BRB No. 01-0493 BLA

DORA G. IVEY (On Behalf of EARL IVEY (deceased))	)	
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 - Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Richard C. Rookard (Lay Representative), Clinton, Tennessee, for claimant.

Rita Roppolo (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (1999-BLA-1302) of Administrative

[1] Earl Ivey, the miner, filed a claim for Black Lung benefits in 1973 and died in 1989. Director's Exhibit 1; Claimant's Exhibit 14. The miner's widow, Dora G. Ivey, is pursuing the claim on the miner's behalf and is represented by Richard C. Rookard, a lay representative.

Law Judge Edward Terhune Miller denying benefits 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).[2] This case has been before the Board previously.[3] After consideration of the newly submitted autopsy reports and blood gas study evidence, as well as the evidence contained in the record prior to the request for modification, the administrative law judge found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) since the medical evidence failed to establish invocation of the interim presumption pursuant to the provisions of 20 C.F.R. Part 727 or entitlement pursuant to 20 C.F.R. Part 718. Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in failing to award benefits.[4] The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

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 by 30

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[2] 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, 722, 725 and 726 (2001).

[3] In its most recent decision, the Board, noting that claimant had requested modification and a hearing, vacated the denial of benefits by Administrative Law Judge Clement J. Kichuk and remanded the case to the district director to initiate modification proceedings pursuant to 20 C.F.R. §725.310 (2000). *Ivey v. Director, OWCP*, BRB No. No. 97-1462 BLA (June 18, 1998)(unpublished). The remaining procedural history of this claim is adequately set forth in prior decisions by the Board and the administrative law judge.

[4] Claimant makes numerous allegations of error, none of which is meritorious. They include challenges to the administrative law judge's findings regarding the length of coal mine employment, the existence of pneumoconiosis, the propriety of the administrative law judge's reconsideration of prior findings and whether certain evidence was properly included in the record. For the most part, claimant argues that the administrative law judge was precluded from considering issues previously adjudicated in claimant's favor, that the administrative law judge should not have considered evidence unfavorable to claimant and should have decided issues in claimant's favor where the evidence is conflicting.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

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

Initially, with respect to the administrative law judge's finding regarding the length of the miner's coal mine employment, claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1985); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983). The administrative law judge discussed the various pieces of evidence pertaining to the miner's coal mine employment, which consisted of statements made on the application for benefits as well his prior testimony, which the administrative law judge determined was "confusing, inconsistent and limited at best." Decision and Order at 11-12. The administrative law judge then relied upon the Social Security Administration (SSA) records in crediting the miner with twelve years of qualifying coal mine employment for the period between 1970 and 1982, noting that the Director did not contest this amount. Decision and Order at 12. The administrative law judge's determination with respect to the length of coal mine employment is the product of a reasonable method of computation and is not inconsistent with the methods set forth in 20 C.F.R. §725.101(a)(32) (2001). We, therefore, affirm the administrative law judge's finding that claimant established less than fifteen years of coal mine employment, as it is rational and supported by substantial evidence. *Vickery v. Director, OWCP,* 8 BLR 1-430 (1986).

Claimant may establish modification by establishing either a change in conditions since the issuance of a previous decision or a mistake in a determination of fact in the previous decision. 20 C.F.R. §725.310(a) (2000). In considering whether a change in conditions has been established pursuant to Section 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 which defeated entitlement in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The United States Court of Appeals for the Sixth Circuit has held that a claimant need not allege a specific error in order for an

administrative law judge to find modification based upon a mistake in fact inasmuch as the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits, contained within a case. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994). In considering modification in the instant case, the administrative law judge correctly determined that claimant's request for modification mandated a *de novo* review of the entire record.[5] The administrative law judge correctly stated that he was therefore required to consider whether the evidence of record was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a) (2000) and, if necessary, whether rebuttal of the interim presumption was established pursuant to 20 C.F.R. §727.203(b). In addition, the administrative law judge correctly stated that if entitlement were not established pursuant to 20 C.F.R. Part 727, he was required to consider entitlement pursuant to 20 C.F.R. Part 718. *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); *Kingery*, *supra*; *Nataloni*, *supra*.

[5] The administrative law judge noted that since the miner had been deceased for more than ten years, there would not have been any change in conditions under the regulations. Decision and Order at 9 n.18.

In addressing whether the x-ray evidence of record was sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) (2000), the administrative law judge discussed all of the x-ray readings, as well as the qualifications of the readers, and correctly determined that none of the interpretations was conforming and positive for the existence of pneumoconiosis. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trent*, *supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 13, 25-26. The administrative law judge next addressed whether invocation of the interim presumption was established by the autopsy evidence pursuant to Section 727.203(a)(1) (2000) and permissibly credited Dr. Blake's autopsy report, which did not include a diagnosis of pneumoconiosis, over the report of Dr. Naeye, who reviewed Dr. Blake's autopsy report, section slides and tissue blocks and diagnosed very mild simple pneumoconiosis, since there was very little difference between the opinions of Drs. Naeye and Blake with respect to their "objective underpinnings" and since Dr. Blake was the autopsy prosector.[6] *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *Simila v. Bethlehem Mines Corp.*, 7 BLR 1-535 (1984), *vacated in part on other grounds sub nom. Bethlehem Mines Corp. v. Director, OWCP*, 766 F.2d 128, 8 BLR 2-4 (3d Cir. 1985); Decision and Order at 26-30. In addition, the administrative law judge reasonably found, within his discretion as fact-finder, that since Dr. Naeye referred to "black pigment" and "black deposits" and " anthracotic deposits," his diagnosis was apparently based on deposits of anthracotic pigmentation and did not therefore establish the existence of pneumoconiosis. Decision and Order at 28. Furthermore, the administrative law judge rationally concluded that the existence of pneumoconiosis was not established by a preponderance of the evidence since Dr. Kleinerman, who reviewed the autopsy report, relevant histological slides and other medical records, also concluded that pneumoconiosis was not present.[7] *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Consequently, we affirm the administrative law judge's finding that the autopsy evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) (2000).

Furthermore, the administrative law judge correctly determined that the pulmonary function study evidence was insufficient to establish invocation of the

[6] The administrative law judge noted that Dr. Blake and Dr. Naeye are both board-certified in Anatomic and Clinical Pathology. Decision and Order at 13-14.

[7] The administrative law judge noted that Dr. Kleinerman is board-certified in Pathologic Anatomy and Clinical Pathology. Decision and Order at 15.

interim presumption pursuant to Section 727.203(a)(2) (2000) since all of the pulmonary function studies of record are noncomforming. Decision and Order at 30. Consequently, we affirm the administrative law judge's finding that the pulmonary function study evidence of record was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(2) (2000). *Seigel v. Director, OWCP*, 8 BLR 1-156 (1985).

Pursuant to Section 727.203(a)(3) (2000), the administrative law judge accurately determined that seven of the twelve blood gas studies of record produced qualifying values, but reasonably concluded that this evidence was insufficient to establish invocation by a preponderance of the qualifying and conforming blood gas study evidence. Decision and Order at 30-32; *see generally Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). In so finding, the administrative law judge noted that the conforming studies were evenly divided and acted within his discretion as fact-finder in determining that the reliability of the studies taken during the miner's last hospitalization was doubtful as the miner was *in extremis* and unsuccessful resuscitation efforts were being performed at that time. Decision and Order at 32. Consequently, we affirm the administrative law judge's finding the blood gas study evidence of record was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(3) (2000). *See Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991).

In considering whether total disability was established pursuant to Section 727.203(a)(4) (2000) based on the medical opinion evidence, which consisted of reports by Drs. Sexton, Fox, Smith, Walker, Blake, Naeye and Kleinerman, the administrative law judge correctly found that none of these physicians opined that claimant was totally disabled from a respiratory standpoint. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-291 (1984); Decision and Order at 33-35. Accordingly, the administrative law judge properly found that the medical reports of record failed to establish total disability pursuant to Section 727.203(a)(4) (2000). We therefore affirm the administrative law judge's finding that the evidence of record was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment and thus insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4) (2000). Consequently, we affirm the administrative law judge's conclusion that this evidence was insufficient to establish either a mistake in a determination of fact or a change in conditions pursuant to Section 725.310 (2000) and we affirm his denial of modification and benefits pursuant to 20 C.F.R. Part 727 as supported by substantial evidence.

Furthermore, we affirm the administrative law judge's determination that

benefits are precluded under 20 C.F.R. Part 718. As discussed *supra*, the administrative law judge properly determined that the x-ray, autopsy and medical opinion evidence of record was insufficient to establish the existence of pneumoconiosis. We thus affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1), (a)(2) and (a)(4) (2001). Decision and Order at 37-40. In addition, claimant was precluded from establishing the existence of pneumoconiosis under Section 718.202(a)(3) (2001) in this case, as none of the presumptions set forth thereunder applies.[8] In addition, the administrative law judge correctly determined that the pulmonary function studies, blood gas studies and medical opinions failed to establish total disability. *See* 20 C.F.R. §718.204(b)(2) (2001). The administrative law judge thus properly determined that claimant failed to establish the existence of pneumoconiosis or total disability, requisite elements of entitlement under 20 C.F.R. Part 718. 20 C.F.R. §§718.202(a), 718.204(b)(2001); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[8]The record does not contain any evidence of complicated pneumoconiosis, and, consequently, claimant does not qualify for the presumption under 20 C.F.R. §718.304 (2000). The administrative law judge further properly determined that the presumptions at 20 C.F.R. §§718.305 and 718.306 (2000) were inapplicable in this case since claimant did not establish fifteen years of coal mine employment, and since the instant claim is a living miner's claim, and not a survivor's claim. *See* 20 C.F.R. §§718.305, 718.306 (2000).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge