BRB No. 97-0893 BLA

JIMMY WILBURN JUSTICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RED ASH SMOKELESS COAL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
VIRGINIA COAL PRODUCERS GROUP SELF-INSURANCE ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Jimmy Justice, Vansant, Virginia, *pro se.*

Bryan A. Sims (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1], without the assistance of counsel[2], appeals the Decision and Order on

[1] Claimant is Jimmy Wilburn Justice, the miner, whose first claim for benefits, filed on June 30, 1973, was finally denied on October 27, 1980. Director's Exhibit 34. The miner's second claim was filed on April 4, 1986. Director's Exhibit 1. Administrative Law Judge Henry W. Sayrs denied the claim on June 7, 1988, and claimant subsequently filed two motions for modification on May 31, 1989 and June 26, 1990. Director's Exhibits 40, 42,

Remand (91-BLA-1766) of Administrative Law Judge Jeffrey Tureck denying modification 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 case is before the Board for the second time. On appeal, the Board vacated the denial of benefits and remanded the case for the administrative law judge to consider all of the evidence of record to determine whether claimant established either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. *Justice v. Red Ash Smokeless Coal Corp.*, BRB No. 96-0377 BLA (Sep. 30, 1996)(unpub.).

On remand, the administrative law judge again found that claimant withdrew the issue of a mistake in a determination of fact at the start of the hearing and stated that, because newly submitted evidence by itself did not establish any of the elements of entitlement which were denied previously, it was unnecessary to consider the previously submitted evidence. Accordingly, benefits were again denied. In the instant appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error

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44, 49.

[2]Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See* 20 C.F.R. §§802-211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

therein. Pursuant to 20 C.F.R. §725.310, claimant may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), modifying 14 BLR 1-156 (1990); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). Further, if a claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the administrative law judge has the authority, without more (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), to modify the denial of benefits. *See Jessee, supra.*

Initially, the Board remanded the claim for the administrative law judge to consider whether claimant established a mistake in a determination of fact pursuant to Section 725.310. *Justice, supra.* On remand, however, the administrative law judge stated that he need not consider whether claimant established a mistake in a determination of fact because claimant withdrew the issue at the start of the hearing. Decision and Order on Remand at 1-2. As the administrative law judge noted, claimant, through his lay representative, stated that the reason for the modification was that he "feels that his condition has worsened since the denial in 1986 and 1989." Hearing Transcript at 7. Because claimant stated that he was only alleging that his condition had worsened since the prior denial, the administrative law judge rationally concluded that claimant waived the mistake in a determination of fact issue. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Thus, we affirm the administrative law judge's finding that claimant waived the issue of a mistake in a determination of fact pursuant to Section 725.310.

The Board also instructed the administrative law judge on remand to consider the newly submitted evidence in conjunction with the previously submitted evidence pursuant to Section 725.310. *Justice, supra.* On remand, the administrative law judge stated that, because the newly submitted evidence by itself did not establish any of the elements of entitlement which were previously denied, it was unnecessary to consider the previously submitted evidence. Decision and Order on Remand at 2. We agree. In the original Decision and Order, the administrative law judge rationally concluded that the newly submitted x-ray evidence was negative for the existence of pneumoconiosis because the three x-rays which were read as positive for pneumoconiosis were also read as negative by more qualified readers. Decision and Order at 3; Director's Exhibits 44, 47, 50, 51, 52, 55, 56, 61; Claimant's Exhibit 1; Employer's Exhibits 1, 2, 9; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Lafferty, supra*; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). The administrative law judge also properly found that the record contains one qualifying pulmonary function study which was invalidated by reviewing physicians and no qualifying arterial blood gas studies. Decision and Order at 5; Director's Exhibits 47, 48; Employer's Exhibit 8. The administrative law judge then rationally concluded that the newly submitted pulmonary function and arterial blood gas study evidence was insufficient to establish total respiratory disability. Decision and Order at 5; *Lafferty, supra; Winchester v. Director,*

OWCP, 9 BLR 1-177 (1986). Further, the administrative law judge rationally rejected the opinions of Drs. Nash and Patel, the only physicians who diagnosed either pneumoconiosis or total respiratory disability, because Dr. Nash's medical license was revoked due to his unlawful distribution of controlled substances and because Dr. Patel's opinion is not well-reasoned. Decision and Order at 4-6; Director's Exhibits 40, 47, 54; *Lafferty, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

The administrative law judge is empowered to weigh the evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's denial of benefits as his finding that the newly submitted evidence is insufficient to establish a change in conditions pursuant to Section 725.310 is supported by substantial evidence and is in accordance with law.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge