BRB No. 99-1323 BLA

EUGENE CLINE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
O'HENRY COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE 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 on Modification Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Eugene Cline, Tazewell, Virginia, *pro se*.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of legal counsel,[2] appeals the Decision and

[1] Claimant is Eugene Cline, the miner, who filed an application for black lung

Order (1999-BLA-0450) of Administrative Law Judge Jeffrey Tureck denying modification and 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 the prior appeal, the Board affirmed the finding of Administrative Law Judge George A. Fath that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3), noting that his finding thereunder precluded establishing entitlement pursuant to 20 C.F.R. Part 410, Subpart D. *Cline v. O'Henry Coal Corp.*, BRB No. 96-0555 BLA (Jan. 29, 1997)(unpub.). Claimant subsequently requested modification pursuant to 20 C.F.R. §725.310. In reviewing this case on claimant's request for modification, the administrative law judge credited claimant with nineteen and one-half years of coal mine employment and found that claimant does not have, and has not had since his initial claim was filed, any respiratory or pulmonary impairment. The administrative law judge thus found that the evidence was insufficient to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, claimant's request for modification was denied. In the instant appeal, claimant generally asserts that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *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, are supported by substantial evidence, and are in

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benefits with the Department of Labor on March 16, 1979. Decision and Order at 2; 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).

accordance with law. 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).

Section 725.310 provides that a party may request modification of the award or denial of benefits within one year on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). In determining whether claimant has established a change in conditions pursuant to Section 725.310, the 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 the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held pursuant to Section 725.310 that the administrative law judge has the authority to consider all of the evidence on modification to determine whether there has been a change in conditions or a mistake in a determination of fact, including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein.

Claimant was presumed totally disabled due to pneumoconiosis upon invoking the interim presumption pursuant to Section 727.203(a)(1) in the prior decision, which the administrative law judge found was rebutted pursuant to Section 727.203(b)(3). To rebut this presumption under subsection (b)(3), employer was required to rule out any causal connection between claimant's total disability and his coal mine employment. *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302, 2-314 (4th Cir. 1998); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). In *Massey*, 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 physician'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. *See Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995).

In considering whether claimant established a change in conditions based on the newly submitted evidence, the administrative law judge initially noted that in the previous denial, the interim presumption was rebutted pursuant to Section 727.203(b)(3) by evidence which established that claimant did not have a disabling respiratory or pulmonary impairment. Decision and Order at 3. In finding that the newly submitted evidence failed to establish a change in conditions, *i.e.*, a totally disabling respiratory or pulmonary impairment, the administrative law judge found that the valid pulmonary function and blood gas studies were normal and that the medical opinions of Drs. Castle and Renn "clearly do not support a finding of total disability" as both physicians "diagnose no pulmonary impairment at all." Decision and Order at 5; Director's Exhibit 224; Employer's Exhibit 1. The administrative law judge permissibly gave greatest weight to the opinion of Dr. Castle, diagnosing pneumoconiosis, but stating that claimant has no respiratory or pulmonary impairment and that claimant's respiratory capacity has not changed, because the report was "thorough and very well-reasoned" and supported by his objective tests, the other evidence of record, as well as Dr. Renn's opinion. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 5; Director's Exhibits 182, 224; Employer's Exhibit 1. In addition, the administrative law judge rationally gave diminished weight to the opinions of Drs. Modi and Jabour as Dr. Modi's report was not well-reasoned or documented and Dr. Jabour's opinion was insufficient to establish that claimant was totally disabled. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1291 (1984); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 5; Director's Exhibit 206, 213, 223. Furthermore, the administrative law judge properly reviewed the entire record and concluded that there was no mistake in fact in the prior denial. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc)*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12

BLR 1-20 (1988). The administrative law judge permissibly found that the objective studies and medical opinions failed to establish total respiratory disability. *See Clark*; *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to demonstrate a change in conditions as it does not establish total respiratory disability or any pulmonary impairment at all, as well as the administrative law judge's finding that there was no mistake in a determination of fact in the prior decision. Therefore, we affirm the administrative law judge's finding that claimant failed to establish modification pursuant to 20 C.F.R. §725.310 as it is supported by substantial evidence and is in accordance with law. *See Jessee*, *supra*. Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310, we affirm the denial of benefits. *Jessee*, *supra*.

Accordingly, the Decision and Order on Modification Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge