BRB No. 99-0377 BLA

JOHN H. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

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

Sparkle Bonds (Virginia Black Lung Association), Richlands, Virginia, for claimant.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (94-BLA-0634) of Administrative Law Judge Clement J. Kichuk 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 case is before the Board for the fifth time. In the Board's previous decision, we discussed fully the procedural history of this claim. *Johnson v. Consolidation Coal Co*., BRB No. 97-0775 BLA at 2 (Feb. 27, 1998)(unpub.). We now focus only on those procedural aspects relevant to the arguments raised in this appeal.

In a Decision and Order on Remand issued on April 10, 1990, Administrative Law Judge Edward J. Murty found that the evidence of record failed to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1)-(4). Director's Exhibit 68. Accordingly, he denied benefits. The Board affirmed Judge Murty's findings pursuant to Section 727.203(a)(1)-(4) and therefore affirmed the denial of benefits. *Johnson v. Consolidation Coal Co*., BRB No. 90-1434 BLA (Feb. 26, 1992)(unpub.); Director's Exhibit 78. Claimant timely requested modification of the denial pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence. Director's Exhibit 81.

On modification, Administrative Law Judge Edith Barnett concluded that the new evidence considered in conjunction with the evidence originally submitted did not establish invocation pursuant to Section 727.203(a)(1)-(4) and thus failed to demonstrate a change in conditions pursuant to Section 725.310. Consequently, she denied benefits. Pursuant to claimant's appeal, the Board affirmed Judge Barnett's findings pursuant to Section 727.202(a)(1), (3), but vacated her findings pursuant to Section 727.203(a)(2), (4) and remanded the case for her to reconsider invocation at these subsections. *Johnson v. Consolidation Coal Co*., BRB No. 95-1014 BLA (May 23, 1996)(unpub.). On remand, Judge Barnett found that invocation was not established pursuant to Section 727.203(a)(2), (4) and therefore found that a change in conditions was not established pursuant to Section 725.310. On appeal, the Board affirmed Judge Barnett's finding pursuant to Section 727.203(a)(2), but vacated her finding at Section 727.203(a)(4) and remanded the case for her to reweigh a medical opinion by Dr. Forehand and determine whether it established a change in conditions. [1998] *Johnson*, slip op. at 4-5. The Board also instructed the administrative law judge to determine whether a mistake in a determination of fact was made in the denial of claimant's claim.

Because Judge Barnett was no longer with the Office of Administrative Law Judges, on remand the case was transferred without objection to Administrative Law Judge Clement J. Kichuk. Pursuant to Section 727.203(a)(4), Judge Kichuk found that Dr. Forehand's medical opinion diagnosing a totally disabling respiratory impairment was outweighed by the contrary opinions of more highly qualified physicians who opined that claimant retained the respiratory capacity to perform his usual coal mine employment. Consequently, the administrative law judge found that Dr. Forehand's medical opinion did not invoke the interim presumption of total disability due to pneumoconiosis and therefore did not establish a change in conditions pursuant to Section 725.310. Additionally, the administrative law judge found pursuant to Section 725.310 that a "review of all the medical evidence of record" did not demonstrate a mistake in a determination of fact in the previous denials. Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in his weighing of the medical opinions pursuant to Section 727.203(a)(4). Claimant further asserts that the administrative law judge erred in finding that there had been no mistake of fact in this case. Employer responds, urging affirmance, and 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).

To establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to Section 727.203(a)(4), claimant must establish by reasoned medical opinion evidence that he suffers from a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §727.203(a)(4). The administrative law judge exercises broad discretion in weighing the medical opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993).

The administrative law judge was instructed to reweigh Dr. Forehand's July 21, 1992 medical report. In this report, Dr. Forehand relied upon claimant's July 21, 1992 qualifying[1] blood gas study results, a history of forty-eight years of coal mine employment, and x-ray evidence of interstitial thickening to diagnose a "pulmonary impairment of a gas exchange nature, due, in part, to chronic exposure to coal dust, or coal workers' pneumoconiosis." Director's Exhibit 81. The administrative law judge noted that Dr. Forehand is Board-certified in Internal Medicine, and compared his opinion with those of Drs. Sargent and Fino, who are Board-certified in Internal Medicine and Pulmonary Disease.

Dr. Sargent examined and tested claimant and reviewed the medical evidence of record. Dr. Sargent opined that claimant's objective test data and examination

[1] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. §727.203(a)(2), (3). A "non-qualifying" study exceeds those values.

findings revealed that claimant has a "very mild" respiratory impairment that would not prevent him from performing the work of a section foreman, as claimant described it. Employer's Exhibit 4, Deposition Exhibit 1 at 2. Dr. Fino reviewed the medical evidence of record and similarly concluded that claimant has a mild respiratory impairment that would not keep him from performing the duties of a section foreman, as Dr. Fino understood claimant's description of the job. Employer's Exhibits 2, 3.

The administrative law judge found that the non-disability opinions of Drs. Sargent and Fino outweighed Dr. Forehand's report. The administrative law judge accorded greater weight to the reports of Drs. Sargent and Fino because he found that they were more highly qualified, had a more complete picture of claimant's health, and submitted better reasoned opinions. Decision and Order on Remand at 5-6. Accordingly, the administrative law judge declined to invoke the interim presumption pursuant to Section 727.203(a)(4).

Claimant contends that the administrative law judge erred in finding Dr. Sargent's opinion reasoned when Dr. Sargent did not perform an exercise blood gas study. Claimant's Brief at 3. Dr. Sargent administered a resting blood gas study on January 31, 1994 which was non-qualifying, and concluded that the test showed "no defect in oxygenation." Employer's Exhibit 4, Deposition Exhibit 1 at 1. Claimant asserts that Dr. Sargent should have performed an exercise blood gas study, but for claims adjudicated under Part 727, the applicable quality standards for medical tests found at 20 C.F.R. Part 410 do not require an exercise study. *See Coleman v. Ramey Coal Co*., 18 BLR 1-9, 1-14-15 (1993); *Pezzetti v. Director, OWCP*, 8 BLR 1-464, 1-465-66 (1986). Moreover, Dr. Sargent based his opinion not only upon the non-qualifying resting blood gas study that he obtained, but also reviewed the resting and exercise blood gas studies performed by other physicians and concluded that claimant has a normal blood gas response to exercise.[2] Employer's Exhibit 4 at 23. Therefore, we reject claimant's contention and hold that the administrative law judge acted within his discretion in finding Dr. Sargent's opinion to be adequately reasoned. *See Hicks, supra*; *Akers, supra*; *Trumbo, supra*.

[2] Four of the five blood gas studies of record yielded non-qualifying values. Director's Exhibits 16, 32, 33, 81; Employer's Exhibit 4.

Claimant next argues that the administrative law judge erred in crediting the opinions of Drs. Sargent and Fino when they ignored qualifying pulmonary function study values. Claimant's Brief at 3-4. Specifically, claimant points to the January 31, 1994 pulmonary function study, which was qualifying before the administration of a bronchodilator but non-qualifying post-bronchodilator. Employer's Exhibit 4, Deposition Exhibit 1 at 8. Contrary to claimant's contention, however, Drs. Sargent and Fino did not ignore these values. They considered the January 31, 1994 pulmonary function study results along with the results of the other pulmonary function studies of record and concluded that these tests indicated the presence of a mild impairment that was not sufficient to prevent claimant from performing the duties of his job as a section foreman. Employer's Exhibits 2-4; *see Walker v. Director, OWCP*, 927 F.2d 181, 183, 15 BLR 2-16, 2-22 (4th Cir. 1991). Since Drs. Sargent and Fino addressed the relevant pulmonary function study results, *see Beavan v. Bethlehem Mines Corp*., 741 F.2d 689, 691, 6 BLR 2-101, 2-109 (4th Cir. 1984), and explained how the objective data overall supported their opinions that claimant is not disabled, substantial evidence supports the administrative law judge's finding that their opinions are adequately reasoned pursuant to Section 727.203(a)(4).[3] *See Hoffman v. B & G Construction Co*., 8 BLR 1-65, 1-66-67 (1985)(physician may properly find a claimant not totally disabled even though studies reveal qualifying results). Accordingly, we affirm the administrative law judge's finding that invocation was not established pursuant to Section 727.203(a)(4) and his conclusion that therefore a change in conditions was not established pursuant to Section 725.310.

[3] Because Drs. Sargent and Fino explicitly considered the nature of claimant's job duties as a section foreman, we reject claimant's argument that Drs. Sargent and Fino failed to consider this information. Claimant's Brief at 4.

Claimant asserts that because the record contains qualifying pulmonary function studies, all of the previous administrative law judge determinations that invocation was not established pursuant to Section 727.203(a)(2) were mistakes and therefore, Judge Kichuk's finding that the record did not demonstrate a mistake of fact was erroneous. Claimant's Brief at 8-9. In the several adjudications of this claim, the various administrative law judges found that the qualifying pulmonary function study values did not invoke the interim presumption pursuant to Section 727.203(a)(2) because some studies did not comply with the applicable quality standards, and because on other studies, the non-qualifying post-bronchodilator values weighed against invocation.[4] Based upon his review of the record on remand, Judge Kichuk indicated that he agreed with the prior administrative law judges' conclusion "that the evidence before them was not sufficient to invoke the interim presumption," and accordingly found within his discretion that "there was no mistake in [a] determination of fact in the earlier denials to the extent they were affirmed by the Benefits Review Board." Decision and Order on Remand at 6. The administrative law judge properly reviewed the entire record for a mistake of fact. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Therefore, we affirm the administrative law judge's finding that no mistake of fact was demonstrated pursuant to Section 725.310.

[4] The record contains eight pulmonary function studies, of which five yielded qualifying values. Director's Exhibits 10, 11, 32, 33, 41, 81; Employer's Exhibit 4, Deposition Exhibit 1 at 8. Of these five studies, four were qualifying pre-bronchodilator but non-qualifying post-bronchodilator, and another was found to be an invalid study.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge