BRB No. 90-1845 BLA

BUFORD WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Charles S. Murry (Sunbelt Advocacy Services, Inc.), Bessemer, Alabama, for claimant.

Edward Waldman (Marshall J. Breger, 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: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (85-BLA-4804) of Administrative Law Judge Edward C. Burch 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). This case is on appeal to the Board for the second time. Claimant's original claim was denied in a Decision and Order issued on March 9, 1983, wherein Administrative Law Judge Halpern credited claimant with twenty-six years of qualifying coal mine employment, and found invocation of the interim presumption established at 20 C.F.R. §727.203(a)(1), but rebuttal of that presumption established at 20 C.F.R. §727.203(b)(2) and (b)(3). As claimant filed a second claim on September 28, 1983, Administrative Law Judge Burch determined that the second claim constituted a request for modification pursuant to 20 C.F.R. §725.310, but found that the new evidence submitted in support thereof was insufficient to establish either a change in conditions or a mistake in a determination of fact. Consequently, the request for modification was denied. On appeal, the Board affirmed the administrative law judge's finding that modification on the basis of a mistake in a determination of fact was not available, but remanded this case for the administrative law judge to consider all of the evidence of record, including a discussion of claimant's condition as found in Judge Halpern's Decision and Order and the evidence upon which that decision was based, and to determine whether it was sufficient to establish a change in conditions pursuant to Section 725.310. On remand, the administrative law judge found that the evidence of record was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) - (a)(4), and therefore concluded that modification pursuant to Section

725.310 was not appropriate. Accordingly, benefits were denied. Claimant appeals, challenging the administrative law judge's findings pursuant to Sections 725.310 and 727.203(a). The Director, Office of Workers' Compensation Programs, responds, urging affirmance.

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

After careful 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. Contrary to claimant's contentions, the administrative law judge clearly set forth his factual findings and legal conclusions concerning all the material issues of fact, law and discretion presented on the record, in full compliance with the terms of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). See Wojtowicz v. Duquesne Light Co., 12 BLR 1-162 (1989); Kurcaba v. Consolidation Coal Co., 9 BLR 1-73 (1986). Further, in light of the recent decision of the United States

Supreme Court in Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991), we reject claimant's contention that the administrative law judge erred in adjudicating this claim pursuant to the regulations at 20 C.F.R. Part 727 rather than those at 20 C.F.R. §410.490. See Whiteman v. Boyle Land and Fuel Co., 15 BLR 1-11 (1991)(en banc).

Claimant additionally maintains that the administrative law judge did not make a threshold determination based solely on the new evidence as to whether it established a change in conditions pursuant to Section 725.310. Assuming arguendo that a change in conditions has been established, however, the administrative law judge is then required to weigh all of the evidence of record and determine whether it is sufficient to support a finding of entitlement. See generally Dingess v. Director, OWCP, 12 BLR 1-141 (1989); Cooper v. Director, OWCP, 11 BLR 1-95 (1988). As the administrative law judge properly considered the entire record in adjudicating the merits of this claim, any error alleged by claimant pursuant to Section 725.310 constitutes harmless error. See Larioni v. Director, OWCP, 6 BLR 1-1276 (1984).

Turning to the merits, the administrative law judge permissibly found that the weight of the x-ray evidence was insufficient to establish invocation pursuant to Section 727.203(a)(1), based on a numerical preponderance of negative x-ray interpretations by the most highly qualified readers, and claimant has not challenged this finding. Decision and Order on Remand at 4; see Prater v. Clinchfield Coal Co.,

12 BLR 1-121 (1989); Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Trent v. Director, OWCP, 11 BLR 1-26 (1987). In finding that the pulmonary function study evidence of record was insufficient to establish invocation at Section 727.203(a)(2), the administrative law judge, contrary to claimant's arguments, properly determined that the study obtained on June 7, 1984, was non-qualifying, as it listed claimant's height at 69", and recorded an FEV1 of 2.441 and an MVV of 59.7.[1] Decision and Order on Remand at 4; Director's Exhibit 6. In order to qualify, the FEV1 value must be equal to or less than 2.4, and as the reported value exceeded the table value by a fractional amount, it failed to qualify. See Bolyard v. Peabody Coal Co., 6 BLR 1-767 (1984). Consequently, we affirm the administrative law judge's findings pursuant to Section 727.203(a)(2), as supported by substantial evidence. We also affirm his finding that the blood gas study evidence of record was non-qualifying and therefore insufficient to establish invocation at Section 727.203(a)(3), as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

[1] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §727.203(a)(2) and (a)(3), respectively. A "non-qualifying" study yields values that exceed those values.

Finally, in finding that the medical opinions of record were insufficient to establish invocation pursuant to Section 727.203(a)(4), the administrative law judge, contrary to claimant's arguments, acted within his discretion in according determinative weight to the opinion of Dr. Risman, who found no evidence of significant bronchopulmonary disease and stated that any impairment attributable to coal mine employment was mild, as his report was thorough and consistent with the weight of the evidence. Decision and Order on Remand at 6; Director's Exhibits 12, 13; see King v. Consolidation Coal Co., 8 BLR 1-262 (1985); Wetzel v. Director, OWCP, 8 BLR 1-139 (1985). Further, the administrative law judge permissibly gave less weight to the opinions of the physicians whose reports supported claimant's position, as they were either brief, non-explanatory and without supporting documentation, or they were unsupported by the objective evidence of record and contrary to the preponderance of the medical opinions of record. Decision and Order on Remand at 4-6; see King, supra; Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985). The administrative law judge was not required to resolve all conflicts in claimant's favor, as he did not find that the evidence of record was equally probative, see King v. Cannelton Industries, Inc., 8 BLR 1-146 (1985), Stanford v. Director, OWCP, 7 BLR 1-541 (1984); and claimant's assertions that the administrative law judge mischaracterized the evidence and misidentified the exhibits are without foundation.[2] Claimant also maintains that the administrative law

[2] Claimant alleges that Dr. Johnson's report of September 8, 1983, and Dr.

judge failed to address all relevant evidence, specifically the seven-page report of Dr. Moyo, which claimant identifies as Claimant's Exhibit 1; however, although claimant referred to said report during the hearing, it was never admitted into the record and thus is not subject to review. See Hearing Transcript at 15, 18, 19; Fetterman v. Dirctor, OWCP, 7 BLR 1-688 (1985); Kuchwara v. Director, OWCP, 7 BLR 1-167 (1984). The administrative law judge's findings pursuant to Section 727.203(a)(4) are supported by substantial evidence and are affirmed. Inasmuch as claimant has failed to establish the existence of a totally disabling respiratory or pulmonary impairment, claimant is precluded from entitlement to benefits under the Act. See generally Fields v. Island Creek Coal Co., 10 BLR 1-19 (1987); Roberts v. Bethlehem Mines Corp., 8 BLR 1-211 (1985).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

Risman's qualifying pulmonary function study of June 7, 1984, were both marked as Director's Exhibit 7. A review of the record, however, reveals that Dr. Johnson's report is marked Director's Exhibit 7, whereas Dr. Risman's pulmonary function study, which produced non-qualifying values, is found at Director's Exhibit 6.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge