BRB Nos. 90-0159 BLA
and 90-0159 BLA-A

WILLIAM EAST	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Vernon M. Williams (Wolfe & Farmer), Norton, Virginia, for claimant.

Douglas A. Smoot and Karen G. Johnson (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (89-

BLA-0237) of Administrative Law Judge Paul H. Teitler denying benefits on a claim filed pursuant to the provisions of *Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). Employer conceded that claimant had thirty years of qualifying coal mine employment, suffered from pneumoconiosis arising out of coal mine employment, and was totally disabled, and the administrative law judge determined that employer's stipulations were supported by the evidence of record. The administrative law judge found that claimant's original claim, filed on October 26, 1977, was still viable, and that invocation of the interim presumption was established pursuant to 20 C.F.R. §727.203(a)(1). The administrative law judge further found, however, that employer established rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b)(3), and that since claimant's total disability was not due to pneumoconiosis, claimant was precluded from entitlement to benefits under 20 C.F.R. §410.490, 20 C.F.R. Part 410, Subpart D, and 20 C.F.R. Part 718. On appeal, claimant contends that the administrative law judge erred in failing to apply only those rebuttal methods found at 20 C.F.R. §410.490(c); in mischaracterizing the opinions of Drs. Sobieski, Fino and Vasudevan; and in failing to apply the proper standard of rebuttal at Section 727.203(b)(3). Employer responds, urging affirmance of the administrative law judge's denial of benefits. In a cross-appeal, employer

contends that because a duplicate claim rather than a modification situation existed herein, the administrative law judge erred in applying the regulations at 20 C.F.R. Part 727.

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).

Turning first to the procedural issues, employer contends that substantial evidence does not support the administrative law judge's determination that the regulations at Part 727 are applicable herein. We disagree. In finding that claimant's original claim was still viable, the administrative law judge determined that on April 30, 1980, claimant was notified that his original claim was being reconsidered; claimant indicated his intent to submit more information on May 23, 1980; the claim was denied on June 3, 1980; claimant submitted a notice of appointment of counsel form on June 17, 1980; and claimant filed a second claim for benefits on April 23, 1984. Decision and Order at 3, 4; Director's Exhibits 1, 24. During development of the second claim and upon receipt of the record, the claims examiner discovered a previously unconsidered positive x-ray interpretation by a Board-certified radiologist and B-reader dated May 13, 1980, which had been

received in the deputy commissioner's office on June 30, 1980. See Director's Exhibit 24. Based on that positive reading, on February 1, 1985, the deputy commissioner modified the denial of claimant's original claim to a finding of entitlement pursuant to 20 C.F.R. §725.310. Decision and Order at 4; Director's Exhibits 12, 44.

Employer argues that modification was improper because more than a year had passed between the final denial of the original claim and the deputy commissioner's consideration of the new x-ray evidence. Employer's argument is without merit. The record reflects that claimant's appointment of representative form and the positive x-ray interpretation were submitted within one month of the denial of the claim, and thus were sufficient to constitute a timely request for modification pursuant to Section 725.310. Director's Exhibit 24; see Stanley v. Betty B Coal Co., 13 BLR 1-72 (1990); Searls v. Southern Ohio Coal Co., 11 BLR 1-161 (1988). Employer also maintains that the new x-ray evidence did not demonstrate a change in claimant's condition pursuant to 20 C.F.R. §725.310, since the x-ray evidence of record was already sufficient to establish the existence of pneumoconiosis. A review of the record, however, reveals only two interpretations of a single film taken on February 3, 1978, which were submitted prior to the denial of the original claim on June 3, 1980, i.e., a positive interpretation by Dr. David S. Cho, whose qualifications do not appear in the record; and an interpretation by Dr. R. H. Morgan, declaring the film unreadable. See Director's Exhibit 24. The deputy commissioner denied the

original claim based on his finding that claimant failed to establish any of the elements of entitlement, including the existence of pneumoconiosis; and then permissibly found that the positive interpretation by a Board-certified radiologist and B-reader, submitted within one year subsequent to the denial, was sufficient to support modification of that denial pursuant to Section 725.310. Director's Exhibit 24; see generally Spese v. Peabody Coal Co., 11 BLR 1-174 (1988). Although the administrative law judge did not consider all newly submitted evidence de novo to determine whether it was sufficient to establish a change in conditions or a mistake in a determination of fact pursuant to Section 725.310, see Kovac v. BCNR Mining Corp., 14 BLR 1-156 (1990), modified on recon., 16 BLR 1-71 (1992), his failure to do so constitutes harmless error, see Larioni v. Director, OWCP, 6 BLR 1-1276 (1984), inasmuch as the administrative law judge properly considered the entire record in adjudicating the merits of this claim. See generally Dingess v. Director, OWCP, 12 BLR 1-141 (1989); Cooper v. Director, OWCP, 11 BLR 1-95 (1988). We therefore affirm the administrative law judge's finding that the original claim was still viable, mandating review pursuant to Part 727, as supported by substantial evidence.

Claimant further contends that inasmuch as this claim arises within the appellate jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge erred in considering rebuttal pursuant to Section 727.203(b)(3) and (b)(4) in light of the holding in Taylor v. Clinchfield Coal Co., 895

F.2d 178, 13 BLR 2-294 (4th Cir. 1990), reh'g denied (1990). Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Supreme Court upheld the validity of the rebuttal methods provided by Section 727.203(b)(3) and (b)(4) in Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991), thus reversing the holding in Taylor, supra. Consequently, contrary to claimant's argument, the administrative law judge properly considered rebuttal of the interim presumption at subsections (b)(3) and (b)(4).[1] Pauley, supra.

Turning to the merits, claimant asserts that in finding rebuttal of the presumption established at Section 727.203(b)(3), the administrative law judge erred in failing to apply the standard enunciated by the United States Court of Appeals for the Fourth Circuit in Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), which requires the party opposing entitlement to "rule out" any relationship between the miner's total disability and his coal mine employment. Contrary to claimant's argument, however, although the administrative law judge did not articulate the Massey standard, he properly applied it in finding that the miner's total disability did not arise in whole or in part out of coal mine employment, based on the opinions of Drs. Sobieski, Fino, Vasudevan and Zaldivar, who diagnosed no

[1] In light of Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991), the Board has held that a claim, such as this, which is properly adjudicated pursuant to Section 727.203, is not subject to adjudication pursuant to Section 410.490. See Whiteman v. Boyle Land and Fuel Co., 15 BLR 1-11 (1991)(en banc). Accordingly, we must vacate the administrative law judge's findings pursuant to Section 410.490.

respiratory impairment arising out of coal mine employment. Decision and Order at 8-12; see Borgeson v. Kaiser Steel Corp., 12 BLR 1-169 (1989).

Claimant next maintains that the administrative law judge erroneously determined that Dr. Sobieski performed a medical examination of claimant, when in fact he was merely a consulting physician. Claimant's argument is without foundation in the record. The administrative law judge accurately summarized the opinion of Dr. Sobieski, noting that the physician "indicated that he had reviewed the medical records herein....Based upon his examination, Dr. Sobieski diagnosed simple coal workers' pneumoconiosis." Decision and Order at 10; Director's Exhibit 31. It appears that claimant has taken the administrative law judge's statement out of context, as the phrase "[b]ased upon his examination" clearly refers to Dr. Sobieski's examination of the medical records, not claimant.[2]

Claimant also asserts that Dr. Fino found sufficient radiographic evidence to justify a diagnosis of pneumoconiosis in his consultative opinion of May 10, 1988, see Director's Exhibit 33, and therefore the administrative law judge erred in stating that Dr. Fino found no radiographic evidence of pneumoconiosis in that report. See Decision and Order at 10, 11. The administrative law judge's error is harmless, however, since Dr. Fino issued a subsequent consultative opinion on June 9, 1989,

[2] In summarizing the medical opinions of record, the administrative law judge explicitly identified the examining physicians, and never stated that Dr. Sobieski examined claimant. Decision and Order at 9-12. Indeed, the administrative law judge found that "Dr. Sobieski reviewed the records again on July 6, 1989 (EX 7)." Decision and Order at 12.

which the administrative law judge accurately summarized. Decision and Order at 11; see Larioni, supra. In that report, Dr. Fino indicated that he had changed his opinion and no longer believed that claimant had x-ray evidence of pneumoconiosis, but regardless of the presence or absence of occupationally-related lung disease, claimant had no respiratory impairment or disability. See Employer's Exhibit 8.

Claimant additionally maintains that the administrative law judge mischaracterized the opinion of Dr. Vasudevan by finding that he diagnosed no disability from a pulmonary standpoint, when, in fact, Dr. Vasudevan stated that claimant had a mild to moderate peripheral airflow limitation in his discussion of claimant's pulmonary function study results. See Decision and Order at 10; Director's Exhibit 34. Claimant's argument is without merit. Dr. Vasudevan's diagnosis establishes the existence of an impairment, but does not establish to what degree the impairment is disabling. Boyd v. Freeman United Coal Mining Co., 6 BLR 1-159 (1983). Moreover, Dr. Vasudevan went on to state that "[e]ven if x-rays shows [sic] pneumoconiosis, his pulmonary function study is not consistant [sic] with any disability arising out of this condition." Director's Exhibit 34.

We further reject claimant's contention that the opinions of Drs. Sobieski, Fino, Vasudevan and Zaldivar are insufficient to support rebuttal of the presumption at subsection (b)(3) pursuant to Massey, supra. Contrary to claimant's arguments, all of the opinions satisfy the Massey standard.[3] As the administrative law judge

[3] Dr. Sobieski diagnosed no significant respiratory impairment, and found that

reasonably relied on a numerical preponderance of opinions rendered by the most highly qualified physicians, which were supported by all of the pulmonary function studies and the majority of the blood gas studies of record, we affirm his findings pursuant to Section 727.203(b)(3), as supported by substantial evidence. See generally Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989); Wetzel v. Director, OWCP, 8 BLR 1-139 (1985).

As claimant failed to establish entitlement pursuant to 20 C.F.R. Part 727, the administrative law judge properly considered entitlement pursuant to 20 C.F.R. Part 410, Subpart D. See Muncy v. Wolfe Creek Collieries Coal Co., Inc., 3 BLR 1-627 (1981). Inasmuch as the evidence of record established that claimant's disability was unrelated to pneumoconiosis, we affirm the administrative law judge's finding

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claimant maintained the respiratory reserve to perform his last coal mine employment, but was disabled by his significant coronary artery disease, which was in no way related to coal mine employment exposure. Decision and Order at 10, 12; Director's Exhibit 31; Employer's Exhibit 7. Dr. Fino opined that claimant had no occupationally-related respiratory impairment or disability, and that claimant had sufficient pulmonary capacity to perform his usual coal mine employment; further, claimant's coal mine employment exposure did not contribute to his cardiac disease. Decision and Order at 10, 11; Director's Exhibit 33; Employer's Exhibit 8. Dr. Vasudevan opined that claimant's symptoms were due to his industrial exposure, but that claimant's pulmonary function study was not consistent with any disability arising out of his pulmonary condition. Decision and Order at 10; Director's Exhibit 34. Dr. Zaldivar determined that claimant could perform arduous manual labor from a pulmonary standpoint; that claimant's heart condition was the only disabling condition Dr. Zaldivar could identify; and that there was no link between claimant's cardiac condition and his coal workers' pneumoconiosis. Decision and Order at 10, 11; Director's Exhibits
16, 35; Employer's Exhibit 9.

that claimant is precluded from entitlement to benefits under the Act. See generally Shaw v. Cementation Co. of America, 10 BLR 1-114 (1987); Perry v. Director, OWCP, 9 BLR 1-1 (1986).

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

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge