BRB No. 99-1077 BLA

HUBERT BOWLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collet, Hyden, Kentucky, for claimant.

Sarah H. Hurley (Henry L. Solano, 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:

Claimant appeals the Decision and Order (98-BLA-1168) of Administrative Law Judge Thomas F. Phalen, Jr. 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).[1] In considering claimant's petition for modification under 20 C.F.R. §725.310, the administrative law judge accepted the parties' stipulation to eighteen years of coal mine employment. The administrative law judge further found that claimant did not establish a change in conditions or a mistake in a determination of fact in the prior denial

[1]The procedural history of this claim is set forth in detail in the Board's prior decision in *Bowling v. Director, OWCP*, BRB No. 95-2222 BLA (April 26, 1996)(unpublished).

pursuant to Section 725.310. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish a change in conditions pursuant to Section 725.310. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.[2]

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).

In considering whether claimant has established a change in conditions pursuant to Section 725.310, the administrative law judge must 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 of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Co.*, 14 BLR 1-156 (1900), *modified on recon.*, 16 BLR 1-71. Claimant invoked the interim presumption of total disability due to pneumoconiosis arising out of coal mine employment pursuant to Section 727.203(a)(4) by proving that he had a total disabling respiratory impairment. However, the claim was denied because the evidence was sufficient to establish the absence of pneumoconiosis and thus, sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4).

[2]Inasmuch as the parties on appeal do not challenge the administrative law judge's finding of eighteen years of coal mine employment, his finding that there was no mistake in a determination of fact in the earlier denials under 20 C.F.R. §725.310 and his finding that the blood gas studies did not yield qualifying values, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant generally argues that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis. Claimant also suggests that the administrative law judge erred in deferring to physicians with superior qualifications. Claimant further argues that the administrative law judge selectively analyzed the x-ray evidence under 727.203(a)(1). Contrary to claimant's suggestion, the administrative law judge properly accorded greater weight to the interpretations rendered by B readers and /or Board-certified radiologists. *See Roberts v. Director, OWCP,* 8 BLR 1-211 (1985). However, the administrative law judge mischaracterized the newly submitted x-ray evidence. There are eleven readings of six x-rays of record. The administrative law judge found that the only newly submitted x-ray readings of record probative on the issue of whether claimant established the existence of pneumoconiosis are the interpretations of the March 26, 1997 and June 8, 1998 x-rays.[3] The administrative law judge characterized Dr. Chaney's October 8, 1998 reading as an interpretation of the June 8, 1998 x-ray. Dr. Chaney actually rendered a positive interpretation of an October 2,1998 x-ray which is the most recent x-ray of record. *See* Claimant's Exhibit 1. Remand is warranted when the administrative law judge's evidentiary analysis does not coincide with the evidence of record. *See Tackett v. Director, OWCP,* 7 BLR 1-703 (1985). Inasmuch as the most recent x-ray of record, uniformly interpreted as positive for pneumoconiosis, was not properly considered by the administrative law judge and the administrative law judge found the interpretations of the March 26, 1997 and June 8, 1998 x-rays "in equipoise", we vacate his finding and remand this case for the administrative law judge to reconsider whether the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis, and thus a change in conditions pursuant to Section 725.310. *Id.*

Claimant also contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis. Claimant specifically contends that Dr. Shelly's diagnosis of pneumoconiosis should have been accorded substantial weight based upon his status as claimant's treating physician. The newly submitted medical opinion evidence is uniformly positive for the existence of pneumoconiosis. Drs. Baker, Chaney and Shelly opined that claimant suffered from pneumoconiosis. The administrative law judge acknowledged Dr. Shelly's treating physician status, but permissibly found his opinion unpersuasive because he did not provide any medical documentation to support his opinion except claimant's exposure history and did not consider claimant's smoking history.[4] *Fields v. Island Creek*

[3]The administrative law judge properly noted that the newly submitted interpretations of claimant's x-rays taken on January 27, 1996, September 5, 1996 and April 10, 1997 were not properly classified for pneumoconiosis. 20 C.F.R. §718.102; Decision and Order at 9.

[4]Although the administrative law judge did not render a finding regarding claimant's smoking history, he noted that claimant testified that he smoked "for around twenty years

Coal Co., 10 BLR 1-19 (1987); Decision and Order at 10; Claimant's Exhibit 1. However, the administrative law judge's rationale for discrediting the opinions of Drs. Baker and Chaney is not supported by the evidence of record.

about a pack a day," Decision and Order at 4, and also noted that Dr. Baker recorded 20 years of smoking one pack per day and Dr. Chaney recorded one pack per day "for many years."

The administrative law judge concluded that Dr. Baker's diagnosis of pneumoconiosis was merely a restatement of his x-ray interpretation. Decision and Order at 10. However, Dr. Baker's diagnosis of pneumoconiosis appears to be based on more than an x-ray interpretation. In fact, Dr. Baker indicated that it was also based upon claimant's "significant duration of exposure." Director's Exhibit 102. The administrative law judge discredited Dr. Chaney's diagnosis of pneumoconiosis because it was not supported by "persuasive medical evidence." Decision and Order at 10. The administrative law judge noted, *inter alia*, that the arterial blood gas study that Chaney performed was not in the record. *Id.* The administrative law judge also noted that the pulmonary function study conducted by Dr. Chaney only measured MVV values, not FEV1 values. *Id.* Pulmonary function studies and arterial blood gas studies, while relevant to the presence or absence of a respiratory impairment, are not determinative of causation. *See generally Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984). Moreover, Dr. Chaney explained that his diagnosis of pneumoconiosis was based upon claimant's significant exposure to coal dust and sufficient abnormalities on physical examination and chest x-ray.[5] Claimant's Exhibit 1. Therefore, we vacate the administrative law judge's factual description of the medical opinions of Drs. Baker and Chaney, and remand for the administrative law judge to reconsider the newly submitted medical opinions in determining whether they are sufficient to establish the existence of pneumoconiosis, and thus, a change in conditions pursuant to Section 725.310.

In the event the administrative law judge, on remand, finds a change in conditions at Section 725.310, he must consider entitlement based on all the evidence of record under 20 C.F.R. Part 727 and 20 C.F.R. Part 718, if necessary. *See Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989).

[5]The administrative law judge erred in finding that Dr. Chaney interpreted claimant's June 8, 1998 x-ray. Dr. Chaney actually interpreted claimant's October 2, 1998 x-ray as positive for pneumoconiosis. *See* discussion *supra* at 4.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, 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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge