BRB No. 98-0208 BLA

JAMES PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BISHOP COAL COMPANY	)	DATE ISSUED:
	)	
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 Request for Modification of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

James Phillips, Bandy, Virginia, *pro se.*

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Request for Modification (96-BLA-1810) of Administrative Law Judge Paul A. Mapes 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). Initially, claimant filed a claim in September, 1977. Director's Exhibit 1. In a Decision and Order Awarding Benefits issued in January, 1988, Administrative Law Judge John J. Forbes, Jr. found thirty-seven or thirty-eight years of coal mine employment. Judge Forbes found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4) and that the evidence was not sufficient to establish rebuttal under 20 C.F.R. §727.203(b)(1)-(4). Accordingly, benefits were awarded.

Employer appealed, challenging Judge Forbes's findings at Section 727.203(a)(1) and (b)(3) and (b)(4). The Board, in a Decision and Order issued in June, 1990, affirmed

as unchallenged on appeal the administrative law judge's findings that the evidence was sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(2)-(4), and affirmed as unchallenged on appeal the administrative law judge's findings that rebuttal of the interim presumption was not established under Section 727.203(b)(1)-(2). The Board declined to address employer's contentions under Section 727.203(a)(1), holding that any errors would be harmless in view of Judge Forbes's findings of invocation under Section 727.203(a)(2)-(4). However, the Board vacated the administrative law judge's finding that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3), inasmuch as Judge Forbes did not identify the evidence upon which he relied or provide a rationale for his determination. The Board also held that it need not address Judge Forbes's finding that rebuttal was not established under Section 727.203(b)(4) as that method of rebuttal was not available in the Fourth Circuit, citing *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178, 13 BLR 2-294 (4th Cir. 1990), and *Dayton v. Consolidation Coal Co.*, 895 F.2d 173, 13 BLR 2-307 (4th Cir. 1990). Accordingly, the Board affirmed in part and vacated in part Judge Forbes's Decision and Order, and remanded the case for consideration of Section 727.203(b)(3) rebuttal under *Taylor*. *Phillips v. Bishop Coal Co.*, BRB No. 88-0574 BLA (Jun. 28, 1990)(unpublished).

On remand, the case was reassigned to Administrative Law Judge G. Marvin Bober, who issued, in October, 1991, a Supplemental Decision and Order on Remand - Denying Claim. Judge Bober held that, because of a change in the applicable law, he would have to review rebuttal under Section 727.203(b)(4) as well as Section 727.203(b)(3), as the United States Supreme Court had reversed *Taylor* and upheld the rebuttal provisions at Section 727.203(b)(3) and (b)(4). *Pauley v BethEnergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991). Judge Bober found that the evidence was insufficient to establish rebuttal of the interim presumption under Section 727.203(b)(4), but found that the opinions of Drs. Abernathy, Kress and Morgan ruled out pneumoconiosis as a contributing factor in the miner's total disability pursuant to Section 727.203(b)(3). Further, Judge Bober found that there was no need for consideration of the case under 20 C.F.R. §410.490, and that entitlement under 20 C.F.R. Part 410, Subpart D was precluded. Accordingly, benefits were denied.

Claimant appealed, and the Board, in a Decision and Order issued in March, 1994, affirmed Judge Bober's finding of rebuttal under Section 727.203(b)(3). The Board held, *inter alia*, that the administrative law judge's finding that Drs. Abernathy, Kress and Morgan opined that claimant's impairment is caused by smoking and that claimant has no disability attributable to the inhalation of coal dust satisfies the Section 727.203(b)(3) rebuttal standard enunciated by the United States Court of Appeals for the Fourth Circuit in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). Accordingly, the Board affirmed Judge Bober's denial of benefits. *Phillips v. Bishop Coal Co.*, BRB No. 92-0377 BLA (Mar. 31, 1994)(unpublished). Claimant appealed to the United States Court of Appeals for the Fourth Circuit, which concluded that the evidence was sufficient to support Judge Bober's finding of rebuttal pursuant to Section 727.203(b)(3). Accordingly, the Fourth Circuit affirmed the denial of benefits. *Phillips v. Director, OWCP*, No. 94-1561 (4th Cir. Feb. 23, 1995)(unpublished).

Claimant, in January, 1996, filed a petition for modification proceedings without the assistance of counsel. Director's Exhibit 102; *see* 20 C.F.R. §725.310. Administrative Law Judge Paul A. Mapes (the administrative law judge), issued, in October, 1997, a Decision and Order Denying Request for Modification.[1] The administrative law judge initially indicated that claimant, in his request for modification, asserted that Judge Bober's Section 727.203(b)(3) finding was in error because it conflicted with the Fourth Circuit's holding in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), and that Judge Bober erred by failing to give reduced weight to the opinions of physicians who found that claimant did not have pneumoconiosis, citing *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). The administrative law judge found that Judge Bober's decision did not make factual findings inconsistent with the Fourth Circuit's decisions in *Grigg* and *Warth*. *See* 1997 Decision and Order at 10. Further, the administrative law judge indicated that he did not consider other grounds for seeking modification, such as a change of conditions or the procurement of new medical evidence, because of claimant's decision to limit the scope of his modification request to *Grigg* and *Warth*, and claimant's corresponding refusal to undergo another physical examination. 1997 Decision and Order at 12. Accordingly, the administrative law judge denied claimant's request for modification.

Claimant, without the assistance of counsel, appeals to the Board, arguing generally that the administrative law judge erred in denying modification. Employer responds, supporting affirmance of the administrative law judge's Decision and Order denying modification. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not participate in the present appeal unless specifically requested to do so by the Board.

In an appeal by a claimant proceeding 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 Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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).

In his Decision and Order denying modification, the administrative law judge initially stated that claimant limited his modification request to the question of whether Judge Bober's decision made factual findings inconsistent with the Fourth Circuit's decisions in

[1] Pursuant to claimant's request that the scheduled hearing on modification be cancelled and that the decision be decided on the record, the hearing was cancelled.

Grigg and *Warth.* 1997 Decision and Order at 10. With regard to *Grigg,* the administrative law judge stated that even if the Fourth Circuit had not previously rejected this argument, he would still find no mistake of fact in Judge Bober's reliance upon the opinions of the physicians who believe that claimant does not suffer from pneumoconiosis because the physicians were justified in concluding that the x-ray evidence does not support a diagnosis of pneumoconiosis and it was Judge Forbes, rather than those physicians, who made a mistake in fact. With regard to *Warth,* the administrative law judge noted that claimant failed to identify specifically any particular portion of the opinions of Drs. Kress, Morgan, and Abernathy, upon whom Judge Bober relied to find subsection (b)(3) rebuttal, that would allegedly warrant rejection under *Warth. Warth*, *supra*; 1997 Decision and Order at 11-12. After rejecting the arguments raised by claimant in his *pro se* request for modification, the administrative law judge stated although it was possible that there were other grounds for seeking modification of Judge Bober's decision such as a change of conditions or new medical evidence, such possibilities were not being considered because of claimant's decision to limit the scope of his modification request and his corresponding refusal to undergo another physical examination. 1997 Decision and Order at 12.

Initially, we hold that the administrative law judge properly rejected the arguments specifically raised by claimant on modification. In *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), the Fourth Circuit held that in order to establish that total disability did not arise in whole or in part out of coal mine employment pursuant to Section 727.203(b)(3), the party opposing entitlement must rule out any causal relationship between a miner's disability and his coal mine employment. The Board subsequently held that a physician's diagnosis of no respiratory or pulmonary impairment supports a finding of rebuttal under Section 727.203(b)(3) since the absence of a pulmonary disability precludes pneumoconiosis as a cause of total disability. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). In *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), the Fourth Circuit held that a doctor's finding of no respiratory or pulmonary impairment is sufficient to satisfy the standard enunciated in *Massey* only where the relevant medical opinion states, without equivocation, that the miner suffers no respiratory or pulmonary impairment of any kind, and furthermore, in cases where the interim presumption is invoked under Section 727.203(a)(1), where the physician has not based his finding on an erroneous finding that the miner does not suffer from pneumoconiosis.

In his request for modification, claimant argued that Judge Bober erred in relying upon Dr. Morgan's opinion to find Section 727.203(b)(3) rebuttal established under *Grigg* inasmuch as Dr. Morgan did not diagnose pneumoconiosis.[2] Dr. Morgan in his most recent

[2] In *Grigg*, the Fourth Circuit noted that it disagreed with the Director's contention that a "no respiratory or pulmonary impairment" opinion can satisfy *Massey* and rebut Section 727.203(a)(1) invocation even if the physician rendering the opinion has premised it on an erroneous finding that the claimant does not suffer from pneumoconiosis. The Fourth Circuit noted that it agreed with those circuits which had held, under analogous circumstances, that such opinions are not worthy of much, if any weight. Although it did not go so far as to hold that such an opinion is without any probative value, the Fourth Circuit

opinion stated that claimant was disabled from emphysema, obesity, cerebrovascular disease and cardiac disease, noting that coal dust exposure did not play a role in their development. Although the administrative law judge stated in his decision on modification that he concurred with the Fourth Circuit's analysis that *Grigg* did not compel the discrediting of the reports of Drs. Abernathy and Kress, the administrative law judge did not discuss the effect of *Grigg* on Dr. Morgan's opinion. 1997 Decision and Order at 10. Unlike the physicians' opinions in *Grigg*, however, Dr. Morgan did not state that claimant had no respiratory or pulmonary impairment. *See Grigg*, *supra*. Moreover, as stated by the Fourth Circuit in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-306 (4th Cir. 1995), a

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concluded that it does not have enough force to satisfy *Massey*. *See Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994).

In *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), the Fourth Circuit held, in a Part 718 case, that an opinion regarding causation must be discredited if the physician rests his conclusion upon a disagreement with the administrative law judge as to either the existence of pneumoconiosis or the presence of a totally disabling respiratory or pulmonary impairment. In *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-306 (4th Cir. 1995), the Fourth Circuit stated, in a Part 718 case, that a medical opinion in which the physician does not refute the administrative law judge's findings of simple pneumoconiosis and a disabling respiratory or pulmonary condition is probative evidence under Section 718.204(b) and warrants due consideration by the administrative law judge.

medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability. *See Ballard*, *supra*. Consequently, contrary to claimant's contention on modification, *Grigg* does not compel a finding that Dr. Morgan's opinion is not relevant evidence under Section 727.203(b)(3). *See Ballard*, *supra*; *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg*, *supra*. Moreover, the administrative law judge correctly concluded that there is no basis for finding that Judge Bober's factual findings with regard to Drs. Kress and Abernathy were inconsistent with the holding in *Grigg*.[3] 1997 Decision and Order at 10; *see Grigg*, *supra*.

[3] Dr. Kress found that claimant did not have coal worker's pneumoconiosis and found that claimant's impairment was due to pulmonary emphysema due to smoking. Director's Exhibit 57. Dr. Abernathy similarly stated that claimant did not have pneumoconiosis and was totally disabled due to emphysema related to smoking. Director's Exhibit 64. As the court stated in its unpublished decision in this case, whether an opinion is entitled to probative weight is a decision that ultimately rests with the fact-finder.

With regard to *Warth*,[4] the administrative law judge properly determined that the opinions of Drs. Kress, Morgan and Abernathy were not subject to rejection on the grounds that they assumed that obstructive disorders cannot be caused by coal mine employment. The administrative law judge properly found that Dr. Kress did not categorically assume that obstructive impairments cannot be caused or aggravated by coal dust exposure. 1997 Decision and Order at 11. Dr. Kress stated that "it is recognized that excessive dust exposure can produce some degree of chronic bronchitis, in turn resulting in a mild obstructive impairment." Director's Exhibit 57; *see also* Director's Exhibit 54. In addition, the administrative law judge properly found that two reports by Dr. Morgan failed to indicate that Dr. Morgan assumed that obstructive diseases cannot be caused by coal dust. *See Warth*, *supra*; *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); 1997 Decision and Order at 11; Director's Exhibits 55, 57; *see also* Director's Exhibit 115. The administrative law judge also stated that Dr. Morgan acknowledged that the statutory definition of pneumoconiosis includes various obstructive impairments. 1997 Decision and Order at 11-12. Finally, the administrative law judge properly stated that there was nothing in Dr. Abernathy's opinions to suggest that Dr. Abernathy was basing his opinions on an assumption that coal dust exposure cannot cause obstructive impairments. Director's Exhibit 110; *see also* Director's Exhibit 64, Deposition at 11.

In *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), the United States Court of Appeals for the Fourth Circuit held that a claimant's allegation of a general error is sufficient to require the administrative law judge to reconsider the entire record in addressing whether there was a mistake in a determination of fact under Section 725.310. *See Jessee*, *supra*. In the instant case, the administrative law judge restricted his inquiry on modification to claimant's arguments regarding *Warth* and *Stiltner* and failed to consider the evidence of record and make a credibility determination as required by *Jessee*.[5] As

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[4] The United States Court of Appeals for the Fourth Circuit held in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) that a doctor's opinion, which is premised upon the belief that pneumoconiosis is a restrictive disease only, is erroneous and worthy of little weight. In *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the court held that when a physician states that it would be likely to see a restrictive component if the impairment was related to coal dust exposure, rather than stating that chronic obstructive pulmonary disease can never result from dust exposure in coal mine employment, his or her opinion can be credited by the administrative law judge.

[5] The administrative law judge found that the alleged mistake raised by claimant on modification involved a mixed question of law and fact under Section 725.310. 1997 Decision and Order at 3. The courts have indicated that the term "mistake of fact" should be construed broadly so that it even encompasses the ultimate fact of entitlement. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The mere existence of principles defining the proper exercise of an administrative law judge's fact-finding authority does not transform an administrative law judge's findings of fact into findings of law. *See Donadi v. Director, OWCP*, 13 BLR 1-24, *aff'g on recon.*, 12 BLR 1-166 (1989).

noted *supra*, the administrative law judge stated that although it was possible that there were other grounds for seeking modification of Judge Bober's decision such as a change of conditions or new evidence, such possibilities were not being considered because of claimant's decision to limit the scope of his modification request and his corresponding refusal to undergo another physical examination. 1997 Decision and Order at 12.

The administrative law judge erred in limiting the scope of his decision on modification only to issues specifically raised by claimant in light of *Jessee* and claimant's *pro se* status below. We, therefore, remand the case for the administrative law judge to consider all of the evidence of record, *de novo*, in determining whether a mistake in fact has been established. *Jessee*, *supra*; *see generally Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge