BRB No. 99-1332 BLA

ELSIE HENDRIX (Widow of LOYED HENDRIX)	)	
Claimant-Respondent	)	
v.	)	
JIM WALTER RESOURCES, INCORPORATED	)	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 - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson and Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Stephen E. Brown (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Jeffrey S. Goldberg (Henry L. Solano, 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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-1332) of Administrative Law Judge Gerald M. Tierney awarding benefits on a survivor's 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). This case has a lengthy procedural history. In his initial Decision and Order issued on October 8, 1986, Administrative Law Judge Kenneth A. Jennings credited the miner with at least twenty-seven years of qualifying coal mine employment performed prior to June 30, 1971, and found that because the miner died prior to March 1, 1978, claimant, the miner's widow, established invocation of the presumption of entitlement pursuant to Section 411(c)(5) of the Act, 33 U.S.C. § 921(c)(5), as implemented by 20 C.F.R. §727.204(a), and that employer failed to establish rebuttal of that presumption. Accordingly, benefits were awarded. Director's Exhibit 46. On appeal, the Board affirmed Judge Jennings's findings regarding invocation of the presumption at Section 727.204(a) and the length of the miner's coal mine employment prior to June 30, 1971, but vacated his finding of no rebuttal, and remanded this case for consideration of all relevant evidence. The Board also affirmed Judge Jennings's finding that claimant's entitlement to benefits was revived upon her divorce. *Cordell v. Jim Walter Resources, Inc.*, BRB No. 86-2786 (Sep. 30, 1988)(unpub.); Director's Exhibit 54.

On remand, Judge Jennings found that the weight of the evidence established rebuttal pursuant to Section 727.204(c) by showing that the miner neither had pneumoconiosis nor was he partially disabled thereby, thus benefits were denied. Director's Exhibit 55. On appeal, the Board affirmed the denial of benefits, Director's Exhibit 67, and in *Cordell v. Jim Walter Resources, Inc.*, BRB No. 89-1484 BLA (Feb. 24, 1994)(unpub.), the Board's decision was affirmed by the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises. Director's Exhibit 68. Claimant timely sought modification and submitted new evidence in support thereof pursuant to 20 C.F.R. §725.310 following each successive denial of modification by the district director, Director's Exhibits 69, 70, 75, 83, and upon claimant's request, the claim was forwarded to the Office of Administrative Law Judges on May 4, 1998.

In a Decision and Order issued on August 27, 1999, Administrative Law Judge Gerald M. Tierney (the administrative law judge) found that new evidence submitted in support of modification established the existence of pneumoconiosis and thus established a mistake in a determination of fact pursuant to Section 725.310, and that a *de novo* review of the totality of the evidence established entitlement under Section 727.204.

Employer appeals, challenging the administrative law judge's finding that modification was appropriate pursuant to Sections 725.310 and that employer failed to establish rebuttal pursuant to Section 727.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments

regarding modification pursuant to Section 725.310.

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 law. 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).

Employer initially contends that the administrative law judge erred in finding that claimant filed a timely request for modification pursuant to Section 725.310. Noting that Section 725.310 provides that a request for modification must be filed within one year of the denial of a claim, employer argues that although claimant's first request was timely filed within a year of the Eleventh Circuit's denial of the claim, her subsequent modification requests following the district director's denial of modification were untimely because they were filed more than one year after the Eleventh Circuit denied the claim, and a request for modification does not constitute a claim. Employer urges the Board to reconsider its decision in *Garcia v. Director, OWCP*, 12 BLR 1-24 (1988), which held that the one-year period for modification set forth in Section 725.310 begins to run anew from the date each denial of a claim is issued, asserting that in the interest of finality, multiple modification requests should not be permitted in survivor's claims. We find no merit in employer's arguments, and decline to overrule *Garcia*. The Director's position, consistent with *Garcia*, is that, under 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, there is nothing which places any restriction on the number of modification petitions an applicant for survivor's benefits can file. The Director maintains that the denial of modification constitutes the denial of the underlying claim, thus, a new modification petition may be filed within a year of the denial of a prior one. We defer to the Director's interpretation, as adopted by the United States Court of Appeals for the Fourth Circuit in *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999), as it is neither unreasonable nor inconsistent with the Act and regulations. *See also Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). Consequently, we affirm the administrative law judge's finding that claimant was entitled to file more than one request for modification, and that her multiple modification requests herein, each filed within one year of the prior denial, were timely.

Employer next contends that the administrative law judge erred in weighing the x-ray evidence of record and in finding that the newly submitted x-ray rereadings of a single film established a mistake in a determination of fact pursuant to Section 725.310. We disagree. After acknowledging that claimant could not establish a change in conditions because the miner was deceased, the administrative law judge determined that Judge Jennings previously found rebuttal established pursuant to Section 727.204(c) by proof that the miner did not have pneumoconiosis and was not partially or totally disabled by the disease. Decision and Order at 3. The administrative law judge accurately reviewed the new x-ray evidence submitted in support of modification in conjunction with the previously-submitted evidence

of record, and permissibly credited the opinions of dually-qualified radiological experts over the opinions of B-readers alone. Decision and Order at 3-4; *see Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-129 (1984). Based on a numerical preponderance of positive interpretations by the best qualified readers, the administrative law judge acted within his discretion in finding that the weight of both the new evidence and the totality of the x-ray evidence of record was now positive for pneumoconiosis, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Sheckler, supra*, thereby establishing a mistake in a determination of fact pursuant to Section 725.310. Decision and

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[1]Contrary to employer's assertion that the administrative law judge limited his analysis to the interpretations of the film taken on November 20, 1974, and ignored the interpretations of films taken close in time, specifically those taken on March 19, 1974, July 3, 1974, July 11, 1974, and March 25, 1975, the administrative law judge reviewed the interpretations of all of these films and weighed the interpretations of the March 19, 1974 film with the totality of the x-ray evidence, *see* Decision and Order at 3-4, but he permissibly did not weigh the interpretations, by readers whose qualifications were not included in the record, of the remaining films because they did not specifically address the presence or absence of pneumoconiosis and/or were not classified in accordance with 20 C.F.R. §410.428. *See* Decision and Order at 3, n. 5; Director's Exhibits 28, 31, 41. We also reject employer's argument that the administrative law judge erroneously credited Dr. Pathak with the qualifications of a dually qualified Board-certified radiologist and B-reader, when Dr. Pathak has not been certified by the American Board of Radiology or the American Osteopathic Association as required pursuant to 20 C.F.R. §718.202(a)(ii)(c). The administrative law judge acknowledged that Dr. Pathak was a B-reader and a British Board-certified radiologist, *see* Decision and Order at 1, 4, and the administrative law judge acted within his discretion in finding that Dr. Pathak's British Board certification enhanced his radiological qualifications over those of a mere B-reader. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

[2]We reject employer's assertion that the "neutral" x-ray interpretations are negative for pneumoconiosis and its argument that the administrative law judge erred in failing to consider the party affiliation of the readers in weighing the conflicting x-ray interpretations of record, as the record contains no evidence of either bias or neutrality on the part of the readers. *See Melnick, supra*.

[3]While employer additionally argues that the administrative law judge should have excluded the newly-submitted x-ray evidence as unduly repetitive and cumulative, and that the interests of justice were not served by the administrative law judge's granting of modification because the evidence claimant submitted in support thereof could have been developed and considered in conjunction with the initial adjudication of her claim, we can discern no abuse of the administrative law judge's broad discretion. *See generally O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Assn.*, 390 U.S. 459 (1968); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989).

Order at 4; *see Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). The administrative law judge's findings are supported by substantial evidence, and thus are affirmed.

Lastly, employer asserts that the the administrative law judge erred in finding the weight of the evidence insufficient to establish rebuttal pursuant to Section 727.204(c). Employer maintains that the new evidence submitted in support of modification is not as compelling as the original evidence credited by Judge Jennings to find rebuttal established, as affirmed by the Board and the Eleventh Circuit. Employer's arguments are without merit. The administrative law judge properly conducted a *de novo* review of the entire record, *see* Decision and Order at 4-7, and found that employer could no longer establish rebuttal by proving that the miner did not have pneumoconiosis because the administrative law judge found the weight of the x-ray evidence was positive for pneumoconiosis. Decision and Order at 5. The administrative law judge additionally found that the evidence remained insufficient to establish rebuttal by proof that the miner suffered no reduced ability to perform his usual coal mine employment at the time of death, because the earlier evidence showed that at the very least, the miner suffered back injuries that prevented him from working, thus the only method of rebuttal still available to employer was proof that the miner's partial or total disability did not result from pneumoconiosis. Decision and Order at 5; *see* 20 C.F.R. §727.204(c); *Dipyatic v. Bethlehem Mines Corp.*, 7 BLR 1-758 (1985); *Campbell v. North American Coal Corp.*, 6 BLR 1-244 (1983). The administrative law judge accurately determined that Judge Jenkins previously found rebuttal established at Section 727.204(c) based on his findings that the pulmonary function studies of record were non-qualifying, the majority of x-rays were negative for pneumoconiosis, and the opinion of Dr. Givhan that the miner did not suffer from silicosis or any disability due to silicosis, in conjunction with Dr. Whitehurst's report, supported the conclusion that the miner's disability was due to back injuries from a car accident rather than pneumoconiosis; further, Judge Jenkins gave little weight to Dr. Goodman's opinion that the miner had a 20-25% disability due to pneumoconiosis because Dr. Goodman failed to explain his finding that the miner was partially disabled from coal dust exposure in light of his non-qualifying pulmonary function study results. Decision and Order at 6. In view of his finding that the weight of the evidence now established the existence of pneumoconiosis, however, Judge Tierney permissibly found that Dr. Givhan's conclusion that he could not establish a diagnosis of silicosis was no longer in accord with the preponderance of the evidence, and therefore Dr. Givhan's finding of no disability due to silicosis was also flawed and entitled to little weight. *Id;* Director's Exhibit 41; *see generally Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Garcia v. Director, OWCP*, 869 F.2d 1413, 12 BLR 2-231 (10th Cir. 1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). The administrative law judge reasonably found that Dr. Goodman's opinion was now more in accord with the weight of the evidence, as the x-ray associated with his examination was reread as positive by a preponderance of the best-

qualified experts, and the physician's conclusion that the miner was partially disabled from pneumoconiosis was supported by the results of the pulmonary function study he performed which, although non-qualifying, were below the predicted normal. Decision and Order at 6; Director's Exhibits 11, 13; *see generally King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge correctly noted that Dr. Givhan's report did not rule out the existence of any partially or totally disabling respiratory or pulmonary disability; rather, the physician merely concluded that "[s]ince I could not establish a diagnosis of silicosis in this case I cannot establish any disability to this cause," Director's Exhibit 41. The administrative law judge also properly found that Dr. Whitehurst's report, either alone or in combination with other evidence, was insufficient to establish rebuttal because the focus of his examinations and the conclusions he derived therefrom, as a neurosurgeon, were on the miner's back problems, without reference to a pulmonary physical examination, x-ray, pulmonary function study, or any of the miner's other known abnormalities including cardiovascular disease, obesity, or pneumoconiosis. Decision and Order at 7; Director's Exhibit 31; *see generally Hall v. Director, OWCP*, 8 BLR 1-193 (1985). Inasmuch as the new medical reports of Drs. Cohen and Weaver submitted by claimant did not support rebuttal, the administrative law judge permissibly found that the evidence of record was insufficient to establish rebuttal pursuant to Section 727.204(c), and we affirm his findings thereunder as supported by substantial evidence. Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[4]Dr. Whitehurst opined that the miner was "disabled for any further work in the mines,"and indicated that since the miner related all his present problems to an automobile accident on January 25, 1974, and was previously asymptomatic, his present problems could be related to the accident. Director's Exhibit 31.

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge