BRB No. 01-0514 BLA

CLYDE C. LAMBERT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Gerald F. Sharp (Gerald F. Sharp, P.C.), Lebanon, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Modification (00-BLA-0298) of Administrative Law Judge Linda S. Chapman awarding benefits on a claim[1] 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). In the first Decision and Order in this case, Administrative Law Judge Peter McC. Giesey adjudicated the claim pursuant to the criteria set forth at 20 C.F.R. Part 727 and found that claimant established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1), but that employer established rebuttal of the presumption pursuant to 20 C.F.R.

[1] Claimant, Clyde C. Lambert, the miner, filed his claim for benefits on September 13, 1979. Director's Exhibit 1.

§727.203(b)(2) and (3). Accordingly, benefits were denied. Following claimant's request for reconsideration, Judge Giesey again denied benefits. Subsequently, claimant appealed these decisions and the Board remanded the case for reconsideration of the relevant medical evidence on rebuttal pursuant to 20 C.F.R. §727.203(b)(2) and (3). *Lambert v. Clinchfield Coal Co.*, BRB No. 84-1850 BLA (Dec. 15, 1986) (unpub.); Director's Exhibit 64. On remand, Judge Giesey again denied benefits.[2]

Claimant filed a petition for modification with supporting evidence on June 20, 1988. Director's Exhibit 68. After conducting a formal hearing, Administrative Law Judge Melvin Warshaw awarded benefits, finding that the interim presumption was not invoked at 20 C.F.R. §727.203(a)(1) and (3), but was invoked at 20 C.F.R. §727.203(a)(2) and (4) and that the presumption was not rebutted at 20 C.F.R. §727.203(b)(1)-(4). Employer appealed the award of benefits and the Board affirmed Judge Warshaw's findings under Sections 725.310, 727.203(a)(1), (2), (3) and 727.203(b)(1) and (2) as unchallenged on appeal, affirmed his finding of no rebuttal at Section 727.203(b)(3), but vacated his finding of no rebuttal at Section 727.203(b)(4), and remanded the case for reconsideration under this subsection and for reconsideration of the onset date. *Lambert v. Clinchfield Coal Co.*, BRB No. 92-2402 BLA (Jun. 13, 1995) (unpub.); Director's Exhibit 138. Inasmuch as Judge Warshaw was no longer with the Office of Administrative Law Judges, the case was assigned to Administrative Law Judge Mollie W. Neal, who found that the evidence was sufficient to establish rebuttal of the presumption at Section 727.203(b)(4), and accordingly, denied benefits.

[2] A review of the record reveals that the Director, Office of Workers' Compensation Programs (the Director), appealed Judge Giesey's remand decision to the Board. Director's Exhibit 66. However, the Director requested that his appeal be dismissed without prejudice in light of claimant's modification request. Director's Exhibit 73. The Board, therefore, dismissed the Director's appeal. *Lambert v. Clinchfield Coal Co.*, BRB No. 88-1708 BLA (Mar. 21, 1989)(Order)(unpub.); Director's Exhibit 75.

Claimant filed a second petition for modification with supporting medical evidence on February 14, 1997. Director's Exhibit 144. Administrative Law Judge Joseph E. Kane conducted a formal hearing on May 13, 1998, and in a Decision and Order issued on January 22, 1999, found that there was no mistake in the prior determinations that claimant established invocation pursuant to Section 727.203(a)(2) and that employer established rebuttal of the presumption pursuant to Section 727.203(b)(4).[3] Judge Kane concluded, therefore, that claimant failed to establish either a mistake in a determination of fact or a change in conditions under Section 725.310 and, denied benefits.

Claimant timely appealed the denial of benefits to the Board. However, on March 30, 1999, claimant filed a Motion to Remand the case to the Office of Administrative Law Judges for consideration of additional evidence. The Board treated claimant's request as a motion for modification, and thus, dismissed claimant's appeal and remanded the case to the district director for modification proceedings. *Lambert v. Clinchfield Coal Co.*, BRB No. 99-0544 BLA (Apr. 16, 1999) (Order) (unpub.); Director's Exhibit 181. After an award of benefits by the district director, Director's Exhibit 196, the case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Linda S. Chapman (administrative law judge), whose decision is the subject of the instant appeal. The administrative law judge credited claimant with twenty-one and one-quarter years of qualifying coal mine employment and found that because the newly submitted evidence did not establish rebuttal of the presumption pursuant to Section 727.203(b)(4), there had been a mistake in a determination of fact in the prior decision, and accordingly, found that claimant was entitled to benefits. Hence, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in failing to consider whether claimant established a change in conditions on rebuttal, erred in finding that the medical opinion evidence failed to establish rebuttal pursuant to Section 727.203(b)(4), and erred in failing to consider whether the presumption was rebutted under Section 727.203(b)(3). In response, claimant urges affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating his intention not to participate in this appeal. Employer filed a reply brief arguing that the administrative law judge's determination that the newly submitted evidence precludes a finding of rebuttal is

[3] Judge Kane additionally found that the evidence was insufficient to establish rebuttal at Section 727.203(b)(1) and (b)(2). However he deferred consideration of the evidence at Section 727.203(b)(3) because it would not be necessary to reach that issue, which Judge Neal had not addressed, as she had correctly determined that employer had established rebuttal at Section 727.203(b)(4). Judge Kane found no mistake in the prior determination that rebuttal was affirmatively demonstrated. [1999] Decision and Order at 22-23.

irrational and not supported by substantial evidence.[4]

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that the administrative law judge erred in her analysis of whether claimant established a change in conditions. Employer recognizes that the administrative law judge found that claimant did not establish a change in conditions and that this finding cannot aggrieve employer. Nevertheless, employer insists on arguing that, since the prior administrative law judge denied benefits because he found that employer had rebutted the presumption by showing that claimant did not have pneumoconiosis, claimant must now, in order to establish a change in conditions, show that he has pneumoconiosis.

[4] We affirm the administrative law judge's findings regarding length of coal mine employment and that the evidence is sufficient to establish invocation of interim presumption under Section 727.203(a)(2) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order on Modification at 19, 22.

In *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that "claimant may simply allege that the ultimate fact...was mistakenly decided, and the [administrative law judge] may, if he so chooses, modify the final order on the claim. There is no need for a smoking-gun factual error, changed conditions, or startling new evidence."[5] We agree with employer that the administrative law judge did not specifically consider subsection (b)(4) rebuttal in her "change in conditions" analysis; however, she did consider (b)(4) rebuttal in her "mistake in fact" analysis. Decision and Order at 19-26. Thus, in light of the broad mandate provided to the administrative law judge in *Jessee* to determine whether the ultimate fact was mistakenly decided without reference to "factual error, changed conditions, or startling new evidence," and as the administrative law judge considered the evidence relevant to (b)(4) rebuttal, she did not err by failing to discuss it in the context of change in conditions. *See Branham v. Bethenergy Mines, Inc.*, 21 BLR 1-79 (1998)(McGranery, J., dissenting); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Furthermore, implicit in the administrative law judge's finding, that employer established that claimant does not have pneumoconiosis, is the fact that claimant failed to prove that he has developed pneumoconiosis. If this were the only argument employer raised on appeal the Board would be obliged to dismiss the appeal for failure to raise a "substantial question of law or fact...." 33 U.S.C. §921(b)(3). Employer also contends, however that the administrative law judge erred in finding that claimant had proved a mistake in fact in the prior decision.

Employer argues that the administrative law judge's finding of a mistake of fact rests on a flawed analysis of the medical opinion evidence. Employer asserts that the administrative law judge erred in discrediting the opinion of Dr. Hippensteel when she found that it was based on a belief that pneumoconiosis cannot produce an obstructive impairment contrary to the holdings in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) and *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996).[6] Rather, employer contends that, like the physicians in *Stiltner*, Dr. Hippensteel did

[5] It is well established that the modification procedure is extraordinarily broad, especially insofar as it permits the correction of mistaken factual findings. *Betty B Coal Company v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999). The plain import of this prong under modification is to vest the finder-of-fact 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. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255, 92 S. Ct. 405, 407 (1971).

[6] In *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, noted that chronic obstructive lung disease was encompassed within the definition of

not assume that pneumoconiosis can never cause an obstructive impairment, but merely that he would expect, with the level of severe obstruction evidenced by claimant, to see also a restrictive defect. Employer's Exhibit 26 at 19; *Stiltner* at 341, 2-254. Thus, employer contends that the administrative law judge erred in rejecting Dr. Hippensteel's opinion that claimant did not have pneumoconiosis as defined by the Act as contrary to the holdings in *Warth* and *Stiltner*. We agree. Because Dr. Hippensteel acknowledged that pneumoconiosis can cause an obstructive impairment, but nonetheless found that claimant's respiratory impairment did not arise out of coal mine employment, Employer's Exhibit 26 at 19, we must remand this case for the administrative law judge to reconsider Dr. Hippensteel's opinion pursuant to *Stiltner, supra*. In reconsidering Dr. Hippensteel's opinion on remand, the administrative law judge must evaluate it in light of the totality of the opinion. *Stiltner* at 342, 2-254; *see Milburn Colliery v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-297 (1984).

Employer additionally contends that the administrative law judge erred in finding that Dr. Hippensteel failed to address whether coal dust caused or aggravated claimant's pulmonary impairment. As employer contends, however, Dr. Hippensteel did address whether coal dust caused or aggravated claimant's pulmonary impairment when he stated that it did not. Employer's Exhibit 26 at 29. Further, as employer contends, Dr. Hippensteel explained why he did not believe claimant's coal mine employment aggravated his pulmonary impairment. Employer's Exhibit 26 at 20-22. Accordingly, we vacate the administrative law judge's findings regarding Dr. Hippensteel's opinion and remand the case

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pneumoconiosis under the Act, and therefore the court vacated an administrative law judge's finding relying on physicians' opinions that the miner did not suffer from pneumoconiosis because their opinions were based on the erroneous assumption that obstructive disorders cannot be caused by coal mine employment. The court subsequently clarified its holding in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), however, and explained that administrative law judges are not precluded from relying on physicians' opinions that, while noting the absence of a restrictive impairment, are not based upon the erroneous assumption that coal mine employment can never cause chronic obstructive pulmonary disease (emphasis added).

for reconsideration of his opinion. *See Stiltner, supra*; *Hicks, supra*; *Hess, supra*.

Employer argues similarly that the administrative law judge erroneously discredited the opinion of Dr. Sargent because it violated the Fourth Circuit's holdings in *Warth* and *Stiltner*. As with the opinion of Dr. Hippensteel, employer contends that the administrative law judge erred in rejecting the opinion of Dr. Sargent when she inferred that Dr. Sargent believed that pneumoconiosis cannot cause an obstructive impairment. Decision and Order at 25. Employer contends that this is error because Dr. Sargent acknowledged that pneumoconiosis can cause an obstructive impairment, Director's Exhibit 169 at 11, 12. Accordingly, on remand the administrative law judge must reconsider Dr. Sargent's opinion. *See Stiltner, supra*; *Hicks, supra*; *Hess, supra*.

Employer contends further that the administrative law judge erred in finding a mistake in fact established when she found that Judge Kane erred in the previous Decision and Order in concluding that the presumption was rebutted at subsection (b)(4), based on his determination that there was no evidence showing that the non-reversible portion of claimant's obstruction was related to coal dust exposure or that coal dust exposure contributed to claimant's asthma. Employer contends that Judge Kane had correctly found that the opinions of Drs. Sargent, Fino, and Hippensteel established by a preponderance of the evidence that claimant did not have pneumoconiosis and that the administrative law judge in the instant case is "nit-pick[ing]", by stating that these doctors did not rule out every conceivable possibility for the cause of claimant's respiratory impairment, which is not required. Rather, employer contends that the opinions of Drs. Sargent, Fino and Hippensteel, that none of claimant's lung disease or respiratory impairment was related to coal mine employment, are sufficient to rebut the presumption, if credited. We agree.

Employer must provide competent evidence demonstrating the absence of pneumoconiosis as defined by the Act, *i.e.*, a respiratory or pulmonary impairment arising out of or significantly related to or aggravated by coal mine employment, in order to rebut the presumption at subsection (b)(4). 20 C.F.R. §727.203(b)(4); *see Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1985); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). In this case, however, the doctors in question discussed fully claimant's disabling pulmonary condition and stated that it was not due to coal mine employment or aggravated by coal mine employment, Director's Exhibits 25, 169, 171; Employer's Exhibits 1, 12, 13. The administrative law judge must, therefore, consider these opinions in their totality in determining whether they are credible evidence to establish the absence of pneumoconiosis as defined by the Act. *See Hicks, supra*; *Pavesi v. Director, OWCP*, 6 BLR 1-1169 (1984); *vacated and remanded on other grounds*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *Biggs, supra*; *Coleman v. Kentland Elkhorn Coal Co.*, 5 BLR 1-260 (1982); *see generally Piney Mountain Coal Co. v. Mays*, F.3d , No. 97-2560, 21 BLR 2-587, 605-606 (4th Cir. 1999).

Finally, employer contends that the administrative law judge erred by failing to address the issue of whether the medical opinion evidence was sufficient to establish rebuttal pursuant to Section 727.203(b)(3). Although she found that rebuttal was not established under Section 727.203(b)(4), the administrative law judge did not address whether rebuttal was established under Section 727.203(b)(3), or any of the other methods of rebuttal. Because the administrative law judge correctly found that employer contested all requisite issues of entitlement, Decision and Order on Modification at 18; Director's Exhibit 199, and because modification permits the administrative law judge to reconsider whether the ultimate fact, *i.e.*, the award of benefits, was properly decided, *see Jessee, supra*, employer is correct in asserting that the administrative law judge should have considered whether the evidence was sufficient to establish rebuttal pursuant to Section 727.203(b)(3). *Jessee*, *supra*; *Branham*, *supra*. Additionally, in view of the broad mandate granted under modification for determining whether the ultimate fact was mistakenly decided, the administrative law judge may also, if necessary, consider whether the presumption is invoked or rebutted under any of the other methods provided at Section 727.203(a)(1)-(4) and (b)(1)-(4). *See Jessee, supra*; *see also Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Branham*, *supra*.

Employer implies that the administrative law judge could not consider whether claimant established invocation of the presumption pursuant to Section 727.203(a)(1); however, we disagree. Regardless of any prior findings, as the administrative law judge must determine on modification whether the ultimate fact was properly decided, *Jessee, supra*, and a finding of subsection (a)(1) invocation could preclude (b)(4) rebuttal, she properly considered evidence relevant to subsection (a)(1) invocation even though invocation had been established at subsection (a)(2). *See Mullins Coal Co. of Virginia, Inc. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1989), *reh'g denied*, 484 U.S. 1047 (1988); *Curry v. Beatrice Pocahontas Coal Co.*, 18 BLR 1-59 (1994), *rev'd on other grounds*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988). Further, because there is evidence of complicated pneumoconiosis in this case and the administrative law judge did not consider this evidence pursuant to the standard set forth by the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), we must remand this case for the administrative law judge to consider any evidence relevant to the existence of complicated pneumoconiosis under the standard set forth there. *See* 30 U.S.C. §921(c)(3) as implemented by 20 C.F.R. §410.418; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 242-43, BLR (4th Cir. 1999). Accordingly, we vacate the administrative law judge's finding of modification and the award of benefits, and remand the case for the administrative law judge to reconsider the medical evidence.

Accordingly, the Decision and Order on Modification of the administrative law judge

is affirmed in part, vacated in part, and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge