BRB No. 03-0703 BLA

VERNON DOTSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/29/2004
	)	
PEABODY COAL COMPANY	)	
	)	
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 – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the June 26, 2003 Decision and Order – Denial of Benefits (01-BLA-1209) of Administrative Law Judge Robert L. Hillyard denying claimant's February 5, 2001 request for modification of the prior denial of 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).[1] The pertinent procedural history is as follows: By

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

Decision and Order dated June 10, 1999, Administrative Law Judge Clement J. Kichuk denied the claim. Director's Exhibit 78. Judge Kichuk noted that the Board had previously affirmed his findings that claimant failed to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) through (a)(3) (2000). *See Dotson v. Peabody Coal Co.*, BRB No. 97-1722 BLA (Sept. 3, 1998)(unpublished), Director's Exhibit 77. Judge Kichuk found that the evidence was insufficient to establish invocation at 20 C.F.R. §727.203(a)(4) (2000). Judge Kichuk further determined that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202 (2000) since the Board had affirmed his weighing of the x-ray evidence at 20 C.F.R. §727.203(a)(1) (2000) and claimant had not challenged his finding that the medical opinions failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). Director's Exhibit 78. Judge Kichuk also found that the evidence was insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(c) (2000) and thus, claimant was not entitled to the presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.305 (2000). *Id.*

Considering claimant's appeal, the Board affirmed, in *Dotson v. Peabody Coal Co.*, BRB No. 99-0988 BLA (June 22, 2000)(unpublished), Judge Kichuk's denial of benefits. Director's Exhibit 79. Specifically, the Board affirmed Judge Kichuk's finding that the evidence was insufficient to establish invocation at 20 C.F.R. §727.203(a)(4) (2000), noting that because claimant failed to establish invocation, it did not need to address his assertions on rebuttal at 20 C.F.R. §727.203(b) (2000). The Board further rejected claimant's challenge to Judge Kichuk's finding that the medical opinions failed to establish total disability at 20 C.F.R. §718.204(c)(4) (2000) and affirmed Judge Kichuk's finding that the relevant evidence failed to establish total disability at 20 C.F.R. §718.204(c) (2000). Because claimant failed to establish total disability, the Board also affirmed Judge Kichuk's finding that claimant failed to establish invocation of the presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.305 (2000). The Board thus affirmed Judge Kichuk's denial of benefits pursuant to 20 C.F.R. Parts 727 and 718.

Claimant filed the instant request for modification on February 5, 2001, and submitted new evidence. Subsequent to a hearing, Administrative Law Judge Robert L. Hillyard (the administrative law judge) issued the June 26, 2003 Decision and Order – Denial of Benefits which is the subject of this appeal. The administrative law judge initially found no mistake in a determination of fact at 20 C.F.R. §725.310 (2000) in the prior denial by Judge Kichuk, based on the evidentiary record as it then existed. The administrative law judge weighed the newly submitted relevant evidence and found it insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1)-(4) (2000). The administrative law judge

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on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

also found that the old evidence was insufficient to establish invocation. The administrative law judge then weighed the new evidence under Part 718 and determined that it was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the old evidence failed to establish the existence of pneumoconiosis. He further determined that, assuming *arguendo*, claimant established the existence of pneumoconiosis, the evidence of record failed to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b). The administrative law judge also determined that claimant was not entitled to the presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.305. Accordingly, the administrative law judge denied claimant's request for modification and the claim.

On appeal, claimant contends that the administrative law judge committed reversible error by not weighing all the evidence of record, but rather weighing only the newly submitted evidence, in analyzing the merits of claimant's request for modification at 20 C.F.R. §725.310 (2000). Claimant argues that the administrative law judge summarily found no mistake in a determination of fact in Judge Kichuk's prior denial of benefits and accepted his findings regarding the weight of the old evidence on each issue. Claimant further generally asserts that the prior denial contains mistakes in determinations of fact and, alternatively, that the new evidence demonstrates a change in claimant's condition, namely that he is now totally disabled due to pneumoconiosis. Claimant also contends that the administrative law judge failed to weigh properly the evidence he did consider, at 20 C.F.R. §727.203(a)(1), (a)(2) and (a)(4) (2000). At 20 C.F.R. §§718.202, 718.204(b), claimant argues that the administrative law judge did not analyze the evidence but relied on his erroneous findings under Part 727. Claimant asserts that the administrative law judge mischaracterized the pulmonary function study evidence and Dr. Cohen's medical opinion. Lastly, claimant contends that because the administrative law judge did not determine the disability causation issue, *see* 20 C.F.R. §718.204(c), the case must be remanded. Employer responds and urges the Board to affirm the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We address together claimant's contentions that the administrative law judge did not consider all the record evidence as he is required to do on modification at 20 C.F.R. §725.310 (2000), that the administrative law judge committed errors in the evidence he did weigh, and that the administrative law judge did not analyze the evidence at 20 C.F.R. §§718.202 and

718.204(b) but relied on his erroneous findings under Part 727.[2]

The record shows that the administrative law judge, on most issues before him, weighed the newly submitted evidence and then found that the old evidence was insufficient, as previously determined by Judge Kichuk in the prior denial and, in some cases, as previously affirmed by the Board in its 1998 or 2000 decisions.

At 20 C.F.R. §727.203(a)(1) (2000), the administrative law judge properly accorded greater weight to the six negative interpretations of the sole newly submitted x-ray dated September 12, 1989, over the four positive interpretations, because (1) they were supported by Dr. Wiot's negative interpretation and Dr. Wiot has superior radiological skills,[3] *Worhach v. Director, OWCP,* 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991), and because (2) the negative readings constitute a majority of the readings, *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997). The administrative law judge added, "As previously determined by Judge Kichuk and affirmed by the Board, I also find that the x-ray evidence previously submitted does not establish that the Claimant suffers from pneumoconiosis." June 26, 2003 Decision and Order at 10. The record shows that the Board affirmed, in its 1998 Decision and Order, Judge Kichuk's finding that the x-ray evidence failed to establish invocation at 20 C.F.R. §727.203(a)(1) (2000) based on its substantive review of the administrative law judge's credibility findings. *Dotson v. Peabody Coal Co.*, BRB No. 97-1722 BLA (Sept. 3, 1998)(unpublished), slip op. at 5, Director's Exhibit 77. Thus, while the administrative law judge relied on Judge Kichuk's prior finding at 20 C.F.R. §727.203(a)(1) (2000), he correctly noted that that finding had been affirmed by the Board, and determined that the newly submitted x-ray evidence failed to establish a ground for modification. Given these facts, we hold that the administrative law judge did not err in not independently weighing the old evidence on modification, given its established insufficiency at 20 C.F.R. §727.203(a)(1) (2000).

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[2]Claimant does not challenge the administrative law judge's determination that the newly submitted non-qualifying blood gas study dated September 12, 2000 does not establish a ground for modification at 20 C.F.R. §727.203(a)(3) (2000) or 20 C.F.R. §718.204(b)(2)(ii). We thus affirm these findings. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The administrative law judge noted that the record shows that Dr. Wiot is a B reader and Board-certified radiologist, that he has taught the B reader certification course for the National Institutes of Science and Health, and that he has taught this course in a number of foreign countries. Employer's Exhibits 8, 10.

Further, because the administrative law judge properly weighed the newly submitted x-ray evidence at 20 C.F.R. §727.203(a)(1) (2000), we reject claimant's assignment of error to the administrative law judge's reliance on this weighing of the newly submitted x-ray evidence to resolve the issue of whether the newly submitted x-ray evidence establishes a ground for modification at 20 C.F.R. §718.202(a)(1). June 26, 2003 Decision and Order at 12. We thus affirm the administrative law judge's finding on modification at 20 C.F.R. §727.203(a)(1) (2000).

At 20 C.F.R. §727.203(a)(2) (2000), the administrative law judge erroneously found that the sole newly submitted pulmonary function study, performed by Dr. Cohen on September 12, 2000, "does not meet required values in order to establish disability under the regulations." June 26, 2003 Decision and Order at 11. As claimant correctly asserts, the September 12, 2000 pulmonary function study resulted in values sufficient to establish the presence of a chronic respiratory or pulmonary disease at 20 C.F.R. §727.203(a)(2) (2000). We thus vacate the administrative law judge's weighing of this newly submitted pulmonary function study at 20 C.F.R. §727.203(a)(2) (2000).

The administrative law judge further found, at 20 C.F.R. §727.203(a)(2) (2000), that, "As previously determined by Judge Kichuk and affirmed by the Board, I also find that the pulmonary function evidence previously submitted fails to establish total disability. After considering the pulmonary function evidence, I find that it is insufficient to invoke the presumption under [20 C.F.R.] §727.203(a)(2)." June 26, 2003 Decision and Order at 11. The record shows that Judge Kichuk found that the old pulmonary function study evidence failed to establish invocation at 20 C.F.R. §727.203(a)(2) (2000) and that the Board, in its 1998 Decision and Order, affirmed Judge Kichuk's finding as it was unchallenged in that appeal. *Dotson v. Peabody Coal Co.*, BRB No. 97-1722 BLA (Sept. 3, 1998)(unpublished), slip op. at 3 n.2, Director's Exhibit 77. On appeal, claimant concedes that the previously submitted six pulmonary function studies were either non-qualifying or non-conforming. Claimant's Brief at 9. In light of these facts, we instruct the administrative law judge on remand to reconsider the sole newly submitted pulmonary function study to determine whether it establishes a ground for modification at 20 C.F.R. §725.310 (2000), given the insufficiency of the old pulmonary function study evidence at 20 C.F.R. §727.203(a)(2) (2000). While the September 12, 2000 pulmonary function study resulted in values sufficient to establish the presence of a chronic respiratory or pulmonary disease at 20 C.F.R. §727.203(a)(2) (2000), *see* discussion, *supra*, the administrative law judge on remand must determine whether this pulmonary function study conformed to applicable quality standards. *See* 20 C.F.R. §727.206(a); 20 C.F.R. Part 718 Appendix B. Additionally, the administrative law judge must reconsider whether the September 12, 2000 pulmonary function study produced qualifying results under Part 718 and conformed to applicable quality standards, *see* 20 C.F.R. Part 718 Appendix B, to determine whether it is sufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i).

At 20 C.F.R. §727.203(a)(4) (2000), the administrative law judge found that the newly submitted medical opinion evidence failed to establish invocation. The administrative law judge found that "Dr. Cohen is the only physician to opine that the Claimant is totally disabled due to pneumoconiosis," June 26, 2003 Decision and Order at 11,[4] and accorded less weight to Dr. Cohen's opinion "as it is inconsistent with his own nonqualifying objective medical evidence, and his corrected findings of normal FEV1/FVC ratios, only mild restriction on FVC, and reliance on moderate reduction in TLC, which was the part of the pulmonary function study found to be invalid upon review by Drs. Tuteur, Renn and Repsher." June 26, 2003 Decision and Order at 12. The administrative law judge determined that Dr. Cohen's opinion was outweighed by the contrary opinions of Drs. Tuteur, Renn, Repsher, and Dahhan. *Id*. at 12, 13, 14. As claimant correctly points out, *see* discussion *supra*, the administrative law judge mischaracterized as non-qualifying under Part 727 the results of the September 12, 2000 pulmonary function study underlying Dr. Cohen's report. Further, while the administrative law judge correctly noted that this pulmonary function study was invalidated by Drs. Tuteur, Renn, and Repsher, he relied on these invalidations without indicating a basis for preferring them over the opinion of the

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[4] Claimant argues that this is a mischaracterization of the record where Dr. Tuteur also found that claimant is totally disabled. Claimant's Brief at 13. In his most recent report dated November 29, 2001, Dr. Tuteur disagreed with Dr. Cohen's finding of a restrictive impairment. Dr. Tuteur further opined:

> Though Mr. Dotson may be totally and permanently disabled to such an extent that he is unable to complete the job of a coal miner, particularly if one recognizes that he has cerebrovascular disease that required a carotid endarterectomy and had a fractured hip that required open reduction and internal fixation and that he is currently 86 years old. Yet, with reasonable medical certainty, Mr. Dotson's total and permanent disability is not due to coal workers' pneumoconiosis in whole or in part or any other coalmine dust induced disease process. Tough [sic] he has simple coal workers' pneumoconiosis, it is of insufficient severity and profusion to produce impairment of pulmonary function. This is demonstrated by the objective data.

Employer's Exhibit 1. Given Dr. Tuteur's findings and the fact that Dr. Cohen found, conversely, that claimant was totally disabled due to coal workers' pneumoconiosis and chronic bronchitis related to his coal mine employment, we uphold the administrative law judge's characterization of Dr. Tuteur's findings as his opinion is insufficient to establish the presence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §727.203(a)(4) (2000) or total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv).

administering physician, Dr. Cohen. *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); June 26, 2003 Decision and Order at 12. The Administrative Procedure Act, 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) and 30 U.S.C. §932(a), requires the administrative law judge to set forth the reasons or bases for his findings and conclusions on all issues of fact and law. Because the administrative law judge's mischaracterization of the pulmonary function study underlying Dr. Cohen's report affected his weighing of that report at 20 C.F.R. §727.203(a)(4) (2000), we vacate his finding and further remand the case.

Discussing the medical opinion evidence, the administrative law judge added:

> Similarly, and as previously determined by Judge Kichuk and affirmed by the Board, I find that the previously submitted medical opinion evidence does not establish the presence of a totally disabling respiratory or pulmonary impairment. After considering all the medical reports of record, I find that the evidence is insufficient to invoke the presumption under [20 C.F.R.] §727.203(a)(4).

June 26, 2003 Decision and Order at 12. The record shows that the Board affirmed, in its June 22, 2000 Decision and Order, Judge Kichuk's finding that the old medical opinions of record failed to establish invocation at 20 C.F.R. §727.203(a)(4) (2000) based on a substantive review of that finding. *Dotson v. Peabody Coal Co.*, BRB No. 99-0988 BLA (June 22, 2000)(unpublished), slip op. at 5, Director's Exhibit 79. We, therefore, instruct the administrative law judge on remand to reconsider whether the newly submitted medical opinion evidence establishes a ground for modification at 20 C.F.R. §725.310 (2000) in light of the insufficiency of the old medical opinions at 20 C.F.R. §727.203(a)(4) (2000).

Further, claimant argues that the administrative law judge erred in relying on his finding that the newly submitted medical opinion evidence is insufficient to establish invocation at 20 C.F.R. §727.203(a)(4) (2000), to resolve the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), two separate issues. Claimant also argues that the administrative law judge again mischaracterized Dr. Cohen's opinion under Part 718. In light of our decision to vacate the administrative law judge's findings regarding the sufficiency of the newly submitted medical opinions to establish a ground for modification under Part 727, we further vacate the administrative law judge's findings at both 20 C.F.R. §§718.202(a)(4) and 718.204(b)(2)(iv).

Based on the foregoing, we affirm in part and vacate in part the administrative law judge's June 26, 2003 Decision and Order. We remand the case to the administrative law judge for further findings regarding claimant's February 5, 2001 request for modification of Judge Kichuk's denial of benefits. Should the administrative law judge find on remand that claimant has established a ground for modification under either Part 727 or Part 718, he must

then determine the merits of the claim based on the record as a whole. The administrative law judge must further determine whether reopening the case would render justice under the Act. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Accordingly, the administrative law judge's June 26, 2003 Decision and Order – Denial of Benefits is affirmed in part and vacated in part. The case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge