BRB No. 00-0661 BLA

JOHN SELAK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WYOMING POCAHONTAS LAND 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 - Denial of Employer's Request for New Medical Examination and Modification of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Eileen S. Goodin (Barkan & Neff), Columbus, Ohio, for claimant.

John G. Paleudis (Hanlon, Duff, Paleudis & Estadt Co., LPA), St. Clairsville, Ohio, for employer.

Mary Forrest-Doyle (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer[1] appeals the Decision and Order on Remand - Denial of Employer's Request for New Medical Examination and Modification (1996-BLA-1233) of Administrative Law Judge Thomas F. Phalen, Jr., issued 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).[2] This case has a lengthy procedural history.[3] Employer sought modification of claimant's award of benefits herein under the interim criteria, 20 C.F.R. Part 727, upon becoming aware that claimant was employed as a part-time driver by the Inn at SharonBrooke (SharonBrooke), an assisted living facility, while claimant was receiving black lung benefits. Employer asserted that claimant was no longer disabled in view of this employment, and employer requested that the Department of Labor (DOL) order claimant to undergo a new medical examination to determine the current nature and extent of his pneumoconiosis and epilepsy, as it was previously found that claimant's pneumoconiosis alone was not totally disabling, but that claimant suffered from epilepsy-induced blackouts which prevented him from returning to coal mine employment and thus precluded a finding of rebuttal at 20 C.F.R. §727.203(b)(2) pursuant to the standard established in *York v.*

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[1]Employer, Wyoming Pocahontas Land Company, was formerly the Youghiogheny & Ohio Coal Company. *See* Hearing Transcript at 5.

[2]The Department of Labor (DOL) 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). DOL, however, has discontinued publication of the interim criteria at 20 C.F.R. Part 727, pursuant to which the underlying claim herein, filed on September 21, 1977, Director's Exhibit 1, was adjudicated. *See* 20 C.F.R. §725.4(d), 65 Fed. Reg. 80,058 (2000). Additionally, the amendments to the regulation at 20 C.F.R. §725.310 do not apply to this claim, as employer's request for modification was pending on January 19, 2001. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000). Consequently, all citations to the regulations herein, unless otherwise noted, refer to the regulations as set forth in 20 C.F.R., parts 500 to end, edition revised as of April 1, 1999.

[3]Claimant's award of benefits was affirmed by the Board, *see Selak v. Youghiogheny & Ohio Coal Co.*, BRB No. 92-1281 BLA (Nov. 3, 1993)(unpub.), Director's Exhibit 43, and by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, *see Youghiogheny & Ohio Coal Co. v. Selak*, No. 93-4370 (6th Cir., Aug. 29, 1995) (unpub); Director's Exhibit 44. The procedural history of this case is more fully set forth therein and in *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173 (1999)(*en banc*).

Benefits Review Board, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987). The district director subsequently determined that claimant's employment with SharonBrooke did not constitute comparable employment, and thus declined to either schedule claimant for a medical examination or modify the award of benefits. This case was then scheduled for a formal hearing before Administrative Law Judge Thomas F. Phalen, Jr.

In a Decision and Order issued on March 17, 1997, the administrative law judge denied employer's request for modification as he found that employer failed to establish a mistake in a previous determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge further found that the decision as to whether to order claimant to undergo a physical examination was within the discretion of the district director. Accordingly, the award of benefits was affirmed.

On appeal, the Board vacated the administrative law judge's Decision and Order denying modification, and remanded the case to the administrative law judge in order for him to consider *de novo* employer's request for a re-examination of claimant pursuant to 20 C.F.R. §§718.404(b) and 725.310(b).[4] The Board instructed the administrative law judge to make a specific determination regarding whether employer has raised a credible issue pertaining to the validity of the original adjudication of disability so that an order compelling claimant to submit to examinations or tests would be in the interest of justice. *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173 (1999)(*en banc*).

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[4]In amending the regulations implementing the Act, DOL deleted 20 C.F.R. §718.404 and incorporated its provisions into 20 C.F.R. §725.203, 65 Fed. Reg. 80,061 (2000). The pertinent subsections of the regulation now provide:

> (c) An individual who has been finally adjudged to be totally disabled due to pneumoconiosis and is receiving benefits under the Act shall promptly notify the Office and the responsible coal mine operator, if any, if he or she engages in his or her usual coal mine work or comparable and gainful work.
>
> (d) Upon reasonable notice, an individual who has been finally adjudged entitled to benefits shall submit to any additional tests or examinations the Office deems necessary, if an issue arises pertaining to the validity of the original award.

20 C.F.R. §725.203(c), (d),65 Fed. Reg. 80,061 (2000).

On remand, the administrative law judge found that it would not be in the interest of justice to compel claimant to submit to a re-examination, and that modification was not appropriate because employer failed to establish either a mistake in a determination of fact or a change in conditions. In the present appeal, employer challenges the administrative law judge's findings pursuant to Section 725.310 and his denial of employer's request for a new medical examination and testing of claimant. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to address the merits of this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao,* No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has not responded to the Board's order.[5] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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 this Board and may not be disturbed. 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).

Employer asserts that the evidence it produced in support of modification, *i.e.*, claimant's blackout-free employment between April 1988 and April 1994 as a driver with SharonBrooke and claimant's testimony that his epilepsy is currently controlled by

[5]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 2, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

medication, demonstrates that claimant is no longer disabled by his epileptic blackouts, thus establishing both a change in conditions since the issuance of the 1981 and 1982 medical reports finding claimant totally disabled from such blackouts, and a mistake of fact in the prior determination that subsection (b)(2) rebuttal was precluded pursuant to the standard established in *York, supra*. Employer also maintains that, because this evidence calls into question the validity of the award and a new medical examination is necessary to ascertain claimant's continued eligibility for benefits, the administrative law judge abused his discretion in declining to order a re-examination of claimant. We disagree.

After consideration of the administrative law judge's Decision and Order, 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 in the record considered as a whole, and that there is no reversible error contained therein. The administrative law judge determined that claimant's part-time employment with SharonBrooke entailed driving elderly individuals to and from their doctors' appointments and occasionally helping them in and out of a car, whereas claimant's last coal mine employment, in his full-time position as underground maintenance foreman, required a substantial amount of physical exertion. Decision and Order on Remand at 4; Director's Exhibit 36 [1983 Hearing Transcript] at 21-23; Director's Exhibit 51; [1996] Hearing Transcript at 28-31, 38. Contrary to employer's arguments, the administrative law judge reasonably found that the skills and abilities required for claimant's employment with SharonBrooke were not similar or equivalent to those required as an adjunct to his foreman duties in the mines, and therefore did not constitute comparable and gainful employment or show that claimant could perform his usual coal mine employment.[6] Decision and Order on

[6]Employer argues that claimant's usual coal mine employment duties were strictly supervisory, and that while the administrative law judge credited claimant's testimony that his job involved cleaning up cave-ins, fixing batteries and uncovering buried equipment, Decision and Order on Remand at 4, 9, Director's Exhibit 36 [1983 Hearing Transcript] at 21-22, claimant additionally testified that most of the actual labor was performed by claimant's crew, *see* Director's Exhibit 36 [1983 Hearing Transcript] at 40. Employer thus asserts that claimant's ability to drive without suffering blackouts shows that claimant's epilepsy is controlled by medication and no longer prevents him from performing his supervisory duties. Contrary to employer's arguments, however, claimant accurately asserts, and the record reflects, that in addition to his supervisory duties, claimant's job involved physical duties which included standing, crawling and walking for approximately six hours per day and occasional lifting. Claimant's Brief at 7; Director's Exhibit 36 [1983 Hearing Transcript] at 22; Director's Exhibit 51. Moreover, claimant testified that although he drove a car at the time he was experiencing frequent blackouts in the mines, he has never suffered a blackout while driving; rather, his blackouts occurred when he was "extremely exhausted

Remand at 5-6, 9; *see Ratliff v. Benefits Review Board*, 816 F.2d 1121, 10 BLR 2-76 (6th Cir. 1987). The administrative law judge also reviewed claimant's testimony and permissibly concluded that it did not establish that claimant's epileptic blackouts were completely controlled and no longer disabling, as he found claimant's testimony that his medication dosage was properly adjusted "in the eighties sometime" was imprecise, Hearing Transcript at 49; claimant suffered at least one blackout following his employment with SharonBrooke in 1994, Hearing Transcript at 41; and the possibility of blackouts still existed, as there was no evidence that claimant did not suffer the underlying condition of epilepsy at the time of the award and at present, and claimant still had to take a proper dosage of medication to control his blackouts.[7] Decision and Order on Remand at 5-6, 9-10. The administrative law judge thus acted within his discretion as trier-of-fact in finding that the evidence submitted by employer in support of modification was insufficient to establish a mistake in a determination of fact or a change in conditions,[8] *see Consolidation Coal Co. v. Worell*, 27

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from working [in the mine]." Hearing Transcript at 38, 49.

[7]We reject, as unsupported by the record, employer's contention that the administrative law judge ignored or mischaracterized claimant's testimony, which employer asserts establishes that claimant no longer suffers any actual impairment from his epilepsy because his blackouts are now controlled by medication. Employer's Brief at 9-10. Claimant testified that he has been taking the same medications, but different dosages, for his blackouts since 1972, Director's Exhibit 36 [1983 Hearing Transcript] at 34; Hearing Transcript at 35; that the medication did not control his blackouts, which he experienced every few weeks between 1972 and 1977, while he was engaged in coal mine employment, Hearing Transcript at 36-37, 49; and that the adjustments in his dosages have subsequently almost eliminated his blackouts, Hearing Transcript at 40-42, 49. The mere fact that claimant's current dosage has greatly reduced the frequency of his blackouts, however, does not establish that the same dosage would prevent him from experiencing blackouts if he engaged in his usual coal mine employment or similar work.

[8]We reject employer's argument that, since claimant's testimony reflects that he no longer suffers epileptic blackouts, the administrative law judge, consistent with *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999), was required to review and reweigh the evidence of record *de novo* to determine whether claimant's pneumoconiosis alone precludes a finding of subsection (b)(2) rebuttal. The administrative law judge reasonably found that the new evidence submitted in support of modification was insufficient to establish that claimant was not disabled by epileptic blackouts, and the medical opinions of record were previously found insufficient as a matter of law to establish that claimant was not disabled by any cause under the standard enunciated by the Sixth Circuit in *York, supra*. *See Youghiogheny & Ohio Coal Co. v. Selak*, No. 93-4370 (6th Cir., Aug. 29, 1995)(unpub); Director's Exhibit 44; *Selak v. Youghiogheny & Ohio Coal Co.*, BRB No. 87-711 BLA (July 31, 1989)(unpub.); Director's Exhibit 40.

F.3d 227, 18 BLR 2-290 (6th Cir. 1994), and did not raise a credible issue pertaining to the validity of the original adjudication so that an order compelling claimant to submit to examinations or tests would be in the interest of justice. Decision and Order on Remand at 5-6, 9-10. The administrative law judge's findings pursuant to Section 725.310 and 20 C.F.R. §725.203, 65 Fed. Reg. 80,061 (2000), are supported by substantial evidence, and thus are affirmed.

Accordingly, the administrative law judge's Decision and Order on Remand - Denial of Employer's Request for New Medical Examination and Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge