BRB No. 07-0608 BLA

D.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 04/29/2008
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 Modification and Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

D.S., Haysi, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia.

Before: DOLDER, Chief Administrative Appeals Judges, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Modification and Benefits (2005-BLA-00039) of Administrative Law Judge Pamela Lakes Wood 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). For the purposes of our consideration of this appeal, the relevant procedural history of this case is as follows: Claimant filed his only claim for black lung benefits on December 4, 1978.[1] Director's Exhibit 1. On September 16, 1999, claimant filed a petition for

[1] The remainder of the lengthy procedural history of this case is set forth in our prior decision in *[D.S.] v. Clinchfield Coal Co.*, BRB No. 98-0995 BLA (Apr. 9,

modification, accompanied by supporting evidence. Director's Exhibit 148. The district director found that claimant established a change in conditions since the prior denial, granted claimant's request for modification and issued a Proposed Decision and Order awarding benefits. Director's Exhibit 167. Employer appealed the district director's award of benefits on modification and requested that the case be referred to the Office of Administrative Law Judges (OALJ) for a hearing. The case was assigned to Administrative Law Judge Daniel F. Solomon, who rendered a decision on the record, finding that the newly submitted evidence was insufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1)-(4) and that there was no mistake in a determination of fact. Accordingly, benefits were denied. Claimant appealed the denial of benefits to the Board and in *[D.S.] v. Clinchfield Coal Co.*, BRB No. 02-0220 BLA (Oct. 18, 2002)(unpub.), the Board affirmed the denial benefits and, subsequently, denied claimant's motion for reconsideration in *[D.S.] v. Clinchfield Coal Co.*, BRB No. 02-0220 BLA (June 6, 2003) (unpub.)(*en banc recon.*). Director's Exhibits 206, 208.

On January 30, 2004, claimant filed a petition for modification, accompanied by supporting evidence, which the district director denied. Director's Exhibits 209, 225. Claimant requested that the case be referred to the OALJ for a hearing. In a Decision and Order issued on March 12, 2007, which is the subject of this appeal, Judge Wood considered the newly submitted evidence, in conjunction with the previous evidence of record, and found that the evidence was insufficient to establish a mistake in a determination of fact. The administrative law judge further found that the newly submitted evidence was insufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1)-(4). In addition, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment, and therefore, failed to demonstrate entitlement to benefits pursuant to the permanent criteria of 20 C.F.R. Part 410, Subpart D. The administrative law judge thus concluded that the record established neither a change in conditions nor a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[2] Accordingly, she denied claimant's modification request and benefits.

1999)(unpub.), wherein the Board affirmed Administrative Law Judge Clement J. Kichuk's March 20, 1998, Decision and Order denying benefits. Director's Exhibits 142, 147.

[2] The revised regulation at 20 C.F.R. §725.310 does not apply to claims, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

On appeal, claimant generally challenges the administrative law judge's denial of modification and benefits and further specifically asserts that, in light of the lack of valid pulmonary function studies, the case should be remanded so that claimant may undergo additional pulmonary function testing so that valid test results may be obtained. Employer responds, urging affirmance of the denial of modification and benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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.[3] 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).

Claimant may establish a basis for modification by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310 (2000). In considering whether a change in conditions has been established pursuant to 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 that defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The administrative law judge has the authority to consider all of the evidence for any mistake of fact, including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

The regulations found at 20 C.F.R. Part 727 contain the interim presumption at 20 C.F.R. §727.203(a), which provides in pertinent part that a miner with at least ten years of coal mine employment is entitled to a rebuttable presumption of total disability due to pneumoconiosis arising out of coal mine employment upon invocation. The presumption is "invoked" if: (1) chest x-ray evidence establishes the existence of pneumoconiosis; (2) ventilatory studies establish the presence of a chronic respiratory or pulmonary disease; (3) blood gas studies demonstrate the presence of an impairment in the transfer of oxygen; (4) well-reasoned, well-documented medical reports support a finding of a totally disabling respiratory impairment. 20 C.F.R. §727.203(a)(1)-(4). Satisfying the

[3] The record indicates that claimant's coal mine employment occurred in Virginia. Director's Exhibit 1. 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 (1989)(*en banc*).

requirements of any one of the separate medical criteria is considered sufficient to invoke the rebuttable presumption of total disability due to pneumoconiosis arising out of coal mine employment. *Wise v. Peabody Coal Co.*, 3 BLR. 1-119 (1981). Claimant bears the burden of satisfying, by a preponderance of the evidence, at least one of the medical criteria to invoke the presumption. *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

After careful consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order Denying Modification and Benefits is supported by substantial evidence and contains no reversible error.

Pursuant to 20 C.F.R. §727.203(a)(1), a miner will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment if a chest x-ray, biopsy, or autopsy establishes the existence of pneumoconiosis. The newly submitted x-ray evidence consists of ten interpretations of four x-rays dated November 21, 2002, May 6, 2004, June 10, 2004, and March 30, 2005. The November 21, 2002 x-ray was read as negative for pneumoconiosis by Drs. Scott and Wheeler, both of whom are Board-certified radiologists and B readers, and Dr. Patel, a Board-certified radiologist. Director's Exhibit 219; Employer's Exhibits 4-5. The May 6, 2004 x-ray was read as negative for the existence of pneumoconiosis by Drs. Scott, Scatarige and Wiot, Board-certified radiologists and B readers, and as positive by Dr. Alexander, a Board-certified radiologist and B reader. Director's Exhibit 221; Employer's Exhibits 1-3. The June 10, 2004 x-ray was read as negative for the existence of pneumoconiosis by Drs. Wheeler and Scatarige, both of whom are Board-certified radiologists and B readers, and Dr. Fino, a B reader. Director's Exhibit 219. Dr. Alexander, a Board-certified radiologist and B reader, read the June 2004 x-ray as positive for pneumoconiosis. Claimant's Exhibit 4. The March 30, 2005 x-ray was read as negative for pneumoconiosis by Drs. Goginini and Abramowitz, both of whom are Board-certified radiologists and B readers. Employer's Exhibits 7-8.

In finding that the newly submitted evidence was insufficient to establish a change in conditions, the administrative law judge determined that the preponderance of the new x-ray evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Decision and Order at 7-8. The administrative law judge rationally found that Dr. Alexander's positive interpretations of the May 6, 2004, and June 10, 2004, x-rays were insufficient to invoke the interim presumption by a preponderance of the evidence because one or more physicians, with equivalent radiological expertise, interpreted those x-rays as negative for pneumoconiosis and all of the other x-rays were read unanimously as negative. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order

at 7-8. Accordingly, we affirm the administrative law judge's finding that the newly submitted x-ray evidence was insufficient to establish invocation of the interim presumption by establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1).

Pursuant to 20 C.F.R. §727.203(a)(2), a miner will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment if ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in 20 C.F.R. §410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the table). *See Strako v. Ziegler Coal Co.*, 3 BLR 1-136 (1981). There are three newly submitted pulmonary function studies. The studies dated February 13, 2003 and May 6, 2004, yielded qualifying values and the June 10, 2004 study yielded nonqualifying values.[4] Director's Exhibit 220.

With regard to the February 13, 2003 qualifying ventilatory study, Dr. Hussain, who supervised the study, noted that there was poor technique and poor effort, that it was a poor study with poor reproducibility, and that the lung volume determination was not reliable. Director's Exhibit 220. Dr. Michos, a consulting physician, determined that the study was not acceptable due to an insufficient number of FVC, FEV1 or MVV tracings without explanation. *Id*. Dr. Long, a consulting physician, determined that the study was not valid due to inconsistent effort, insufficient tracings, and recording of the tracings at too fast a speed. Director's Exhibit 224. Dr. Fino, a consulting physician, commented that the study was invalid due to a premature termination of exhalation and a lack of reproducibility in the expiratory tracings and a lack of an abrupt onset of exhalation. Director's Exhibit 219.

With regard to the May 6, 2004, qualifying ventialatory study, Dr. Michos found the study unacceptable due to less than optimal effort, cooperation and comprehension, and noted that there was more than a 5% variation between the two best FVC and FEV1 values. Director's Exhibit 220. Dr. Fino commented that the FVC tracings showed a lack of an abrupt onset to exhalation, a hesitancy and inconsistency in the expiratory flows, a premature termination to exhalation, a lack of plateauing in the expiratory curves, a lack of reproducibility in the expiratory curves and a lack of patient effort and cooperation resulting in an invalid study. Director's Exhibit 224. Dr. Long noted technical problems with the study and determined that the study was not valid due to inconsistent and less than optimal effort and other deficiencies. *Id*.

[4] A "qualifying" ventilatory study or 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. §727.203(a)(2) and (3), respectively. A "nonqualifying" study yields values that exceed those values. 20 C.F.R. §727.203(a)(2), (3).

The administrative law judge rationally found that the studies were unreliable based upon the reviewing physicians' determination that the qualifying results were invalid due to claimant's inadequate or poor effort. *See Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); *Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986); *Houchin v. Old Ben Coal Co.*, 6 BLR 1-1141, 1-1142 (1984); *Verdi v. Price River Coal Co.*, 6 BLR 1-1067, 1-1070 (1984); *Runco v. Director, OWCP*, 6 BLR 1-945, 1-946 (1984). Decision and Order at 9-10. Because the administrative law judge, within a proper exercise of her discretion, found that all three of the studies were flawed and lacked sufficient reliability to render the results credible, we affirm the administrative law judge's determination that the newly submitted ventilatory study evidence was insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.202(a)(2) because this determination is rational and supported by substantial evidence. *See Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376, 2-387 (6th Cir. 1989); *Anderson v. Youghiogheny & Ohio Coal Co.*, 7 BLR 1-152 (1984); *see also Bueno v. Director, OWCP*, 7 BLR 1-337, 1-340 (1984); *Clay v. Director, OWCP*, 7 BLR 1-82 (1984); *Inman v. Peabody Coal Co.*, 6 BLR 1-1249 (1984).

Pursuant to 20 C.F.R.§727.203(a)(3), a miner will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment if blood gas studies demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as determined by values which are equal to or less than those specified in the applicable table. With regard to the evidence relevant to 20 C.F.R. §727.203(a)(3), the administrative law judge determined that the only newly submitted arterial blood gas study, dated June 10, 2004, produced nonqualifying values. Decision and Order at 10; Director's Exhibit 219. Consequently, we affirm the administrative law judge's finding that the newly submitted blood gas study evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3). *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).

Pursuant to 20 C.F.R. §727.203(a)(4), a miner will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment if other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory impairment. Because the only newly submitted medical opinions, prepared by Drs. Fino and Castle, conclude that claimant does not have a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that the medical opinion evidence does not establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4). *See Wenanski v. Director, OWCP*, 8 BLR 1-487, 1-490 (1986); *Turner v. Director, OWCP*, 7 BLR 1-419, 1-421 (1984); Decision and Order at 10-11; Director's Exhibit 219; Employer's Exhibits 6, 9. The administrative law judge thus properly concluded that

claimant failed to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1)-(4) by a preponderance of the evidence.

Under 20 C.F.R. Part 410, Subpart D, claimant has the burden of establishing that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§410.414, 410.416, 410.422, 410.426. Failure to establish any of these requisite elements precludes entitlement. *Saunders v. Director, OWCP*, 7 BLR 1-186 (1984); *Migalich v. Director, OWCP*, 2 BLR 1-27 (1979).

The administrative law judge applied her evidentiary findings under 20 C.F.R. Part 727 to the regulations at 20 C.F.R. Part 410, Subpart D, and, based upon the reasons set forth thereunder, concluded that "it is equally clear that [claimant] cannot establish pneumoconiosis and total disability, either directly or presumptively, under those regulations." Decision and Order at 11, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).[5] Consequently, we affirm the administrative law judge's finding that the evidence was insufficient to establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D, as it is supported by substantial evidence.

In conclusion, "based upon consideration of the newly submitted evidence in the context of the evidence previously of record," the administrative law judge permissibly found that claimant has not established a change in conditions. *Kingery*, 19 BLR at 1-11; *Nataloni*, 17 BLR at 1-84

; Decision and Order at 11. We also affirm the administrative law judge's separate determination that the prior denial of benefits did not contain a mistake in a determination of fact, as it is rational and supported by substantial evidence. *Jessee*, 5 F.3d at 725, 18 BLR at 2-28; Decision and Order at 7. The administrative law judge further noted that this claim would be denied on the merits as well because claimant "cannot establish total disability due to pneumoconiosis directly or presumptively." *Id*.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Furthermore, the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences. *Maypray v. Island Creek Coal Co.*,

[5] The administrative law judge further found that "even if this claim were to be considered on the merits, it would still have to be denied because [claimant] has not satisfied his burden of establishing a basis for invocation of the interim presumption, nor is he able to otherwise establish that he is totally disabled due to pneumoconiosis." Decision and Order at 11.

7 BLR 1-683 (1985). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Because the administrative law judge properly found that claimant failed to satisfy his burden of establishing invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4) and the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§410.414, 410.416, 410.422, 410.426, we affirm her finding that claimant failed to establish a change in conditions or a mistake in a determination of fact. We thus affirm the administrative law judge's determination that claimant failed to establish a basis for modification of the prior denial pursuant to 20 C.F.R. §725.310 (2000) as it is supported by substantial evidence. *Jessee*, 5 F.3d at 725, 18 BLR at 2-28; *see Migalich*, 2 BLR at 1-30; Decision and Order at 11. Since claimant's petition for modification was properly denied, we affirm the denial of benefits.

Accordingly, the Decision and Order Denying Modification and Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge