BRB No. 00-1125 BLA

DELMER L. DUTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
COVE HOLLOW COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise III (Vinyard & Moise), Abingdon, Virginia, for claimant.

Darren E. Pogoda and Tab R. Turano(Greenberg Traurig, LLP), Washington, D.C., for employer.

Dorothy L. Page (Howard M. Radzely, 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (1999-BLA-1154) of Administrative Law Judge Rudolf L. Jansen denying modification and 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] In the original Decision and Order, Administrative Law Judge Giles J. McCarthy credited claimant with at least fifteen years of coal mine employment and found that the x-ray evidence established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1), but concluded that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2). Accordingly, benefits were denied. Decision and Order at 2; Director's Exhibit 85. Claimant timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence.[2]

On modification, Judge McCarthy again found that the weight of the x-ray evidence established invocation of the interim presumption pursuant to Section 727.203(a)(1), but determined

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations. There are no revisions to 20 C.F.R. Part 727.

[2] The amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3) and, accordingly, denied modification and benefits. *Id*.; Director's Exhibit 122.

Claimant appealed the denial of benefits to the Board and in *Duty v. Cove Hollow Coal Co*., BRB No. 92-0247 BLA (May 25, 1993)(unpub.), the Board affirmed the administrative law judge's invocation finding at Section 727.203(a)(1) as unchallenged on appeal and affirmed as supported by substantial evidence his finding that rebuttal was established pursuant to Section 727.203(b)(3). *Id*.; Director's Exhibit 144. Claimant again requested modification and submitted additional medical evidence. Because Judge McCarthy was unavailable to consider claimant's second request for modification, the case was reassigned, without objection, to Administrative Law Judge Edward J. Murty, Jr.

On second modification, Judge Murty concluded that the medical evidence of record failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4). He therefore denied benefits under 20 C.F.R. Part 727. Judge Murty also considered entitlement pursuant to 20 C.F.R. Part 718 (2000) and found that the evidence failed to establish the existence of pneumoconiosis or total respiratory disability pursuant to Sections 718.202(a) and 718.204(c) (2000). Accordingly, benefits were denied under 20 C.F.R. Part 718 (2000).

Claimant appealed the denial of benefits to the Board and in *Duty v. Cove Hollow Coal Co*., BRB No. 98-0174 BLA (Oct. 16, 1998)(unpub.), the Board affirmed the administrative law judge's finding of no invocation at Section 727.203(a)(1) as supported by substantial evidence and affirmed

his findings unfavorable to claimant pursuant to Sections 727.203(a)(2)-(4), 718.202(a) and 718.204(c) as unchallenged on appeal. *Id*.; Director's Exhibit 186. Claimant again requested modification and submitted additional evidence.

On third modification, the subject of the instant appeal, the district director initially determined that claimant was entitled to benefits, but employer controverted the finding and requested a formal hearing. The claim was referred to the Office of Administrative Law Judges and assigned to Judge Jansen (the administrative law judge). The administrative law judge considered the previously submitted evidence and the evidence developed and submitted subsequent to the previous denial, which included x-ray readings, pulmonary function studies, an arterial blood gas study and medical opinions. The administrative law judge credited claimant with twenty-five years and five months of coal mine employment and adjudicated this case involving a modification request pursuant to 20 C.F.R. Part 727 and 20 C.F.R. Part 718 (2000). The administrative law judge found that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4) and insufficient to establish entitlement pursuant to 20 C.F.R. Part 718. The administrative law judge thus found that the evidence was insufficient to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (1999). Accordingly, modification and benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in his weighing of the pulmonary function study evidence pursuant to Section 727.203(a)(2) and in his weighing of the medical opinions pursuant to Section 727.203(a)(4).[3] Employer responds, urging affirmance of the denial of benefits. The Director,

[3] The administrative law judge's findings with respect to the x-ray evidence and

Office of Workers' Compensation Programs (the Director), has not filed a brief on the merits in this appeal.

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blood gas study evidence and whether this evidence would establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (3) or a change in conditions pursuant to 20 C.F.R. §725.310 (1999) are unchallenged on appeal and therefore are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on May 21, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has not responded to the Board's order.[4] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls*

[4] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on May 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

Associates, Inc., 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error therein. Initially, claimant contends that the administrative law judge erred in failing to find the pulmonary function study evidence sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(2). In this case, the administrative law judge considered all of the pulmonary function study evidence submitted since the denial of claimant's most recent claim which consists of a November 11, 1998 qualifying pulmonary function study by Dr. Patel and a November 3, 1999 qualifying pulmonary function study by Dr. Hippensteel. Decision and Order at 7, 12; Director's Exhibit 187; Employer's Exhibit 11. In addition, there are validation reports regarding the November 11, 1998 pulmonary function study by Drs. Hippensteel and Michos. Decision and Order at 8; Employer's Exhibits 13-14. The administrative law judge noted that, while the two pulmonary function studies produced qualifying results, Dr. Hippensteel, the administering physician, commented that the values obtained on the November 3, 1999 study underestimated claimant's true pulmonary function and that Drs. Hippensteel and Michos both commented that the values obtained on the November 11, 1998 study underestimated claimant's true pulmonary function. Decision and Order at 12 Employer's Exhibits 11, 13-14. Based on these findings, the administrative law judge concluded that the evidence failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(2) and that claimant had not demonstrated a material change in conditions. Decision and Order at 12. Inasmuch as an administrative law judge may

assign a qualifying pulmonary function study little or no weight, *see Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Runco v. Director, OWCP*, 6 BLR 1-945 (1984); *cf. Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991), and may accord greater weight to the opinion of a consulting physician regarding the validity of a pulmonary function study, *see Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984), we affirm the administrative law judge's treatment of the pulmonary function study evidence. Accordingly, the administrative law judge permissibly found that the pulmonary function studies of record failed to establish total disability pursuant to Section 727.203(a)(2). Consequently, we affirm the administrative law judge's finding that pulmonary function study evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(2).

Claimant next contends that the administrative law judge erred in failing to find the medical opinion evidence sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4). We disagree. In considering whether total disability was established pursuant to Section 727.203(a)(4) based on the newly submitted evidence, the administrative law judge permissibly credited the opinion of Dr. Hippensteel, who found that claimant was not totally disabled from a respiratory standpoint, based on his credentials, *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and because his conclusion was better documented and reasoned than Dr. Patel's as it was supported by the credible objective medical evidence. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-291 (1984); Decision and Order at 13; Employer's Exhibit 11, 15. In addition, the administrative law judge properly accorded diminished

weight to the opinion of Dr. Patel in light of his reliance on an invalidated pulmonary function study. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); Decision and Order at 13; Director's Exhibit 187. Accordingly, the administrative law judge permissibly found that the medical reports of record failed to establish total disability pursuant to Section 727.203(a)(4). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment and thus insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(4). We therefore affirm the administrative law judge's finding that the evidence was insufficient to establish a change in conditions pursuant to Section 725.310 (1999) and we affirm the denial of benefits under 20 C.F.R. Part 727.[5]

The administrative law judge also found that claimant failed to establish entitlement pursuant to 20 C.F.R. Part 718 (2000). In this case involving a miner with over ten years of coal mine employment, the administrative law judge should have considered this claim filed prior to March 31, 1980, under the permanent criteria of 20 C.F.R. Part 410, Subpart D, instead of 20 C.F.R. Part 718 (2000). *Muncy v. Wolfe Creek Collieries Coal Company, Inc.*, 3 BLR 1-627 (1981). The Board,

[5]We note that as the instant claim was properly adjudicated under 20 C.F.R. Part 727, the presumption at 20 C.F.R. §410.490 is inapplicable. *Whiteman v. Boyle Land and Fuel Co.*, 15 BLR 1-11 (1991); *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991).

however, has held that where the administrative law judge has made the necessary findings of fact after discussing all of the relevant evidence of record, the Board will review the case by applying those findings to the proper regulations. *Hamric v. Director, OWCP*, 6 BLR 1-1091 (1984).

Under 20 C.F.R. Part 410, Subpart D, claimant has the burden of establishing that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§410.414, 410.416, 410.422, 410.426. Failure to establish any of these requisite elements precludes entitlement. *Saunders v. Director, OWCP*, 7 BLR 1-186 (1984); *Migalich v. Director, OWCP*, 2 BLR 1-27 (1979).

In the instant case, the administrative law judge weighed all of the recent x-ray evidence of record and properly found that this evidence was insufficient to establish the existence of pneumoconiosis. *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 6-7, 9-10. Further, the administrative law judge also weighed the pulmonary function studies, the blood gas studies and medical opinions and rationally determined that this evidence failed to establish the existence of a totally disabling respiratory or pulmonary impairment arising out of coal mine employment. As the pulmonary function studies were invalid and the blood gas study was non-qualifying, this evidence thus supports the administrative law judge's finding that claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment. Decision and Order at 12-13. Moreover, the administrative law judge permissibly discounted the opinion of Dr. Patel in light of the physician’s reliance on an

invalidated pulmonary function study. *See Siwiec*, *supra*; *Trent*, *supra*; Decision and Order at 13. Consequently, we hold that the evidence of record fails to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§410.414, 410.416, 410.422, 410.426, and that claimant is therefore precluded from entitlement under the permanent criteria of 20 C.F.R. Part 410, Subpart D. *Migalich*, *supra*. Furthermore, the administrative law judge properly reviewed the entire record and concluded that there was no mistake in a determination of fact in the prior denial. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Therefore, we affirm the administrative law judge's finding that claimant failed to establish modification pursuant to 20 C.F.R. §725.310 (1999) as it is supported by substantial evidence and is in accordance with law. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310 (1999), we affirm the denial of benefits. *Jessee*, *supra*.

Accordingly, the Decision and Order of the administrative law judge denying modification and benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge