BRB No. 00-1064 BLA

JOHNNIE STANLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Lawrence E. Moise III, Abingdon, Virginia, for claimant.

Barry H. Joyner (Howard M. Radzely, 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (99-BLA-1107) of Administrative Law Judge Daniel J. Roketenetz with respect to 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] This case has been before the Board

[1]Claimant is Johnnie Stanley, a miner, who filed his application for benefits on December 22, 1971. Director's Exhibit 1. Mr. Stanley died after the Notice of Appeal was filed regarding Judge Roketenetz's denial of benefits.

previously.[2] In its most recent Decision and Order, the Board affirmed Administrative Law Judge Donald B. Jarvis's determination that claimant failed to establish the grounds for modification of the previous denial of his claim pursuant to 20 C.F.R. §725.310 (2000).[3] *Stanley v. Director, OWCP*, BRB No. 97-1161 BLA (Mar. 20, 1998)(unpub.);

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[2]The complete procedural history of this case is set forth in detail in Judge Roketenetz's Decision and Order - Denial of Benefits. Decision and Order at 3-4.

[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 20 C.F.R. Parts 718, 725, 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board issued an order on April 24, 2001 requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary

Director's Exhibit 91. Claimant filed another request for modification on February 3, 1999, which was denied by the district director. Director's Exhibits 92, 94. At claimant's request, a hearing was held before Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) on December 16, 1999.

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injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). On August 10, 2001, the Board issued an Order rescinding its April 24, 2001 order.

In the Decision and Order that is the subject of the present appeal, the administrative law judge credited claimant with twenty years of coal mine employment and based upon the filing date of claimant's application for benefits, determined that the regulations set forth in 20 C.F.R. Part 727 were applicable in this case. The administrative law judge considered the evidence of record as a whole to determine whether claimant demonstrated a change in conditions or mistake in a determination of fact in the prior denial of benefits pursuant to Section 725.310 (2000). The administrative law judge determined that the newly submitted evidence, when weighed in conjunction with the previously submitted evidence, was insufficient to establish invocation of the interim presumption under 20 C.F.R. §727.203(a)(1)-(4) (2000). The administrative law judge further found, therefore, that claimant did not establish the prerequisites for modification and denied benefits accordingly. Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Section 727.203(a)(1), (a)(2), and (a)(4). The Director, Office of Workers' Compensation Programs (the Director), has responded and urges affirmance of the denial of benefits.[4]

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 applicable 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).

Modification may be established under Section 725.310 (2000) by a showing of a change in conditions or a mistake in a determination of fact. In considering whether a claimant has established a change in conditions, an administrative law judge must consider all of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the new evidence is sufficient to establish at least one of the elements of entitlement which defeated entitlement in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that a claimant's general allegation of error is sufficient to require the administrative law judge to review the entire record and determine whether there was a mistake in a determination of fact in the prior

[4]We affirm the administrative law judge's finding with respect to the length of claimant's coal mine employment and his determination that claimant did not establish invocation pursuant to 20 C.F.R. §727.203(a)(3), as these findings have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

denial.[5] 20 C.F.R. §725.310 (2000); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Pursuant to Section 727.203(a)(1), the administrative law judge considered the newly submitted x-ray readings of record, dated 1998 and 1999. The administrative law judge noted that the 1998 x-ray was read as positive by a majority of readers, who were qualified as B-readers and/or Board certified radiologists, while the x-ray obtained in 1999 was interpreted as negative for pneumoconiosis by similarly qualified physicians. Decision and Order at 8; Director's Exhibits 92, 103, 106; Claimant's Exhibits 1-3. The administrative law judge determined that:

> Given that the most recent x-ray was found to be negative for the disease, and in light of the prior readings, reviewed in detail by Judge Fath and Judge Jarvis, which also were insufficient to establish the existence of the disease, it is found that the x-ray evidence is insufficient to establish the interim presumption pursuant to 20 C.F.R. §727.203(a)(1).

Decision and Order at 9. Claimant asserts that the administrative law judge should have determined that the interim presumption was invoked based upon the preponderance of positive readings of the 1998 x-ray considered in the context of the progressive nature of pneumoconiosis. This contention is without merit. As the Director asserts, the administrative law judge's finding under Section 727.203(a)(1) is rational and supported by substantial evidence. In light of the holding of the United States Court of Appeals for the Fourth Circuit in *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61 (4th Cir. 1992), in which the court prohibited using a "head count" to resolve conflicts in the x-ray

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. Director's Exhibits 2, 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). In *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), the court held that once a request for modification is filed, no matter the grounds stated, if any, an administrative law judge has the duty to reconsider all of the evidence of record and determine if it demonstrates a mistake of fact or change in conditions.

evidence, the administrative law judge acted within his discretion in declining to rely upon the mere preponderance of positive readings to find the existence of pneumoconiosis established. With respect to the administrative law judge's alleged failure to consider that pneumoconiosis is a progressive disease, based upon his determination that the most recent x-ray was negative for pneumoconiosis, the administrative law judge did not err in finding that the most recent x-ray evidence did not support a determination that claimant had pneumoconiosis. *See Adkins*, *supra*. The administrative law judge's finding that claimant did not establish a change in conditions or mistake in determination of fact regarding invocation under Section 727.203(a)(1) is, therefore, affirmed.

Pursuant to Section 727.203(a)(2), the administrative law judge considered the newly submitted pulmonary function study of record, obtained by Dr. Paranthaman on September 9, 1999, and determined that although it produced qualifying values, it was entitled to little weight, as Dr. Paranthaman stated that claimant's effort was poor. Decision and Order at 9; Director's Exhibit 101. The administrative law judge further found that the pulmonary function study evidence as a whole was insufficient to establish invocation of the interim presumption. *Id*. Claimant argues that the administrative law judge erred in relying upon the prior studies in light of the progressive nature of pneumoconiosis and in ignoring the declining FEV1 values reflected in claimant's pulmonary function tests. These contentions are without merit. The administrative law judge acted within his discretion in determining that the newly submitted study did not support a finding of invocation under Section 727.203(a)(2), as the physician who administered the test found that claimant's effort was inadequate.[6] *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). In addition, because the terms of Section 727.203(a)(2) provide for invocation based upon the presence of ventilatory studies that are qualifying according to the table values set forth in the regulation, the administrative law judge was not required to address the particulars of nonqualifying tests. The administrative law judge's finding that claimant did not establish a change in conditions or mistake in determination of fact regarding invocation under Section 727.203(a)(2) is, therefore, affirmed.

Turning to the administrative law judge's consideration of the medical opinions of record under Section 727.203(a)(4), the administrative law judge addressed the newly submitted medical reports of Drs. Paranthaman and Winegar. The administrative law judge found that Dr. Paranthaman's opinion, in which he determined that claimant was not totally disabled due to a respiratory problem, was entitled to great weight, as the

[6]Dr. Paranthaman stated that "the accurate assessment of respiratory impairment is not possible because of claimant's poor effort on spirogram." Director's Exhibit 100.

doctor is highly qualified and his opinion is well reasoned and well documented.[7] Decision and Order at 9; Director's Exhibit 100. The administrative law judge found that despite his status as claimant's treating physician, Dr. Winegar's opinion was of little probative value because the doctor did not state that claimant was suffering from a totally disabling respiratory or pulmonary impairment. *Id*.; Director's Exhibit 95. The administrative law judge then determined that "[u]pon reviewing the totality of the medical opinion evidence as set forth above and as detailed in the prior decisions of Judge Fath and Judge Jarvis, I find that the interim presumption has not been invoked pursuant to 20 C.F.R. §727.203(a)(4)." Decision and Order at 10.

Claimant asserts that the administrative law judge erred in failing to address the previously submitted reports of Drs. Smiddy and Robinette. We disagree. The administrative law judge rationally determined that the newly submitted evidence was insufficient to alter the prior determination that claimant was not experiencing total respiratory disability. The administrative law judge properly concluded that Dr. Winegar's reports did not support a finding of invocation, as Dr. Winegar did not diagnose a totally disabling respiratory or pulmonary impairment. *See Buttermore v. Duquesne Light Co.*, 7 BLR 1-604 (1984). The administrative law judge also acted within his discretion in according great weight to Dr. Paranthaman's opinion, that claimant did not suffer from respiratory disability, based upon Dr. Paranthaman's superior qualifications. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). The administrative law judge's ultimate determination that the weight of the medical reports as a whole is insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4) is rational and supported by substantial evidence, in light of the administrative law judge's indication that he reviewed all of the evidence of record and in light of the prior, appropriate determinations that the medical opinion evidence did not support a finding that claimant had a totally disabling respiratory or pulmonary impairment. *See Jessee, supra*; *see also Stanley v. Director, OWCP*, BRB No. 97-1161 BLA (Mar. 20, 1998)(unpub.); *Stanley v. Director, OWCP*, BRB No. 87-3044 BLA (Apr. 27, 1990)(unpub.), *aff'd* No. 92-1453 (4th Cir. Mar. 22, 1993); *Stanley v. Director, OWCP*, BRB No. 84-2146 BLA (Aug. 29, 1986)(unpub.).

[7]Dr. Paranthaman is Board certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 100.

We affirm, therefore, the administrative law judge's determination that claimant did not establish a change in conditions or mistake of fact pursuant to Section 725.310 (2000) and the denial of benefits.[8] In this regard, we must also reject claimant's request that the case be remanded to the district director for the commencement of modification proceedings if the Board should affirm the denial of benefits. As the Director maintains, there is no provision in the regulations for contingent requests for modification. If claimant wishes to seek modification, it is his affirmative obligation to commence modification proceedings before the district director after the issuance of the Board's Decision and Order. *See* 20 C.F.R. §725.310 (2001).

[8]Remand for consideration pursuant to 20 C.F.R. Part 718 or 20 C.F.R. Part 410, Subpart D is not necessary, as the administrative law judge's finding that the evidence of record is insufficient to establish the presence of a totally disabling respiratory or pulmonary impairment precludes entitlement under both Part 718 and Part 410, Subpart D. 20 C.F.R. §727.203(c); *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge