BRB No. 98-1636 BLA

VERNON FULLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
RHONDA 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 of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Vernon Fuller, Oakwood, Virginia, *pro se*.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen, Chartered), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order (91-

[1]Claimant is Vernon Fuller, the miner, who filed his claim for benefits on September 26, 1979. Director's Exhibit 1.

[2]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

BLA-0950) of Administrative Law Judge Edward Terhune Miller [hereinafter, the administrative law judge] 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). This case is before the Board for the third time. In a Decision and Order dated May 26, 1989, Administrative Law Judge Giles J. McCarthy credited claimant with twenty-one years of coal mine employment and, applying the regulations at 20 C.F.R. Part 727, found the evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a) and entitlement to benefits at 20 C.F.R. Part 410, Subpart D. Director's Exhibit 65. Accordingly, benefits were denied.

On October 24, 1989, claimant requested modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 81. Administrative Law Judge Victor J. Chao considered the new evidence and found that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a). Accordingly, benefits were denied. Claimant appealed, and the Board vacated the denial of benefits and remanded the case to Judge Chao to consider all of the evidence of record to determine whether claimant established a change in conditions or a mistake in a determination of fact pursuant to Section 725.310, citing *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). *See Fuller v. Rhonda Coal Co.*, BRB No. 92-2642 BLA (May 24, 1992)(unpub.).

On the first remand, Judge Chao found that claimant established invocation of the interim presumption at Section 727.203(a)(1) and that employer failed to establish rebuttal at Section 727.203(b). Accordingly, benefits were awarded.

Employer appealed, and the Board vacated Judge Chao's Section 727.203(a)(1) finding and remanded this case for reconsideration of the x-ray evidence. *See Fuller v. Rhonda Coal* Co., BRB No. 95-0389 BLA (Aug. 24, 1995)(unpub.) However, the Board affirmed Judge Chao's finding that employer failed to establish rebuttal pursuant to Section 727.203(b)(2)-(3). *Id.* The Board also noted that, contrary to employer's arguments, the determination as to whether claimant established a change in conditions or a mistake in fact was subsumed in Judge Chao's decision on the merits. *Id.*

On the second remand, this case was transferred, without objection, to the administrative law judge, who found that claimant failed to establish invocation pursuant to Section 727.203(a)(1)-(4). Decision and Order on Remand at 7-8, 17-19. Accordingly, benefits were denied.

On this appeal currently before the Board, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate 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).

Pursuant to Section 727.203(a)(1), the administrative law judge thoroughly considered all of the x-ray evidence in the record. Decision and Order at 4-6. In doing so, the administrative law judge weighed the numerous readings of each x-ray, considering the radiological qualifications of the readers rendering the positive and negative interpretations. Decision and Order at 6-7. "[A]fter weighing all of the x-ray evidence as a whole," the administrative law judge permissibly concluded that "there is clearly not a preponderance of x-ray evidence sufficient to establish the existence of pneumoconiosis." *See Director, OWCP v. Greenwich Collieries* [Ondecko], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Therefore, we affirm the administrative law judge's finding that claimant failed to invoke the interim presumption at Section 727.203(a)(1) inasmuch as he rationally weighed all the x-ray evidence and his finding is supported by substantial evidence.[3] *See*

[3]It is noted that the administrative law judge identified Drs. Hippensteel, Castle, and Stewart as Board-certified radiologists when the record indicates that these physicians are B-readers and Board-certified in internal medicine and pulmonary disease, but not Board-certified radiologists. Director's Exhibit 45. However, we deem harmless the administrative law judge's error regarding these physician's qualifications, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), inasmuch as this error does not undermine the administrative law judge's overall analysis of the x-ray evidence, which is supported by substantial evidence. *See Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995).

Adkins, supra; *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995).

In considering the pulmonary function studies pursuant to Section 727.203(a)(2), the administrative law judge found that only two of the twelve pulmonary function studies in the record yielded qualifying[4] values. Decision and Order at 7. The administrative law judge noted that one of the qualifying studies, performed by Dr. Rao on March 2, 1987, "does not meet the quality standards set forth in §410.430 and is therefore nonconforming, since the requisite number of tracings are not attached." *Id.* While the record reveals that a April 9, 1980 study performed by Dr. Baxter yielded qualifying values, Director's Exhibit 6, the March 2, 1987 study, as found in the record, does not reveal qualifying values, Director's Exhibit 58. Therefore, the administrative law judge erred in finding the March 2, 1987 study to be qualifying. However, we deem the administrative law judge's error harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), inasmuch as his mischaracterization does not affect his ultimate conclusion, that claimant failed to establish Section 727.203(a)(2) invocation, *see Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Doss, supra.*

Pursuant to Section 727.203(a)(3), the administrative law judge found that invocation could not be established inasmuch as only one of the numerous blood gas studies contained in the record yielded qualifying values and this study's validity was questioned by Dr. Stewart. Decision and Order at 7-8. While the administrative law judge noted that the exercise blood gas study performed by Dr. Abernathy, Director's Exhibit 39, yielded qualifying values, he failed to consider the three other qualifying studies in the record. *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987). These studies include the September 28, 1979 and October 12, 1981 studies performed by Dr. Buddington, Director's Exhibits 8, 12, 14, and the April 24, 1985 study performed by Dr. Rao, Director's Exhibit 58. Inasmuch as the administrative law judge failed to consider all relevant evidence in the record as required by the Administrative Procedure Act, *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984),

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

we vacate his Section 727.203(a)(3) finding and remand this case for him to reconsider invocation pursuant to this subsection.

Pursuant to Section 727.203(a)(4), the administrative law judge found that "Claimant has not proved by a preponderance of the evidence that he has a totally disabling respiratory or pulmonary impairment." Decision and Order at 18. The administrative law judge noted that Drs. Buddington, Modi, and Rasmussen found that claimant has a totally disabling pulmonary or respiratory impairment whereas Drs. Garzon, Abernathy, Stewart, and Endres-Bercher found that the cause of any impairment claimant may have is not attributable to a pulmonary defect, but heart disease. *Id.* The administrative law judge found Dr. Modi's opinion "to be the least credible of all the medical opinions" because he found it to be "not well reasoned or supported by objective evidence," noting that Dr. Modi does not refer to the results of the non-qualifying pulmonary function studies and blood gas studies performed on the same day of his examination. Decision and Order at 11-12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Considering the other relevant medical opinions, the administrative law judge permissibly found that Dr. Buddington's opinion provides little analysis as to the cause of claimant's pulmonary impairment and that Dr. Rasmussen's opinion is not as "well reasoned or objectively based or complete in its analysis" as the contrary opinions of Drs. Garzon, Abernathy, Stewart, and Endres-Bercher. Decision and Order at 18; *see Clark, supra*; *Fields, supra*; *Lucostic, supra*; *see also Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984).

Moreover, the administrative law judge noted that Dr. Baxter's opinion "contains some notations regarding Claimant's physical limitations," but disregarded these limitations because he found "it is unclear. . .whether these notations constitute his assessment of the extent of Claimant's impairment, or whether they are simply a record of Claimant's chief complaints." Decision and Order at 10. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grounds*, 14 BLR 1-37 (1990)(en banc), that an administrative law judge may not reject physical limitations noted in a physician's opinion as a patient's complaints unless there is specific evidence in the opinion for his doing so. *See generally Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-375 (11th Cir. 1989). Inasmuch as the administrative law judge has not identified specific evidence in Dr. Baxter's opinion that the limitations listed are the patient's subjective complaints, we vacate the administrative law judge's Section 727.203(a)(4) finding and remand this case for him to make a determination. If, on remand, the administrative law judge finds that the limitations listed are Dr. Baxter's assessment of claimant's abilities, we

instruct the administrative law judge to compare these limitations with the exertional requirements of claimant's usual coal mine employment to determine if they support a finding of total respiratory disability.[5] *See Scott, supra; Kowalchick, supra*; *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986).

Pursuant to 20 C.F.R. 727.203(d), as construed by the Board in *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981), a claim such as this filed on or before March 31, 1980 must be reviewed under the permanent criteria of Part 410, Subpart D if eligibility is not established under Section 727.203. *Contra Oliver v. Director, OWCP*, 888 F.2d 1239, 13 BLR 2-124 (8th Cir. 1989); *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); *Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987). Inasmuch as the administrative law judge failed to consider whether entitlement could be established at 20 C.F.R. Part 410, Subpart D, we instruct the administrative law judge to consider modification at 20 C.F.R. Part 410, Subpart D, if, on remand, benefits are denied under 20 C.F.R. Part 727.

[5]The administrative law judge rationally, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), found that Dr. Baxter's diagnosis of chronic obstructive lung disease, coal workers' pneumoconiosis, and "impaired function," Director's Exhibit 11, does not clearly establish a totally disabling respiratory impairment, and, therefore, is insufficient to support Section 727.203(a)(4) invocation. Decision and Order at 18.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and this case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge