

BRB No. 97-1681 BLA

ESTILL THACKER)
)
 Claimant-Respondent)
)
 v.)
)
 LITTLE HACKNEY CREEK COAL) DATE ISSUED:
 COMPANY)
)
 and)
)
 TRAVELERS INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS'))
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of J. Michael O'Neill,
Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

J. Logan Griffith (Wells, Porter, Schmitt and Jones), Paintsville,
Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (90-BLA-1060) of
Administrative Law Judge J. Michael O'Neill 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 the third time regarding claimant's request for modification of Administrative Law Judge Daniel J. Roketenetz's 1985 Decision and Order denying benefits.² In his original decision on claimant's request for modification, Administrative Law Judge O'Neill found the evidence of record insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. Additionally, he found that claimant had not alleged a mistake in a determination of fact and therefore, declined to consider this issue. Accordingly, claimant's request for modification was denied.

On appeal, the Board vacated the denial of benefits and remanded the case for the administrative law judge to consider whether a mistake in fact had been

¹ Claimant is the miner, Estill Thacker, who filed his initial claim for benefits on May 9, 1978, which was denied on July 29, 1985. Director's Exhibits 1, 47. Claimant initiated modification proceedings on May 29, 1987. Director's Exhibit 56.

² In the initial decision and order, Administrative Law Judge Daniel J. Roketenetz found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), but that employer established rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(2), the only method of rebuttal available in the instant case. The administrative law judge further found that claimant had not established entitlement to benefits pursuant to 20 C.F.R. Part 410, Subpart D, and benefits were denied. Claimant appealed the denial of benefits to the Board. While the case was pending before the Board, claimant filed a request for modification. Accordingly, the Board dismissed claimant's appeal. *Thacker v. Little Hackney Creek Coal Company*, BRB No. 85-1908 BLA (Jan. 1989)(Order)(unpub.).

established, and affirmed the finding that a change in conditions had not been established since this issue was unchallenged on appeal. *Thacker v. Little Hackney Coal Company*, BRB No. 93-0670 BLA (Sept. 8, 1994)(unpub.). On remand, the administrative law judge found that no mistake of fact had been established and denied claimant's petition for modification.

Claimant again appealed to the Board who vacated the finding of rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2), and remanded the case for the administrative law judge to apply the standard contained in *York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987). On remand, the administrative law judge found that employer's evidence was insufficient to establish rebuttal at Section 727.203(b)(2) in light of the *York* standard, and benefits were awarded. Decision and Order on Remand at 2-3. In the instant appeal, employer argues that the administrative law judge erred in his consideration of the medical evidence relevant to the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On appeal, employer does not challenge the administrative law judge's finding that employer failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(2). We therefore affirm this finding as unchallenged on appeal.³ See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). As employer has failed to raise any arguments relevant to the regulatory provisions applicable to this claim, we affirm the award of benefits.

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

³ Employer's brief raises only arguments regarding claimant's burden of proof under 20 C.F.R. §718.204(c) and fails to address any finding by the administrative law judge pursuant to 20 C.F.R. Part 727.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge