BRB No. 01-0533 BLA

JOHN E. STILTNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK 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 Remand of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Vinyard & Moise), Abingdon, Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly, PLLC), Charleston, West Virginia, for employer.

Edward Waldman (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-BLA-1506) of Administrative Law Judge Alexander Karst awarding 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] This case has been before the Board previously.[2] In the

[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 on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board issued an order on March 15, 2001 requesting supplemental briefing in the instance case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]The procedural history of this case has previously been set forth in detail in the Board's prior decision in *Stiltner v. Island Creek Coal Co.*, BRB No. 99-0241 BLA (August

1998 Decision and Order, the administrative law judge noted that the instant claim is a modification request and considered entitlement pursuant to the provisions of 20 C.F.R. Part 727 (2000); the administrative law judge concluded that claimant established a basis for modification pursuant to 20 C.F.R. §725.310 (2000) and subsequently determined that the evidence of record was sufficient to establish entitlement to benefits. Decision and Order dated September 16, 1998. The administrative law judge further found that February 1991 was the month of onset of claimant's total disability for the purpose of commencing benefits. Order Granting Motion for Reconsideration and Modifying Previous Order dated October 23, 1998. On appeal, the Board vacated the administrative law judge's award of benefits as well as his onset of disability determination and remanded the case for the administrative law judge to reconsider the evidence of record. *See Stiltner v. Island Creek Coal Co.*, BRB No. 99-0241 BLA (August 30, 2000)(unpublished).

On remand, the administrative law judge concluded that claimant established a basis for modification as the evidence of record was sufficient to prevent rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) and (4) (2000). Decision and Order on Remand at 19-22. The administrative law judge further determined that as claimant established a mistake in fact in the prior decision, benefits were to be awarded commencing November 1, 1979, the date claimant filed his claim. Decision and Order on Remand at 22. Accordingly, benefits were awarded. In the instant appeal, employer contends that the administrative law judge erred in finding modification established, in finding the evidence of record insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) and (4) (2000) and in determining the date of the onset of claimant's total disability. Claimant has not responded in the instant appeal. The Director, Office of Workers' Compensation Programs (the Director), has responded and asserts that employer's arguments regarding the standards used by the administrative law judge in addressing the issues of modification and rebuttal are without merit. The Director declined to take a position with respect to the administrative law judge's weighing of the medical evidence.

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 the 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).

30, 2000)(unpublished), which is incorporated herein by reference.

After consideration of the administrative law judge's Decision and Order on Remand, 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 that there is no reversible error contained therein. Employer initially contends that the administrative law judge erred in finding modification established pursuant to 20 C.F.R. §725.310 (2000) as the administrative law judge did not offer a basis for his mistake of fact finding. Employer's Brief at 6-7. We disagree. In the instant case, the administrative law judge found modification established based on the newly submitted evidence and upon further reflection on its effect on the record as a whole. Decision and Order on Remand at 20-22. The United States Court of Appeals for the Fourth Circuit has held that to support a petition for modification, a 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 as there is no need for a smoking-gun factual error, changed conditions or startling new evidence.[3] *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). As a result, based on the circumstances of the instant case, we conclude that the administrative law judge properly considered the merits of this claim without making a preliminary determination that claimant established a change in condition or a mistake in the determination of fact pursuant to 20 C.F.R. §725.310 (2000) as such a finding is subsumed in his decision on the merits. *See Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Motichak v. Beth Energy Mines, Inc*, 17 BLR 1-14 (1992); Decision and Order on Remand at 19-23.

Employer further contends that the administrative law judge erroneously violated the "law of the case" principle in granting modification. Employer's Brief at 6-7. We disagree with employer's specific argument. The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). The Fourth Circuit has declared that:

> Under law of the case doctrine... the decision of an appellate court establishes the law of the case [and] it must be followed in all subsequent proceedings in the same case... unless: (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work a manifest injustice." (Internal

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

quotations omitted) (citation omitted.)

United States v. Aramony, 166 F.3d 655, 661 (4th Cir. 1999), quoted in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 203 F.3d 291, 303, 304 (4th Cir. 2000). In requests for modification, Section 22 of the Longshore and Harbor Workers' Compensation Act vests the administrative law judge with the authority to reconsider the previous decision and to correct prior mistakes in fact or to decide if claimant established a change in condition. *See* 33 U.S.C. §922; 30 U.S.C. §932(a); 20 C.F.R. §725.310 (2000); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The administrative law judge can determine whether a mistake in fact in the prior decision occurred by reviewing wholly new evidence, cumulative evidence, or merely upon further reflection of the evidence initially submitted.[4] *O'keeffe, supra*; *Jessee, supra*; *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). The administrative law judge's authority to correct mistakes is not limited to any kind of factual mistake, but rather, extends to any mistake of fact, including "the ultimate fact" of entitlement. *Jessee, supra*. Therefore, as the administrative law judge has the authority, if not the duty, to reconsider all the evidence for any mistake of fact, including the ultimate fact of entitlement, we hold that there is no merit in employer's contention that the law of the case principle limits the administrative law judge's scope of authority on modification. *See Aramony, supra*; *O'Keeffe, supra*; *Jessee, supra*; *Kovac, supra*.

With respect to the merits, employer asserts that the administrative law judge improperly weighed the medical opinions of record. Employer's Brief at 8-10. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers and is therefore rejected. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Employer contends that the administrative law judge erred in finding that employer failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3), (4) (2000), arguing that the administrative law judge erred in requiring employer to prove that claimant's disability was not caused by his coal mine employment and in failing to weigh all of the relevant evidence with respect to the existence of pneumoconiosis. The Fourth Circuit has held that in order to establish rebuttal pursuant to subsection (b)(3), the party opposing entitlement must rule out any causal connection between a miner's disability and his coal

[4]Contrary to employer's contention, the Board instructed the administrative law judge to reconsider whether a mistake of fact or a change in conditions was established. Employer's Brief at 7, *Stiltner, supra* at 7.

mine employment. *See Cox v. Shannon-Pocahontas Mining Co.*, 6 F.3d 199, 18 BLR 2-31 (4th Cir. 1993); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *see also Phillips v. Jewell Ridge Coal Co.*, 825 F.2d. 408, 10 BLR 2-160 (4th Cir. 1987); *see generally Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). A causal connection can be "ruled out" if positive evidence demonstrates that the miner suffers from no respiratory or pulmonary impairment of any kind or if such evidence explains all of any impairment present and attributes it solely to sources other than coal mine employment. *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

In the instant case, the administrative law judge properly reviewed the evidence of record *de novo* pursuant to Section 725.310 (2000), and permissibly disagreed with the credibility determinations previously rendered and affirmed in the prior decisions pursuant to Section 727.203(b)(3) (2000), since he found that the ultimate conclusion, that the evidence was sufficient to establish rebuttal thereunder, was incorrect. *See Jessee, supra*. In evaluating the evidence relevant to subsection (b)(3) rebuttal, the administrative law judge reasonably determined that the opinions of Drs. Endres-Bercher, Sutherland, Berry, Robinette and Caday, which support a finding that claimant's totally disabling impairment is due, at least in part, to his lengthy coal mine employment, outweighed the opinions of Drs. Abernathy, Sargent, Renn, Morgan, Fino and Castle, who concluded that claimant had an impairment solely due to smoking, obesity and age.[5] Decision and Order on Remand at 20-22. The administrative law judge reasonably discounted the opinions of Drs. Sargent, Morgan and Fino, which ruled out pneumoconiosis as a contributing factor in claimant's total disability, as he found that the reasoning behind these opinions was flawed since these physicians relied on the proposition that if no functional impairment is present at the time that the miner leaves the mines, the miner will not develop a functional impairment in the absence of further coal dust exposure. Decision and Order on Remand at 21; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge rationally concluded, therefore, that their opinions were insufficient to rule out coal mine employment as a cause of claimant's total disability under

[5]The administrative law judge properly found that Drs. Wright, Sutherland, Berry, Abernathy, Endres-Bercher, Robinette and Castle, all examining physicians, as well as Dr. Caday, the miner's treating physician, and Dr. Renn, a reviewing physician, all agreed with the diagnosis of chronic bronchitis and that Dr. Morgan, a reviewing physician, was the only doctor to disagree with that diagnosis. Decision and Order on Remand at 20; Director's Exhibits 12, 14, 27, 57, 61, 62, 77, 81, 85, 88, 89; Claimant's Exhibits 1, 2; Employer's Exhibits 3, 9-14. The administrative law judge concluded that claimant suffered from chronic bronchitis based on this evidence and determined that the physicians failed to rule out coal dust exposure as a cause. Decision and Order on Remand at 20.

Section 727.203(b)(3) (2000). Decision and Order on Remand at 21-22; *Cox, supra*; *Phillips, supra*; *Massey, supra*.

Employer's contention regarding the administrative law judge's failure to consider the medical opinions in light of *Milburn Colliery Company v. Hicks*, 138 F.2d 524, 21 BLR 2-323 (4th Cir. 1998), under Section 727.203(b)(3) (2000) is without merit. The administrative law judge rationally relied on Dr. Robinette's opinion to find that a connection between claimant's chronic bronchitis and coal dust exposure was not ruled out, thus supporting the conclusion that claimant's total disability was substantially due to coal dust exposure. *Id*. The administrative law judge acted within his discretion as trier-of-fact, therefore, in rejecting, as unpersuasive, the opinions of Drs. Renn, Castle, Fino and Sargent as compared to the detailed and fully explained opinion of Dr. Robinette, *see generally Clark v. Karst-Robbins Coal* Co., 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), that claimant's disability was related, at least in part, to dust exposure in coal mine employment and was not attributable solely to smoking, obesity and age. *See Kuchwara, supra*; *Piccin, supra*. The administrative law judge also permissibly determined that the medical opinion evidence was sufficient to establish a mistake of fact in the previous finding that rebuttal of the interim presumption pursuant to subsection (b)(3) was established. Decision and Order on Remand at 22; *Massey, supra*; *Grigg, supra*; *Lockhart, supra*. Furthermore, contrary to employer's contention, the administrative law judge acknowledged the qualifications of the physicians in his discussion of their opinions. Decision and Order on Remand at 2-19. Inasmuch as the administrative law judge's rationale comports with *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), in which the Fourth Circuit indicated that the administrative law judge must consider the credentials of the respective physicians and the extent to which their opinions are documented, the administrative law judge acted within his discretion in determining that the medical opinion evidence of record was insufficient to establish rebuttal pursuant to Section 727.203(b)(3) (2000). *See Akers, supra*; *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *see also Hicks, supra*.

Employer further contends that remand is required in the instant case as the administrative law judge failed to properly consider the medical opinions and x-ray evidence in determining if rebuttal of the interim presumption was established pursuant to 20 C.F.R. §727.203(b)(4) (2000) in light of *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000). Employer's Brief at 10. We disagree. The administrative law judge noted that the x-ray evidence in the instant case was in equipoise. Decision and Order on Remand at 2, 20. In finding that the evidence was insufficient to establish rebuttal pursuant to subsection (b)(4), the administrative law judge permissibly relied on the medical opinions relating the miner's chronic bronchitis to coal dust exposure as well as the fact that the x-ray evidence was in equipoise. Decision and Order on Remand at 22; *Dockins v. McWane Coal Co.*, 9 BLR 1-57 (1986). Subsection (b)(4) rebuttal requires the party opposing entitlement to rebut the

interim presumption by presenting evidence which establishes both the absence of clinical pneumoconiosis and the absence of pneumoconiosis as defined in the Act, *i.e.*, the absence of any respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§727.203(b)(4) (2000). The administrative law judge acted within his discretion as fact-finder in determining that employer failed to establish rebuttal of the interim presumption as the administrative law judge rationally found that the medical opinion evidence established the existence of legal pneumoconiosis and properly noted that the x-ray evidence was in equipoise and thus insufficient to meet employer's burden under subsection (b)(4). *Kuchwara, supra*; *Jones v. Kaiser Steel Corp.*, 8 BLR 1-339 (1985); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1985); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Thus, the administrative law judge rationally weighed the medical evidence and his credibility determinations regarding the evidence under subsection (b)(4) were proper. *Kuchwara, supra*; *Kozele, supra*. Consequently, we affirm the administrative law judge's finding that the evidence was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4) (2000) as it is supported by substantial evidence.

Finally, employer argues that the administrative law judge erred in setting the date of onset of claimant's disability at November 1979, the month claimant filed for benefits. Specifically, employer argues that as the prior rebuttal findings were affirmed by the United States Court of Appeals for the Fourth Circuit, then claimant did not have any impairment related to coal dust exposure as of 1996 and therefore the law of the case controls. Employer's Brief at 10. We find no merit to employer's assertion.

Payment of benefits begins on the first day of the month in which claimant becomes totally disabled, unless the evidence fails to establish the month of onset. *See* 20 C.F.R. §725.503. If the evidence fails to establish the month of onset of total disability, payment of benefits begins on the first day of the month in which the claim was filed. In the instant case, after concluding that claimant established a mistake of fact, the administrative law judge decided that he was unable to determine, from the evidence of record, the date of onset of claimant's total disability due to pneumoconiosis. Decision and Order on Remand at 22

On the facts of this case, as the administrative law judge found claimant established modification based on a mistake of fact, the administrative law judge properly found that the commencement of claimant's benefits began in November 1979, the month in which claimant filed his claim for benefits. *See Eifler v. Director, OWCP*, 926 F.2d 633, 15 BLR 2-1 (7th Cir. 1991); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Consequently, as we have held that the law of the case principle does not limit the

administrative law judge's scope of authority on modification and employer fails to make a specific challenge to the administrative law judge's weighing of the relevant evidence, we affirm the administrative law judge's date of onset of disability finding as it is supported by substantial evidence and is in accordance with law. *See* 20 C.F.R.§725.503; Decision and Order on Remand at 22; *Owens, supra*; *Lykins, supra*; *Carney, supra*; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge