined that the evidence fails to establish that the miner is totally disabled due to pneumoconiosis arising out of coal mine employment."[6] Decision and Order at 5.

Initially, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) since all of the newly submitted x-ray interpretations are negative for pneumoconiosis and the record does not contain any biopsy or autopsy evidence. Employer's Exhibits 1-3, 5, 34, 36, 37, 41, 42. Further, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(2) and (a)(3) since none of the newly submitted pulmonary function or arterial blood gas studies yielded qualifying[7] values.

[6]The administrative law judge observed that "[i]n the prior denial, dated August 13, 1997, the [prior] administrative law judge determined that the claimant failed to meet his burden of proof to invoke the presumption of 20 C.F.R. §727.203(a)(1) and concluded that the claimant again failed to establish his entitlement to black lung benefits under Parts 727 and 410." Decision and Order at 5.

[7]A "qualifying" pulmonary function study or blood gas study yields values that are

Director's Exhibit 121; Claimant's Exhibit 1; Employer's Exhibits 5, 6, 33, 35.

Next, we address the administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4). The record contains the newly submitted medical opinions of Drs. Castle and Smiddy. Dr. Castle opined that claimant does not suffer from a disabling respiratory impairment. Employer's Exhibit 5. Dr. Smiddy did not render an opinion with respect to the issue of total disability. Claimant's Exhibit 1. Since none of the newly submitted medical opinions of record could support a finding that claimant suffers from a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4).

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equal to or less than the appropriate values set out in the tables at 20 C.F.R. §727.203 (a) (2) and (a) (3). A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §727.203 (a) (2), (a) (3).

With regard to 20 C.F.R. Part 410, Subpart D, the administrative law judge found that claimant failed to establish the presumption of total disability due to pneumoconiosis. Since all of the newly submitted x-ray interpretations are negative for pneumoconiosis and the record does not contain any biopsy or autopsy evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §410.414(a). Employer's Exhibits 1-3, 5, 34, 36, 37, 41, 42. Further, since claimant did not establish fifteen or more years of coal mine employment[8] and the record does not contain other evidence which demonstrates the existence of a totally disabling chronic respiratory or pulmonary impairment, we affirm the administrative law judge's finding that the evidence is insufficient to establish invocation of the rebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §410.414(b). Director's Exhibit 121; Claimant's Exhibit 1; Employer's Exhibits 5, 6, 33. Moreover, since the record does not contain any other relevant evidence of a totally disabling chronic respiratory or pulmonary impairment, and that such impairment arose out of coal mine employment,[9] we hold that as a matter of law the newly submitted evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §410.414(c).[10] In view of the foregoing, we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions. *See* 20 C.F.R. §725.310; *Kingery, supra*; *Nataloni, supra*; *Kovac, supra*.

Finally, we affirm the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact. *See* 20 C.F.R. §725.310; *Jessee*

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[8]Claimant alleged fourteen years of coal mine employment in his 1973 claim for benefits. Director's Exhibit 1. The Board has previously affirmed Judge Lesser's finding that claimant established ten years of coal mine employment. *Powers v. Clinchfield Coal Co.*, BRB No. 81-0729 BLA, slip op. at 3 (Jan. 18, 1985)(unpub.).

[9]As previously noted, none of the newly submitted pulmonary function or arterial blood gas studies yielded qualifying values. Director's Exhibit 121; Claimant's Exhibit 1; Employer's Exhibits 5, 6, 33, 35. Additionally, the record does not contain any newly submitted evidence by Drs. Castle and Smiddy which could support a finding of a totally disabling chronic respiratory or pulmonary impairment arising out of coal mine employment. Claimant's Exhibit 1; Employer's Exhibit 5.

[10]We decline to address the administrative law judge's finding that claimant is not entitled to benefits under 20 C.F.R. §410.490. The interim criteria contained in 20 C.F.R. §410.490 is not applicable in this instance where claimant has established at least ten years of coal mine employment. *See Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 15 BLR 2-155 (1991); *Whitman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991)(*en banc*).

v. Director, OWCP, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge's finding of no mistake of fact is based on his review of all of the evidence of record, and we find no error therein. Decision and Order at 5.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge