BRB No. 99-0515 BLA

ERNEST H. EDWARDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL 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 of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Ernest H. Edwards, Haysi, Virginia, *pro se*.

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

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order Denying Benefits (98-BLA-0382) of Administrative Law Judge Jeffrey Tureck on a duplicate claim filed pursuant to the provisions of Title IV of the Federal Coal Mine

[1] Claimant is Ernest H. Edwards, who filed his first application for benefits on August 30, 1978. Director's Exhibit 1. Thereafter, claimant filed two additional claims for benefits on February 9, 1987 and July 28, 1988, which were treated as a petitions for modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 54, *see* discussion *infra*.

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 third time. Claimant filed his initial application for benefits on August 30, 1978 and Administrative Law Judge Bernard J. Gilday, Jr. adjudicated this claim pursuant to 20 C.F.R. Part 727. Administrative Law Judge Gilday credited claimant with thirty-five years and eight months of qualifying coal mine employment, found that invocation of the interim presumption of totally disabling coal workers' pneumoconiosis was established under Section 727.203(a)(1), but that rebuttal of the presumption was established under Section 727.203(b)(3). Director's Exhibit 52. Accordingly, benefits were denied. Thereafter, claimant filed a duplicate claim for benefits on February 9, 1987, which was treated as a petition for modification pursuant to 20 C.F.R. §725.310 because it was filed within one year of Administrative Law Judge Gilday's denial of benefits. Director's Exhibit 54. Claimant filed a third application for benefits on July 28, 1988, which was similarly treated as a petition for modification. Director's Exhibit 54. The district director denied modification on August 3, 1988. Director's Exhibit 54. Claimant subsequently requested a formal hearing, over which Administrative Law Judge Clement J. Kichuk presided on November 6, 1991.

In his Decision and Order on Modification, Administrative Law Judge Kichuk noted Administrative Law Judge Gilday's previous finding that claimant worked for thirty-five years in qualifying coal mine employment, found that claimant established invocation of the interim presumption of totally disabling coal workers' pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1) and (a)(2), and that employer failed to rebut the presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4). In light of his finding that employer failed to rebut the presumption, Administrative Law Judge Kichuk found that claimant established a change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, he awarded benefits. Director's Exhibit 57.

Employer timely appealed the award of benefits. The Board affirmed Administrative Law Judge Kichuk's findings pursuant to Sections 725.310, 727.203(a)(2), 727.203(b)(2), (b)(3) and regarding the date of onset of disability inasmuch as these findings were rational and supported by substantial evidence. However, the Board vacated his finding under Section 727.203(a)(1) because the true doubt rule had been invalidated. The Board remanded the case for reconsideration of all the relevant evidence under Section 727.203(a)(1) and further, advised the administrative law judge that if he found invocation at subsection (a)(1), rebuttal under subsection (b)(4) would be precluded. *Edwards v. Clinchfield Coal Co.*, BRB No. 92-2468 BLA (Jun. 30, 1994)(unpub.); Director's Exhibit 58. Hence, the Board affirmed in part and vacated in part the Decision and Order, and remanded the case for further consideration.

Pursuant to the Board's Decision and Order remanding this case,

Administrative Law Judge Kichuk found that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) and that employer established rebuttal under Section 727.203(b)(4). Accordingly, Administrative Law Judge Kichuk determined that claimant failed to establish a basis for modification pursuant to Section 725.310 and accordingly, denied benefits. Director's Exhibit 59.

Claimant timely appealed the denial of benefits. The Board affirmed Administrative Law Judge Kichuk's determinations under Sections 727.203(a)(1) and 727.203(b)(4) as rational and supported by substantial evidence. The Board also held that rebuttal under Section 727.203(b)(1) was precluded as a matter of law as the record was devoid of evidence which would support a finding of rebuttal at that subsection. Accordingly, the Board affirmed the denial of benefits. *Edwards v. Clinchfield Coal Co.*, BRB No. 96-0658 BLA (Apr. 21, 1997)(unpub.); Director's Exhibit 60. Thereafter, claimant filed another petition for modification with supportive evidence on July 27, 1997. Director's Exhibit 61.

After a formal hearing on June 19, 1998 on modification, Administrative Law Judge Jeffrey Tureck (administrative law judge) noted that employer had not challenged the previous length of coal mine employment determination of thirty five years. Next, the administrative law judge acknowledged that, at the formal hearing, claimant's petition for modification was based solely on a change in conditions. [1998] Hearing Transcript at 7-8. Referring generally to the earlier evidence considered by Administrative Law Judge Kichuk and considering the newly submitted evidence filed since the previous denial of benefits, the administrative law judge found that, although claimant again established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to Section 727.203(a)(2), employer had again established rebuttal of the presumption pursuant to Section 727.203(b)(4). Hence, the administrative law judge concluded that claimant failed to demonstrate modification on the grounds of a change in conditions under Section 725.310. Accordingly, the administrative law judge denied benefits on modification.

On appeal, claimant generally challenges the administrative law judge's denial of benefits on modification. Employer responds to this *pro se* appeal, urging 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.[2]

[2] We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 727.203(a)(2) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-

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 applicable 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).

30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2-3.

Relevant to Section 727.203(b)(4),[3] the administrative law judge correctly found that the newly submitted x-ray evidence consists of fourteen readings, with thirteen interpretations read as negative for the existence of pneumoconiosis and one x-ray determined to be unreadable. *See Knudson v. Benefits Review Board*, 782 F.2d 97, 8 BLR 2-102 (7th Cir. 1986)(while negative x-rays alone are insufficient to establish nonexistence of pneumoconiosis, negative x-ray evidence is relevant to rebuttal under Section 727.203(b)(4) and, when corroborated by other evidence, must be considered); *Sakach v. Director, OWCP*, 8 BLR 1-237, 1-240 (1985); *Bray v. Director, OWCP*, 6 BLR 1-400, 1-403 (1983); Decision and Order at 3-4; Director's Exhibits 61, 64, 71; Employer's Exhibits 1-4, 6, 7, 9-13. The newly submitted medical opinion evidence consists of the opinions of examining physicians, Drs. Sargent and Jabour, and of consulting physicians, Drs. Hippensteel and Fino. In a report dated September 30, 1997 and during his deposition on November 24, 1997, Dr. Sargent opined that, even though claimant has a respiratory impairment arising out of cigarette smoking, he does not suffer from coal workers' pneumoconiosis. Director's Exhibit 71. Dr. Jabour diagnosed pneumoconiosis related to coal dust exposure on July 9, 1997. Director's Exhibit 61. Drs.

[3] The administrative law judge found that during the formal hearing, claimant's counsel alleged "that the denial of benefits should be modified solely on the ground of a change in conditions," therefore, "there is no reason to address the issue of a mistake in a determination of fact." Decision and Order at 3. The United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, recognized that Section 725.310 is an "inherently broad provision" and has been "interpreted expansively" by the federal courts, who adopt the principle that "black lung proceedings are by nature informal and that 'the principle of finality' just does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits." *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 180, 21 BLR 2-545, 2-555 (4th Cir. 1999). Thus, the Court held that informal modification proceedings are accompanied by "a requirement for flexibility" inasmuch as a request for modification need not meet formal criteria; if a claimant avers generally that the administrative law judge improperly found the ultimate fact and thus, erroneously denied the claim, the denial of benefits may be modified. *Borda*, *supra*; *see Jessee v. Director, OWCP*, 5 F.3d 723, 726, 18 BLR 2-26, 2-30 (4th Cir. 1993). However, in the case at bar, claimant's counsel unequivocally maintained that claimant's petition for modification was based solely upon a change in conditions, *see* [1998] Hearing Transcript at 7-8; Decision and Order at 3. Because claimant's petition for modification was based solely on a change in conditions, the Board has no occasion to address the possible alternate ground for modification, a mistake in a determination of fact. *See Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27, 1-31 n.5 (1996), *aff'd*, 21 BLR 1-79 (1998) (McGranery, J., dissenting).

Hippensteel and Fino each reviewed the medical evidence of record and opined that the medical records are devoid of evidence of a coal mine dust related pulmonary condition or a diagnosis of coal workers' pneumoconiosis and that claimant has a very mild obstructive ventilatory impairment secondary to cigarette smoking. Employer's Exhibits 14, 15. The administrative law judge permissibly found Dr. Jabour's opinion not credible because Dr. Jabour, whose medical qualifications are not of record, diagnosed coal workers' pneumoconiosis, but relied upon an interpretation of the July 9, 1997 x-ray film that was not read as positive for the existence of pneumoconiosis.[4] Decision and Order at 4; Director's Exhibits 61, 64. The administrative law judge similarly found that this film was reread by two B-readers, one finding the x-ray negative while the other interpreted it as unreadable. Decision and Order at 4; Director's Exhibits 64, 71. Furthermore, the administrative law judge rationally found that the pulmonary function studies upon which Dr. Jabour relied were invalidated. *See Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *White v. Director, OWCP*, 6 BLR 1-368 (1983). The administrative law judge properly determined that Dr. Sargent's opinion was well reasoned, adequately explained in his deposition testimony, and supported by the well reasoned, consulting opinions of Drs. Hippensteel and Fino, "who reviewed most, if not all, of the medical evidence in the record." *See Dockins v. McWane Coal Co.,* 9 BLR 1-5 (1986); *Shonborn v. Director, OWCP*, 8 BLR 1-434, 1-436 (1986); Decision and Order at 5; Director's Exhibit 71; Employer's Exhibits 14, 15. Hence, the administrative law judge, within a proper exercise of his discretion, properly relied upon the well reasoned opinions of Drs. Sargent, Hippensteel, and Fino that claimant does not suffer from coal workers' pneumoconiosis and that claimant's respiratory impairment is related to cigarette smoking and not coal mine employment, coupled with the newly submitted negative x-ray evidence to conclude that claimant does not have pneumoconiosis as defined in the Act and regulations. *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-74 (1986). We, therefore, affirm the administrative law judge's determinations that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(4) and that claimant failed to demonstrate modification on the basis of a change in conditions pursuant to 725.310. *See Kurcaba*, *supra*; *Dockins*, *supra*.

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

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[4] Associated with Dr. Jabour's report is an x-ray interpretation of a film dated July 9, 1997 by Dr. Shahan, whose radiological qualifications are not contained in the record, and who diagnosed "mild bilateral basilar interstitial thickening," but did not mention the existence of pneumoconiosis. Director's Exhibits 61, 64.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge