BRB No. 98-0139 BLA

JAMES C. YATES	)	
	)	
Claimant-	)	
Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF	)	
WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	DECISION AND ORDER

Respondent

Appeal of the Decision and Order Denying Benefits of Edith Barnett, Administrative Law Judge, United States Department of Labor.

James C. Yates, Haysi, Virginia, *pro se*.

Jeffrey S. Goldberg (Marvin Krislov, Deputy Solicitor for National Operations; 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Administrative Appeals Judge.

PER CURIAM:

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

[1] Tim White, 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. White is not representing claimant on

Order Denying Benefits (96-BLA-1717) of Administrative Law Judge Edith Barnett 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).[2] The administrative law judge determined that this application for benefits, dated March 6, 1996, was a request for modification of the Decision and Order denying benefits of Administrative Law Judge Quentin P. McColgin, dated July 13, 1995, pursuant to 20 C.F.R. §725.310.[3] The administrative law judge found the newly

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appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] The administrative law judge properly considered this case on the documentary record based on claimant's written waiver of his right to a formal hearing, by letter dated June 23, 1997. Decision and Order at 1; 20 C.F.R. §725.461(a); *Churpak v. Director, OWCP*, 9 BLR 1-71 (1986).

[3] Claimant filed his original application for benefits with the Social Security Administration (SSA) on June 27, 1973, Director's Exhibit 65. This claim was denied by SSA on November 2, 1973. Director's Exhibits 44, 65. Claimant filed a second application for benefits, with the Department of Labor, on October 6, 1986. Director's Exhibit 1. This claim was denied by the district director on April 3, 1987, Director's Exhibit 14, and transferred to the Office of Administrative Law Judges for a formal hearing on July 17, 1987. Director's Exhibit 19. Pursuant to an Order of Remand dated April 20, 1988, Administrative Law Judge Richard E. Huddleston remanded the case to the district director for further consideration of the issue of the viability of the 1973 claim and whether claimant had filed an election card, requesting review of the denial of the 1973 claim. Director's Exhibit 27. The district director determined that no election card had been filed, Director's Exhibits 29-31, and transferred the case to the Office of Administrative Law Judges, Director's Exhibit 32. By Order of Remand dated November 29, 1989, Administrative Law Judge Giles J. McCarthy again remanded the case to the district director to determine the status of the prior claim with respect to the filing of an election card. Director's Exhibit 57. On August 28, 1990, the district director determined that since no election had been made by claimant for review of the November 1973 SSA denial of his original claim, this case was not subject to transfer to the Black Lung Disability Trust Fund. Director's Exhibit 80. The case was again transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Quentin P. McColgin. Director's Exhibit 96.

Following a formal hearing, Judge McColgin issued a Decision and Order dated January 16, 1992 denying benefits, based on his finding that claimant failed

to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and also failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 125. The Board affirmed the denial of benefits, based on its affirmance of Judge McColgin's finding that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). *Yates v. D O & W Coal Co.*, BRB No. 92-1014 BLA (Aug. 30, 1993)(unpub.); Director's Exhibit 141. In addition, the Board affirmed Judge McColgin's decision to credit claimant with twenty-five years of coal mine employment, as supported by substantial evidence. *Id*.

By decision dated September 28, 1994, the United States Court of Appeals for the Fourth Circuit vacated the Board's affirmance of Judge McColgin's denial of benefits and remanded the case for further consideration. Initially, the court affirmed Judge McColgin's finding that claimant failed to establish entitlement under 20 C.F.R. Part 718. However, the court held that the issue of whether an election card had been filed was not resolved and, therefore, remanded the case for resolution of this issue. In addition, the court held that, if, the administrative law judge found that the election card was either filed by claimant or there was good cause for claimant's failure to file, then the claim must be reevaluated under 20 C.F.R. Part 727. In consideration of the evidence under Part 727, the court held that the evaluation under Part 718 precludes a finding of total disability under Section 727.203(a)(2)-(4). However, the court remanded the case for consideration of the x-ray evidence pursuant to Section 727.203(a)(1). *Yates v. D O & W Coal Company, Inc.*, No.93-2304 (4th Cir. Sep. 28, 1994)(unpub.); Director's Exhibit 145.

On remand, Judge McColgin credited claimant's testimony that he did not receive the election card and, therefore, found that good cause was established for claimant not having filed an election for review of the 1973 SSA denial. As a result, Judge McColgin found the 1973 claim viable and reviewed the claim under Part 727. Noting that the Fourth Circuit held that invocation was precluded pursuant to Section 727.203(a)(2)-(4), based on its affirmance of the finding of no total disability under Part 718, Judge McColgin then found the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 727.203(a)(1). Judge McColgin further noted that the pulmonary function study and blood gas study evidence did not establish invocation at Section 727.203(a)(2) and (a)(3). Accordingly, Judge McColgin found claimant failed to establish entitlement to benefits pursuant to Part 727. In addition, Judge McColgin found that the x-ray evidence did not establish the existence of

submitted x-ray evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). The administrative law judge further found that the newly submitted medical reports were insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §727.203(a)(4). Consequently, the administrative law judge determined that claimant failed to establish a change in conditions pursuant to Section 725.310. In addition, the administrative law judge determined that the evidence of record did not establish a mistake in a determination of fact in the 1995 Decision and Order of Judge McColgin, in which Judge McColgin found the x-ray evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Accordingly, the administrative law judge denied claimant's request for modification and benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. In response, the Director, Office of Workers' Compensation Programs (the Director), requests that the Board vacate the denial of benefits and remand the case to the administrative law judge for further consideration of the x-ray evidence of record pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). In addition, the Director contends that the administrative law judge erred in her evaluation of the medical opinion evidence pursuant to Section 727.203(a)(4) inasmuch as she failed to render a preliminary determination as to the physical requirements of claimant's usual coal mine employment.

In an appeal by a claimant filed 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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*

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pneumoconiosis pursuant to Section 718.202(a)(1), thus, reaffirming his denial of benefits under Part 718. Director's Exhibit 149. On April 22, 1996, following claimant's request for modification, the district director dismissed employer from the case. Director's Exhibit 155.

Associates, Inc., 380 U.S. 359 (1965).

In considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, an administrative law judge must consider all of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the new evidence is sufficient to establish at least one of the elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In addition, the United States Court of Appeals for the Fourth Circuit, under whose jurisdiction the instant case arises, has held that a claimant's general allegation of error is sufficient to require the administrative law judge to consider the entire record in addressing whether there was a mistake in a determination of fact. 20 C.F.R. §725.310; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

In finding that the newly submitted evidence was insufficient to establish a change in conditions, the administrative law judge determined that the preponderance of the new x-ray evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1). Decision and Order at 4. Specifically, the administrative law judge found that three of the four well-qualified physicians provided negative interpretations of the x-ray films on modification. *Id*. However, as the Director correctly contends, the administrative law judge did not consider the applicability of the rereading prohibition set forth at Section 413(b) of the Act, 30 U.S.C. §923(b), in this case originally filed in June 1973.[4] 20 C.F.R. §727.206(b)(1); *Auxier v. Director, OWCP*, 4 BLR 1-717 (1982); *Tobias v. Republic Steel Corp.*, 2 BLR 1-1277 (1981). Consequently, we vacate the administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the interim presumption under Section

[4] In all claims filed before January 1, 1982, Section 413(b) of the Act, 30 U.S.C. §923(b), prohibits the Director, Office of Workers' Compensation Programs (the Director), from having certain x-rays reread except for purposes of determining quality. *Tobias v. Republic Steel Corp.*, 2 BLR 1-1277 (1981). This prohibition is applicable when each of the following threshold requirements has been met: 1) the physician who originally read the x-ray is either board certified or board eligible; 2) there is other evidence of a significant and measurable pulmonary or respiratory impairment; 3) the x-ray was performed in compliance with the requirements of the applicable quality standards and was taken by a radiologist or qualified radiologic technician; and 4) there is no evidence that the claim was fraudulently represented. 20 C.F.R. §727.206(b)(1); *Auxier v. Director, OWCP*, 4 BLR 1-717 (1982).

727.203(a)(1) and remand the case for the administrative law judge to determine whether the Section 413(b) rereading prohibition is applicable under the facts of this case.

On remand, the administrative law judge must determine whether the record contains evidence, which, if credited, demonstrates a significant and measurable pulmonary or respiratory impairment. *Hyle v. Director, OWCP*, 8 BLR 1-512 (1986); *Bobbit v. Director, OWCP*, 8 BLR 1-381 (1985); *Auxier, supra*. If, the administrative law judge determines that the record contains evidence of a significant and measurable pulmonary or respiratory impairment, then Section 413(b) of the Act is applicable and prohibits the consideration of x-ray interpretations, obtained by the Director, of films originally read as positive by a physician who is either Board-certified or Board-eligible in Radiology.[5] 20 C.F.R. §727.206(b)(1); *Auxier, supra*; *Tobias, supra*. We, therefore, remand this case for the administrative law judge to reconsider the x-ray evidence of record in light of Section 413(b) of the Act.

We, however, reject the Director's contention that the administrative law judge erred in failing to render an initial determination regarding the exertional requirements of claimant's usual coal mine employment prior to finding the newly submitted evidence insufficient to establish a totally disabling respiratory impairment pursuant to Section 727.203(a)(4). Contrary to the Director's contention, in the instant case the administrative law judge need not have rendered an initial determination regarding the exertional requirements of claimant's usual coal mine employment inasmuch as neither of the newly submitted medical reports provided a diagnosis of a respiratory or pulmonary impairment in terms such that the administrative law judge could infer total disability.[6] 20 C.F.R. §727.203(a)(4); *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *see also Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986);

[5] We note that the rereading prohibition set forth at Section 413(b) of the Act, 30 U.S.C. §923(b), does not apply to interpretations obtained by employer. *Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985).

[6] As the administrative law judge correctly determined, the new medical opinion evidence consists of two medical treatment summaries from a Department of Veterans' Affairs treating facility, referencing claimant's radiation therapy for prostate cancer. Director's Exhibit 165. These reports, dated March 26, 1996 and April 9, 1996, provided a history of "Black Lung" but did not otherwise comment on claimant's respiratory or pulmonary condition. *Id.*

Turner v. Director, OWCP, 7 BLR 1-419 (1984). We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 727.203(a)(4).[7] *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Moreover, we vacate the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact. Decision and Order at 4. Pursuant to Section 725.310, the fact-finder is vested with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely reflection on the evidence initially submitted. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Jessee, supra*; *Nataloni, supra*; *see also Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). The broad discretion to correct mistakes of fact is not limited to particular factual errors. *O'Keeffe*, *supra*; *Jessee, supra*; *see also Worrell, supra*. The administrative law judge, therefore, has the duty and full authority to review any and all prior findings of fact under the modification proceedings. *Id.* Thus, contrary to the administrative law judge's interpretation of Section 725.310, the fact-finder is not restricted to reviewing the last decision of record, *i.e.*, the 1995 Decision and Order of Judge McColgin, in which Judge McColgin found no invocation under Section 727.203(a)(1). Rather, the fact-finder must look at the entirety of the claim, including prior decisions, to determine whether the evidence of record supports a finding of a mistake in a determination of fact, including the ultimate fact of entitlement to benefits. *Id.*

[7] In addition, the administrative law judge properly that claimant did not submit any pulmonary function study or blood gas study evidence on modification and, therefore, did not establish a change in conditions under Section 727.203(a)(2) and (a)(3). 20 C.F.R. §§725.310; 727.203(a)(2), (a)(3).

If, on remand, the administrative law judge finds the evidence sufficient to grant claimant's request for modification, the administrative law judge must then consider all the relevant evidence, both previously and newly submitted, in determining whether claimant has established entitlement to benefits on the merits under 20 C.F.R. Part 727.[8] *See Nataloni*, *supra*; *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

[8] If, on remand, the administrative law judge finds that claimant has not established entitlement under Part 727, the administrative law judge should consider the evidence pursuant to 20 C.F.R. 410, Subpart D. *See Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge