BRB No. 98-0174 BLA

DELMER L. DUTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
COVE HOLLOW COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise III (Vinyard & Moise), Abingdon, Virginia, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0882) of Administrative Law Judge Edward J. Murty, 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). Initially, Administrative Law Judge McCarthy credited claimant with at least fifteen years of coal mine employment and found that the x-ray evidence established invocation of the interim presumption of

total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1), but concluded that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(2). Accordingly, he denied benefits. Director's Exhibit 85. Claimant timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence.

On modification, Judge McCarthy again found that the weight of the x-ray evidence established invocation of the interim presumption pursuant to Section 727.203(a)(1), but determined that employer established rebuttal pursuant to Section 727.203(b)(3) and, accordingly, denied benefits. Director's Exhibit 122.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's invocation finding at Section 727.203(a)(1) as unchallenged on appeal, and affirmed as supported by substantial evidence his finding that rebuttal was established pursuant to Section 727.203(b)(3). *Duty v. Cove Hollow Coal Co*., BRB No. 92-0247 BLA (May 25, 1993)(unpub.); Director's Exhibit 129. Accordingly, the Board affirmed the denial of benefits. Claimant again requested modification and submitted additional evidence. Because Judge McCarthy was unavailable to consider claimant's second request for modification, the case was reassigned, without objection, to Administrative Law Judge Edward J. Murty, Jr.

On second modification, the administrative law judge concluded that the medical evidence of record failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4). He therefore denied benefits under 20 C.F.R. Part 727. The administrative law judge also considered entitlement pursuant to 20 C.F.R. Part 718 and found that the evidence failed to establish the existence of pneumoconiosis or total respiratory disability pursuant to Section 718.202(a), 718.204(c). Accordingly, he denied benefits under Part 718.

On appeal, claimant contends that the administrative law judge lacked the authority to consider Section 727.203(a)(1) invocation on modification. Claimant further asserts that the administrative law judge failed to consider all of the relevant evidence at Section 727.203(a)(1). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

[1] We affirm as unchallenged on appeal the administrative law judge's findings

pursuant to 20 C.F.R. §§727.203(a)(2)-(4), 718.202(a), and 718.204(c). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

Claimant first contends that, because Judge McCarthy previously found invocation established by the x-ray evidence, the law of the case doctrine barred Judge Murty from considering Section 727.203(a)(1) invocation and reaching a different conclusion. Claimant's Brief at 2. We disagree.

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 at Section 725.310, provides that upon his own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits. 33 U.S.C. §922; 20 C.F.R. §725.310. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge considering a request for modification pursuant to Section 725.310 has "the duty and full authority to review any and all prior findings of fact," including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 724-25, 18 BLR 2-26, 2-28 (4th Cir. 1993); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971). "[T]here is no need for a smoking-gun factual error, changed conditions, or startling new evidence" to trigger the administrative law judge's review authority; "the statute and regulations give the [administrative law judge] the authority, for one year after the final order on the claim, to simply rethink a prior finding of fact." *Jessee,* 5 F.3d at 725, 18 BLR at 2-28-29.

Here, the administrative law judge acted within the scope of his authority on modification to consider invocation in light of both the earlier x-ray readings and the new readings submitted with the current modification request. The administrative law judge acknowledged Judge McCarthy's previous invocation findings based on the weight of the x-ray evidence in the record at that time, but after weighing the x-ray readings in the current record based upon the readers' radiological credentials, he concluded that "I am not satisfied that the preponderance of the x-ray evidence establishes the presence of pneumoconiosis." Decision and Order at 3. Because the modification provision displaces traditional "principle[s] of finality," *Jessee*, 5 F.3d at 725, 18 BLR at 2-29; *Branham v. BethEnergy Mines, Inc.*, 20 BLR at 1-27, 1-32 (1996), we reject claimant's contention that the law of the case doctrine barred the administrative law judge from addressing invocation at Section 727.203(a)(1).

Claimant next asserts that the administrative law judge failed to consider all of the x-ray evidence. Claimant's Brief at 2. Specifically, claimant contends that the administrative law judge discussed only the recent x-ray readings by Drs. Wiot, Shipley, Wheeler, Scott, and Spitz, which were submitted by employer. *Id*. Contrary to claimant's contention, review of the record indicates that the administrative law judge considered all of the x-ray readings but accorded greater weight to the negative readings by these physicians. Decision and Order at 2-3. The administrative law judge correctly noted that the record contains eighty readings of forty x-rays. Twenty of these x-rays were taken and read for the purpose of detecting pneumoconiosis using the ILO classification system. There were thirty-five positive readings, nineteen negative readings, and two reports classifying an x-ray as unreadable. Director's Exhibits 11, 12, 28-38, 54, 64-76, 80, 86, 100-105, 107, 131, 132, 139, 145, 151; Employer's Exhibit 1. Eighteen of the positive readings were by Board-certified radiologists, B-readers, or both, while nineteen of the negative readings were by similarly credentialed radiologists. In addition, thirteen of the negative readings were by Drs. Wiot, Shipley, Spitz, Scott, and Wheeler, who the record indicates are professors of radiology. Director's Exhibits 139, 145, 151.

The administrative law judge permissibly determined to accord weight only to the interpretations by B-readers, "who have demonstrated competence in recognizing pneumoconiosis." Decision and Order at 2-3; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). In this context, the administrative law judge noted that Drs. Fisher, Brandon, Bassali, Aycoth, Robinette, Castle, Pathak, Shipley, and Wiot rendered positive readings, and that Drs. Spitz, Wheeler, Scott, Hippensteel, Shipley, and Wiot rendered negative readings.[2] Then, among the B-readers, the administrative law judge afforded even greater weight to the negative readings by Drs. Wiot, Shipley, Spitz, Wheeler, and Scott based upon their professorships in radiology. Decision and Order at 3. The Board has held that where an administrative law judge first considers the B-reader status of the physicians reading the x-rays, the administrative law judge may also consider a physician's professorship in radiology as a factor relevant to his or her radiological competence. *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). Because the administrative law judge considered the x-ray readings in light of the readers' qualifications, provided valid reasons for the weight that he accorded to the x-ray evidence, *see Adkins*, *supra*; *Worhach, supra*, and substantial evidence supports his finding, we affirm the administrative law judge's finding pursuant to Section

[2] Drs. Wiot and Shipley read the May 9, 1990 x-ray submitted with the first modification request as positive, Director's Exhibits 105, 107, but in the second modification read three later x-rays taken in 1992, 1994, and 1996 as negative. Director's Exhibit 145.

727.203(a)(1).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge