BRB No. 99-0480 BLA

MELVIN H. TEPHABOCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAUREL RUN MINING COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
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 Order Denying Request for Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Order Denying Request for Reconsideration (97-BLA-1910) of Administrative Law Judge Thomas M. Burke 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 before the Board for the third time. Originally, claimant filed a claim on June 6, 1977, Director's Exhibit 1, which was denied on May 7, 1979, Director's Exhibit 21. Claimant filed a second claim on March 13, 1986, Director's Exhibit 2. In a Decision and Order issued on January 25, 1988, Administrative Law Judge Frank J. Marcellino found eighteen years of coal mine employment established and that claimant's second claim was a protective filing so that

claimant's original claim was still viable, Director's Exhibit 35. Thus, Judge Marcellino adjudicated the claim pursuant to 20 C.F.R. §727.203 and, ultimately, awarded benefits.

Employer appealed and the Board vacated Judge Marcellino's findings that claimant's second claim was a protective filing and that claimant's original claim was still viable, Director's Exhibit 48. *Tephabock v. Laurel Run Mining Co.*, BRB No. 88-0409 BLA (Feb. 26, 1990)(unpub.). The Board remanded the case for a determination as to whether a physician's statement dated June 12, 1979, Director's Exhibit 12, and a coal mine employment affidavit dated October 6, 1979, Director's Exhibit 8, had been submitted and/or received by the Department of Labor within one year of the denial of claimant's original claim and, therefore, constituted a request for modification of claimant's original 1977 claim, *see* 30 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.310. The Board noted that if evidence constituting a request for modification had been submitted within one year of the denial of claimant's original claim, then claimant's original claim would be still viable and the regulations at Section 727.203 would be applicable. However, if no action were taken by claimant after the denial of his original claim until the filing of his second claim in 1986, then the only viable claim would be claimant's 1986 claim which would be considered a duplicate claim under 20 C.F.R. §725.309(d). Thus, the Board vacated Judge Marcellino's Decision and Order awarding benefits pursuant to Section 727.203 and remanded the case for further consideration.

On remand, Judge Marcellino considered testimony from claimant and his brother that the two exhibits at issue were mailed in 1979, within one year of the denial of claimant's original claim, Director's Exhibit 54, as well as a letter from the Department of Labor indicating that there is no evidence that the two exhibits at issue were received within one year of the denial of claimant's original claim, Director's Exhibit 64. Judge Marcellino found no evidence that the two exhibits at issue were submitted within one year of the denial of claimant's original claim so as to constitute a request for modification and that claimant and his brother were "honestly mistaken" as to when they were mailed, Director's Exhibit 69. Thus, Judge Marcellino found that only claimant's second claim was viable and should be adjudicated pursuant to 20 C.F.R. Part 718, but did not consider the merits of the claim.

Claimant appealed and employer cross-appealed, and the Board affirmed Judge Marcellino's findings of fact that the instant claim is a duplicate claim under Section 725.309(d), Director's Exhibit 85. *Tephabock v. Laurel Run Mining Co.*, BRB Nos. 92-2011 BLA and 92-2011 BLA-A (Sep. 17, 1993)(unpub.). Thus, the Board remanded the case for consideration on the merits pursuant to Section 725.309(d) and, if reached, Part 718. On reconsideration, the Board reaffirmed its holdings, Director's Exhibit 93. *Tephabock v. Laurel Run Mining Co.*, BRB Nos. 92-2011 BLA and 92-2011 BLA-A (July 17, 1996) (unpub.). Subsequently, on July 29, 1996, claimant filed a timely petition for modification based on a mistake in a determination of fact that claimant had not submitted a timely motion

for modification of his original, finally denied claim.

In the Decision and Order at issue, herein, the administrative law judge found that claimant did not establish a basis for modification based on a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 by demonstrating that Judge Marcellino had erred in previously finding that claimant had not submitted a timely motion for modification of his original, finally denied claim. Next, the administrative law judge considered whether the evidence submitted since the denial of his original claim established a material change in conditions pursuant to Section 725.309(d) in accordance with the standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997). The administrative law judge considered all of the newly submitted evidence pursuant to Part 718 and found that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(5), which were the elements of entitlement previously adjudicated against claimant, *see* Director's Exhibit 21. Thus, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to Section 725.309(d) in accordance with standard enunciated in *Rutter*. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that claimant did not establish a basis for modification based on a mistake in a determination of fact pursuant to Section 725.310 by demonstrating that Judge Marcellino had erred in previously finding that claimant had not submitted a timely motion for modification of his original, finally denied claim. Employer responds, urging that the administrative law judge's Decision and Order Denying Benefits and Order Denying Request for Reconsideration be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to this appeal.

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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. The intended purpose of modification based on a mistake in fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted" in an effort to

render justice under the Act, *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that if a party merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

The administrative law judge considered new affidavits and testimony from claimant and four of his family members, Director's Exhibits 97, 99; Claimant's Exhibits 5-10, all stating that the two exhibits at issue were mailed in 1979, within one year of the denial of claimant's original claim. 1998 Decision and Order at 4-8. However, the administrative law judge noted that claimant, as well as his wife and brother who claimed to have personal knowledge when the two exhibits at issue were mailed over nineteen years ago, all testified to having general memory problems, 1998 Decision and Order at 6.[1] The administrative law judge found that the new testimony of claimant and his family members did not differ substantively from the earlier testimony before Judge Marcellino who had found that it was not persuasive. 1998 Decision and Order at 7. Inasmuch as three of the four members of claimant's family claiming that the two exhibits at issue were mailed in 1979 also claimed to have difficulty remembering matters far in the past, the administrative law judge found that the proffered testimony was not persuasive. Thus, the administrative law judge found that claimant did not establish a basis for modification based on a mistake in a determination of fact pursuant to Section 725.310 by demonstrating that Judge Marcellino had erred in previously finding that claimant had not submitted a timely motion for modification of his original, finally denied claim.

Claimant initially contends that the Board and Judge Marcellino previously erred in characterizing the relevant issue in this case as whether the two exhibits at issue were "received" by the Department of Labor within one year of the denial of claimant's original claim. Claimant notes that "a timely and accurate mailing raises a rebuttable presumption that the mailed material was received," *see Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 21 BLR 2-464 (6th Cir. 1998); *Old Ben Coal Co. v. Luker*, 826 F.2d 688, 10 BLR 2-249

[1] Claimant testified that "[w]hen you're my age... you don't remember like you did ten, fifteen years ago," 1998 Hearing Transcript at 47. In regard to the filing of claimant's second claim, claimant's wife testified that "it's been so long ago, it's hard to remember all that," 1998 Hearing Transcript at 56. Finally, claimant's brother testified that while one of claimant's sons was present when the coal mine employment affidavit at issue was mailed, he couldn't recollect which one of claimant's sons was there, noting that "[m]y mind's not that good anymore," 1998 Hearing Transcript at 61.

(7th Cir. 1987), *citing Hagner v. United States*, 285 U.S. 427 (1932). Claimant contends that claimant's and his family's testimony that the two exhibits at issue were timely mailed to the Department of Labor within one year of the denial of claimant's original claim cannot be disputed and is sufficient to entitle claimant to the rebuttable presumption that the exhibits were received by the Department of Labor within one year of the denial of claimant's original claim. In addition, claimant contends that the letter from the Department of Labor indicating that there is no evidence that the two exhibits at issue were received within one year of the denial of claimant's original claim, Director's Exhibit 64, is insufficient to rebut the presumption. Finally, claimant also contends that the administrative law judge did not fully consider claimant's testimony relevant to establishing that the coal mine employment affidavit at issue, *see* Director's Exhibit 8, as well as the statement from the physician, were submitted in 1979.[2]

Although claimant notes that in *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), the court held that the absence of a letter constituting a request for modification from the government's file could not strip the claimant in that case of the viability of his original claim, the facts in *Borda* are distinguishable from those in the instant claim. In *Borda*, it was uncontested that the letter constituting a request for modification, which was in the record, was sent at the time indicated on the letter, *see Borda, supra*. Moreover, in the *Satterfield* and *Luker* cases cited by claimant, evidence from computer printouts that the exhibits at issue in those cases were mailed, sufficient to invoke the

[2] Claimant testified that the coal mine employment affidavit was submitted in order to establish ten years of coal mine employment as requested by the Department of Labor, 1998 Hearing Transcript at 34, and thereby entitle claimant to the rebuttable presumption under Section 727.203, because claimant contends that the record submitted with his original claim, *i.e.*, his Social Security records, *see* Director's Exhibit 5, was insufficient at that time to establish ten years of coal mine employment. Claimant contends that there was no need to submit the coal mine employment affidavit in conjunction with his second claim filed in 1986, as the record with his second claim was already sufficient to establish ten years of coal mine employment.

presumption that the mailed material was received, was contained in the records, *see Satterfield*, *supra*; *Luker*, *supra*. However, in the instant case, the administrative law judge found no sufficient, credible evidence that the exhibits at issue were mailed to the Department of Labor within one year of the denial of claimant's original claim in order to invoke any presumption that the exhibits were received by the Department of Labor within one year of the denial of claimant's original claim. Contrary to claimant's contention that it cannot be disputed that the testimony offered by claimant establishes that the two exhibits at issue were mailed to the Department of Labor within one year of the denial of claimant's original claim, the administrative law judge found that the testimony was not persuasive in light of the memory problems conceded to by those testifying.

It is within an administrative law judge's discretion to determine whether testimony is credible and the administrative law judge is not required to accept a party's testimony merely because it is uncontradicted, *see Miller v. Director, OWCP*, 7 BLR 1-693 (1985). In considering the new testimony offered by claimant, the administrative law judge found that it did not differ substantively from the earlier testimony regarding when the exhibits at issue were mailed, but found it unpersuasive in light of the memory problems conceded to by those testifying. Consequently, as it is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded witnesses, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that claimant did not establish a basis for modification pursuant to Section 725.310 by demonstrating that Judge Marcellino had erred in previously finding that claimant had not submitted a timely motion for modification of his original, finally denied claim.[3]

Moreover, inasmuch as claimant does not challenge the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) or total disability pursuant to Section

[3] Inasmuch as we affirm the administrative law judge's finding that claimant did not establish a basis for modification pursuant to Section 725.310, we need not address employer's contention that if claimant's original claim is viable, employer should be dismissed from this case as it did not receive notice of claimant's original claim.

718.204(c)(1)-(5) and, therefore, a material change in conditions pursuant to Section 725.309(d) in accordance with the standard enunciated in *Rutter*, the administrative law judge's findings on the merits are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the Decision and Order Denying Benefits and Order Denying Request for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge