BRB No. 00-1062 BLA

WILLIAM FLANARY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
U.S. STEEL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William Flanary, Appalachia, Virginia, *pro se*.

Howard G. Salisbury, Jr. (Kay, Casto, Chaney, Love and Wise), Charleston, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Acting Solicitor of Labor; 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-0332) of Administrative Law Judge Joseph E. Kane 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).[1] This case is before the Board for a second time. Claimant filed his initial

[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, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended 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.

claim for benefits on March 29, 1978. Director's Exhibit 1. The claim was administratively denied by the district director on May 30, 1980. Director's Exhibit 16. Claimant filed a timely motion for reconsideration by his submission of new evidence on July 18, 1980, which request was not acted upon until claimant filed a second claim for benefits on March 15, 1996. Director's Exhibits 17, 23. The district director determined that claimant's initial claim was still pending, but denied benefits on May 28, 1996, and again on September 25, 1996. Director's Exhibits 38, 46. Claimant submitted a petition for modification on July 30, 1997, which was denied on September 15, 1997, and claimant subsequently requested a formal hearing. Director's Exhibits 51, 56, 59. In a Decision and Order issued on January 25, 1999, the administrative law judge denied benefits finding that although claimant established thirty-three years of coal mine employment, and invocation of the interim presumption that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1)(2000), employer established rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(3)(2000). The administrative law judge further found that although claimant established the existence of coal workers' pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b)(2000), claimant failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(2000), which precluded an award of benefits.

On appeal, the Board affirmed the administrative law judge's findings pursuant to Section 727.203(a)(1), (b)(1), (b)(2), and (b)(4)(2000), and Sections 718.202(a)(4) and 718.203(b)(2000), as unchallenged on appeal, but remanded the administrative law judge's findings pursuant to Section 727.203(b)(3)(2000) in light of the holding in *Warman v. Pittsburgh & Midway Coal Mining Co.,* 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988).[2] *Flanery v. U.S. Steel Mining Company,* BRB No. 99-0526 BLA (Mar. 31, 2000)(unpub.). On remand, the administrative law judge found the evidence of record insufficient to establish rebuttal pursuant to Section 727.203(b)(3)(2000). Accordingly, benefits were awarded commencing March 1978.

On appeal, employer challenges the administrative law judge's determination that the instant claim involves a request for modification pursuant to 20 C.F.R. §725.310(2000), that the evidence invokes the interim presumption pursuant to Section 727.203(a)(2000), that employer failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3)(2000), and that the date of onset of claimant's disability cannot be determined. Claimant has not participated in the instant appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in the merits of this appeal.

[2]Since the miner's last coal mine employment took place in the Commonwealth of Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 725.310(2000), a party may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. 20 C.F.R. §725.310(a)(2000). In determining whether claimant has established a mistake in a determination of fact pursuant to Section 725.310(2000), the administrative law judge must consider all of the evidence of record to determine whether the evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), modifying 14 BLR 1-156 (1990); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see also Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). In addition, the United States Court of Appeals for the Sixth Circuit has held that the scope of modification extends to whether the "ultimate fact (disability due to pneumoconiosis) was wrongly decided .... ," *Worrell, supra,* and has noted the "very low" standard for what constitutes a modification request. *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999).

Employer contends that the administrative law judge erred by treating the instant case as a petition for modification, rather than as a duplicate claim subject to the provisions of 20 C.F.R. §725.309(d)(2000). Specifically, employer argues that this is a new claim since the record "does not contain an objection to the prior denial issued on May 30, 1980, or any request for reconsideration or modification of that denial." Employer's Brief at 5. Thus, employer asserts that the administrative law judge erred by adjudicating this claim pursuant to 20 C.F.R. Part 727 (2000) rather than 20 C.F.R. Part 718 (2000), and by failing to consider whether claimant established a material change in condition subsequent to the prior denial of the claim. We disagree. Although, claimant may not have specifically requested an appeal or reconsideration of the initial denial of his claim, issued on May 30, 1980, his timely submission of new evidence on July 18, 1980, within the one year modification period is tantamount to a request for modification, as it clearly indicated that claimant wished to have additional evidence considered in his recently denied claim. *Milliken, supra; Worrell, supra.* Thus, since claimant's request for modification was still pending when claimant filed his second claim in March 1996, the administrative law judge properly considered the claim pursuant to the provisions of Section 725.310(2000). Accordingly, we reject employer's contention.

Employer also argues that the administrative law judge erred in his 1999 Decision and Order, by finding that the evidence of record was "arguably sufficient" to establish invocation of the interim presumption pursuant to Section 727.203(a)(1)(2000), which violates the holding in *Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994), which requires that claimant bear the burden of proof of establishing invocation by a preponderance of the evidence.[3] Employer's Brief at 7. The Decision and Order indicates that the administrative law judge considered the x-ray readings, from February 10, 1976 to April 24, 1996, and the November 4, 1996 CT scan contained in the record and found that although the preponderance of the x-ray readings was negative for the existence of pneumoconiosis, the preponderance of the CT scan evidence was positive for the existence of pneumoconiosis. In considering all the aforementioned evidence together, the administrative law judge found that "it would appear to put such evidence in equipoise." Decision and Order Denying Benefits at 18. The administrative law judge then determined that since pneumoconiosis is a progressive disease, and the CT scan evidence was more recent than the x-ray readings of record, greater weight could be accorded to the CT scan and found that the evidence was therefore "arguably sufficient" to invoke the interim presumption. Decision and Order Denying Benefits at 18.

We agree with employer that this finding does not satisfy the holding in *Ondecko,* that claimant bears the affirmative burden of proof in establishing invocation of the interim presumption, since the administrative law judge's finding is not an unequivocal finding that the evidence supporting claimant's position outweighs employer's evidence, thereby affirmatively establishing invocation of the presumption by a preponderance of the evidence. Accordingly, we vacate the administrative law judge's finding on this issue, and hold that

[3]Although we previously affirmed the administrative law judge's findings pursuant to Section 727.203(a)(1)(2000) as unchallenged on appeal, we hold that the facts of the present case require that we depart from the law of the case doctrine. The doctrine of the law of the case is a discretionary rule of practice based on the policy that once an issue is litigated and decided, the matter should not be re-litigated. *United States v. U.S. Smelting Refining & Mining Co.,* 339 U.S. 186 (1950), *reh'g denied,* 339 U.S. 972 (1950). However, under the law of the case doctrine, it is proper for a court to depart from a prior holding if the holding is clearly erroneous and not in the interest of justice. *Cale v. Johnson,* 861 F.2d 943 (6th Cir. 1988), citing *Arizona v. California,* 460 U.S. 605 (1983); *see also Brinkley v. Peabody Coal Co.,* 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield,* 22 BRBS 234 (1989) (Brown, J. dissenting); *Bridges v. Director, OWCP,* 6 BLR 1-988 (1984). Inasmuch as employer had been the prevailing party, it was not required to challenge this determination prior to the administrative law judge's subsequent award of benefits. *Jones v. Badger Coal Co.,* 21 BLR 1-102 (1998)(*en banc*).

remand is required for reconsideration of the evidence relevant to this section. *Ondecko, supra.*

Employer also contends that the administrative law judge erred by failing to find rebuttal of the interim presumption established pursuant to Section 727.203(b)(3)(2000). Employer specifically argues that the administrative law judge erred by finding the opinion of Dr. Paranthaman insufficient to establish rebuttal at this section. Employer's Brief at 7-9. The record contains five relevant medical reports.[4] Dr. Odom diagnosed coal workers' pneumoconiosis, hypertension, emphysema, and arthritis and stated that claimant was "disabled for coal mining and work in a dusty environment" but could perform non-mine work. Director's Exhibit 17. Dr. Booth found pneumoconiosis, hypertension, and degenerative disc disease which rendered claimant "disabled". Director's Exhibits 17, 45. Dr. O'Neill diagnosed mild obstructive airway disease, chronic bronchitis, coal workers' pneumoconiosis, heart disease, and arthritis, and stated that claimant's arterial blood gas study revealed minimal arterial hypoxemia, but did not specifically address the issue of disability or its cause. Director's Exhibits 17, 20. Dr. Fleenor diagnosed coal workers' pneumoconiosis, hypertension, and congestive heart failure related to claimant's coal mine employment, but rendered no opinion regarding disability. Director's Exhibit 11. Lastly, Dr. Paranthaman diagnosed chronic bronchitis of uncertain etiology, and hypertension unrelated to coal dust exposure, and found no respiratory impairment of any kind. This physician further stated that he doubted that the chronic bronchitis was related to coal dust exposure, and that claimant's age and arthritis of the knees appear to cause a significant impairment from performing manual labor. Director's Exhibit 33.

In the Decision and Order on Remand, the administrative law judge considered these opinions and found that Dr. Paranthaman's opinion was insufficient to establish rebuttal under Section 727.203(b)(3)(2000), since his diagnosis of pneumoconiosis was equivocal as he was "uncertain" of the etiology of claimant's chronic bronchitis, and his diagnosis of no respiratory impairment does not satisfy employer's burden of proving that claimant's total disability did not arise out his coal mine employment. Decision and Order on Remand at 5-6; *Warman, supra; Roberts v. Benefits Review Board,* 822 F.2d 636, 10 BLR 2-153 (6th Cir. 1987); *Ramey v. Kentland Elkhorn Coal Corp.,* 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985); *Gibas v. Saginaw Mining Co.,* 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984); *Cole v. East Kentucky Collieries,* 20 BLR 1-50 (1996); *Michael v. James Spur Coal Co.,* 11 BLR 1-78 (1988)(Tait, J. concurring). As the administrative law judge has rationally determined that employer's evidence did not establish that pneumoconiosis played no part in claimant's total

[4]Although the Decision and Order on Remand notes the existence of Dr. Anderson's deposition testimony, his failure to discuss this opinion is harmless as it does not support rebuttal under Section 727.203(b)(3). Director's Exhibit 17.

disability, we decline to disturb the administrative law judge's findings on this issue if invocation is established on remand. *Warman, supra.*[5]

Employer further challenges the administrative law judge's findings regarding the date for the commencement of benefits in the instant claim. Employer contends that if benefits are again awarded on remand, the date of onset of claimant's total disability should be November 1996, the date of the CT scan which established invocation of the interim presumption, or September 25, 1996, the date of the most recent denial of benefits prior to the date of the CT scan. Employer's Brief at 9-10. Benefits are payable from the month in which claimant's pneumoconiosis progressed to the point of total disability. *Lykins v. Director, OWCP,* 12 BLR 1-181 (1989). If this date is not ascertainable from the record evidence, then benefits commence with the month the claim was filed or the month claimant elected review under Section 435 of the Act. 30 U.S.C. §925; 20 C.F.R. §§725.503(b)(2000), 727.302(c)(1) (2000); *Gardner v. Consolidation Coal Co.,* 12 BLR 1-184 (1989). Contrary to employer's contention, the date of onset is not determined based on the date of the evidence which establishes invocation of the interim presumption. *Merashoff v. Consolidation Coal Co.,* 8 BLR 1-105 (1985). However, the Decision and Order on Remand summarily states that the administrative law judge has reviewed the evidence of record, was unable to determine the date of onset of claimant's total disability, and therefore awarded benefits as of March 1978, the month claimant filed his initial claim. Decision and Order on Remand at 6. Since the administrative law judge has not provided any discussion of the record evidence regarding this issue, the administrative law judge must reconsider the evidence relevant to this issue if reached, on remand. *Williams v. Director, OWCP,* 13 BLR 1-28 (1989); *see Rochester & Pittsburgh Coal Co. v. Krecota,* 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, and vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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[5]We also find no merit in employer's suggestion that Dr. Paranthaman's opinion may be sufficient to establish rebuttal pursuant to Section 727.203(b)(2)(2000), as this subsection requires proof that claimant is not totally disabled due to any cause, a diagnosis contradicted by this physician's statement that "advanced age and arthritis of the knees appear to cause significant impairment to do heavy manual work." Director's Exhibit 33; *York v. Benefits Review Board,* 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987).

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge