BRB Nos. 98-0503 BLA
and 98-0503 BLA-A

STEVE N. NONACK, JR.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 and the Decision on Motion for Reconsideration of Goerge P. Morin, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Carl J. Smith, Jr. (Richman & Smith), Washington, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Denying Benefits and the Decision on Motion for Reconsideration (97-BLA-0137) of Administrative Law Judge George P. Morin 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). The pertinent procedural history of this case is as follows: Claimant filed his initial claim on November 13, 1978. Director's Exhibit 1. On August 17, 1979, the Department of Labor (DOL) issued a Notice of Initial Finding that claimant is entitled to benefits. Director's Exhibit 20. Employer controverted liability on September 8, 1979. Director's Exhibit 23. On August 28, 1984, the administrative law judge issued a Decision and Order denying benefits. Director's Exhibit 63. Although the administrative law judge credited claimant with thirty-six years of coal mine employment and found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), he nonetheless found the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). *Id*. The administrative law judge further 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 the administrative law judge's findings at 20 C.F.R. §727.203(b) and 20 C.F.R. Part 410, Subpart D. However, the Board remanded the case to the administrative law judge to consider entitlement to benefits at 20 C.F.R. §410.490. *Nonack v. Bethlehem Mines Corp.*, BRB No. 84-2200 BLA (Sept. 22, 1987)(unpub.).

On remand, the administrative law judge issued a decision dated May 4, 1988 in which he found claimant entitled to benefits at 20 C.F.R. §410.490. Director's Exhibit 69. In disposing of employer's appeal, the Board, citing *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 15 BLR 2-155 (1991), vacated the administrative law judge's finding of entitlement to benefits at 20 C.F.R. §410.490, and remanded the case to the administrative law judge for further consideration of the evidence under 20 C.F.R. Part 718 in accordance with *Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 1-180 (3d Cir. 1987). *Nonack v. Bethenergy Mines, Inc.*, BRB No. 88-1971 BLA (Sept. 27, 1990)(unpub.). On the second remand, the administrative law judge issued a decision dated November 18, 1991, in which he found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c) and, thus, he denied benefits. Director's Exhibit 75. Claimant filed an appeal of the administrative law judge's denial on December 24, 1991. Director's Exhibit 76. On July 27, 1992, the Board ordered claimant to show cause why his claim should not be dismissed for failure to comply with the requirements as to the timely filing of the Petition for Review and brief. *Nonack v. Bethlehem Mines, Corp.*, BRB No. 92-0734 BLA (Order)(July 27, 1992)(unpub.). Subsequently, on September 24, 1992, the Board dismissed claimant's appeal as abandoned since claimant did not respond to the Board's Order or file a Petition for Review and brief. *Nonack v. Bethlehem Mines Corp.*, BRB No. 92-0734 BLA (Order)(Sept. 24, 1992)(unpub.).

Claimant filed another claim on August 27, 1993. Director's Exhibit 80. The district director denied this claim on November 12, 1993 and June 8, 1994 based on

claimant's failure to establish modification. Director's Exhibits 81, 90. Claimant filed his second request for modification on June 7, 1995. Director's Exhibit 91. On July 31, 1995, the district director again denied benefits based on claimant's failure to establish modification. Director's Exhibit 96. On August 25, 1995, claimant filed a letter with newly submitted evidence, which the DOL construed as claimant's most recent request for modification. Director's Exhibits 99, 100. The DOL denied benefits on October 27, 1995 and June 28, 1996. Director's Exhibits 101, 111.

In his decision, the administrative law judge rejected employer's argument that claimant's August 27, 1983 application should have been treated as a duplicate claim rather than a request for modification. Further, the administrative law judge credited claimant with thirty-six years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 727. With regard to 20 C.F.R. Part 727, the administrative law judge found the evidence sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). With regard to 20 C.F.R. Part 718, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge found the evidence insufficient to establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 and, thus, he denied benefits. In a subsequent Order, the administrative law judge denied claimant's request for reconsideration.

On appeal, claimant contends that the administrative law judge erred in finding the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Employer responds, urging affirmance of the administrative law judge's denial of benefits. On cross-appeal, employer contends that the administrative law judge erred by considering this claim at 20 C.F.R. Part 727. Employer also contends that the administrative law judge erred by revisiting the issue of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Claimant responds, urging dismissal of employer's cross-appeal. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[1]

[1]Inasmuch as the administrative law judge's findings of no total disability pursuant to 20 C.F.R. §718.204(c) and no total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) are not challenged on appeal, we affirm these

findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Initially, we will address employer's contentions on cross-appeal. Employer contends that the administrative law judge erred by considering this claim under 20 C.F.R. Part 727 because claimant's August 27, 1993 claim should have been treated as a duplicate claim rather than a request for modification since it was filed more than one year after the administrative law judge's November 18, 1991 denial of benefits. Specifically, employer asserts that the Board's September 24, 1992 Order dismissing claimant's appeal as abandoned should not have been treated as a denial since the claim never reached the Board on the merits due to claimant's failure to perfect an appeal. The administrative law judge stated that "[w]hile I recognize the logic set forth in the argument denying modification status to a claim filed more than one year after the administrative law judge's denial of benefits but prior to one year after the Board's dismissal of the appeal for abandonment, I decline to take employer's suggestion that I treat the modification request as a duplicate claim in light of the remedial nature of the Act." Decision and Order at 4.

The regulations provide that the district director "may, at any time before one year from the date of the last payment of benefits, or at any time before one year after *the denial of a claim*, reconsider the terms of an award or denial of benefits." 20 C.F.R. §725.310(a)(emphasis added). The Board has held that the one year period for modification under 20 C.F.R. §725.310 begins to run anew from the date of each denial. *See Garcia v. Director, OWCP*, 12 BLR 1-24 (1988). The Board has also held that the modification process remains available throughout the appellate proceedings. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Ashworth v. Blue Diamond Coal Co.*, 11 BLR 1-167 (1988); *Hoskins v. Director, OWCP*, 11 BLR 1-144 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985).[2]

[2]Employer argues that the alj erred by relying on *Hall v. Director, OWCP*, 8 BLR 1-193 (1985), to find that the Board's September 24, 1992 Order was a denial of claimant's November 13, 1978 claim since the facts in *Hall* are distinguishable from the facts here. Specifically, employer asserts that whereas the appeal on the merits was actually before the Board in *Hall*, the appeal on the merits never reached the Board in the case at hand. We are not persuaded by employer's attempt to distinguish *Hall*.

Therefore, since the Board's September 24, 1992 Order was issued during the appellate proceedings of this case, we reject employer's assertion that the Board's September 24, 1992 Order was not a denial of benefits since the November 13, 1978 claim never reached the Board on the merits due to claimant's failure to perfect an appeal. Moreover, since claimant's August 27, 1993 claim was filed within one year of the Board's September 24, 1992 Order, we reject employer's assertion that the administrative law judge erred by construing claimant's August 27, 1993 claim as a request for modification and, thus, erred by applying the regulations contained in 20 C.F.R. Part 727. *See Garcia, supra*.

Next, employer maintains that the administrative law judge erred by revisiting the issue of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) since the administrative law judge's prior 1984 finding of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) was affirmed by the Board in 1987 and was not challenged in any subsequent appeal or request for modification. In determining whether claimant has established a change in conditions under 20 C.F.R. §725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered along with the previously submitted evidence, to determine whether the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Further, with respect to the issue of mistake in fact under 20 C.F.R. §725.310, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that on modification, the regulation empowers the administrative law judge to make a *de novo* review of factual determinations which requires that, at a minimum, the administrative law judge must review all of the evidence of record and "further reflect" on whether any mistakes of fact were made in the previous adjudication of the case. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). Therefore, we reject employer's assertion that the administrative law judge erred by considering whether the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3).

Finally, we will address claimant's contention that the administrative law judge erred in finding the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). The administrative law judge stated that "the more recent evidence, particularly the report of Dr. Kaplan, satisfies the employer's burden of rebuttal." Decision and Order at 7. Dr. Kaplan opined that pneumoconiosis does not limit, restrict or affect claimant's ability to do his work in

any way.[3] Employer's Exhibit G. The United States Court of Appeals for the Third Circuit has held that in order to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3), the party opposing entitlement must "rule out" a possible causal connection between a miner's disability and his coal mine employment. *See Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995); *see also Kline v. Director, OWCP*, 877 F.2d 1175, 12 BLR 2-346 (3d Cir. 1989). In the instant case, the administrative law judge rationally found "Dr. Kaplan's opinion sufficient to 'rule out' pneumoconiosis or coal mine employment-related dust exposure as a cause of claimant's disability." Decision and Order at 7. Thus, we reject claimant's assertion that the administrative law judge erred by failing to apply the proper standard in his consideration of Dr. Kaplan's opinion under 20 C.F.R. §727.203(b)(3). Claimant also asserts that the administrative law judge erred by failing to consider all of the relevant newly submitted medical opinions of record with respect to the issue of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). The record contains Dr. Gandhi's newly submitted opinion that claimant's condition is due to pulmonary hypertension caused by coal workers' pneumoconiosis with associated hypertension. Director's Exhibit 99. Although the administrative law judge did not specifically address the newly submitted opinion of Dr. Gandhi in his consideration of the evidence under 20 C.F.R. §727.203(b)(3), he did discuss Dr. Gandhi's opinion in his weighing of the newly submitted evidence under 20 C.F.R. §718.204(b) and (c)(4). In so doing, the administrative law judge properly accorded greater weight to the opinion of Dr. Kaplan than to the contrary opinion of Dr. Gandhi because Dr. Kaplan's opinion is better reasoned and documented.[4] *See Clark v. Karst-Robbins*

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[3]In a deposition dated March 11, 1997, Dr. Kaplan responded "No" to the question, "does the pneumoconiosis in [claimant] limit, restrict or affect his ability to work in any way?" Employer's Exhibit G at 13.

[4]The administrative law judge stated that Dr. Gandhi does "not adequately explain why [he] attributed claimant's shortness of breath to pneumoconiosis rather than claimant's heart condition." Decision and Order at 9. The administrative law judge also stated that Dr. Gandhi did not obtain "pulmonary function tests or arterial blood gas studies to demonstrate a pulmonary or respiratory impairment attributable to a coal dust related disease." *Id*. In contrast, the administrative law judge stated that "Dr. Kaplan found that claimant's shortness of breath was more likely a heart related condition unrelated to claimant's lung function." *Id*. The administrative law judge further stated that "Dr. Kaplan's medical opinion is the most persuasive on the issue of total disability causation, as he relied on objective medical data which supported a finding of no pulmonary impairment under the regulatory criteria." *Id*. Moreover, the administrative law judge stated that Dr. Kaplan's "medical opinion persuasively considers all of the medical evidence in reaching his conclusions." *Id*.

Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge properly accorded greater weight to the opinion of Dr. Kaplan because of Dr. Kaplan's superior qualifications.[5] *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Hence, since the administrative law judge's findings at 20 C.F.R. §718.204(b) and (c)(4) with regard to the newly submitted opinions of Drs. Gandhi and Kaplan are relevant to the administrative law judge's finding at 20 C.F.R. §727.203(b)(3), we affirm the administrative law judge's finding that the newly submitted evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). *See Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Hamric v. Director, OWCP*, 6 BLR 1-1091 (1984).

[5]The administrative law judge correctly stated that "Dr. Kaplan is a Board-certified pulmonary specialist." Decision and Order at 9; Employer's Exhibit G. Dr. Gandhi is Board-certified in internal medicine and critical care medicine. Claimant's Exhibit 3.

Since the administrative law judge found the newly submitted evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3), but insufficient to establish total disability at 20 C.F.R. §718.204(c), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310. In determining whether the evidence supports a finding of a mistake in a determination of fact, the administrative law judge stated that he "reviewed the record." Decision and Order at 4. The administrative law judge also stated that claimant was not entitled to benefits under 20 C.F.R. Part 727 "[b]ased on all of the evidence of record." *Id*. at 7. Further, the administrative law judge found that claimant failed to establish total disability at 20 C.F.R. §718.204(c) based on his "[w]eighing [of] all of the medical evidence, old and new, supportive of a finding of a totally disabling respiratory or pulmonary impairment against the contrary probative evidence."[6] *Id*. at 9. Thus, we reject claimant's contention that the administrative law judge erred by failing to consider all of the evidence of record. Furthermore, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[6]In denying claimant's request for reconsideration, the administrative law judge stated that "my finding of rebuttal pursuant to Section 727.203(b)(3) has been affirmed by the Board, and is supported by the more recent medical opinion of Dr. Kaplan." Decision on Motion for Reconsideration at 1. We hold that any error by the administrative law judge in indicating that he did not consider all of the evidence of record is harmless since it is clear from the administrative law judge's decision that he did consider all of the evidence of record in finding the evidence insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge