BRB Nos. 93-1480 BLA
and
93-1480 BLA-A

MICHAEL EVOSEVICH)
)
Claimant-Petitioner)
)
v.)
)
CONSOLIDATION COAL COMPANY)
) Date Issued:
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 Thomas M. Burke, Acting District Director, United States Department of Labor.

Gregory C. Hook (Hook & Hook), Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Nancy G. Feeney (Thomas S. Williamson, Jr., 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: , , and , Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order denying benefits and the Decision and Order denying Motion for Reconsideration (91-BLA-2165) of Administrative Law Judge Thomas M. Burke 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). Claimant filed his first claim for benefits on March 2, 1979 and it was denied by Administrative Law Judge Reno E. Bonfanti on September 29, 1982. This denial was affirmed by the Board on July 17, 1985 and by the United States Court of Appeals for the Third Circuit on May 5, 1986. Claimant filed the present claim for benefits on October 20, 1986. The administrative law judge considered this claim to be a request for modification as it was filed within a year of the final denial of the prior claim. Upon considering the request for modification, the administrative law judge stated that claimant submitted three medical opinions diagnosing total disability from pneumoconiosis and determined that claimant established a material change in conditions. The administrative law judge then considered the evidence submitted subsequent to the final denial and determined that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2). The administrative law judge next considered the newly submitted evidence and found that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) and (4). Accordingly, benefits were denied. Claimant then filed a motion for reconsideration

of the administrative law judge's Decision and Order denying benefits, which was denied. On appeal, claimant contends that the administrative law judge erred in failing to find that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and in finding that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) and (4). On cross-appeal, employer contends that the administrative law judge erred in finding that claimant's second claim is a request for modification as the mere filing of an application for benefits is insufficient to request modification under the Act. Additionally, employer responds in support of the remainder of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's cross-appeal in support of the administrative law judge's finding that claimant's second claim constitutes a request for modification.

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).

Initially, it is necessary to address employer's cross-appeal. Employer contends that claimant's second claim should be considered a duplicate claim

because claimant has neither contended that there has been a change in condition nor a mistake in a determination of fact. However, the Board has previously addressed this issue and held that if claimant's duplicate claim was filed within one year of the issuance of the final denial of the prior claim, the duplicate claim constitutes a timely request for modification of claimant's initial claim pursuant to 20 C.F.R. §725.310. *See Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990); *Garcia v. Director, OWCP*, 12 BLR 1-24 (1988). In the present case, claimant's first claim was finally denied by the United States Court of Appeal for the Third Circuit on May 5, 1986. Claimant filed his second claim for benefits on October 20, 1986, within one year of the prior denial. Thus, the administrative law judge's finding that claimant's second claim is a timely request for modification of the prior denial pursuant to Section 725.310 is affirmed.

After determining that claimant's second claim for benefits is a request for modification, the administrative law judge stated that claimant must either show a change in conditions or a mistake in a determination of fact for his claim to be reconsidered pursuant to 20 C.F.R. Part 727. The administrative law judge then noted that claimant offered the opinions of Drs. Levine, Bobak, and Silverman diagnosing total disability from pneumoconiosis. The administrative law judge concluded by stating that the Board has held in *Spese v. Peabody Coal Company*, 11 BLR 1-174 (1988), that one medical report diagnosing pneumoconiosis is sufficient evidence on which to base a finding of a material change in conditions.

See D&O at 12-13. The administrative law judge's findings on this issue are in error. The Board has held that upon considering a claim pursuant to Section 725.310, the administrative law judge's role is to consider any contested issue *de novo*. *See Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990). In this instance, the contested issues are whether there has been a change in conditions or mistake in a determination of fact. *See Kovac*, *supra*. Thus, the administrative law judge erred in stating that there is sufficient evidence to establish a "material change in conditions", which is the standard applied to duplicate claims pursuant to 20 C.F.R. §725.309, and in failing to make findings as to whether claimant established a change in conditions or mistake in a determination of fact pursuant to Section 725.310. As a result, the administrative law judge's finding that claimant established a material change in conditions is vacated and the case is remanded for the administrative law judge to make the necessary findings pursuant to Section 725.310.

Additionally, the Board has held that, in determining whether claimant has established a change in conditions pursuant to Section 725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In the present claim, the administrative law judge erroneously failed to consider all of the evidence of record.

In making his findings pursuant to Section 727.203, the administrative law judge merely considered the evidence submitted subsequent to the May 5, 1986 decision of the Court of Appeals and ignored the evidence submitted with claimant's prior claim. The evidence submitted with claimant's prior claim includes numerous positive x-ray interpretations and several medical opinions which diagnose total disability due to pneumoconiosis. The administrative law judge erred in failing to consider the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *See Nataloni*, *supra*. As a result, the administrative law judge's findings pursuant to Section 727.203(a) and (b) are vacated and the case is remanded for the administrative law judge to properly consider all of the evidence of record when considering claimant's request for modification pursuant to Section 725.310. Further, as the administrative law judge's findings pursuant to Section 727.203 are vacated, the Board need not address claimant's contentions of error on appeal.

Accordingly, the administrative law judge's Decision and Order denying Motion for Reconsideration is vacated and the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part, and remanded for further consideration consistent with this opinion.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge