BRB No. 00-0290 BLA

ROY FUNK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
W-P COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED:
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Second Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Anthony J. Cicconi (Shaffer & Shaffer), Charleston, West Virginia, for claimant.

Dorothy L. Page (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, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (1992-BLA-966) of Administrative Law Judge Clement J. Kichuk (the administrative law judge) denying 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). This claim is before the Board for the third time. In the initial Decision and Order, Administrative Law Judge Reno E. Bonfanti found that claimant's second claim constitutes a duplicate claim. He then considered the claim pursuant to 20 C.F.R. Part 718 and found that claimant established thirty-seven years of qualifying coal mine employment, the existence of pneumoconiosis which arose from his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), but failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) and, thus, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, the Board held that a letter written by claimant's counsel after the denial of claimant's initial claim constitutes a petition for modification and vacated the administrative law judge's denial of benefits and remanded the case for the administrative law judge to consider claimant's second claim as a request for modification pursuant to 20 C.F.R. §725.310 and to consider entitlement under 20 C.F.R. Part 727 and 20 C.F.R. Part 410, Subpart D, if necessary. *Funk v. W-P Coal Co.*, BRB No. 93-2315 BLA (Dec. 22, 1994)(unpub.).

On remand, the administrative law judge 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 interim presumption pursuant to 20 C.F.R.§727.203(b)(3) and that claimant failed to establish entitlement pursuant to Part 410, Subpart D and Part 718. Accordingly, benefits were denied. On appeal, the Board rejected the Director's, Office of Workers' Compensation Programs (the Director), challenge of the Board's finding that the case involves a petition for modification and held that its prior decision that counsel's letter kept the initial claim alive stands as the law of the case. *Funk v. W-P Coal Co.*, BRB No. 98-0910 BLA (Mar. 31, 1999)(unpub.). The Board also vacated the administrative law judge's finding of rebuttal pursuant to Section 727.203(b)(3) and remanded the case to the administrative law judge for further consideration pursuant to Section 727.203(b)(3) and Part 410, Subpart D, if necessary. *Id.*

In the instant Decision and Order, the administrative law judge found that employer

[1]Claimant is Roy F. Funk, the miner, whose initial claim for benefits was filed on June 13, 1973 and ultimately denied on April 8, 1981. Director's Exhibit 22. Claimant filed the instant claim on November 14, 1988. Director's Exhibit 1.

established rebuttal pursuant to Section 727.203(b)(3) and that claimant failed to establish entitlement to benefits pursuant to Part 410, Subpart D. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding Dr. Zaldivar's opinion sufficient to establish rebuttal pursuant to Section 727.203(b)(3) and in failing to consider the opinions of the remaining physicians of record. The Director responds, urging the Board to reconsider its holding that claimant's counsel's letter constitutes a petition for modification, but arguing that, if the Board holds that the initial claim remains viable, benefits should be awarded pursuant to Part 727 inasmuch as Dr. Zaldivar's opinion is not sufficient to support a finding of rebuttal pursuant to subsection (b)(3).

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In its response brief, the Director again challenges the Board's holding that claimant's counsel's letter constitutes a petition for modification. In support of its position, the Director argues that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held, in *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999), that a claimant must at least express dissatisfaction with a purportedly erroneous denial and, that in this case, claimant's counsel's letter expresses no dissatisfaction with the denial of benefits. Director's Brief at 5. In addition to stating that claimant must express dissatisfaction with the denial of benefits, the Court, in *Stanley*, also held that "the modification procedure is flexible, potent, easily invoked, and intended to secure 'justice under the act.'" *Stanley*, 194 F.3d at 497, 22 BLR at 2-11.

In its prior Decision and Order, the Board held that claimant's counsel's letter, which was prompted by the previous denial of the claim, is sufficient to alert a reasonable person that the earlier compensation order might warrant modification. *Funk*, 1999 *slip op.* at 5. It follows that if a letter is sufficient to alert a reasonable person that a particular order might warrant modification, this letter would also be sufficient to express claimant's dissatisfaction with that same order. In this case, claimant obtained counsel after receiving a letter denying benefits on his claim. Claimant's newly appointed counsel then wrote a letter in which he expressed concern about whether the pulmonary function study evidence was properly considered. Letter dated Jan. 19, 1982. Given the flexible nature of the modification procedure, we hold that claimant's counsel's letter satisfies the Fourth Circuit's requirement that claimant express dissatisfaction with the denial of benefits and reject the Director's argument. *Stanley, supra.* Further, inasmuch as the Board previously addressed and

rejected the remainder of the Director's arguments, we again hold that our prior decision on this issue stands as the law of the case, and hold that no exceptions to this doctrine apply under these circumstances. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

In its brief on appeal, claimant contends that the administrative law judge erred in finding Dr. Zaldivar's opinion supportive of a finding of subsection (b)(3) rebuttal because Dr. Zaldivar did not rule out pneumoconiosis as a cause of claimant's disability. Claimant's Brief at 4-5. We agree. Dr. Zaldivar opined that claimant does not have pneumoconiosis and that he has mild airway obstruction which is due to asthma which is not related to occupational pneumoconiosis. Employer's Exhibits 1, 2. The administrative law judge found that Dr. Zaldivar's opinion that claimant's pulmonary impairment is due to asthma which is not related to pneumoconiosis is sufficient to rule out pneumoconiosis as a cause of claimant's pulmonary impairment. Decision and Order on Remand at 5-8. While Dr. Zaldivar states that claimant has an impairment due to asthma and that claimant's asthma is not caused by or related to his coal mine dust exposure, Dr. Zaldivar does not discuss whether claimant's total disability is in any way related to his pneumoconiosis or his coal mine dust exposure. *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). Consequently, Dr. Zaldivar's opinion is not sufficient to rule out pneumoconiosis as a cause of the miner's disability. *Stiltner, supra; Thorn, supra; Massey, supra.* Inasmuch as Dr. Zaldivar's opinion is the only evidence relied upon by the administative law judge to support a finding of rebuttal pursuant to Section 727.203(b)(3), we reverse the administrative law judge's finding that employer established rebuttal pursuant to subsection (b)(3), as well as the denial of benefits, and remand the case for the administrative law judge to determine the date entitlement to benefits commences.

[2]As noted earlier, the Director concedes that Dr. Zaldivar's opinion is insufficient to establish rebuttal of the interim presumption.

Accordingly, the administrative law judge's Decision and Order denying benefits is reversed and the case is remanded for further findings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge