BRB No. 00-0242 BLA

LLOYD STEVENSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
BISHOP COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order on Modification Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Lloyd Stevenson, Cedar Bluff, Virginia, *pro se*.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Modification Denying Benefits (98-BLA-1040) of Administrative Law Judge Jeffrey Tureck with respect to 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 relevant procedural history of this case is as follows: Claimant filed an application for benefits on May 11, 1976. In the initial Decision and Order, Administrative Law Judge Robert J. Brissenden credited

claimant with more than fifteen years of coal mine employment and adjudicated the claim pursuant to the regulations set forth in 20 C.F.R. Part 727. Judge Brissenden found the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(3). Judge Brissenden also determined that employer did not establish rebuttal of the interim presumption under 20 C.F.R. §727.203(b)(1)-(4). Accordingly, benefits were awarded. In response to claimant's appeal and employer's cross-appeal, the Board vacated the administrative law judge's findings under Section 727.203(b)(2) and (b)(3) and remanded the case to the administrative law judge for reconsideration of the relevant evidence. *Stevenson v. Bishop Coal Co.*, BRB Nos. 86-2043 BLA and 86-2043 BLA-A (June 30, 1988)(unpub.).

On remand, Judge Brissenden denied employer's motion to reopen the record to allow for the submission of evidence relating to the new Section 727.203(b)(2) rebuttal standard set forth by the United States Court of Appeals for the Fourth Circuit in *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987). On the merits, Judge Brissenden again found the evidence insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(2) and (b)(3). Accordingly, Judge Brissenden awarded benefits. Upon consideration of employer's appeal, the Board vacated Judge Brissenden's denial of employer's motion to reopen the record and his findings under Section 727.203(b)(2) and (b)(3). *Stevenson v. Bishop Coal Co.*, 89-0260 BLA (Aug. 19, 1993)(unpub.). The case was remanded to Judge Brissenden for further consideration.

On remand, the case was reassigned to Administrative Law Judge Daniel L. Stewart who returned the case to the district director to provide the parties with the opportunity to submit evidence relevant to the holding in *Sykes*. The case was subsequently returned to the Office of Administrative Law Judges and assigned to Administrative Law Judge Jeffrey Tureck (the administrative law judge). The administrative law judge found that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3). Accordingly, benefits were denied. Claimant filed an appeal with the Board, which affirmed the administrative law judge's findings under Section 727.203(b)(3) and the denial of benefits. *Stevenson v. Bishop Coal Co.*, BRB No. 96-1247 BLA (Feb. 25, 1997)(unpub.).

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[1]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Claimant filed a timely request for modification on July 31, 1997 and submitted new evidence. A hearing was held before the administrative law judge regarding the request for modification. In his Decision and Order, the administrative law judge determined that claimant did not demonstrate either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, he denied claimant's request for modification. Claimant's appeal followed. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

In an appeal filed by a claimant 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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).

Modification may be established under Section 725.310 by a showing of a change of conditions or a mistake in a determination of fact. In considering whether a claimant has established a change in conditions, an administrative law judge must consider all of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the new evidence is sufficient to establish at least one of the elements of entitlement which defeated entitlement in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The United States Court of Appeals for the Fourth Circuit has held that a claimant's general allegation of error is sufficient to require the administrative law judge to review the entire record in addressing whether there was a mistake in a determination of fact in the prior denial. 20 C.F.R. §725.310; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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[2]Claimant's Notice of Appeal regarding the denial of benefits in the present case was accompanied by a letter from Ron Carson, a benefits counselor employed by Stone Mountain Health Services. In a letter dated November 17, 1999, the Board informed claimant that his appeal would be considered under the standard applicable to claimants who file appeals without the assistance of counsel. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of claimant's request for modification. With respect to the issue of a change in conditions, inasmuch as the prior denial was premised upon a finding, pursuant to Section 727.203(b)(3), that claimant's pneumoconiosis is not totally disabling, the newly submitted evidence, considered in conjunction with the evidence previously of record, must be sufficient to defeat rebuttal under Section 727.203(b)(3). *See Kingery*, *supra*. Upon weighing the relevant evidence, the administrative law judge acted within his discretion in finding that the medical opinion in which Dr. Forehand concluded that pneumoconiosis is a contributing cause of claimant's total disability is not credible, as Dr. Forehand did not discuss the significance of claimant's documented tuberculosis or the nonqualifying blood gas studies that he obtained during his second examination of claimant. Decision and Order on Modification at 5; Director's Exhibit 112; Employer's Exhibit 2; *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge also rationally found that Dr. Michos's opinion was insufficient to defeat Section 727.203(b)(3) rebuttal, as Dr. Michos stated in his second report that the cause of claimant's total disability "cannot be determined with certainty." Decision and Order on Modification at 5; Director's Exhibit 123; *see generally Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984).

Finally, the administrative law judge determined correctly that the opinion of Dr. Hippensteel, who examined claimant, and the consulting opinions of Drs. Castle, Morgan, Jarboe, and Dahhan, are reasoned and documented and support a finding that claimant's total disability is due to a combination of factors entirely unrelated to pneumoconiosis or dust exposure in coal mine employment. Decision and Order on Modification at 6; Director's Exhibit 126; Employer's Exhibits 3, 5, 7, 8; *see Curry*, *supra*; *Massey*, *supra*. Thus, the administrative law judge rationally determined that claimant did not satisfy his burden on modification on the ground that the "credible medical opinions continue to conclude that claimant is totally disabled but that this disability is unrelated to his coal mine employment." Decision and Order on Modification at 6.

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[3]Drs. Zaldivar and Fino stated that pneumoconiosis is not a contributing cause of claimant's total disability, but also questioned whether claimant has pneumoconiosis. Employer's Exhibits 3, 7. Their reliance upon this premise renders their opinions of little value under 20 C.F.R. §727.203(b)(3), as invocation of the interim presumption was established under 20 C.F.R. §727.203(a)(1) in addition to 20 C.F.R. §727.203(a)(2) and (a)(3). *See Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994).

The administrative law judge also rationally concluded that his prior Decision and Order denying benefits did not contain a mistake in a determination of fact, inasmuch as he properly found that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3). Decision and Order on Modification at 3; *see Jessee*, *supra*; *see also Stevenson v. Bishop Coal Co.*, BRB No. 96-1247 BLA (Feb. 25, 1997)(unpub.), slip op. at 3-5. In addition, the administrative law judge acted within his discretion in determining that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis. *See* 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §§410.418, 718.304. The administrative law judge determined correctly that Dr. Hippensteel attributed the large opacity that he detected on claimant's March 11, 1998 x-ray to tuberculosis. Decision and Order on Modification at 3; Director's Exhibits 126, 127; Employer's Exhibit 9 at 14-15. With respect to Dr. Alexander's diagnosis of complicated pneumoconiosis based upon his interpretation of the x-ray dated February 17, 1999, the administrative law judge acted within his discretion in according little weight to Dr. Alexander's reading as unlike Dr. Hippensteel, Dr. Alexander did not have the opportunity to view any other films or medical evidence of record. Decision and Order on Modification at 3; Claimant's Exhibit 1; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, the administrative law judge's finding that claimant has not established a change in conditions or mistake in a determination of fact pursuant to Section 725.310 is rational and supported by substantial evidence and is, therefore, affirmed. *See Jessee*, *supra*; *Kingery*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Modification Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge