BRB No. 98-0587 BLA

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

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James D. Charles, Wolford, Virginia, *pro se*.

Laura Metcoff Klaus (Arter & Hadden, LLP), Washington, D.C., 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

(97-BLA-0641) of Administrative Law Judge Michael P. Lesniak 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). Initially, Administrative Law Judge James L. Guill credited claimant with twenty-eight and one-quarter years of coal mine employment, weighed all of the relevant evidence, and found that the evidence of record failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a), or any element of entitlement at 20 C.F.R. Part 410, Subpart D. Director's Exhibit 52. Accordingly, he denied benefits.

Pursuant to claimant's appeal, the Board remanded the case for the administrative law judge to reconsider invocation at Section 727.203(a) under *Stapleton v. Westmoreland Coal Co*., 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986)(*en banc*), which permitted invocation based upon a single item of evidence. *Charles v. Knox Creek Coal Co*., BRB No. 85-0414 BLA (Aug. 21, 1986)(unpub.); Director's Exhibit 61. On remand, Judge Guill applied *Stapleton* and found invocation established pursuant to Section 727.203(a)(1) and (a)(3), but concluded that rebuttal was established pursuant to Section 727.203(b)(3). Director's Exhibit 65. Accordingly, he again denied benefits.

Claimant filed a notice of appeal from the denial but failed to file a Petition for Review, and the Board dismissed his appeal as abandoned. *Charles v. Knox Creek Coal Co*., BRB No. 87-1317 BLA (May 19, 1988)(Order)(unpub.); Director's Exhibit 72; *see* 20 C.F.R. §802.402. Thereafter, claimant timely requested modification of the denial of his claim pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence. Director's Exhibits 75, 80, 87.

On modification, Administrative Law Judge Clement J. Kichuk found that the medical evidence of record failed to establish a change in conditions or entitlement to benefits under 20 C.F.R. Part 727 or 20 C.F.R. §410.490. Director's Exhibit 151. Accordingly, he denied benefits. On appeal, the Board affirmed as supported by substantial evidence Judge Kichuk's findings that the evidence failed to establish invocation pursuant to Section 727.203(a), and held that he properly found no basis for modification of the denial of benefits.[2] *Charles v. Knox Creek Coal Corp.*, BRB No. 92-2311 BLA (Sep. 27, 1994)(unpub.); Director's Exhibit 157. The Board also held that in light of Judge Kichuk's findings at Part 727, entitlement at Part 410, Subpart D was precluded. [1994] *Charles*, slip op. at 4, n.4. Subsequently, the Board granted claimant's motion for reconsideration, and after reconsideration, reaffirmed its Decision and Order. *Charles v. Knox Creek Coal Corp.*, BRB No. 92-2311 BLA (Jan. 22, 1996)(unpub.); Director's Exhibit 160. Thereafter, claimant again requested modification and submitted additional medical evidence. Director's Exhibit 172.

On second modification, Administrative Law Judge Michael P. Lesniak incorporated by reference Judge Kichuk's summary of the evidence submitted since the filing of the claim, found that the new medical evidence considered in conjunction with the previously submitted evidence failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4), and concluded that the record did not establish a change in conditions or a mistake in a determination of fact pursuant to Section 725.310. Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

Section 725.310 provides that a party may request modification of the award or denial of benefits within one year on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held pursuant to Section 725.310 that the administrative law judge has the authority to consider all of the evidence on modification to determine whether there has been a change in conditions or a mistake in a determination of fact, including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

Pursuant to Section 727.203(a)(1), the administrative law judge considered six readings of two new x-rays submitted on modification, in conjunction with the earlier x-ray readings as summarized by Judge Kichuk in his 1992 decision on modification. [1997] Decision and Order at 3-4; Director's Exhibit 151 at 3-6. Of the six new readings, four readings classified the March 12, 1997 x-ray as negative, one reading classified the July 22, 1997 x-ray as unreadable, and the other reading of the July 22, 1997 x-ray diagnosed interstitial scar tissue, a reading that the administrative law judge considered as positive for pneumoconiosis even though the x-ray was not ILO classified for pneumoconiosis. *See* 20 C.F.R. §410.428(a). All of the negative readings and the unreadable classification were rendered by Board-certified

radiologists, B-readers, or both, while the reading accepted by the administrative law judge as positive was rendered by a physician whose radiological qualifications are not in the record. In this context, the administrative law judge permissibly accorded greater weight to the negative readings by the qualified readers, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), and further found "by a preponderance of the newly submitted x-ray evidence, considered in conjunction with the evidence previously made part of the record, that the [c]laimant has failed to show either a change in conditions or a mistake in a determination of fact through x-ray evidence." [1997] Decision and Order at 7. Judge Kichuk previously found the weight of the x-ray readings by qualified readers submitted in the first modification to be negative for pneumoconiosis and concluded that the overall weight of the readings then in the record was negative, and Judge Guill in the initial decision found the weight of the x-ray readings viewed in light of the readers' qualifications to be negative for pneumoconiosis. Director's Exhibits 52 at 9, 151 at 13-14. We therefore affirm as supported by substantial evidence the administrative law judge's finding that the x-ray evidence did not establish invocation pursuant to Section 727.203(a)(1) or a basis for modification.

Pursuant to Section 727.203(a)(2), the administrative law judge summarized the results of the single new pulmonary function study submitted on modification. The administrative law judge correctly noted that although the March 12, 1997 study yielded qualifying[3] values, Dr. Castle, the administering physician, declared the study invalid "because of less than maximal effort and cooperation . . . ." Employer's Exhibit 1 at 3. Accordingly, the administrative law judge found that the new pulmonary function study was not sufficiently reliable to establish a change in conditions, *see Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987), and further found that "after thorough review of the entire record . . . the decision of Judge Kichuk does not contain a mistake in [a] determination of fact with respect to the pulmonary function study evidence." [1997] Decision and Order at 7. Judge Kichuk previously found that the four pulmonary function studies submitted in the first modification did not establish invocation because all of the qualifying studies were invalidated by administering or reviewing physicians due to inadequate effort on the tests, and Judge Guill in the initial decision found that the original set of six pulmonary function studies did not establish invocation because the three qualifying studies were all invalidated due to insufficient effort. Director's Exhibits 52 at 10, 151 at 14, 157 at 3; *see Schetroma, supra*. We therefore affirm the administrative law judge's finding that the pulmonary function studies did not establish invocation pursuant to Section 727.203(a)(2), and thus did not provide a basis for modification.

Pursuant to Section 727.203(a)(3), the administrative law judge found that the

single new blood gas study administered on March 12, 1997 was non-qualifying and thus did not establish a change in conditions, and concluded that after review of the prior blood gas study evidence summarized by Judge Kichuk, "the previous decision [did] not contain a mistake in [a] determination of fact with regard to the blood gas evidence." [1997] Decision and Order at 7. Judge Kichuk previously considered all nine of the blood gas studies in the record as of that time, and reasonably found that because only one study, the earliest in the record, was qualifying, invocation was not established pursuant to Section 727.203(a)(3). Director's Exhibit 151 at 6-7, 15; *see Mullins, supra*; *see also Crace v. Kentland-Elkhorn Coal Corp*., 109 F.3d 1163, 1167, 21 BLR 2-73, 2-82 (6th Cir. 1997); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). We therefore affirm the administrative law judge's finding that the blood gas studies did not establish invocation pursuant to Section 727.203(a)(3), and thus did not provide a basis for modification.

Pursuant to Section 727.203(a)(4), the administrative law judge summarized the six new medical reports submitted on modification. Claimant's treating physician, Dr. Sutherland, whose credentials are not in the record, submitted two one-page letters opining that based upon his examination of claimant and review of claimant's chest x-ray, claimant is totally disabled due to advanced pulmonary disease resulting from coal dust exposure. Director's Exhibit 172; Claimant's Exhibit 1. Dr. Castle, who the record indicates is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and reviewed medical records. Director's Exhibits 1, 8. Dr. Castle opined that claimant's normal blood gas study results and the last valid pulmonary function study obtained showed at best a mild obstructive airways disease due to smoking which was not sufficient to prevent claimant from performing his job duties operating a bulldozer and endloader, as claimant had described them. *Id*. Dr. Fino, who the record indicates is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record and concluded that there was no valid objective evidence of any respiratory impairment. Employer's Exhibits 5, 9. Drs. Castle and Fino also reviewed their previous medical record reviews done in the prior modification.

The administrative law judge permissibly accorded "great weight" to the non-disability opinions of Drs. Castle and Fino because he found their opinions to be more thorough, documented, and better reasoned than that of Dr. Sutherland. [1997] Decision and Order at 8; *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, 1-155 (1989)(*en banc*). The administrative law judge further found that "a review of the physician opinion evidence previously of record coupled with the newly submitted evidence also demonstrates that claimant is not entitled to the interim presumption," and

concluded that there was no mistake in a determination of fact in the prior denial. [1997] Decision and Order at 8. Judge Kichuk in the prior denial permissibly accorded no weight to Dr. Modi's opinion because of his fraud conviction, and found Dr. Buddington's opinion diagnosing total respiratory disability to be outweighed by the opinions of Drs. Rasmussen, Endres-Bercher, Castle, and Fino, who found minimal or no respiratory impairment. Director's Exhibits 151 at 7-12, 15-16; 157 at 4. Judge Guill in the first decision found that because none of the medical opinions then in the record diagnosed a totally disabling respiratory or pulmonary impairment, the evidence did not establish invocation at subsection (a)(4). Director's Exhibit 52 at 10. Accordingly, the administrative law judge properly found that the medical opinion evidence did not establish a basis for modifying the denial of benefits. We therefore affirm his finding pursuant to Section 727.203(a)(4).

Because the administrative law judge permissibly found that invocation of the interim presumption was not established pursuant to Section 727.203(a), and therefore found that the record did not demonstrate a change in conditions or a mistake in a determination of fact, he properly declined to modify the denial of benefits.[4] *See Jessee, supra*.

Accordingly, the administrative law judge's Decision and Order denying modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge