BRB No. 06-0219 BLA

DONNIE BLAKE ADKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENTLAND ELKHORN COAL CORPORATION	)	DATE ISSUED: 07/28/2006
	)	
and	)	
	)	
THE PITTSTON 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 Remand-Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Donnie Blake Adkins, Kimper, Kentucky, *pro se*.[1]

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

[1] Kelly Fidell, of the Kentucky Black Lung Coalminers and Widows Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Fidell is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant appeals, without the assistance of counsel, the Decision and Order on Remand-Denial of Benefits (03-BLA-0130) of Administrative Law Judge Robert L. Hillyard rendered 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). Claimant is requesting modification of a previous denial of benefits.[2] When claimant's request for modification was most recently before the Board, the Board affirmed the administrative law judge's finding that the newly submitted evidence of record failed to establish the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but the Board remanded the case for the administrative law judge to consider whether this evidence could establish invocation of the interim presumption of totally disabling pneumoconiosis arising out of coal mine employment at 20 C.F.R. §727.203(a), and, therefore, establish modification pursuant to Section 725.310 (2000). *Adkins v. Kentland Elkhorn Coal Corp.*, BRB No. 04-0500 BLA (Mar. 23, 2005). On remand, the administrative law judge found that the newly submitted evidence failed to establish invocation of the interim presumption, a change in an applicable condition of entitlement, or a mistake in a determination of fact pursuant to Section 725.310. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating that he will not 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (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 & Grills Associates, Inc.*, 380 U.S. 359 (1965).

[2] This claim, filed October 26, 1978, has been before the Board five times and the United States Court of Appeals for the Fourth Circuit twice, culminating in a final denial of benefits on March 21, 2000. Director's Exhibit 1-171. Claimant filed a request for modification on March 12, 2001. *See Adkins v. Kentland Coal Corp.*, BRB No. 04-0500 BLA (Oct. 24, 2005).

Turning first to the administrative law judge's consideration of the newly submitted evidence pursuant to Section 727.203(a)(1), the administrative law judge, noting that the record contained no biopsy evidence, credited the greater number of negative readings from those physicians with specialized qualifications in the field of radiology, finding that the preponderance of the newly submitted x-ray evidence failed to establish invocation of the interim presumption, or a change in claimant's condition. Reviewing the previously submitted x-ray evidence, the administrative law judge found that it did not support a finding of the existence of pneumoconiosis, or, therefore, a mistake in a determination of fact at Section 725.310 (2000). This was rational. Employer's Exhibits 1, 3, 5, 8, 9; Director's Exhibit 179; Decision and Order on Remand-Denial of Benefits at 3, 7-8; *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Hatfield v. Secretary of HHS*, 743 F.2d 1150, 7 BLR 2-1 (6th Cir. 1984); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis or invocation of the interim presumption under Section 727.203(a)(1).

We also affirm the administrative law judge's finding that the requirements of Section 727.203(a)(2)-(3) were not met, as the newly submitted pulmonary function studies produced non-qualifying values, and the new arterial blood gas study failed to provide a statement regarding the altitude at which it was performed, and therefore, failed to conform to the quality standards. 20 C.F.R. §718.105 (2001). Concurring with the prior holding of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, the administrative law judge also found that the previously submitted objective tests failed to establish the presence of a chronic respiratory or pulmonary disease. Accordingly, the administrative law judge correctly found that neither a change in condition nor a mistake in a determination of fact was made. Employer's Exhibit 3; Decision and Order on Remand-Denial of Benefits at 3-4, 8-9; *see Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Estes v. Director, OWCP*, 7 BLR 1-414 (1984); *Horn v. Jewell Ridge Coal Corp.*, 6 BLR 1-933 (1984).

Pursuant to Section 727.203(a)(4), the administrative law judge considered the newly submitted medical reports of Drs. Rosenberg and Fino. Dr. Rosenberg opined that claimant did not have coal workers' pneumoconiosis or any associated impairment, Employer's Exhibit 3, and Dr. Fino found that there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis, and concluded that claimant had no respiratory impairment. Employer's Exhibits 9, 12. The administrative law judge permissibly found these opinions well reasoned and supported by the objective evidence of record, as well as noting their qualifications in the field of pulmonary medicine. As

neither of the newly submitted medical reports diagnosed the presence of a totally disability respiratory or pulmonary impairment, the administrative law judge rationally determined that the new medical opinion evidence was insufficient to establish invocation of the interim presumption at Section 727.203(a)(4). Employer's Exhibits 9, 12; Decision and Order on Remand-Denial of Benefits at 4-5, 9-11; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85; *Buttermore v. Duquesne Light Co.*, 7 BLR 1-604 (1984); *Short v. Director, OWCP*, 7 BLR 1-318 (1984). Reviewing the previously submitted medical opinion evidence, the administrative law judge permissibly found that it also failed to support invocation of the interim presumption. Accordingly, the administrative law judge found that the medical opinion evidence did not establish either a change in conditions or mistake in a determination of fact. Decision and Order on Remand-Denial of Benefits at 10; *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Kovac*, 16 BLR 1-71 (1992), *modif'g on recon.*, 14 BLR 1-156 (1990).

As the administrative law judge properly found the newly submitted evidence, in conjunction with the previously submitted evidence, insufficient to establish invocation of the interim presumption to Section 727.203(a), we affirm the finding that claimant has failed to establish a basis for modification of the prior denial of benefits, *i.e.*, has failed to establish a change in condition or a mistake in a determination of fact in the prior decision. 20 C.F.R. §725.310; *Worrell*, 27 F.3d 227, 18 BLR 2-290; *Kovac*, 16 BLR 1-71. Thus, we affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand-Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge