BRB No. 13-0446 BLA

DANIEL B. SUTHERLAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 03/31/2014
	)	
and	)	
	)	
PITTSTON COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification and Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Daniel B. Sutherland, Haysi, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Modification and Benefits (2011-BLA-05426) of Administrative Law Judge Pamela J. Lakes with respect to a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant

filed his only claim for black lung benefits on December 4, 1978.[1] Director's Exhibit 1. On February 22, 2010, claimant filed a request for modification, which the district director denied. Director's Exhibits 258, 260, 266. In the decision currently before the Board, the administrative law judge adjudicated this claim pursuant to the provisions set forth in 20 C.F.R. Part 727 and found that the newly submitted 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 and 20 C.F.R. Part 718.[2] The administrative law judge thus concluded that the record established neither a change in conditions nor a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[3] Having found that claimant did not establish the prerequisites for modification, the administrative law judge denied benefits.

[1] The remainder of the lengthy procedural history of this case is set forth in the Board's prior decisions in *D.S.* [*Sutherland*] *v. Clinchfield Coal Co.*, BRB No. 07-0608 BLA(Apr. 29, 2008)(unpub.), wherein the Board affirmed Administrative Law Judge Pamela J. Lake's March 12, 2007, Decision and Order denying benefits, and *Sutherland v. Clinchfield Coal Co.*, BRB No. 98-0995 BLA (Apr. 9, 1999)(unpub.), wherein the Board affirmed Administrative Law Judge Clement J. Kichuk's March 20, 1998, Decision and Order denying benefits. Director's Exhibits 142, 147, 249, 255.

[2] The administrative law judge noted that the United States Courts of Appeals for the Third, Sixth, Seventh, Eighth, and Eleventh Circuits have "held that if a claimant cannot establish entitlement under Part 727 and the claim is adjudicated after March 31, 1980, then the regulations at Part 718, not Part 410, are applicable." Decision and Order at 16 n. 21; *see Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987); *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Oliver v. Director, OWCP*, 888 F.2d 1239, 13 BLR 2-124 (8th Cir. 1989); *Terry v. Director, OWCP*, 956 F.2d 251, 16 BLR 2-67 (11th Cir. 1992). This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 1. The Board has held that claims denied under Part 727 should be reviewed under Part 410. *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981).

[3] The 2001 revision to the regulation at 20 C.F.R. §725.310 does not apply to claims, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

On appeal, claimant generally challenges the administrative law judge's denial of his request for modification. Employer/carrier responds, urging affirmance of the denial of modification and benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 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. 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).

Claimant may establish a basis for modification by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310 (2000). In considering whether a change in conditions has been established pursuant to 20 C.F.R. §725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element that defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The administrative law judge has the authority to consider all of the evidence for any mistake of fact, including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

The regulations found at 20 C.F.R. Part 727 contain the interim presumption at 20 C.F.R. §727.203(a), which provides, in pertinent part, that a miner with at least ten years of coal mine employment is entitled to a rebuttable presumption of total disability due to pneumoconiosis arising out of coal mine employment upon invocation. The presumption is invoked if: (1) chest x-ray, biopsy or autopsy evidence establishes the existence of pneumoconiosis; (2) ventilatory studies establish the presence of a chronic respiratory or pulmonary disease; (3) blood gas studies demonstrate the presence of an impairment in the transfer of oxygen; (4) well-reasoned, well-documented medical reports support a finding of a totally disabling respiratory impairment. 20 C.F.R. §727.203(a)(1)-(4). Satisfying the requirements of any one of the separate medical criteria is considered sufficient to invoke the rebuttable presumption of total disability due to pneumoconiosis arising out of coal mine employment. *Wise v. Peabody Coal Co.*, 3 BLR 1-119 (1981). Claimant bears the burden of establishing, by a preponderance of the evidence, at least one of the medical criteria to invoke the presumption. *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).

After consideration of the administrative law judge's Decision and Order, the arguments on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order Denying Modification and Benefits is supported by substantial evidence and contains no reversible error.

Relevant to 20 C.F.R. §727.203(a)(1), the newly submitted x-ray evidence consists of seven interpretations of five x-rays dated November 9, 2009, May 28, 2008, February 6, 2009, April 29, 2010, and July 29, 2010.[4] All of the physicians who interpreted x-rays are Board-certified radiologists and B readers. Director's Exhibits 264-265; Employer's Exhibit 1. The November 9, 2009 x-ray was interpreted as positive by Dr. Alexander and as negative by Drs. Meyer and Wiot. Director's Exhibits 264-265. Dr. Wiot interpreted the May 28, 2008, February 6, 2009, and April 29, 2010 x-rays as negative. Director's Exhibit 265. Dr. Traver interpreted the July 29, 2010 x-ray as negative. Employer's Exhibit 1.

In finding that the newly submitted x-ray evidence was insufficient to establish a change in conditions, the administrative law judge rationally found that, as all of the physicians were equally qualified, the evidence was, at best, in equipoise. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); Decision and Order at 14. Accordingly, we affirm the administrative law judge's finding that the newly submitted x-ray evidence was insufficient to establish invocation of the interim presumption by establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1).

At 20 C.F.R. §727.203(a)(2), the administrative law judge considered three newly submitted pulmonary function studies. The studies dated May 29, 2009 and April 29, 2010 yielded nonqualifying values and the study dated November 9, 2009 yielded qualifying values.[5] Director's Exhibits 264-265. The administrative law judge permissibly found that, because one of the studies was qualifying and two of the studies were nonqualifying, the evidence was, at best, in equipoise and insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.202(a)(2). *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); Decision and Order at 14-15.

[4] There was no biopsy evidence in the record.

[5] A "qualifying" ventilatory study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §727.203(a)(2) and (3), respectively. A "nonqualifying" study yields values that exceed those values. 20 C.F.R. §727.203(a)(2), (3).

At 20 C.F.R. §727.203(a)(3), the administrative law judge determined that the only newly submitted arterial blood gas study, dated April 29, 2010, produced nonqualifying values. Decision and Order at 15; Director's Exhibit 265. Consequently, we affirm the administrative law judge's finding that the newly submitted blood gas study evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3). *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133.

Relevant to 20 C.F.R. §727.203(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Habre and Fino. Dr. Habre observed a mild obstruction but did not address whether claimant was able to perform his usual coal mine employment from a respiratory perspective. Director's Exhibit 264. Dr. Fino found that, because claimant did not have a respiratory impairment, he was not totally disabled, on that basis, from returning to his last coal mine employment or a similar position. Director's Exhibit 265; Employer's Exhibit 2 at 13, 15. The administrative law judge acted within her discretion as fact-finder in determining that the medical opinion evidence is insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(4), as "the only physician to squarely address this issue, Dr. Fino, found [claimant] to not be disabled from a respiratory standpoint."[6] *See Wenanski v. Director, OWCP*, 8 BLR 1-487, 1-490 (1986); *Turner v. Director, OWCP*, 7 BLR 1-419, 1-421 (1984); Decision and Order at 15-16. Consequently, we affirm the administrative law judge's determination that claimant did not invoke the interim presumption at 20 C.F.R. §727.203(a)(1)-(4) by a preponderance of the evidence.

Under 20 C.F.R. Part 410, Subpart D, claimant has the burden of establishing that he has pneumoconiosis arising out of coal mine employment and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§410.414, 410.416, 410.422, 410.426. Failure to establish any of these requisite elements precludes entitlement. *Saunders v. Director, OWCP*, 7 BLR 1-186 (1984); *Migalich v. Director, OWCP*, 2 BLR 1-27 (1979).

Applying her findings at 20 C.F.R. Part 727, the administrative law judge rationally determined that "either under the Part 410 or Part 718 regulations, Claimant would still be unable to prevail because he is unable to establish that he is totally disabled from a pulmonary or respiratory standpoint under the criteria in those parts, which are

[6] The administrative law judge also considered records from claimant's hospitalization at Norton Community Hospital, from March 13-24, 2009, for rehabilitation after a hip replacement. *See* Decision and Order at 15-16; Director's Exhibit 265. However, as the administrative law judge noted, these records did not address whether claimant was totally disabled from a respiratory standpoint when he was discharged. Decision and Order at 16.

generally more stringent than the Part 727 regulations." Decision and Order at 16, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Consequently, we affirm the administrative law judge's finding that the evidence was insufficient to establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D, as it is supported by substantial evidence. *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133.

Because the administrative law judge rationally found that claimant did not invoke the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4) or establish total disability pursuant to 20 C.F.R. Part 410, we affirm her finding that claimant failed to establish a change in conditions or a mistake in a determination of fact. Therefore, we also affirm the administrative law judge's rational determination that claimant failed to establish a basis for modification of the prior denial pursuant to 20 C.F.R. §725.310 (2000), as it is supported by substantial evidence. *Jessee*, 5 F.3d at 725, 18 BLR at 2-28; *see Migalich*, 2 BLR at 1-30. As claimant's petition for modification was properly denied, we further affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Modification and 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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BETTY JEAN HALL
Administrative Appeals Judges