BRB No. 01-0555 BLA

EUGENE YATES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIRGINIA POCAHONTAS COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order On Modification Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Eugene Yates, Vansant, Virginia, *pro se*.

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order On

[1] Initially, claimant was represented by counsel. On June 25, 2001, counsel, Lawrence L. Moise, III, filed a Motion requesting permission to withdraw as claimant's attorney. The Board granted this request. *Yates v. Virginia Pocahontas Co.*, BRB No. 01-0555 BLA (Jul.

Modification Denying Benefits (00-BLA-0202) of Administrative Law Judge Linda S. Chapman 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] After concluding that the newly revised regulations did not affect the outcome of this case, Decision and Order at 3-6, the administrative law judge found that the instant claim constituted a request for modification of a previous denial,[3] and that the case was thus governed by the standard enunciated in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. Decision and Order at 5-7. Considering the newly submitted evidence, in conjunction with previously submitted evidence, the administrative law judge

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11, 2001)(Order). Claimant has not retained new counsel.

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). The regulations at issue in this case, however, are not affected by the revised regulations. 20 C.F.R. §§725.2, 725.4(a), (d), (e).

[3] Claimant initially filed a claim with the Department of Labor on August 8, 1978, Director's Exhibit 1, which was denied by Administrative Law Judge Bernard J. Gilday on April 1, 1981. Director's Exhibit 68. Subsequently, the Board vacated the denial of benefits, and remanded the claim for further consideration under 20 C.F.R. §410.490. *Yates v. Virginia Pocahontas Coal Co.*, BRB No. 87-0214 BLA (Mar. 30, 1990)(unpub.); Director's Exhibit 87. On remand, Judge Gilday again issued a Decision and Order denying benefits. Director's Exhibit 90. Claimant appealed the denial of benefits, but this time the Board affirmed the denial. *Yates v. Virginia Pocahontas Coal Co.*, BRB No. 91-1193 BLA (Jul. 20, 1992)(unpub.). Subsequently, claimant sought review by the United States Court of Appeals for the Fourth Circuit. In an unpublished decision, the Fourth Circuit court affirmed the decisions below. *Yates v. Virginia Pocahontas Coal Co.*, No. 92-1931 (6th Cir., Oct. 19, 1993)(unpub.). Claimant filed a request for modification on July 22, 1994. Director's Exhibit 104. On February 1, 1996, Administrative Law Judge Robert S. Amery issued a Decision and Order denying the request. Director's Exhibit 146. Claimant filed a second request for modification on January 28, 1997. Director's Exhibit 167. On January 21, 1999, Administrative Law Judge Lawrence E. Donnelly issued a Decision and Order denying the request. Director's Exhibit 175. On June 30, 1999, claimant filed a third (and the instant) request for modification. Director's Exhibit 176. After denial by the district director, Director's Exhibit 189, and a hearing, Administrative Law Judge Linda S. Chapman issued the Decision and Order denying the request for modification from which claimant now appeals.

found that it failed to establish that there was a mistake in the prior administrative law judge's determination that claimant's disability did not arise in whole or in part from coal mine employment, or that there was a change in conditions since that determination. Decision and Order at 15.[4] Accordingly, the administrative law judge denied claimant's request for modification and denied benefits.

On appeal, claimant contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-361 (1986). 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In the instant claim, the administrative law judge properly determined that the claim was previously denied because employer established rebuttal of the interim presumption of totally disabling coal workers' pneumoconiosis pursuant to 20 C.F.R. §727.203(b)(3), *i.e.*, employer showed that claimant's disability did not arise in whole or in part out of coal mine employment. *See* Director's Exhibit 176. Accordingly, the administrative law judge determined that in order to establish modification, claimant had the burden of establishing that the prior determination of fact was erroneous or that the newly submitted evidence of record established a change in conditions. Decision and Order at 6-7; *see Jessee, supra*; *see also Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corporation*, 14

[4] The administrative law judge also found that employer did not dispute certain findings by the previous administrative law judge: that claimant had thirty years and eleven months of coal mine employment; that employer was the responsible operator; and that claimant had one dependent, his wife, for purposes of augmentation of benefits. Decision and Order on Modification 7-8.

BLR 1-56 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

In order to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3), the Fourth Circuit has held that employer must affirmatively rule out the causal relationship between the miner's total disability and his coal mine employment. *See Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *see Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299, 2-305 (4th Cir. 1994); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Endrizzi v. Bethlehem Mines Corp.*, 8 BLR 1-11 (1985).

In the instant case, the administrative law judge concluded that the newly submitted evidence "viewed in the context of the record as whole" failed to establish a mistake in the administrative law judge's prior determination that employer established rebuttal pursuant to Section 727.203(b)(3). Decision and Order at 15. A review of the evidence of record demonstrates that the administrative law judge's determination in this regard, *i.e.*, that claimant has failed to establish a mistake in the prior determination of fact, is consistent with the standard enunciated in *Jessee*, *supra*.

The administrative law judge further found that the newly submitted evidence failed to establish a change in conditions sufficient to defeat the prior finding of rebuttal. Specifically, the administrative law judge found that the newly submitted medical opinions of Dr. McSharry, Director's Exhibit 185; Employer's Exhibit 14, Dr. Hippensteel, Employer's Exhibit 8, and Dr. Dahhan, Employer's Exhibit 9, were well-reasoned and well-supported and that they all supported a finding that claimant suffered from no respiratory impairment, but, in fact, suffered from disability due to cardiac problems. Decision and Order at 16. The administrative law judge, in a permissible exercise of his discretion, accorded great weight to these opinions, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

The administrative law judge also considered the remaining medical evidence of record, including: the medical opinion of Dr. Morgan, who found no pulmonary impairment,[5] Employer's Exhibit 9; various hospital records, none of which made any diagnosis of a pulmonary or respiratory impairment, Director's Exhibits 188, 194; the opinions of Dr. Thakkar, who diagnosed pneumoconiosis and recurrent shortness of breath, Claimant's

[5] Even though Dr. Morgan found that claimant had no respiratory impairment the administrative law judge accorded little weight to his opinion because the doctor believed there must be a positive finding on a CT scan before pneumoconiosis could be diagnosed. *See* 20 C.F.R. §§727.203(a)(1), (b)(4).

Exhibits 1, 2; and the opinion of Dr. Patel, that claimant suffered from a significant ventilatory impairment arising out of coal mine employment, Director's Exhibit 176. The administrative law judge permissibly accorded little weight to these medical opinions as they were not supported by the objective evidence of record, and did not reflect a complete picture of the miner's health, *Hicks, supra*; *Akers, supra*; *Clark, supra*; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Peskie, supra*; *Lucostic, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985). Thus, because the administrative law judge addressed all relevant evidence in a manner consistent with the holding in *Jessee, supra, i.e.*, and has rendered affirmable findings, we must affirm his denial of claimant's request for modification.[6]

Accordingly, the administrative law judge's Decision and Order On Modification Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[6] Since we affirm the administrative law judge's finding of rebuttal at 20 C.F.R. §727.203(b)(3), we need not address the administrative law judge's finding regarding the x-ray evidence or employer's arguments concerning invocation at Section 727.203(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).