BRB Nos. 97-0269 BLA
97-0269 BLA-A
Case No. 95-BLA-0169

WALTER N. SHATLEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY	)	
	)	
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 on Modification of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Walter N. Shatley, Matoaka, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for the employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, and employer, Consolidation Coal Company, appeal and cross-appeal the Decision and Order on Modification Denying Benefits (95-BLA-0169) of Administrative Law Judge Jeffrey Tureck rendered on a claim filed pursuant to the provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). A claimant is entitled to benefits under the Act by establishing that he has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by the disease. 30 U.S.C. §901; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 141, 11 BLR 2-1, 2-5 (1987),

reh'g denied, 484 U.S. 1047 (1988); *Doss v. Director, OWCP*, 53 F.3d 654, 658, 19 BLR 2-181, 2-190 (4th Cir. 1995).

I

Claimant left the mines in October, 1981, after 38 years of coal mine employment. Claimant first filed for benefits under the Act on May 4, 1979. DX-1. This claim was administratively denied by OWCP on June 27, 1980. *See* DX-25. Claimant, by letter dated July 30, 1980, asked to keep this claim open. DX-26. The district director did not reply to claimant's correspondence, and in 1982 claimant filed a second claim. DX-2. This latter claim was denied in 1988, and the claim was referred to the Office of Administrative Law Judges for a formal hearing.

The first administrative law judge (Administrative Law Judge Aaron Silverman), credited claimant with 38 years of coal mine employment, found that claimant had not abandoned his 1979 claim and adjudicated both claims pursuant to the interim criteria set forth at 20 C.F.R. Part 727 and 20 C.F.R. Part 410.490. He determined that claimant failed to establish invocation of the interim presumption, and that the evidence did not establish entitlement under the permanent criteria set forth at 20 C.F.R. Part 410, Subpart D. DX-41. The initial administrative law judge's denial of benefits was appealed to the Board on May 24, 1989. DX-42. While this appeal was pending, claimant petitioned for modification with the district director. DX-53. The Board thereupon dismissed claimant's appeal without prejudice, and remanded the claim to the Office of Administrative Law Judges for modification.[1] DX-55. After a formal hearing, the administrative law judge issued the Decision and Order on Modification Denying Benefits which is the subject of claimant's *pro se* appeal and employer's cross-appeal.

[1]*Shatley v. Consolidation Coal Co.*, BRB Nos. 88-3838 BLA/A (Nov. 18, 1991)(Order).

The administrative law judge invoked the interim presumption on the basis of biopsy evidence of simple pneumoconiosis,[2] *see* 20 C.F.R. §727.203(a)(1), and found the presumption rebutted pursuant to Section 727.203(b)(3), 20 C.F.R. §727.203(b)(3), on the basis of medical reports of Drs. Zaldivar, Fino, W.K.C. Morgan, Kleinerman and Wiot. The administrative law judge also found that claimant failed to establish complicated pneumoconiosis. The administrative law judge credited the reports of these experts on the basis of their credentials and because their opinions, that claimant does not suffer from a respiratory or pulmonary impairment arising out of coal mine employment, were "based on and consistent with all the probative evidence of record." He also ruled that this rebuttal finding precluded entitlement under the permanent criteria set forth at 20 C.F.R Part 410, Subpart D. Decision and Order at 3-5. These appeals followed.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88, 1-90 (1995)(Order). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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).

Upon consideration of the administrative record as a whole, the decision and order[3] rendered in this case, and any arguments presented on appeal, we conclude that the

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[2]On August 2, 1995, claimant underwent a needle biopsy on a pulmonary nodule. Drs. Pardasani and Pia diagnosed "moderately differentiated bronchoalveolar adenocarcinoma and coal worker's pneumoconiosis." CXs-4, 5.

[3]Because claimant did not request that the Board reinstate his initial appeal, only the Decision and Order on Modification is under direct review in these appeals. *Compare Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 1165, 21 BLR 2-73, 2-77 (6th Cir. 1997); *Burns v. Director, OWCP*, 41 F.3d 1555, 1561-62, 29 BRBS 28, 36-7 (CRT)(D.C.Cir. 1994); *Rochester v. George Washington University*, 30 BRBS 233, 235 (1997)(interlocutory decisions subject to review on appeal of final order).

administrative law judge's finding that claimant is not entitled to benefits cannot be affirmed in its entirety. For the reasons that follow, we therefore will vacate the Decision and Order on Modification denying benefits in part and remand to the administrative law judge for a *de novo* review of the administrative record as a whole.

II

We will first address employer's challenge to the administrative law judge's determination that the interim criteria set forth at 20 C.F.R. Part 727 govern the adjudication of these claims. Employer asserts that only claimant's 1982 claim remains viable, and avers that claimant abandoned his first claim because he failed to follow-up on his response to the first administrative denial by the Office of Workers' Compensation Programs. If so, the more stringent permanent criteria set forth at 20 C.F.R. Part 718 would apply. *See* 20 C.F.R. §§718.1(b), 718.2, 725.1(d). According to employer, "nothing in the record ... would support the theory that the Claimant's 1980 letter[4] was sufficient to keep his claim alive for years after the denial." Er.Br. at 10. We disagree.

Initially, we conclude that claimant's letter was properly deemed to be a request for modification pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act. Section 22 provides in part that "upon his own initiative, or upon the application 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 rejection of a claim, review a compensation case ...." *See* 33 U.S.C. §922, as incorporated by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310.

Judicial authority supports a broad reading of Section 22, and neither the wording of the statute nor its legislative history supports a "narrowly technical and impractical construction." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971); *Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27, 1-31-33 (1996). Given its liberal application, it is clear that the petition seeking modification need not allege any specific ground for relief. *See Jessee v. Director, OWCP*, 5 F.3d 723, 726, 18 BLR 2-26, 2-30 (4th

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[4]Claimant's first claim was administratively denied on June 27, 1980. DX-25. In response to the CM-1000 denial letter, *see Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 12 BLR 2-371 (11th Cir. 1989), claimant wrote the district director

> request[ing] that my claim remain open for a few more months until I can gather some additional information to support my claim. I do plan to cease my coal mine employment as soon as possible.
>
> I am willing to take any and all examinations necessary to establish a total disability from Black Lung.

DX-26.

Cir. 1993); *accord Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *see generally Fireman's Fund Insurance Company v. Bergeron*, 493 F.2d 545, 547 (5th Cir. 1974).

The Fourth Circuit's decision in *I.T.O. Corporation of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6 (CRT) (4th Cir.), *cert. denied*, 117 S.Ct. 49 (1996), does not compel a different result. The employee in that case, by counsel, sent two letters to the OWCP, referencing two injury claims under the Longshore and Harbor Workers' Compensation Act, and stating "[p]lease be advised that I herewith make demand for any and all benefits that may be due the above claimant pursuant to the [LHWCA]." 73 F.3d at 525, 30 BRBS at 7 (CRT). As in this case, the OWCP did not respond to the letters.

The court of appeals, stating that "[a] request for modification constitutes the commencement of review only if it is sufficient to initiate the process required under §922," held that Pettus' letters "were too sparse to meet even the most lenient of standards," because they

> made no reference to any change in claimant's condition, to a mistake of fact in the earlier order, to additional evidence concerning claimant's disability, to dissatisfaction with the earlier order, or to anything that would alert a reasonable person that the earlier compensation award might warrant modification. The letters thus failed to indicate any actual intention ... to seek compensation for a particular loss, a factor that is critical in assessing their sufficiency.

73 F.3d at 527, 30 BRBS at 9 (CRT).

Although claimant's letter in this case is also "sparse," on this record it does not suffer from the deficiencies noted by the court of appeals in *Pettus*. Claimant's letter in this case must be judged in the context of the CM-1000 denial letter from the district director. *See* DX-25. That correspondence framed the issues, and points out the deficiencies of claimant's case. Unlike the longshoreman in *Pettus*, who suffered various periods of temporary disability as well as a permanent disability, and whose first letter predated one of his injuries, claimant in this case effectively articulates his desire to seek "compensation for a particular loss" in response to specific notification from OWCP. *See Pettus*, 73 F.3d at 527, 30 BRBS at 9 (CRT). There is a single ground for relief under the compensation provisions of the Federal Coal Mine Health and Safety Act: total disability due to coal worker's pneumoconiosis. None of the prudential concerns raised in *Pettus* are present here, where claimant's letter, prompted as it was by the denial notification from the Office of Workers' Compensation Programs, was sufficient to "alert a reasonable person [in OWCP] that the earlier compensation [order] might warrant modification." *Id*.

Furthermore, claimant's failure to follow-up on his letter does not entail a conclusion that his request for modification somehow "lapsed" or was abandoned in this case. Absent a warning by the district director that claimant has failed to proceed with "reasonable

diligence” in the prosecution of his claim, *see* 20 C.F.R. §725.409(a)(3), and notification to claimant of actions on his part necessary to avoid a denial by abandonment, *see* 20 C.F.R. §725.409(b), it should be clear under the circumstances of this case that claimant was not obliged to act further. We note that the district director “has the authority, *if not the duty*, to reconsider all the evidence for any mistake of fact or change in condition,” *Worrell,* 27 F.3d at 230, 18 BLR at 2-296 (emphasis added); *see Jessee,* 5 F.3d 723, 724, 726, 18 BLR 2-26, 2-28, 2-30 (4th Cir. 1993)(deputy commissioner "must" review request for modification), by examining “wholly new evidence, cumulative evidence, or merely [by] further reflection on the evidence initially submitted," *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1972); *Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Branham*, 20 BLR at 1-32, and may do so even “[u]pon his or her own initiative.” 33 U.S.C. §922 as incorporated by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310. We therefore hold that claimant’s request for modification kept the 1979 claim active, reject employer’s contention to the contrary, and affirm the administrative law judge’s ruling that the interim criteria govern the adjudication of this claim. *See* 20 C.F.R. §§718.1(b), 718.2, 725.1(d).

III

We next address claimant's appeal from the administrative law judge's finding that employer rebutted the interim presumption pursuant to Section 727.203(b)(3) by establishing that claimant's pulmonary or respiratory impairment was not due to coal mine employment. At the outset, we affirm as unchallenged by employer the administrative law judge's finding of 38 years of qualifying coal mine employment and invocation of the interim presumption on the basis of that employment history and the diagnosis of coal worker's pneumoconiosis from biopsy evidence pursuant to Section 727.203(a)(1), 20 C.F.R. §727.203(a)(1); *Skrack v. Island Creek Coal* Co., 6 BLR 1-710, 1-711 (1983); *see C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 1116, 28 BRBS 84, 87 (CRT) (11th Cir. 1994)(assuming as correct findings not contested on appeal). We likewise affirm as uncontested the Administrative Law Judge's finding that rebuttal of the interim presumption was not achieved through Section 727.203(b)(1), (2) or (4). *Id*. Nevertheless, we are unable to conclude at this juncture that the administrative law judge's finding of rebuttal pursuant to Section 727.203(b)(3) is supported by substantial evidence based on the administrative record as a whole. For the reasons that follow, we vacate the Decision and Order on Modification and remand to the administrative law judge to review the record as a whole, addressing all relevant evidence, and explain “the degree of consideration given probative evidence countering the evidence in support of [employer.]” *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 356, 21 BLR 2-83, 2-90-91 (3d Cir. 1997).

This claim arises with the geographical jurisdiction of the Fourth Circuit. That court has ruled that the interim presumption may be rebutted pursuant to Section 727.203(b)(3) by substantial evidence which "rules out" any causal connection between the miner's coal mine employment and his presumed totally disabling pulmonary or respiratory impairment. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 339, 20 BLR 2-246, 2-250 (4th Cir. 1996); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-22 (4th Cir. 1993);

Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 123, 7 BLR 2-72, 2-80 (4th Cir. 1984); *Johnson v. Old Ben Coal Co.*, 19 BLR 1-103 (1995). The administrative law judge found that employer met its burden of rebuttal pursuant to Section 727.203(b)(3). Decision and Order on Modification at 5. In so doing, the administrative law judge credited medical conclusions of Drs. Zaldivar, Fino, W.K.C. Morgan, Endres-Bercher, Kleinerman, Hansbarger and Naeye that claimant's pulmonary or respiratory disability was due entirely to cigarette smoking and the surgical removal of a cancerous tumor[5] which was unrelated to claimant's coal mine employment, *see* DXs-69-71; EXs-2-7, 11-25, over the contrary opinion of Dr. Jabour, CX-5. Decision and Order on Modification at 4-5. He also determined that Dr. Rasmussen did not render an opinion as to the cause of claimant's pulmonary or respiratory impairment. Decision and Order on Modification at 4 n. 4; *see* DX-60. The administrative law judge, in judging that the opinions of employer's experts were "consistent with all the probative evidence in the record," did not address the medical form report authored by Dr. Piracha, who rendered his conclusion on April 7, 1980 that claimant's chronic obstructive pulmonary disease is due to claimants coal mine dust exposure. DX-19. Further, while Dr. Rasmussen did not provide a causation opinion in his August 26, 1982 letter report, he corrected this oversight one year later in a consultation report in which he opined that "[claimant's] loss of function can readily be attributed to his occupational pneumoconiosis, which has been demonstrated on a number of chest x-ray examinations." DX-66.

In evaluating the evidence pursuant Section 727.203(b), the trier-of-fact must consider "all relevant evidence." *Amax Coal Co. v. Director, OWCP*, 993 F.2d 600, 602, 17 BLR 2-91, 2-94 (7th Cir. 1993); *see generally Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-29 (4th Cir. 1997). Moreover, the administrative law judge must engage in a *de novo* review the administrative record as a whole on modification. *See O'Keeffe*, 404 U.S. at 257; *Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Branham*, 20 BLR at 1-32. This was not done in this case.

With the administrative law judge's failure to mention the medical reports of Drs. Piracha and Rasmussen, or the fact that claimant received a disability award from the Social Security Administration, DX- 60, and a West Virginia Occupational Pneumoconiosis award, DX-6, we are unable to conclude whether he "simply disregarded significant probative evidence or reasonably failed to credit it." *Witmer*, 111 F.3d at 356, 21 BLR at 2-91. We must therefore vacate the administrative law judge's finding that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3).

To conclude, we affirm the administrative law judge's findings that the interim criteria govern the adjudication of this claim, that claimant invoked the interim presumption pursuant to Section 727.203(a)(1), and that employer did not prove rebuttal of the interim presumption pursuant to Section 727,203(b)(1), (2) and (4). We vacate, however, the

[5]On August 15, 1995, claimant underwent a left exploratory thoracotomy and left upper lobectomy. *See* CX-5.

administrative law judge's finding that employer achieved rebuttal under Section 727.203(b)(3), that claimant did not establish the presence of complicated pneumoconiosis, and remand to the administrative law judge for a reconsideration of the evidence consistent with this opinion.[6]

Accordingly, the Decision and Order on Modification is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[6]We likewise vacate the administrative law judge's finding that claimant did not establish the presence of complicated pneumoconiosis because not all evidence was considered on this issue. *See* 20 C.F.R. §410.418. While we affirm the administrative law judge's decision to discount the diagnosis of complicated pneumoconiosis rendered by Dr. Pathak, CX-2, we note that the administrative law judge does not explicitly address the reading of Category "A" pneumoconiosis on a June 26, 1995 x-ray made by Dr. Patel. CX-1. This exhibit was received into the record, *see* Tr. at 11, but was not forwarded to the Board. Accordingly, on remand, the administrative law judge must determine whether the record must be reconstructed with a copy of this exhibit.

REGINA C. McGRANERY
Administrative Appeals Judge