BRB No. 09-0454 BLA

JAMES D. CHARLES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KNOX CREEK COAL CORPORATION	)	DATE ISSUED: 03/24/2010
	)	
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 Sixth Modification Request and Denying Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

James D. Charles, Wolford, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Sixth Modification Request and Denying Benefits (07-BLA-0025) of Administrative Law Judge Edward Terhune Miller (the administrative law judge), rendered 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). This case

[1] Claimant, James D. Charles, filed his application for benefits on November 22, 1978. Director's Exhibit 1. Claimant's most recent request for modification, filed on January 16, 2007, is the subject of this appeal. Director's Exhibit 270.

is before the Board pursuant to the claimant's sixth request for modification at 20 C.F.R. §725.310 (2000). The lengthy procedural history of the case is set forth by the administrative law judge in his Decision and Order.[2] In the decision now before us, the administrative law judge adjudicated this claim pursuant to the provisions set forth in 20 C.F.R. Part 727 and found that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). Further, the administrative law judge found that because claimant failed to establish a totally disabling respiratory impairment, entitlement to benefits was precluded under 20 C.F.R. Part 410, Subpart D. Therefore, the administrative law judge concluded, based on a review of all the evidence of record, that claimant failed to demonstrate a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). The administrative law judge also found that claimant failed to demonstrate a change in conditions at Section 725.310 (2000) because he failed to submit any new evidence in support of his current request for modification. Accordingly, the administrative law judge denied claimant's request for modification and again denied benefits on the claim.

On appeal, claimant contends generally that the administrative law judge erred in failing to find invocation of the interim presumption of total disability due to pneumoconiosis under Section 727.203(a) and, therefore, erred in failing to find a basis for modification of the prior denial. In response, employer urges affirmance of the denial of benefits.[3] The Director, Office of Workers' Compensation Programs, is not participating in this appeal.

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[2] The most recent prior adjudication of this claim was rendered by Administrative Law Judge Mollie W. Neal. By Decision and Order dated October 25, 2004, Judge Neal adjudicated the claim pursuant to the provisions set forth in 20 C.F.R. Part 727, credited claimant with twenty-eight years and three months of qualifying coal mine employment, and found that the evidence failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). Further, Judge Neal found that, because claimant failed to establish a totally disabling respiratory impairment, entitlement to benefits was precluded under 20 C.F.R. Part 410, Subpart D. Therefore, she concluded, based on a review of all the evidence of record, that claimant failed to demonstrate either a mistake in a determination of fact or a change in conditions at 20 C.F.R. §725.310 (2000) and, accordingly, denied claimant's request for modification and denied benefits. Director's Exhibit 253. Claimant appealed and the Board affirmed Judge Neal's denial of modification. *Charles v. Knox Creek Coal Corp.*, BRB Nos. 05-0215 BLA and 05-0215 BLA-A (Sept. 29, 2005) (unpub.); Director's Exhibit 264.

[3] In its response brief, employer argues that because this proceeding involves claimant's sixth petition for modification on a claim filed in 1978, claimant's successive modification requests have forced employer to litigate this claim for more than thirty years. As such, employer urges that claimant's repeated requests for modification not

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[4] 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).

Section 203(a) of the Secretary of Labor's "interim regulations" governing black lung benefits claims filed between July 1, 1973, and April 1, 1980, provides that a claimant who engaged in coal mine employment for at least 10 years is entitled to a rebuttal presumption of eligibility for disability benefits if he meets one of four medical requirements: (1) a chest x-ray "establishes" the presence of pneumoconiosis; (2) ventilatory studies establish the presence of any respiratory or pulmonary disease of a specified severity; (3) blood gas studies demonstrate an impairment in the transfer of oxygen from the lungs to the blood; or (4) other medical evidence, including the documented opinion of a physician exercising reasonable medical judgment, establishes a totally disabling respiratory impairment. *See* 20 C.F.R. §727.203(a)(1)-(4). Section 203(b) provides that "all relevant medical evidence shall be considered" in the adjudication of a claim, and that the interim presumption is rebutted if the evidence establishes: (1) that the claimant is doing his usual or comparable work; (2) that he is capable of doing such work; (3) that his disability did not arise, even in part, out of coal mine employment; or (4) that he does not have pneumoconiosis. 20 C.F.R. §727.203(b)(1)-(4); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987); *reh'g denied*, 484 U.S. 1047 (1988).

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only constitute a clear abuse of the modification process, but also demonstrate that claimant is not acting in good faith, particularly since the evidence has consistently and repeatedly failed to establish entitlement. Hence, employer asserts that the administrative law judge's decision should be affirmed on this basis alone. In our prior Decision and Order in this case, we rejected employer's argument in this regard. *Charles*, *slip op*. at 6-7; Director's Exhibit 264 at 6-7. As our previous holding in this regard is the law of the case, we will not address employer's argument again. *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

[4] The law of the United States Court of Appeals for the Fourth Circuit applies because the miner was last employed in coal mining employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 2.

In order to establish entitlement to benefits on a living miner's claim pursuant to Part 410, claimant must establish that he has pneumoconiosis, that it arose out of coal mine employment, and that he is totally disabled thereby. 20 C.F.R. Part 410, Subpart D.

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310 (2000), authorizes modification of an award or denial of benefits based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement, which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely upon further reflection of the evidence of record. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error because the administrative law judge properly found that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4) or entitlement under Part 410, Subpart D, and, therefore, failed to establish a change in conditions or a mistake in a determination of fact pursuant to Section 725.310 (2000).[5]

Considering the x-ray evidence at Section 727.203(a)(1), the administrative law judge first noted that, although numerous x-ray readings of x-rays "obtained between November 9, 1978 and August 7, 2000, were read as positive for pneumoconiosis," the "vast majority" of the x-ray readings were negative. Decision and Order at 4. Turning to the more recent evidence, the administrative law judge found it "more probative" because of the progressive and irreversible nature of pneumoconiosis. Decision and Order at 4. Specifically, the administrative law judge found that the x-rays of March 27, 2003 and

[5] Because claimant did not submit any new evidence in conjunction with his present request for modification, the administrative law judge properly found that claimant failed to establish modification based upon a change in conditions. Decision and Order at 4; *see Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-13 (1994) (*en banc*).

September 26, 2003, were negative because, even though Dr. Alexander, a B reader and Board-certified radiologist, read them as positive, the March 27, 2003 x-ray was subsequently read as negative by two dually-qualified readers and the September 26, 2003 x-ray was read as negative by both a B reader and a dually-qualified radiologist.[6] Consequently, the administrative law judge properly concluded that the x-ray evidence was negative for pneumoconiosis. Decision and Order at 4-5; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.3d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Accordingly, we affirm the administrative law judge's finding that the x-ray evidence was negative for pneumoconiosis, and insufficient to invoke the interim presumption at Section 727.203(a)(1), and that it did not show that a mistake in a determination of fact was made in the prior decision on this issue.

Turning to Section 727.203(a)(2), the administrative law judge properly concluded that the more recent pulmonary function studies, dated December 23, 2002, August 29, 2003, September 29, 2003, and December 18, 2003, failed to establish invocation of the presumption thereunder, because they were "invalidated, in whole or in part, based upon variability, inadequate effort, and other technical deficiencies by Dr. Fino or Dr. Castle, who are [B]oard-certified pulmonary specialists."[7] Decision and Order at 5; *see*

[6] The March 27, 2003 x-ray was reread as negative by Drs. Navani and Barrett, dually-qualified readers, and the September 26, 2003 x-ray was reread as negative by Dr. Scatarige, a dually-qualified reader, and by Dr. Fino, a B reader.

[7] After reviewing the August 2003 and December 2003 pulmonary function studies, Dr. Fino, who is Board-certified in internal medicine and in the subspecialty of pulmonary diseases, concluded that both studies were invalid because the results underestimated claimant's true pulmonary function. With respect to the August 2003 test, Dr. Fino opined that the maximum voluntary ventilation tracings indicated a breathing frequency of less than 60 breaths per minute, erratic tidal volumes, and tidal volumes measuring less than 50-60% of the observed forced vital capacity. Director's Exhibit 246. With respect to the December 2003 study, Dr. Fino reported that the forced vital capacity tracings indicated a lack of an abrupt onset and premature termination to exhalation, hesitancy and inconsistency in the expiratory flows, lack of plateauing and reproducibility in the expiratory curves, and complete lack of patient effort and cooperation. *Id.* Similarly, Dr. Castle, a Board-certified pulmonary specialist, opined that the August 2003, September 2003, and December 2003 pulmonary function studies were invalid due to marked variability and less than maximal patient effort and that the

Winchester v. Director, OWCP, 9 BLR 1-177, 1-178 (1986); *Revnack v. Director,* OWCP, 7 BLR 1-771, 1-772-773 (1985); *Houchin v. Old Ben Coal Co.*, 6 BLR 1-1141, 1-1142 (1984); *Verdi v. Price River Coal Co.*, 6 BLR 1-1067, 1-1070 (1984); *Runco v. Director, OWCP*, 6 BLR 1-945, 1-946 (1984); *see also Prater v. Hite Preparation Corp.*, 829 F.2d 1363, 10 BLR 2-297 (6th Cir. 1987). Accordingly, we affirm the administrative law judge's determination that the pulmonary function study evidence was insufficient to establish invocation of the interim presumption at Section 727.203(a)(2). *See Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376, 2-387 (6th Cir. 1989); *Anderson v. Youghiogheny & Ohio Coal Co.*, 7 BLR 1-152 (1984). We, likewise, affirm the administrative law judge's determination that the pulmonary function study evidence failed to demonstrate a mistake in fact in the prior decision. *See Peabody Coal Co. v. Brinkley*, 972 F.2d 880, 882, 16 BLR 2-129, 2-132 (7th Cir. 1992); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988).

Turning to Section 727.203(a)(3), the administrative law judge correctly determined that the record does not contain an arterial blood gas study that yielded qualifying values. Decision and Order at 5; Director's Exhibits 133, 170, 203, 233. Hence, we affirm the administrative law judge's finding that the arterial blood gas study evidence was insufficient to establish invocation of the interim presumption under Section 727.203(a)(3), and his resultant determination that a mistake in fact was not demonstrated under this subsection. *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Horn v. Jewell Ridge Coal Corp.*, 6 BLR 1-933, 1-938 (1984).

Finally, turning to the medical opinion evidence at Section 727.203(a)(4), the administrative law judge properly concluded that it was insufficient to invoke the interim presumption thereunder. The administrative law judge noted that the more recent medical opinions consisted of reports by Drs. Sutherland, Fino, and Castle. In a report dated April 4, 2002, Dr. Sutherland opined that claimant's severe irreversible lung disease associated with multiple years of coal dust exposure rendered claimant totally and permanently disabled. Director's Exhibit 215. After conducting a pulmonary evaluation of claimant on September 26, 2003 and reviewing additional medical records, Dr. Fino opined that claimant did not suffer from coal workers' pneumoconiosis or a respiratory impairment. Dr. Fino further opined that claimant retained the respiratory capacity to return to his former coal mine job. Director's Exhibit 204. On February 4, 2004, after reviewing claimant's medical records, Dr. Castle opined that claimant did not have coal workers' pneumoconiosis and that from a "pulmonary point of view" he retained the respiratory capacity to perform his previous coal mine employment. Director's Exhibit 247.

December 2002 pulmonary function study was invalid because it had only one volume time curve and flow volume loop. Director's Exhibit 247.

In considering these opinions, the administrative law judge properly accorded greater weight to the opinions of Drs. Fino and Castle, than to that of Dr. Sutherland, based on the superior credentials of Drs. Fino and Castle and because their opinions were "based upon more recent and extensive clinical data" than was the opinion of Dr. Sutherland.[8] Decision and Order at 5; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8 (1996); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). We, therefore, affirm the administrative law judge's determination that the medical opinion evidence was insufficient to establish invocation of the interim presumption under Section 727.203(a)(4), and insufficient to show that a mistake in a determination of fact was made in the prior decision. *See* 20 C.F.R. §727.203(a)(4); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*).

In conclusion, we affirm the administrative law judge's findings that claimant did not establish invocation of the interim presumption at Section 727.203(a)(1)-(4), and a mistake in a determination of fact at Section 725.310 (2000).[9]

[8] The administrative law judge noted that the record showed that Drs. Fino and Castle, were Board-certified pulmonary specialists, while Dr. Sutherland was not. Decision and Order at 5.

[9] We also affirm the administrative law judge's finding that entitlement was not established under Part 410, Subpart D, as the evidence did not establish total respiratory disability, an essential element of entitlement thereunder. 20 C.F.R. Part 410, Subpart D.

Accordingly, the administrative law judge's Decision and Order Denying Sixth Modification Request and Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge