BRB No. 98-0913 BLA

I. ARNOLD KEEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BEATRICE POCAHONTAS COMPANY	)	DATE ISSUED:
	)	
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 Benefits on Modification of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

I. Arnold Keen, Oakwood, Virginia, *pro se*.[1]

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant,[2] without the assistance of counsel, appeals the Decision and Order Denying Benefits on Modification (97-BLA-0884) of Administrative Law Judge Stuart A. Levin 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). This case is before the Board for the second time. In the initial Decision and Order, Administrative Law Judge V.M. McElroy credited claimant with seventeen years of coal mine employment and properly adjudicated this claim pursuant to 20 C.F.R. Part 727. Administrative Law Judge McElroy found that while claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), employer affirmatively established rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(2) and (b)(3). Director's Exhibit 36. Accordingly, benefits were denied.

Thereafter, claimant filed an appeal with the Board, later withdrew his appeal and filed a petition for modification accompanied by supporting medical evidence. Director's Exhibits 38, 39, 41-43. The district director denied modification, Director's Exhibit 57, and per claimant's request, forwarded the claim to the Office of Administrative Law Judges for a formal hearing. Due to the unavailability of Administrative Law Judge McElroy, Administrative Law Judge Stuart A. Levin (administrative law judge) was assigned the case and reviewed claimant's petition for modification and supporting evidence pursuant to Section 725.310. The administrative law judge found that the newly submitted evidence was insufficient to establish invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304; *see* 20 C.F.R. §410.418, and therefore, claimant failed to demonstrate a change in conditions. Furthermore, the administrative law judge determined that there was no mistake in a determination of fact with respect to Administrative Law Judge McElroy's rebuttal findings under 20 C.F.R. §727.203(b)(2) and (b)(3). Accordingly, the administrative law judge denied benefits. Director's Exhibit 88. Consequently, claimant appealed the denial of benefits.

On appeal, the Board affirmed the administrative law judge's denial of modification inasmuch as he properly considered all of the evidence relevant to modification, and rationally found that, because claimant failed to establish either the existence of complicated pneumoconiosis pursuant to Section 718.304 or a totally disabling respiratory or pulmonary impairment, claimant failed to demonstrate a mistake in a determination of fact or a change in conditions under Section 725.310. *Keen v. Beatrice Pocahontas Co.*, BRB No. 93-2273 BLA (Apr. 27, 1995)(unpub.);

[2] Claimant is I. Arnold Keen, who filed his application for benefits on July 5, 1979. Director's Exhibit 1.

Director's Exhibit 94. Subsequently, claimant filed another petition for modification with supporting evidence. Director's Exhibit 95. After considering the newly submitted evidence in conjunction with the previously submitted evidence under Sections 718.304 and 727.203(b)(2) and (b)(3), the administrative law judge again found that claimant failed to establish modification under Section 725.310. Accordingly, the administrative law judge denied benefits and this appeal followed.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 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. 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).

In the administrative law judge's previous denial of benefits, claimant failed to establish the existence of complicated pneumoconiosis and was, therefore, not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §§410.418, 718.304; Director's Exhibits 88, 94.

The newly submitted evidence relevant to the existence of complicated pneumoconiosis consists of twenty-seven interpretations of eight x-ray films and the medical opinions of Drs. Fino, Dahhan, and Crisalli.[3] Director's Exhibits 95, 99, 100, 104; Employer's Exhibits 2-4. The newly submitted x-ray evidence consists of an x-ray film dated February 14, 1996, which was read by Dr. Alexander, who is a B-reader and who diagnosed "r/q, 2/2" with a category B large opacity in the right

[3] Dr. Fino provided a report reviewing certain x-ray films and diagnosed the existence of simple pneumoconiosis, bilateral upper lobe coalescence of opacities and bilateral upper lobe bullae. Employer's Exhibit 2. During his deposition on September 8, 1997, Dr. Dahhan testified that he diagnosed simple pneumoconiosis and testified that the medical records that he reviewed are insufficient to justify a diagnosis of complicated pneumoconiosis due to a lack of large opacities. Employer's Exhibit 4 at 6, 15. Dr. Crisalli opined that claimant does not have coal workers' pneumoconiosis. Employer's Exhibit 3.

upper lobe. Director's Exhibit 95. This film was reread by Drs. Wheeler, Francke, and Kim, who are Board-certified radiologists and B-readers and Drs. Fino and Dahhan, who are B-readers, who all found only evidence of simple pneumoconiosis. Director's Exhibits 99, 100, 104; Employer's Exhibits 2, 3. The other twenty-one x-ray interpretations are of seven previously submitted x-ray films that were reread by Drs. Wheeler, Dahhan, Fino, and Kim, all of whom diagnosed the existence of simple pneumoconiosis with no large opacities present. Director's Exhibit 99; Employer's Exhibits 2-4.

Although noting the appropriate standard governing modification proceedings, *see* Decision and Order at Modification at 4-5, and citing *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994)(*en banc*); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993), the administrative law judge nevertheless considered only the six x-ray readings of the February 14, 1996 film and the opinions of Drs. Fino and Dahhan out of the newly submitted evidence. He failed to consider the remaining twenty-one newly submitted x-ray interpretations. Decision and Order on Modification at 5; Director's Exhibit 99; Employer's Exhibits 2-4; *see* 20 C.F.R. §410.418. Furthermore, the administrative law judge also mischaracterized the record in stating that Dr. Alexander's opinion is "unsupported by any other physician of record," inasmuch as the record contains four previously submitted x-ray readings and two previously submitted medical opinions diagnosing the existence of complicated pneumoconiosis. *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11, 1-14 (1991); Decision and Order on Modification at 5; Director's Exhibits 43, 50, 56, 68.

Section 22, 33 U.S.C. §922, as incorporated by 30 U.S.C. §932(a) and implemented by Section 725.310 of the Secretary's regulations, vests the fact-finder with "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted," *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27, 1-32 (1996). Because the administrative law judge is obligated to review the administrative record as a whole on modification, and did not consider all relevant evidence, we vacate his finding that claimant failed to establish invocation of the irrebuttable presumption pursuant to Section 718.304 and remand the case for a *de novo* consideration of the administrative record as a whole in order to determine whether claimant has proven a mistake in a determination of fact or change in conditions pursuant to Section 725.310. If, on remand, the administrative law judge finds that claimant affirmatively established invocation of the irrebuttable presumption at Section 718.304, *see* 20 C.F.R. §410.418, and is, therefore, entitled to benefits, he should then determine the

date of onset of disability pursuant to Section 725.503.

We, likewise, vacate the administrative law judge's determinations that there is neither a mistake in a determination of fact nor a change in conditions with the prior rebuttal findings under Section 727.203(b)(2) and (b)(3), inasmuch as the administrative law judge's credibility determinations on remand, after reviewing the entire record as a whole, may impact his modifications findings with respect to rebuttal.[4] Again, the administrative law judge must consider all of the record evidence *de novo*. *See O'Keeffe*, *supra*; *Jessee*, *supra*. Specifically, the administrative law judge must determine on remand whether the medical evidence is sufficient to rebut the interim presumption in accordance with the proper standards articulated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. Rebuttal of the interim presumption pursuant to "Section 727.203(b)(2) is concerned with the question of whether miners are totally disabled *for whatever reason*," and "[t]here is no inquiry into causation in a proper [Section] 727.203(b)(2) rebuttal" analysis. *Sykes v. Director, OWCP*, 812 F.2d 890, 894, 10 BLR 2-95, 2-98 (4th Cir. 1987)(emphasis in original). As such, a mere finding of no impairment is not tantamount to a finding that a miner can continue to perform coal mine work. *Sykes*, 812 F.2d at 893, 10 BLR 2-98.

To rebut the interim presumption pursuant to Section 727.203(b)(3), the party opposing entitlement must establish that pneumoconiosis was not a causative factor

[4] We note that the administrative law judge also referred to the Board's affirmance of certain findings contained in his 1993 Decision and Order. *See* Decision and Order on Modification at 5, 6. We hasten to add, however, that modification was implemented by Congress to displace traditional notions of *res judicata* and collateral estoppel, *see Williams v. Jones*, 11 F.3d 247, 257, 27 BRBS 142, 159 (CRT)(1st Cir. 1993); *see generally Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), and that the law of the case principle is inapplicable to the administrative law judge's *de novo* review of the record on modification. *See Branham*, *supra*.

in the miner's total disability by producing evidence which "rules out" any causal connection between coal mine employment and the presumed totally disabling pulmonary or respiratory impairment. *See Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Cox v. Shannon-Pocahontas Mining Co.*, 6 F.3d 190, 18 BLR 2-31 (4th Cir. 1993)(medical opinion that miner is not totally disabled due to his pulmonary impairment alone is insufficient to establish (b)(3) rebuttal); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). "Rebutting the presumption under this provision is not easy." *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 804, 21 BLR 2-302, 2-314 (4th Cir. 1998). In his review of the record, the administrative law judge must gauge the probative value of medical opinions at Section 727.203(b)(3) which may be based on an incorrect premise that claimant does not suffer from pneumoconiosis, a fact that, with respect to simple pneumoconiosis, has been established. *See Grigg*, 28 F.3d at 419, 18 BLR at 2-306. In gauging the probative value of the rebuttal evidence, the administrative law judge must take into account, *inter alia*, the numerous positive x-ray interpretations for pneumoconiosis and explain whether employer's experts have "persuasively discounted the effects" of claimant's seventeen years of coal mine employment. *See Grigg*, *supra*; *see also Peabody Coal Co. v. Hill*, 123 F.3d 412, 417, 21 BLR 2-192, 2-199 (6th Cir. 1997).

Finally, the administrative law judge must articulate his rebuttal findings under the stringent standards set forth by the Fourth Circuit, providing adequate findings of fact and conclusions of law. *See See v. WMATA*, 36 F.3d 375, 384 (4th Cir. 1994).

Accordingly, the Decision and Order Denying Benefits on Modification of the administrative law judge is vacated and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge