BRB No. 01-0188 BLA

CARNES C. HORN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BISHOP COAL COMPANY,	)	DATE ISSUED:
	)	
INCORPORATED	)	
	)	
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 Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0610) of Administrative Law Judge Richard T. Stansell-Gamm 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. The administrative

[1] Claimant originally filed a claim on March 28, 1979, Director's Exhibit 1. In a Decision and Order issued on February 18, 1988, Administrative Law Judge John H. Bedford found twelve years and eleven months of coal mine employment established and adjudicated the claim pursuant to the interim presumption at 20 C.F.R. §727.203, Director's Exhibit 99. Judge Bedford found that invocation of the interim presumption was not established pursuant

law judge found that the relevant, newly submitted evidence of record, considered in conjunction with the previously submitted evidence, was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4) or, therefore, a basis for modification based on a change in conditions pursuant to 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c). The administrative law judge further found that no basis for modification based on a mistake in a determination of fact was established pursuant to Section 725.310 (2000) in regard to the prior determinations that claimant had failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4). Finally, the administrative law judge found that claimant failed to establish a basis for modification based on either a change in conditions or a mistake in determination of fact pursuant to Section 725.310 (2000) under the entitlement provisions at 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in weighing the newly submitted evidence and finding it insufficient to establish the existence

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to 20 C.F.R. §727.203(a)(1)-(4) and that entitlement was not established pursuant to the permanent regulations at 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. Claimant appealed and the Board affirmed the Judge Bedford's findings regarding the length of claimant's coal mine employment and pursuant to Section 727.203(a)(1)-(4) and Part 410, Subpart D, Director's Exhibit 122. *Horn v. Bishop Coal Co.*, BRB No. 88-0805 BLA (May 27, 1993)(unpub.). Thus, the Board affirmed Judge Bedford's Decision and Order denying benefits. Claimant appealed and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, affirmed the denial of benefits, Director's Exhibit 125. *Horn v. Bishop Coal Co.*, No. 93-1900 (4th Cir., Dec. 3, 1993) (unpub.).

Claimant filed a timely motion for modification on January 11, 1994, Director's Exhibit 126. In a Decision and Order issued on August 23, 1996, Administrative Law Judge Edith Barnett found that no mistake in a determination of fact was established pursuant to 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c). Director's Exhibit 172. Judge Barnett further found that the newly submitted evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4) or, therefore, a basis for modification based on a change in conditions pursuant to Section 725.310 (2000). Accordingly, benefits were denied. Claimant appealed and the Board affirmed Judge Barnett's findings pursuant to Sections 725.310 (2000) and 727.203(a)(1)-(4), Director's Exhibit 177. *Horn v. Bishop Coal Co.*, BRB No. 96-1701 BLA (May 8, 1997)(unpub.). In addition, in light of the Board's affirmance of Judge Barnett's findings pursuant to Section 727.203(a)(2)-(4), the Board held that modification based on a change in conditions was not established pursuant to Part 410, Subpart D. Thus, the Board affirmed Judge Barnett's Decision and Order denying benefits.

Claimant filed a timely motion for modification on September 3, 1997, Director's Exhibit 178, which was ultimately referred to the administrative law judge for a hearing and is at issue, herein.

of pneumoconiosis and total disability. Employer responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to this appeal.

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 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 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. Moreover, the Fourth Circuit has held that if a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Initially, the administrative law judge found the relevant, newly submitted x-ray evidence insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1). Claimant contends that the newly submitted x-ray evidence from claimant is sufficient to establish the existence of pneumoconiosis, whereas the newly submitted x-ray readings from employer are contradictory and equivocal. The relevant, newly submitted x-ray evidence consists of an x-ray dated December 2, 1996, which was read as positive for pneumoconiosis by Drs. Bassali and Alexander, both of whom are board-certified radiologists and B-readers. Director's Exhibit 178; Claimant's Exhibits 2, 6. However, the December 2, 1996, x-ray was read as negative for pneumoconiosis by Drs. Wiot, Scott, Wheeler and Kim, all of whom are board-certified radiologists and B-readers, *see* Employer's Exhibits 5, 9-10, as well as by Drs. Lippman and Castle, who are both B-readers, *see* Director's Exhibit 192; Employer's Exhibit 17. Finally, an April 20, 1998, x-ray was read exclusively as negative for pneumoconiosis by physicians who were both board-certified radiologists and B-readers, *see* Employer's Exhibits 2-3, 5-8, 12, as well as by Dr. Castle, Employer's Exhibits 1, 17.

[2] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *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); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

The administrative law judge found that the consensus of the physicians who read the April 20, 1998, x-ray was that it did not show pneumoconiosis and that the preponderance of the expert readings of the December 2, 1996, x-ray was negative, *i.e.*, it had been read as negative by a greater number of physicians who had similar qualifications as board-certified radiologists and/or B-readers than the physicians who provided positive x-ray readings. Decision and Order at 12. Thus, contrary to claimant's contentions, the administrative law judge properly found that the relevant, newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis based on the weight, *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), of the negative readings from physicians who were both board-certified radiologists and/or B-readers, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Consequently, the administrative law judge's finding that invocation of the interim presumption was not established by the relevant, newly submitted x-ray evidence pursuant to Section 727.203(a)(1) is affirmed as supported by substantial evidence.

Next, the administrative law judge found the relevant, newly submitted medical opinion evidence insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4). Claimant submitted answers from claimant's treating physician, Dr. Cardona, provided in response to questions from claimant's attorney, inquiring whether Dr. Cardona believed that claimant has pneumoconiosis arising out of his coal mine employment and whether claimant is totally disabled, *see* Director's Exhibit 178; Claimant's Exhibits 4, 8. The administrative law judge noted that Dr. Cardona responded "yes," but "did not state the reason" for his opinion: although claimant's attorney had requested that Dr. Cardona attach any x-ray, examination and/or objective study results on which he based his answers, nothing was attached, *see* Director's Exhibit 178; Decision and Order at 18. On the other hand, employer submitted a new medical report from Dr. Castle, a board-certified physician in internal medicine and pulmonary disease and a B-reader, who based his opinion on a new x-ray, physical examination, pulmonary function study and blood gas study results, as well as on a review of the evidence of record, *see* Employer's Exhibits 1, 15, 17. Dr. Castle found no evidence of coal workers' pneumoconiosis or any respiratory impairment or disability due to any cause. Similar new opinions were provided by Drs. Fino, Zaldivar, and Dahhan, who reviewed the evidence of record and share Dr. Castle's qualifications, *see* Employer's

[3] Moreover, because the administrative law judge's findings that newly submitted pulmonary function study and blood gas study evidence, *see* Employer's Exhibit 1, was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2)-(3) has not been challenged by claimant on appeal, *see* Decision and Order at 12-13, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Exhibits 3, 6, 11, 13-16, as well as by Dr. Morgan, a B-reader who also reviewed the evidence of record, *see* Employer's Exhibits 4, 16.

Claimant contends that the opinion of Dr. Cardona, as claimant's treating physician, is entitled to greater weight than the opinions of those physicians who merely reviewed the evidence of record. However, the administrative law judge found that Dr. Cardona's opinion was not documented or reasoned because, other than the fact that he was claimant's treating physician, Dr. Cardona did not provide any objective evidence or other reason in support of his opinion as compared to Dr. Castle, who based his opinion on normal pulmonary function study and blood gas study results. Decision and Order at 18-19. The administrative law judge also found the reviewing physicians' opinions were better documented and reasoned than Dr. Cardona's opinion, as they were based on all of the evidence of record, including Dr. Cardona's treatment records, and they were consistent with the objective evidence of record. Finally, the administrative law judge found Dr. Castle's opinion was the best documented, reasoned and probative opinion, as he had both examined claimant and reviewed the evidence of record, whereas the administrative law judge found Dr. Cardona's opinion less probative, as he was the only physician who was not board-certified in pulmonary disease and internal medicine.

Contrary to claimant's contention, the Fourth Circuit Court has held that an administrative law judge should not "mechanistically" credit, "to the exclusion of all other testimony," the testimony of a treating physician solely because the physician treated the claimant, but has a "statutory obligation to consider all of the relevant evidence," *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). In this case, the administrative law judge, within his discretion, permissibly found the opinions of Dr. Castle and the other physicians who reviewed the evidence of record were entitled to greater weight than Dr. Cardona's opinion, as they were better supported by the objective evidence of

[4] Claimant notes that he objected to admission of evidence from Dr. Fino, due to his lack of licensure in Kentucky, and from Dr. Castle, due to his reliance on objective tests performed by an uncertified assistant. However, inasmuch as claimant did not raise this issue or offer any evidence regarding the status of Dr. Fino's license or Dr. Castle's assistant's qualifications until after the hearing and after the record was closed, the evidence was not admitted into the record or considered by the administrative law judge, *see* Decision and Order at 14 n. 20 and at 16 n. 21. Inasmuch as the administrative law judge has broad discretion in procedural matters and may properly refuse to admit evidence which is submitted post-hearing and/or after the close of the record, we affirm the administrative law judge's refusal to admit into the record and/or consider the post-hearing evidence submitted by claimant, *see* 20 C.F.R. §725.456(b)(1)-(2), *see Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985).

record, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and in light of their superior qualifications, *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Wetzel*, *supra*. As it is within the administrative law judge's discretion, as the trier-of-fact, to determine whether an opinion is documented and reasoned, *see Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge if they are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that invocation was not established by the newly submitted medical opinion evidence pursuant to Section 727.203(a)(4) as supported by substantial evidence. Consequently, the administrative law judge's finding that the newly submitted medical evidence, in conjunction with the evidence previously submitted, did not demonstrate a change in conditions pursuant to Section 725.310 (2000), is affirmed as supported by substantial evidence.

In addition, the administrative law judge properly considered all of the prior decisions of record, along with the relevant, newly submitted evidence, and found that no mistake in a determination of fact was established pursuant to Section 725.310 (2000) in regard to any of the prior findings pursuant to Section 727.203(a), Decision and Order at 19-20. Inasmuch as the administrative law judge's finding is supported by substantial evidence, it is affirmed. Finally, the administrative law judge found that no basis for modification was established pursuant to Section 725.310 (2000) in regard to the finding that entitlement was not established under Part 410, Subpart D, Decision and Order at 20-23. Because the administrative law judge's finding that the preponderance of the new medical evidence fails to establish that claimant suffers from a pulmonary impairment or disability is supported by substantial evidence, his finding that entitlement is not established under Part 410, Subpart D, is affirmed, *see Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981). Consequently, the administrative law judge's finding that claimant failed to establish a basis for modification pursuant to Section 725.310 is affirmed as rational and supported by substantial evidence, *see Jessee*, *supra*.

Accordingly, the Decision and Order On Remand of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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[5] Inasmuch as the administrative law judge's finding that invocation was not established by the newly submitted medical evidence pursuant to Section 727.203(a)(1)-(4) is affirmed, we need not address claimant's contention that employer's newly submitted evidence is insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b), *see Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge