BRB No. 00-1069 BLA

KERMIT R. BUCKLEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
JEWELL SMOKELESS COAL COMPANY	)	
	)	
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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Kermit R. Bucklen, Raven, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (95-BLA-2523) of Administrative Law Judge Stuart A. Levin 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). Claimant filed a claim on

[1]The Department of Labor 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). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The regulations under 20 C.F.R. Part 727 have not been

November 4, 1980. In a Decision and Order dated March 27, 1987, Administrative Law Judge Robert L. Cox credited claimant with twenty-seven and one-half years of coal mine employment and considered the instant claim pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000). Judge Cox determined that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) (2000), pneumoconiosis arising out of coal mine employment under 20 C.F.R. §718.203(b) (2000), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). Accordingly, Judge Cox awarded benefits. Employer appealed. The Board, in pertinent part, affirmed Judge Cox's finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(1) (2000), but vacated Judge Cox's finding that total disability was established under Section 718.204(c) (2000), and remanded the case for further consideration thereunder. *Bucklen v. Jewell Smokeless Coal Co.*, BRB Nos. 87-0903 BLA and 87-2047 BLA (Jan. 29, 1990)(unpublished). The Board also noted that, if on remand, Judge Cox were to find total disability established under Section 718.204(c) (2000), claimant would be entitled to the rebuttable presumption that his total disability is due to pneumoconiosis at 20 C.F.R. §718.305 (2000) and that Judge Cox should consider rebuttal of the presumption pursuant to Section 718.305(d). *Id*.

In a Decision and Order on Remand dated June 26, 1991, Judge Cox found that, while claimant established total disability at Section 718.204(c) (2000), and, thus, invocation of the presumption of total disability due to pneumoconiosis under Section 718.305 (2000), the evidence established rebuttal. Accordingly, benefits were denied. Claimant filed a motion for reconsideration of Judge Cox's decision, and Judge Cox denied claimant's motion in a Decision and Order on Motion for Reconsideration dated August 12, 1991. Subsequently, on November 11, 1991, claimant filed for modification of Judge Cox's denial of benefits, Director's Exhibit 71, which Administrative Law Judge Edward J. Murty, Jr. denied in a

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amended by the new regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

Decision and Order dated February 24, 1994. Director's Exhibit 99.

Claimant filed a second request for modification on July 4, 1994. In a Decision and Order dated September 11, 1996, Administrative Law Judge Stuart A. Levin (the administrative law judge), concluded that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) (2000), but that the presumption of total disability due to pneumoconiosis was invoked pursuant to Section 718.305 (2000) because the evidence established total disability under Section 718.204(c) (2000). The administrative law judge concluded, however, that the presumption was rebutted by evidence showing that claimant does not suffer from pneumoconiosis, specifically the x-ray evidence and medical opinions from Drs. Sargent, Castle and Garzon. The administrative law judge further determined that claimant "also has failed to demonstrate the existence of a material change in condition since the previous denial, insofar as his pulmonary condition is concerned." 1996 Decision and Order Denying Modification at 9. Accordingly, the administrative law judge denied claimant's petition for modification. Claimant appealed.

The Board vacated the administrative law judge's finding that claimant failed to establish modification, remanding the case with instructions for the administrative law judge to reconsider modification pursuant to the decision of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). *Bucklen v. Jewell Smokeless Coal Co.*, BRB No. 96-1750 BLA (Aug. 27, 1997)(unpublished). The Board further vacated the administrative law judge's finding that rebuttal of the Section 718.305 (2000) presumption was established, remanding the case for the administrative law judge to reconsider the opinion of Dr. Garzon in light of the decisions of the United States Court of Appeals for the Fourth Circuit in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) and *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). *Id*.

On remand, in a Decision and Order dated July 1, 1998, the administrative law judge stated that he was adopting the proposed findings of the Director, Office of Workers' Compensation Programs (the Director), and that he was incorporating the Director's findings along with his own findings made in his September 11, 1996 Decision and Order. The administrative law judge then concluded: "[e]ven when Dr. Garzon's report is not considered, I find that claimant has failed to establish entitlement to benefits." Consequently, the administrative law judge denied modification. Claimant appealed. The Board vacated the administrative law judge's decision denying modification and benefits, and remanded the

[2]The case was referred to Judge Murty as Judge Cox was no longer available to render a decision.

[3]The case was referred to Judge Levin for modification proceedings as Judge Murty was unavailable to render a decision.

case for a "complete consideration and evaluation of the medical evidence as instructed in [its] prior decision." *Bucklen v. Jewell Smokeless Coal Co.*, BRB No. 98-1406 BLA (Jan. 28, 2000)(unpublished). The Board further instructed the administrative law judge to evaluate independently the medical evidence of record on remand instead of adopting the Director's brief as his decision. *Id*. The Board held that the administrative law judge's adoption of the Director's conclusions and analysis was contrary to the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *Id*. In his Decision and Order dated July 17, 2000, after discussing the Board's remand order, the administrative law judge turned to the merits of the claim, and again found the evidence sufficient to establish rebuttal of the presumption of total disability due to pneumoconiosis under Section 718.305. Accordingly, the administrative law judge denied benefits. In the instant appeal, claimant asserts that the administrative law judge again failed to adjudicate this case pursuant to the Board's remand instructions, and generally contends that he is entitled benefits. Employer responds in support of the administrative law judge's decision denying benefits. The Director has filed a letter indicating he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

We hold that the administrative law judge's finding on remand, that the evidence of record is sufficient to establish rebuttal of the presumption of total disability due to pneumoconiosis under Section 718.305, is supported by substantial evidence and must be affirmed. On remand, the administrative law judge referenced his prior findings from his 1996 Decision and Order, and stated that he was incorporating them, with the exception of his findings regarding Dr. Garzon's opinion. Decision and Order on Remand at 13. In his 1996 Decision and Order, the administrative law judge properly credited the opinions of Drs. Castle and Sargent, which indicate that claimant does not suffer from pneumoconiosis, over Dr. Rasmussen's opinion, that claimant has pneumoconiosis, on the basis that the opinions of Drs. Castle and Sargent were well-reasoned and documented. 1996 Decision and Order at 7-8. Specifically, the administrative law judge found that Dr. Sargent based his opinion on his 1994 examination of claimant, Director's Exhibit 112, and that both Drs. Castle and Sargent conducted a thorough review of the evidence of record, and provided detailed explanations for their opinions. *Id.*; Director's Exhibits 42, 95, 96 The administrative law judge also noted that Drs. Castle and Sargent are Board-certified in internal medicine and pulmonary diseases. *Id*. In addition, the administrative law judge properly discounted Dr. Rasmussen's opinion because Dr. Rasmussen based his diagnosis of pneumoconiosis on the positive x-ray interpretation of Dr. Patel, which was called into question by negative rereadings of the same

x-ray by physicians possessing superior radiological qualifications. *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984); 1996 Decision and Order at 8; Director's Exhibit 101.

In the 1996 Decision and Order, the administrative law judge also found the opinion of Dr. Garzon was entitled to greater weight than Dr. Rasmussen's opinion, a finding which the Board vacated, as noted *supra*. In the present Decision and Order on Remand, however, the administrative law judge stated that he no longer accorded determinative weight to Dr. Garzon's opinion, but found the opinions of Drs. Castle and Sargent sufficient to establish rebuttal of the presumption under Section 718.305 for the reasons he provided in his 1996 Decision and Order. Decision and Order on Remand at 14. The administrative law judge further stated that he had "personally entered findings based on the record evidence in this case, including those findings set forth at pages 2-9 of my September 11, 1996 Decision and Order which I have herein incorporated." Decision and Order on Remand at 14. The administrative law judge stated that he found no indication that this case was mistakenly decided by Judge Cox in 1991 or by Judge Murty in 1994. Inasmuch as the administrative law judge's finding that there was no mistake in a determination of fact in these prior two decisions is supported by substantial evidence, and inasmuch as the administrative law judge properly found that the opinions of Drs. Castle and Sargent are entitled to greatest weight for the reasons discussed *supra*, the administrative law judge's finding that the evidence of record is sufficient to establish rebuttal of the presumption of total disability due to pneumoconiosis under Section 718.305 (2000) is affirmed. *See* 20 C.F.R. §718.305. We

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[4]In the 1996 Decision and Order, the administrative law judge correctly found that Dr. Rasmussen examined claimant on June 6, 1994 and cited Dr. Patel's positive interpretation of the film taken on June 6, 1994, without indicating that Dr. Rasmussen read the x-ray. 1996 Decision and Order at 4, 7-8; Director's Exhibit 101. The record does not reflect that Dr. Patel is a B reader or Board-certified radiologist. The June 6, 1994 x-ray was read as negative by Drs. Francke, Wiot and Spitz, all of whom are B reader/ Board-certified radiologists. Director's Exhibit 101; Employer's Exhibit 5.

[5]The administrative law judge found that there are "aspects of Dr. Garzon's report which are both consistent with and contrary to" the decisions of the United States Court of Appeals for the Fourth Circuit in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) and *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Decision and Order on Remand at 13-14.

[6]In his February 24, 1994 Decision and Order, Judge Murty noted that claimant was examined on September 7, 1991 by Dr. Robinette. Murty Decision and Order at 3. In fact, the record reflects that claimant was not examined by Dr. Robinette, but that it was Dr. Ranavaya who examined claimant on September 7, 1991. Director's Exhibit 71. Nonetheless, the report of the September 7, 1991 examination was considered. Murty Decision and Order at 3-4.

thus affirm the administrative law judge's finding that claimant failed to establish modification under Section 725.310 (2000). *See* 20 C.F.R. §725.310.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge