BRB No. 99-0149 BLA

EUGENE W. HAMBLIN Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

John D. Maddox (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0043) of Administrative Law Judge Pamela Lakes Wood awarding 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 Board's previous decision, the Board discussed fully this claim's procedural history. *Hamblin v. Eastern Associated Coal Corporation*, BRB No. 94-

0429 BLA at 1-3 (Dec. 29, 1994)(unpub.); Director's Exhibit 134. We now focus only on those procedural aspects relevant to the issues raised in this appeal.

As of the Board's prior decision, claimant had established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(2). The issue was whether employer established rebuttal of that presumption. At that time, the Board vacated Administrative Law Judge George A. Fath's finding that employer had not done so and remanded the case for him to reweigh the x-ray readings to determine whether claimant established invocation pursuant to Section 727.203(a)(1),[1] then reconsider whether employer established rebuttal pursuant to Section 727.203(b)(3), (4). [1994] *Hamblin*, slip op. at 3-5. On remand, the administrative law judge found that the weight of the x-ray readings did not establish invocation pursuant to Section 727.203(a)(1), and accorded determinative weight to one of employer's medical opinions to conclude that employer established rebuttal pursuant to Section 727.203(b)(3). Director's Exhibit 149. Consequently, he denied benefits.

Claimant timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence, to which employer responded with its own submissions.

Administrative Law Judge Pamela Lakes Wood considered claimant's modification request and found two bases for reopening the denied claim. She concluded that the prior finding of subsection (b)(3) rebuttal was a mistake in a determination of fact because the medical opinion Judge Fath had credited as severing the causal connection between claimant's disability and his coal mine

[1] Where invocation is established pursuant to 20 C.F.R. §727.203(a)(1), the rebuttal method at 20 C.F.R. §727.203(b)(4) becomes unavailable. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Curry v. Beatrice Pocahontas Coal Co*., 18 BLR 1-59 (1994)(Brown and McGranery, JJ., concurring and dissenting, separately), *rev'd on other grounds*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988).

employment was based upon a medical assumption in conflict with the Act. She additionally found a change in conditions because in her view the weight of the new medical evidence did not rule out such a causal connection. Considering the merits of the claim, the administrative law judge found that the x-ray readings did not establish invocation pursuant to Section 727.203(a)(1), and concluded that employer did not establish rebuttal pursuant to Section 727.203(b)(1)-(4). Accordingly, she awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that a mistake in a determination of fact occurred in the prior denial and that the new evidence established a change in conditions. Employer additionally asserts that the administrative law judge erred in her weighing of the medical evidence when she concluded that employer did not establish rebuttal pursuant to Section 727.203(b)(3), (4). Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal. Employer has filed a reply brief reiterating its arguments.[2]

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).

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). 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).

Claimant has been presumed totally disabled due to pneumoconiosis pursuant to Section 727.203(a)(2). To rebut this presumption under subsection (b)(3), employer must rule out any causal connection between claimant's total disability and

[2] We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §727.203(b)(1), (2). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

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). To rebut the presumption under subsection (b)(4), employer must prove that the miner does not have pneumoconiosis, in either the clinical or legal sense. *See* 20 C.F.R. §727.202; *Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-67 (4th Cir.1995).

On the remand following our previous decision, Judge Fath credited the July 26, 1988 opinion of Dr. Tuteur to find that employer ruled out the causal connection pursuant to Section 727.203(b)(3).[3] Dr. Tuteur, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence then of record and opined that although claimant may have had "coal workers' pneumoconiosis" by x-ray, his obstructive ventilatory abnormality did not result from "coal workers' pneumoconiosis" or exposure to coal mine dust. Director's Exhibit 44. Dr. Tuteur's reasoning on this point was that claimant suffered from an obstructive rather than a restrictive defect and that coal dust exposure produces a restrictive, rather than an obstructive defect. *Id*.

On modification, Judge Lakes Wood found Dr. Tuteur's 1988 opinion insufficient to establish subsection (b)(3) rebuttal because it was premised on the view that pneumoconiosis does not cause an obstructive impairment. *See Stiltner v. Island Creek Coal Co*., 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co*., 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). Consequently, she found Judge Fath's prior rebuttal determination to be a mistake in a determination of fact.

On appeal, having considered employer's contention that Dr. Tuteur's 1988 opinion should not have been discredited under *Warth* and *Stiltner*, Employer's Brief at 33-37, we conclude that substantial evidence supports the administrative law judge's finding. In explaining why claimant's ventilatory obstruction was unrelated to "coal workers' pneumoconiosis," Dr. Tuteur posited that "[n]o obstructive ventilatory defect occurs with simple coal workers' pneumoconiosis, an interstitial pulmonary process," and concluded that because claimant's impairment was obstructive, not restrictive, it must not be due to "coal workers' pneumoconiosis." Director's Exhibit 44 at 4. Medical opinions that categorically exclude obstructive impairments from the legal definition of pneumoconiosis lack probative value. *See Warth*, *supra*; *Stiltner, supra*. Employer contends that Dr. Tuteur's later statement that claimant's

[3] The Board had previously held that Judge Fath had permissibly found the other medical opinions then of record to either be legally insufficient to establish Section 727.203(b)(3) rebuttal or to be worthy of diminished weight.

obstruction was unrelated to the inhalation of coal mine dust proves that he did not exclude obstructive impairments from the category of legal pneumoconiosis. However, this statement was not based upon an independent explanation but rather upon Dr. Tuteur's earlier explanation that claimant's obstruction was unrelated to "coal workers' pneumoconiosis" because it was obstructive, not restrictive. Director's Exhibit 44 at 4. Therefore, we conclude that substantial evidence supports the administrative law judge's finding that Dr. Tuteur's 1988 opinion rested upon an erroneous medical assumption. *See Warth, supra*.

Employer asserts that even if Dr. Tuteur's 1988 opinion violated *Warth*, modification based upon a mistake of fact was unavailable because the controversy over his opinion involves an error of law rather than fact.[4] We reject this assertion first because such a distinction loses its relevance when the administrative law judge has the authority within the one-year modification period to simply rethink a prior determination of fact, including the ultimate fact of entitlement. *See Jessee*, 5 F.3d at 724-25, 18 BLR at 2-28; *O'Keeffe, supra*. Second, for purposes of determining whether a claim should be reopened on modification, prior findings should generally be treated as facts. *See Jessee*, 5 F.3d at 725 n.3; 18 BLR at 2-29 n.3; *Amax Coal Co. v. Franklin*, 957 F.2d 355, 357-58, 16 BLR 2-50, 2-54-55 (7th Cir. 1992). Therefore, we affirm the administrative law judge's finding that there was a mistake in a determination of fact in the prior denial that justified modification pursuant to Section 725.310. Accordingly, we turn to the administrative law judge's findings on the merits that employer did not establish rebuttal pursuant to Section 727.203(b)(3),

[4] Employer also asserts that *Warth* was a change in the law occurring after Judge Fath's decision. Employer's Brief at 33. Even assuming *arguendo* that *Warth* changed the law concerning the weighing of medical opinions, *Warth* was issued three months prior to Judge Fath's decision on remand.

(4).[5]

The administrative law judge focused primarily on the more recent medical opinions developed on modification. The physicians of record considered that claimant worked in the mines for forty-two years and smoked for thirty to forty years before quitting in the 1970's. The physicians agreed that claimant has a mild obstructive ventilatory abnormality detected by pulmonary function study, but disagreed regarding the etiology of that impairment.

In connection with his modification request, claimant was examined and tested by Dr. Rasmussen, who is Board-certified in Internal Medicine. Dr. Rasmussen concluded that claimant has pneumoconiosis by x-ray and that his obstructive impairment is due both to smoking and coal mine dust exposure. Dr. Rasmussen attributed claimant's obstruction partly to coal mine dust exposure because he stated that the medical literature he cited in his report proved that coal dust is "a known potent cause of chronic obstructive lung disease." Claimant's Exhibit 1.

Subsequently, Dr. Zaldivar, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and concluded that he does not have clinical or legal pneumoconiosis but suffers from minimal obstruction due to asthma. Employer's Exhibits 5, 8. Although Dr. Zaldivar stated at his deposition that claimant has no pulmonary impairment related to his occupation, he did not specifically address whether the asthma he diagnosed was related to or aggravated by claimant's coal mine dust exposure.

Thereafter, Drs. Fino and Tuteur, both of whom are Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record. Dr. Fino concluded that claimant does not have clinical or legal pneumoconiosis but

[5] The administrative law judge discussed Section 727.203(b)(3) rebuttal twice, first with regard to a change in conditions and then on the merits. Our analysis of her weighing of the evidence at subsection (b)(3) pertains to both of her discussions because they were connected. However, we do not address the change in conditions finding itself since we have already affirmed the administrative law judge's finding of a mistake in fact.

suffers from mild obstruction due solely to his past smoking habit. Employer's Exhibits 7, 10. Dr. Fino reviewed and criticized Dr. Rasmussen's opinion, stating that the research articles cited by Dr. Rasmussen as evidence of a strong link between coal dust and chronic obstructive lung disease are methodologically flawed and do not establish the proposition stated by Dr. Rasmussen. Employer's Exhibit 10. Dr. Fino stated that reliable medical studies show some relationship between coal dust exposure and clinically insignificant obstruction, but not a relationship of the magnitude that Dr. Rasmussen described. *Id*. Dr. Tuteur concluded that claimant may have pneumoconiosis by x-ray, but his mild obstruction is related to smoking not coal mine employment. Employer's Exhibits 6, 9. Dr. Tuteur opined that Dr. Rasmussen's opinion attributing claimant's impairment partly to coal dust exposure based upon medical studies was not based on an accurate understanding of current, reliable medical literature, which he stated does not show that coal dust exposure causes excess obstruction when smoking is taken into account. Employer's Exhibit 9.

The administrative law judge found that Dr. Zaldivar's opinion fell short of the "rule out" standard, and she accorded greater weight to Dr. Rasmussen's opinion than to those of Drs. Fino and Tuteur to find that employer failed to establish rebuttal pursuant to Section 727.203(b)(3).

As an initial matter, we reject employer's contention that the administrative law judge erred in giving less weight to Dr. Zaldivar's opinion because it failed to definitely rule out a causal connection between coal mine employment and claimant's disability. Employer's Brief at 26. Contrary to employer's argument, the administrative law judge rationally found that Dr. Zaldivar's opinion that claimant had asthma and not pneumoconiosis, without identifying the etiology of the asthma, was not definite enough to rule out pneumoconiosis as a cause of disability. Because Dr. Zaldivar did not identify the etiology of claimant's asthma, a respiratory impairment, or explain that the asthma was not significantly related to or aggravated by claimant's exposure to coal dust, the administrative law judge properly found Dr. Zaldivar's opinion insufficient to establish rebuttal pursuant to Section 727.203(b)(3); *See* 20 C.F.R. §727.202; *[Lockhart]*, 137 F.3d at 804, 21 BLR at 2-314; *Massey, supra*.

Employer also contends that the administrative law judge failed to analyze all of the relevant evidence in crediting Dr. Rasmussen over Drs. Fino and Tuteur. Employer's Brief at 21-25. This contention has merit. In making her finding, the administrative law judge deferred to Dr. Rasmussen because: 1) Dr. Rasmussen cited epidemiological studies; 2) Dr. Tuteur's credibility was somewhat undermined because he apparently modified his opinion regarding obstructive impairments and pneumoconiosis; and 3) Drs. Fino and Tuteur did not examine claimant. Decision

and Order at 8, 12.

An administrative law judge must assess the comparative quality of medical opinions by addressing the physicians' relative qualifications and the quality of their medical reasoning and explanation. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Here, the administrative law judge credited Dr. Rasmussen's opinion because he cited medical studies regarding coal dust and obstruction, but, as employer notes, without indicating how she weighed Dr. Fino's and Dr. Tuteur's criticism of those studies and of Dr. Rasmussen's interpretation of them. Although the administrative law judge noted the physicians' credentials, we see no indication in her decision as to the significance, if any, of the difference in relative qualifications on this dispute regarding the medical literature. Because Dr. Rasmussen's citation to medical studies was a key factor in the administrative law judge's finding that his opinion was "entitled to significant weight" compared to employer's opinions, Decision and Order at 8, we must vacate her finding and remand this case for her to more thoroughly analyze these opinions pursuant to Section 727.203(b)(3) in accordance with *Hicks* and *Akers*.

Nevertheless, we reject employer's contention that the administrative law judge erred by taking into account Dr. Tuteur's apparent change in position regarding obstructive impairments and pneumoconiosis in his 1997 opinion compared to the medical explanation he offered in 1988. It is the administrative law judge's duty to assess credibility, and we will not interfere with such determinations unless they are inherently incredible or patently unreasonable. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co*., 12 BLR 1-77, 1-79 (1988). It was not unreasonable for the administrative law judge to consider the difference between Dr. Tuteur's two opinions, and she may consider it on remand, if she again deems it relevant. However, we additionally note that the failure to examine a claimant, while certainly a relevant consideration, should not serve as an automatic basis for discrediting an expert opinion, *see Hicks, supra*; *Akers, supra*, and in the particular context of this case, non-examination alone does not resolve the difference of opinion between the physicians regarding what current medical studies say about the link between coal dust and obstruction.[6]

Pursuant to Section 727.203(b)(4), the administrative law judge found that

[6] In weighing the medical opinions on remand, the administrative law judge should explain her brief statement that she found the earlier medical opinions insufficient to establish subsection (b)(3) rebuttal. Decision and Order at 12.

employer did not establish the absence of clinical pneumoconiosis by x-ray or the absence of legal pneumoconiosis by medical opinion evidence. She found that Dr. Zaldivar did not adequately address the legal pneumoconiosis issue, and she again found Dr. Rasmussen's opinion to be the most persuasive because he discussed medical studies, and because she discounted Drs. Fino and Tuteur for the same reasons given at subsection (b)(3).

Employer correctly contends that the administrative law judge omitted four negative x-ray readings from her analysis, which could have affected her conclusion that "the x-ray evidence [was] in equipoise" and thus did not assist employer in establishing the absence of clinical pneumoconiosis.[7] Decision and Order at 13. With regard to the medical opinions, contrary to employer's contention, the administrative law judge permissibly found that Dr. Zaldivar's opinion "was not definite enough" to establish the absence of pneumoconiosis when he did not identify the etiology of claimant's asthma. Decision and Order at 13; *see Barber, supra*. However, because the administrative law judge's weighing of the opinions of Drs. Rasmussen, Fino, and Tuteur was the same analysis as at (b)(3), we must vacate her finding and remand this case for her to reconsider subsection (b)(4) rebuttal.[8]

[7] The record contains thirty-eight readings of seven x-rays. There are thirteen positive readings, twenty-three negative readings, and two readings not classified for the presence or absence of pneumoconiosis. Of the positive readings, eight are by Board-certified radiologists and B-readers and three are by B-readers. Of the negative readings, twenty are by Board-certified radiologists and B-readers and two are by B-readers.

[8] We note however, that only Dr. Fino affirmatively stated that both clinical and legal pneumoconiosis were absent; Dr. Tuteur stated that clinical pneumoconiosis may be present by x-ray. Employer's Exhibits 6, 7, 9, 10.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and 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