BRB No. 97-0753 BLA

EDDIE BROWN Claimant-Petitioner v. PYRO MINING COMPANY and THE TRAVELERS INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Charles E. Lowther (Mitchell, Joiner, Hardesty & Lowther), Madisonville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (89-BLA-2061 and 93-BLA-1558) of Administrative Law Judge Robert L. Hillyard 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 filed in 1977 is before the Board for the third time. Judge Hillyard denied benefits in a Decision and Order issued on

August 12, 1983. Director's Exhibit 32A. Claimant timely requested modification pursuant to 20 C.F.R. §725.310, which was denied by Administrative Law Judge Robert L. Cox on January 16, 1991. Director's Exhibit 101. Claimant appealed, but while his appeal was pending before the Board, he again requested modification and submitted additional evidence. Director's Exhibit 111. Accordingly, by order dated August 29, 1991, the Board dismissed the appeal and remanded the case for modification proceedings. Director's Exhibit 114.

On remand, Administrative Law Judge Bernard J. Gilday, Jr. denied modification on October 25, 1994. In so doing, Judge Gilday weighed the new evidence to find that a change in conditions was not established, but did not address whether a mistake in a determination of fact had been made in the prior denials. Therefore, pursuant to claimant's appeal, the Board vacated the denial of benefits and remanded the case for the administrative law judge to consider modification under the standard of *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). *Brown v. Pyro Mining Co*., BRB Nos. 91-0846 BLA/A, 95-0696 BLA/A, (Aug. 18, 1995)(unpub.).

On remand, the case was again assigned to Judge Hillyard, who considered the old and the new evidence, found that a mistake in a determination of fact was not established, and denied modification.

On appeal, claimant contends that the administrative law judge erred by denying modification because the newly submitted evidence establishes invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (2) as a matter of law. Claimant further asserts that one of the medical opinions of record is hostile to the Act. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), 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 law. 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).

Section 725.310 provides that a party may request modification of the award or denial of benefits within one year on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge has the authority, if not the duty, to reconsider all the evidence to determine whether the record demonstrates a change in conditions since the previous denial of benefits or a mistake in a determination of fact. *Worrell*, *supra*; *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

Claimant contends that he established invocation pursuant to Section 727.203(a)(1)

"as a matter of law" because the new x-ray readings submitted since the previous denial of benefits were read as 1/1. Claimant's Brief at 8. An administrative law judge may, but is not required to accord greater weight to the readings of the most recent x-ray films. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Here, the administrative law judge considered the old and the new readings and permissibly relied on "the overwhelming majority [of readings] by the most qualified readers . . . ." to find that invocation was not established under Section 727.203(a)(1). Decision and Order on Remand at 1-2; *see Woodward, supra*. Substantial evidence supports the administrative law judge's finding.[1] Therefore, we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 727.203(a)(1).

[1] The record contains forty-nine readings of seventeen x-rays. There were thirty-three negative readings, twelve positive readings, one unclassified reading, and three "unreadable" classifications. Director's Exhibits 10, 12, 13, 15, 16, 32, 49, 50, 52, 53, 68, 76, 78, 111; Employer's Exhibits 1, 8, 9. All of the negative readings were by Board-certified radiologists, B-readers, or both, while five of the positive readings were by similarly-credentialed physicians.

Pursuant to Section 727.203(a)(2), claimant contends that he established invocation as a matter of law because the two most recent pulmonary function studies were qualifying.[2] Claimant's Brief at 9. The record contains eleven pulmonary function studies, of which four were qualifying and seven were non-qualifying. Director's Exhibits 9, 32, 48, 68, 78, 111; Employer's Exhibits 1, 9. Prior to making his finding that the pulmonary function study results did not establish that a mistake in a determination of fact had been made, Judge Hillyard adopted the findings of the previous administrative law judges to the extent that they were consistent with his own. Decision and Order on Remand at 2. Judge Gilday previously concluded that the two studies cited by claimant did not establish subsection (a)(2) invocation because the March 1991 study lacked the required tracings, and because he accepted the opinion of the administering physician that the July 1994 study revealed only a slight reduction in the FEV1 value due to aging and the effects of cardiovascular disease, and that claimant retained the respiratory pulmonary capacity to perform his usual coal mine employment. [1994] Decision and Order at 8. Claimant does not challenge Judge Hillyard's acceptance of Judge Gilday's findings regarding these two studies. Moreover, Judge Gilday considered the old and the new pulmonary function studies in finding that invocation was not established, and he was not required to mechanically credit the two most recent studies. Decision and Order at 3; *see Cooley v. Island Creek Coal Co*., 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982). Therefore, we reject claimant's contention that invocation was established as a matter of law and affirm the administrative law judge's finding pursuant to Section 727.203(a)(2).[3]

Claimant lastly contends that “the only current medical evidence in opposition to the claim” is Dr. Anderson's medical opinion, which is hostile to the Act. Claimant's Brief at 11. Of the twelve medical opinions in the record, only one--Dr. West's 1978 report--diagnoses a totally disabling respiratory or pulmonary impairment. Director's Exhibit 11; *see* 20 C.F.R. §727.203(a)(4). The remaining opinions either do not address respiratory disability, Director's Exhibits 12, 13, 50, 81, merely advise against further dust exposure, Director's Exhibit 111, or opine that claimant retains the respiratory capacity to perform his usual coal mine employment. Director's Exhibits 10, 83, 96; Employer's Exhibits 1, 2. Contrary to claimant's contention, Dr. Anderson did not state that simple pneumoconiosis never causes respiratory disability. Rather, he stated that he would not infer total respiratory disability based solely on an x-ray diagnosis of Category 1 pneumoconiosis because medical studies and his own experience indicate that smoking or cardiovascular disease may be the source of a miner's ventilatory reduction. Employer's Exhibit 2 at 30. Because Judge Hillyard

[2] A "qualifying" pulmonary function study yields values which are equal to or less than the values specified in the table at 20 C.F.R. §727.203(a)(2). A "non-qualifying" study exceeds those values.

[3] The administrative law judge did not address 20 C.F.R. §727.203(a)(3). Review of the record indicates that all of the blood gas studies are non-qualifying. Director's Exhibits 14, 32, 51, 78; Employer's Exhibit 9.

considered the old and the new medical reports in finding that invocation was not established pursuant to Section 727.203(a)(4), *see Worrell, supra*, and claimant raises no other allegations of error, we affirm the administrative law judge's finding pursuant to Section 727.203(a)(4).

Accordingly, the administrative law judge's Decision and Order on Remand denying modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge