BRB No. 95-0459 BLA

SANDRA COX (Widow of TIVIS COX)	)	
Claimant-Petitioner	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Sheldon R. Lipson, Administrative Law Judge, United States Department of Labor.

Daniel Sachs (United Mine Workers of America - Legal Department), Castlewood, Virginia, for claimant.

Douglas A. Smoot (Jackson & Kelly), Charlestown, West Virginia, for employer.

Eileen M. McCarthy (J. Davitt McAteer, 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (93-BLA-1219) of

[1]Claimant is Sandra Cox, the miner's widow, who filed a survivor's claim for benefits on June 20, 1992. Director's Exhibit-Widow's Claim 1. The miner, Tivis Cox, filed a claim on September 20, 1979, was awarded benefits on September 15, 1987, and
died on June 8, 1992. Director's Exhibits-Miner's Claim 1, 51; Director's Exhibit-Widow's Claim 6. On appeal, the Board affirmed the award of benefits. *Cox v. Island Creek Coal Co.*, BRB No. 87-2874 BLA (Jun. 29, 1990). Employer filed a request for modification pursuant to 20 C.F.R. §725.310 on January 25, 1991. Director's Exhibit-Miner's Claim 67.

Administrative Law Judge Sheldon R. Lipson 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). The case was before Judge Lipson on employer's petition for modification of an award of benefits. Relying upon evidence obtained after the miner's death, employer contended that the award was based on a mistake in fact. The administrative law judge found that the parties did not dispute the miner's thirty-three years of qualifying coal mine employment and that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) and, thus, a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied on the miner's claim. The administrative law judge then found that claimant failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied on the survivor's claim.

On appeal, claimant contends that employer's request for modification was not timely filed and that the administrative law judge erred in his finding at Section 725.310. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a motion to remand.[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 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 employer's request for modification was not timely filed because employer never paid benefits on the claim, thus failing to toll the one year limitation on filing a petition for modification pursuant to Section 725.310. Claimant's Brief at 3. Section 725.310 provides that on his own initiative, or on 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. 20 C.F.R. §725.310

[2]We affirm the administrative law judge's finding regarding the miner's coal mine employment and the denial of the survivor's claim as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

While claimant is correct in stating that employer did not pay benefits on the claim, the record indicates that the Black Lung Trust Fund made payments to claimant and continued to do so as of January 15, 1991. Director's Exhibits-Miner's Claim 64, 66. Because employer's petition for modification was filed on January 25, 1991, we hold that the petition was timely filed pursuant to Section 725.310. 20 C.F.R. §725.310.

Claimant next contends that the administrative law judge erred in not applying the standard as set forth in *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988), for determining a material change in conditions upon considering the request for modification. Claimant's Brief at 4-6. We reject this contention because the standard suggested by claimant is a standard applied to determine whether a claimant has established a material change in conditions in a duplicate claim pursuant to 20 C.F.R.§725.309.

Pursuant to 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 by 20 C.F.R. §725.310, a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. The United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, has held, however, that if a claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the district director or the administrative law judge has the authority, without more (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), to modify the denial of benefits, *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). As the administrative law judge considered the evidence in determining that a mistake in a determination of fact was made, this finding is affirmed. 20 C.F.R. §725.310.

Claimant also generally contends that the administrative law judge erred in denying benefits, however, she did not contend that the administrative law judge erred in finding rebuttal established pursuant to subsection(b)(3). Claimant's Brief at 1. The Director filed a motion to remand arguing that the administrative law judge erred in finding rebuttal established pursuant to subsection (b)(3). Motion to Remand at 14. Employer objects to the motion to remand, arguing that the Board should affirm the administrative law judge's finding pursuant to subsection (b)(3) and not address the Director's motion to remand because claimant did not raise subsection (b)(3) as an issue and the Director did not raise the issue in a cross-

appeal. Employer's Objection to Director's Motion for Remand at 1-2. We reject employer's argument.

The Board has recognized that a Motion to Remand is distinct and separate from a response brief. *See* 20 C.F.R. §§802.212, 802.219. Consequently, the Board has held that the Director, having filed a Motion to Remand, is not limited to raising arguments that either respond to arguments raised in claimant's brief or support the decision below. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994)(*en banc*). Further, the Board has held that where the Director's brief responds to claimant's general allegation that the administrative law judge erred in failing to award benefits, the Director's brief is sufficiently responsive to satisfy the requirements of Section 802.212, and thus the Board will address the Director's contentions on appeal. *See Barnes v. Director, OWCP*, 18 BLR 1-73 (1995)(*en banc reconsideration*)(Smith, J., dissenting), *affirming in part and vacating in part* 18 BLR 1-55 (1994). Because, claimant generally contends that the administrative law judge erred in denying benefits, and because the Director is not limited in the arguments that he can raise in a Motion to Remand, we will consider the Director's Motion to Remand.

The Director, in its motion to remand, argues that the administrative law judge erred in determining that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3) because he focused solely on the relationship between the miner's "clinical" pneumoconiosis and his respiratory disability and did not determine whether the miner had chronic bronchitis or emphysema which caused a respiratory impairment. Director's Motion to Remand at 14-26.

Because this claim arose within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, employer must "rule out" any connection between total respiratory disability and coal mine employment in order to establish rebuttal pursuant to subsection (b)(3). *Cox v. Shannon-Pocahontas Mining Co.*, 6 F.3d 190, 193 18 BLR 2-31, 2-94 (4th Cir. 1993); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *see Borgeson v. Kaiser Steel Corp.*, 12 BLR 1-169 (1989)(*en banc*). The *Massey* court stated that where "the combined effects of several diseases disable the miner," rebuttal cannot be established "by focusing solely on the disabling potential of the miner's pneumoconiosis." Rather, it must be shown "that the miner's primary condition, whether it be emphysema or some other pulmonary disease, was not aggravated to the point of total disability by prolonged exposure to coal dust." *Massey*, 736 F.2d at 124, 7 BLR 2-81. The court further held, in *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), that employer may establish subsection (b)(3) rebuttal if medical opinion evidence states

without equivocation that the miner suffers no respiratory or pulmonary impairment of any kind.

In this case, the administrative law judge considered all of the medical opinion evidence of record, which includes evidence developed subsequent to the miner's death, and stated:

> The autopsy confirmed the fact that the miner had coal workers' pneumoconiosis. The autopsy evidence also provided actual microscopic evidence of the lung tissue to determine the extent of the damage done by pneumoconiosis. This new evidence generated a considerable body of new medical opinion. Of those physicians who have reviewed the autopsy evidence, all have agreed that the very mild degree of simple coal workers' pneumoconiosis found in the miner's lung could not have resulted in any respiratory or pulmonary impairment, nor did it contribute to his death.

Decision and Order at 25.

After discussing the opinions, the administrative law judge concluded:

> In sum, I find, based upon the medical opinion generated after the miner's death, that the Employer has established that the miner's pneumoconiosis was very mild, affecting only a very small amount of the lung tissue, and that it was not of a degree sufficient to have caused any respiratory impairment, nor did it play a role or affect his primary condition, which was severe atherosclerotic heart disease. Further, I find that the Employer has established by the unrefuted weight of the medical evidence that the miner's death due to cardiogenic shock was not in *any* degree occupationally related.

Decision and Order at 27. The administrative law judge then found that employer established rebuttal pursuant to subsection (b)(3).

The record contains evidence that the miner suffered from chronic bronchitis and emphysema. Director's Exhibits-Miner's Claim 12, 49, 63, 70, 73, 82, 91, 98; Director's Exhibits-Widow's Claim 7, 8, 14, 15, 17, 73, 93; Employer's Exhibits 1, 3, 5, 6. However, the administrative law judge did not weigh this evidence and determine whether the miner had chronic bronchitis and/or emphysema, whether these conditions arose from the miner's coal mine employment, and whether they caused total respiratory disability. *See Massey*, *supra*; *Cox*, *supra*. Thus, we vacate

the administrative law judge's findings pursuant to Section 727.203(b)(3) and remand the case for further consideration pursuant to subsection (b)(3).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge