BRB No. 04-0535 BLA

JERRY S. SAPP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/18/2005
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Richard Wehner (Wehner Law Offices), Kingwood, West Virginia, for claimant.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-0053) of Administrative Law Judge Fletcher E. Campbell, Jr. denying 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). The administrative law judge found the instant case to be a request for modification of the denial of claimant's application for benefits originally filed on June 6, 1979, and adjudicated the claim under 20 C.F.R. Part 727.[1] Decision and Order at 3. The administrative law judge credited claimant with ten

[1] Claimant filed his initial application for benefits on June 6, 1979, which was denied by the district director on May 7, 1980. Director's Exhibits 1, 44. Claimant filed

years of coal mine employment, based on a stipulation of the parties. Decision and Order at 1; Hearing Transcript at 8. Weighing the evidence submitted since Administrative Law Judge Stuart A. Levin's 1988 Decision and Order denying benefits, the administrative law judge found the x-ray evidence insufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to Section 727.203(a)(1) (2000). Decision and Order at 12. He further found that the new

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two separate letters, including one dated May 9, 1980, stating that he wished to pursue his claim. Director's Exhibits 45, 46. Claimant filed a second application for benefits on December 8, 1982, which was denied by the district director on September 23, 1983. Director's Exhibits 2, 47. The claim was thereafter transferred to the Office of Administrative Law Judges (OALJ). Following a formal hearing, Administrative Law Judge Stuart A. Levin found that claimant's May 9, 1980 letter constituted a request for modification and that the 1979 claim was still viable. He then found the medical evidence of record insufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to Section 727.203(a)(1)-(4). Accordingly, benefits were denied. Director's Exhibit 89. Claimant appealed to the Board.

In a Decision and Order issued on March 27, 1992, the Board affirmed Judge Levin's denial of benefits as supported by substantial evidence. *Sapp v. Ruttmann Corp*., BRB No. 88-2048 BLA (Mar. 27, 1992)(unpub.); Director's Exhibit 104. However, pursuant to claimant's motion for reconsideration referencing new evidence, the Board remanded the case to the district director for modification proceedings. *Sapp v. Ruttmann Corp*., BRB No. 88-2048 BLA (Jul. 28, 1992)(Order)(unpub.); Director's Exhibit 106. Noting that the district director's functions were "purely ministerial," the Board stated that once the district director finished processing the evidence, the case was to be sent to the administrative law judge for disposition of the modification request. *Id*., slip op. at 2. However, on May 12, 1993 the district director denied claimant's request for modification and by a letter dated June 14, 1993, the district director stated that no appeal had been filed, and, therefore the claim was closed. Director's Exhibits 111, 113, 115, 117.

Claimant filed a third application for benefits on November 10, 1998, which was denied by the district director on September 20, 1999. Director's Exhibits 3, 52. Following several remands by the OALJ to the district director for further development of the record, Director's Exhibits 156, 171, the case was transferred to the OALJ and assigned to Judge Campbell. At the formal hearing, the Director, Office of Workers' Compensation Programs noted that the original 1979 claim was still viable because the district director was not in a position in 1993 to issue a final decision on the modification request. Hearing Transcript at 7-10.

pulmonary function study and blood gas study evidence did not yield qualifying values and, therefore, was insufficient to establish invocation pursuant to Section 727.203(a)(2)-(3) (2000). Decision and Order at 12-13. The administrative law judge also found that the medical opinion evidence was insufficient to establish invocation pursuant to Section 727.203(a)(4) (2000). In addition, the administrative law judge stated that even if claimant had established invocation, the presumption would have been rebutted pursuant to Section 727.203(b)(4) (2000). Decision and Order at 13. Lastly, the administrative law judge found that Judge Levin's evaluation of the evidence was correct and that there was no basis to disturb his findings. Decision and Order at 14. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits, arguing that the x-ray evidence and medical opinion evidence is sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) and (a)(4) (2000). In response, the Director, Office of Workers' Compensation Programs, urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's decision to deny claimant's request for modification.[3] On appeal, claimant generally contends that the administrative law judge

[2] The parties do not challenge the administrative law judge's findings under 20 C.F.R. §727.203(a)(2) and (a)(3). We therefore affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Claimant notes that contrary to the administrative law judge's finding, see Decision and Order at 1, he did not stipulate to ten years of coal mine employment, but rather, testified to seventeen years of employment. Claimant's Brief at 7; Hearing Transcript at 6. Error, if any, in the administrative law judge's crediting of ten years of coal mine employment would be harmless, as the crediting of any additional years of coal mine employment does not afford claimant any other presumptions under Part 727, 20 C.F.R. §727.203(a) (2000), and contrary to claimant's contention, the administrative law judge did not use a discrepancy in length of coal mine employment as a basis for

erred in finding that the new x-ray evidence is insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) (2000). In support of his contention, claimant sets forth eleven readings of six x-ray films and one medical report that he considers supportive of his burden of proof, based on his noting that the x-ray readings state that there are "parenchymal abnormalities consistent with pneumoconiosis." Claimant's Brief at 2; Director's Exhibits 42, 110, 135, 136, 159, 164, 168. Claimant contends that these allegedly positive x-rays establish the existence of pneumoconiosis and invoke the interim presumption. This contention lacks merit.

Initially, we hold that claimant's reliance on Dr. Bender's 1999 medical report referencing x-ray evidence is misplaced, as only the actual x-ray interpretations are considered under Section 727.203(a)(1). Moreover, contrary to claimant's contention, of the eleven x-ray readings he sets forth as supportive of his burden, the two readings of the June 20, 1985 film could not support a finding of a change in conditions pursuant to Section 725.310 (2000), because Judge Levin issued his Decision and Order in 1988. In addition, the two x-ray readings by Dr. Wiot did not reflect that there are any abnormalities consistent with pneumoconiosis, but rather, that there are **no** parenchymal or pleural abnormalities consistent with pneumoconiosis, Director's Exhibit 110 (emphasis added), and three other readings by Drs. Binns, Ranavaya and Jaworski were classified as 0/1, which is a negative and not a positive reading. *Canton v. Rochester & Pittsburgh Coal Co*., 8 BLR 1-475 (1986); *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984).

Of the remaining x-ray evidence highlighted by claimant, there are two films, with a total of three readings, read as positive by B-readers. The administrative law judge properly found both films negative based upon a negative reading of each film by a physician who is dually qualified as a B-reader and Board-certified radiologist. *Compare* Director's Exhibits 135, 159, 168 *with* Director's Exhibits 142, 166; *Edmiston v. F & R Coal Co*., 14 BLR 1-710 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Roberts v. Bethlehem Mines Corp*., 8 BLR 1-211 (1985). As claimant does not otherwise allege any specific error in the administrative law judge's weighing of the evidence, we affirm his finding that the newly submitted x-ray evidence is insufficient to establish invocation of the interim presumption.[4] 20 C.F.R. §727.203(a)(1) (2000); *see Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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discrediting any evidence of record. *See generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4] The record does not contain any autopsy or biopsy evidence. 20 C.F.R. §727.203(a)(1) (2000).

Likewise, we affirm the administrative law judge's finding that the medical evidence is insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4) (2000). Decision and Order at 13. In challenging the administrative law judge's finding, claimant generally contends that he has established the existence of a totally disabling respiratory impairment, by stating his need for additional medications and the use of a nasal BIPAP machine and portable oxygen, as set forth in medical reports. Claimant's Brief at 5; *see* Director's Exhibits 129, 140, 141. Claimant, however, does not allege any specific error in the administrative law judge's consideration of the relevant medical opinion evidence.[5] *See Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109; *see also Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, because the Board is not empowered to reweigh the evidence, or substitute its own inferences on appeal, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4) (2000).[6] Decision and Order at 13; 20 C.F.R. §727.203(a)(4) (2000); *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *see also Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Since the administrative law judge reasonably exercised his discretion as trier-of-fact in finding the evidence of record insufficient to support granting modification, we affirm his denial of benefits.

[5] The administrative law judge reasonably found that the opinion of Dr. Bender, the only newly submitted medical opinion supportive of claimant's burden, was entitled to no weight because it was merely a conclusory statement in which the physician did not state the facts or data upon which he based his opinion. Decision and Order at 13; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985).

[6] In light of the affirmance of the administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4), we need not address claimant's allegation of error in the administrative law judge's finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order denying 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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REGINA C. McGRANERY
Administrative Appeals Judge