BRB No. 01-0308 BLA

HAZEL THOMAS (Widow of GEORGE S. THOMAS) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Dorothy L. Page (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[1] appeals the Decision and Order on Remand (98-BLA-0030) of Administrative Law Judge Daniel F. Sutton denying benefits on a miner's claim and a survivor's 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).[2] This case is before

[1]Claimant is the widow of the miner, George S. Thomas, who died on July 14, 1978. Director's Exhibits 1, 11, 85.

[2]The Department of Labor has amended the regulations implementing the Federal

the Board for the fourth time. The miner filed a claim on April 29, 1970 and claimant filed a survivor's claim on July 31, 1978. Director's Exhibit 1. In a Decision and Order dated February 19, 1987, Administrative Law Judge Reno E. Bonfanti credited the miner with thirty-seven years of coal mine employment and adjudicated both the miner's claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 727.[3] Judge Bonfanti found the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Judge Bonfanti also found the evidence sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(4). Accordingly, Judge Bonfanti denied benefits under 20 C.F.R. Part 727. Further, Judge Bonfanti found the evidence insufficient to establish entitlement to benefits under 20 C.F.R. Part 410, Subpart D. In response to claimant's appeal, the Board affirmed Judge Bonfanti's finding at 20 C.F.R. §727.203(b)(4).[4] The Board also noted that Judge Bonfanti's finding that the miner did not suffer from pneumoconiosis precludes entitlement to benefits under 20 C.F.R. Part 410, Subpart D and 20 C.F.R. §410.490. *Thomas v. Director, OWCP*, BRB No. 87-0722 BLA

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.

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 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 subsequently issued an order 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 injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[3]The regulations contained in 20 C.F.R. Part 727 are not affected by the recent amendments to the regulations.

[4]Citing *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988), the Board noted that Administrative Law Judge Reno E. Bonfanti should not have found invocation of the interim presumption at 20 C.F.R. §727.203(a)(1).

(Dec. 30, 1988)(unpub.). Following claimant's appeal, the United States Court of Appeals for the Fourth Circuit affirmed the Board's decision. *Thomas v. Director, OWCP*, No. 89-3211 (4th Cir. Aug. 21, 1989)(unpub.).

Claimant filed a letter dated August 17, 1990, disagreeing with the handling of the case, which the Department of Labor construed as a request for modification. Director's Exhibits 65, 66. On August 27, 1990, the Department of Labor denied claimant's request for modification. Director's Exhibit 66. Subsequently, in a Decision and Order dated April 22, 1992, Administrative Law Judge George A. Fath found the evidence insufficient to establish a change in conditions or a mistake in a determination of fact at 20 C.F.R. §725.310 (2000).[5] Accordingly, Judge Fath denied benefits under 20 C.F.R. Part 727. Judge Fath also found the evidence insufficient to establish entitlement to benefits under 20 C.F.R. Part 410, Subpart D. In disposing of claimant's appeal, the Board vacated Judge Fath's Decision and Order, and remanded the case for further consideration of the evidence. The Board instructed Judge Fath to discuss all of the relevant evidence and provide the basis for all material issues resolved. The Board additionally instructed Judge Fath to consider the lay evidence pursuant to 20 C.F.R. §727.203(a)(5).[6] *Thomas v. Director, OWCP*, BRB No. 92-1565 BLA (Nov. 26, 1993)(unpub.).

On the first remand, Judge Fath found the evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1)-(5). Accordingly, Judge Fath found the evidence insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000), and thus, he denied benefits under 20 C.F.R. Part 727. Judge Fath also found the evidence insufficient to establish entitlement to benefits under 20 C.F.R. Part 410, Subpart D.

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[5]The revisions to the regulations at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001.

[6]The Board noted that since there cannot be a change in the deceased miner's condition, the sole ground for modification in this case is a mistake in a determination of fact. *Thomas v. Director, OWCP*, BRB No. 92-1565 BLA, slip op. at 2 n.2 (Nov. 26, 1993)(unpub.).

Claimant filed a request for reconsideration on July 7, 1995. Director's Exhibit 84. However, the Department of Labor did not address claimant's request for reconsideration. Hence, claimant filed another survivor's claim on April 28, 1997, which merged into claimant's viable 1978 survivor's claim. Director's Exhibit 85. In a Decision and Order dated May 27, 1999, Administrative Law Judge Daniel F. Sutton (the administrative law judge) found the evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1)-(5). Accordingly, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000), and thus, he again denied benefits in both the miner's claim and the survivor's claim under 20 C.F.R. Part 727. On claimant's appeal, the Board affirmed the administrative law judge's finding at 20 C.F.R. §727.203(a)(5). However, the Board vacated the administrative law judge's finding at 20 C.F.R. §727.203(a)(1), and remanded the case for further consideration of the evidence. The Board instructed the administrative law judge to reweigh the pathologists' opinions along with the other relevant evidence. *Thomas v. Director, OWCP*, BRB No. 99-0944 BLA (July 13, 2000)(unpub.).

On the most recent remand, the administrative law judge found the evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). Accordingly, the administrative law judge found the evidence insufficient to establish modification at 20 C.F.R. §725.310 (2000), and thus, he denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). Claimant also contends that the administrative law judge previously erred in finding the lay evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(5). Citing *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988), claimant further contends that Judge Bonfanti erred in finding the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4) since, claimant asserts, he found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order on Remand.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 contends that the administrative law judge erred in finding the evidence

insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). We disagree. The administrative law judge stated that "the record contains only one interpretation of a chest x-ray that is positive for the presence of pneumoconiosis – a report from the miner's treating physician, Lawrence J. Fleenor, Jr., M.D., who read a September 15, 1973 x-ray as positive for black lung."[7] Decision and Order on Remand at 3. The

[7]Claimant asserts that Administrative Law Judge Daniel F. Sutton (the administrative law judge) erred in failing to accord greater weight to the positive x-ray reading provided by Dr. Fleenor because he is a B-reader and the miner's treating physician. The Board correctly stated, in its previous Decision and Order, that "Dr. Fleenor's credentials are not part of the record." *Thomas v. Director, OWCP*, BRB No. 99-0944 BLA, slip op. at 3 (July 13, 2000)(unpub.). The Board also correctly stated that "whether a physician treated the miner has no bearing on his ability to read an x-ray." *Id.* The Board's prior disposition of this issue constitutes the law of the case, as claimant has advanced no new argument in support of altering the Board's previous holding and no intervening case law has contradicted the Board's resolution of this issue. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). Thus, we are not persuaded that there is reason for us to revisit this issue.

Of the six x-ray interpretations of record, five readings are negative for

administrative law judge also stated, "[i]n view of the superior qualifications in radiology possessed by the physicians who detected no evidence of pneumoconiosis in the miner's chest x-rays, Dr. Fleenor's solitary positive interpretation is clearly outweighed."[8] *Id*. Although the record indicates that the physicians who provided negative x-ray readings are radiologists, it does not contain the specific credentials of these physicians. Nonetheless, since five of the six x-ray readings of record by radiologists are negative for pneumoconiosis, we hold that any error by the administrative law judge in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Thus, we reject claimant's assertion that the administrative law judge should have accorded determinative weight to Dr. Fleenor's positive x-ray reading.

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pneumoconiosis, Director's Exhibits 36, 38-41, and one reading is positive, Director's Exhibit 35.

[8]The administrative law judge stated, "Dr. Fleenor, who is not a radiologist or certified as a B-reader, also reported that the radiologist who reviewed this film saw no evidence of black lung, and all other interpretations of chest x-rays in the record, which were taken both before and after the September 15, 1973 x-ray, including some by physicians who are either certified B-readers or [B]oard-certified in radiology, are uniformly negative for the presence of pneumoconiosis." Decision and Order on Remand at 3.

The administrative law judge also stated that "[i]n addition to the chest x-ray interpretations, the record contains the reports from three pathologists [Drs. Green, Jones and Potter] who examined a specimen of tissue which was removed from the miner's lower right lobe *post-mortem*."[9] Decision and Order on Remand at 3. Dr. Jones opined that the miner suffered from coal workers' pneumoconiosis. Claimant's Exhibit 1. Dr. Green opined that macules or nodular lesions of coal workers' pneumoconiosis are not seen and there is no evidence of progressive massive fibrosis. Director's Exhibit 14. Dr. Potter opined that a portion of the lower right lobe of the lung shows mild subpleural anthracotic pigmentation.[10] Director's Exhibit 13. The administrative law judge permissibly discredited Dr. Jones's opinion because he found it "was totally at variance with the findings reported by Drs. Potter and Green." Decision and Order on Remand at 4; *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). Thus, we reject claimant's assertion that the administrative law judge erred in discrediting Dr. Jones's opinion.[11] Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1).[12] *See Director, OWCP v. Greenwich Collieries*

[9]The administrative law judge stated that "[t]he record also contains a fourth report from a Dr. Hansbarger, who reviewed the other pathologists' reports and an 'electronic scan' of a pathology slide made by Dr. Jones." Decision and Order on Remand at 3. The administrative law judge, however, stated that "Dr. Hansbarger did not examine the lung specimen due to its apparent loss at some undetermined point after it was examined by Dr. Jones." *Id*. Nevertheless, based upon his review of the opinions of Drs. Green and Jones, Dr. Hansbarger opined that the miner did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 2.

[10]The administrative law judge stated, "[i]t is noted that [a] finding of anthracotic pigment is not sufficient, by itself, to establish the existence of pneumoconiosis." Decision and Order on Remand at 5 n.6.

[11]Claimant argues that the administrative law judge erred in finding the credentials of Drs. Green and Potter better than the credentials of Dr. Jones. Contrary to claimant's assertion, the administrative law judge stated that "[a]ll of these physicians are [B]oard-certified in pathology, and the Board has affirmed my prior finding that their qualifications are equal." Decision and Order on Remand at 3.

[12]Claimant contends that the administrative law judge previously erred in finding the lay evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(5). In its previous Decision and Order, the Board affirmed the administrative law judge's finding at 20 C.F.R. §727.203(a)(5). *Thomas v. Director, OWCP*, BRB No. 99-0944 BLA, slip op. at 4 (July 13, 2000)(unpub.). Since the Board's prior disposition of this

[*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Moreover, since the administrative law judge properly found the evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a), we affirm the administrative law judge's finding that the evidence is insufficient to establish modification at 20 C.F.R. §725.310 (2000).[13] *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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issue constitutes the law of the case, as claimant has advanced no new argument in support of altering the Board's previous holding and no intervening case law has contradicted the Board's resolution of this issue, *see Coleman*, *supra*, we are not persuaded that there is reason for us to revisit this issue.

[13]In view of our disposition of the case at 20 C.F.R. §727.203(a), we decline to address claimant's contention with respect to Judge Bonfanti's finding at 20 C.F.R. §727.203(b)(4).