BRB No. 98-0914 BLA

EARL W. THAXTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order After Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Earl W. Thaxton, Charleston, West Virginia, *pro se*.

Rita Roppolo (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,[1] without the assistance of counsel, appeals the Decision and Order After Remand (97-BLA-1285) of Administrative Law Judge Richard A. Morgan on a duplicate 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). In the original Decision and Order in this case, Administrative Law Judge Michael P.

[1] Claimant, Earl W. Thaxton, filed three applications for benefits in this case: January 24, 1973, June 13, 1977, and March 10, 1995. Director's Exhibits 1, 17.

Lesniak credited claimant with "at least" fifteen years of qualifying coal mine employment and noted that this was a duplicate claim. Director's Exhibit 32 at 2. Adjudicating this claim pursuant to 20 C.F.R. Part 718, Administrative Law Judge Lesniak found that the Director, Office of Workers' Compensation Programs (the Director), conceded the existence of pneumoconiosis arising out of coal mine employment and total disability,[2] which were elements of entitlement previously adjudicated against claimant, and found therefore, that claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309(d).[3] After determining that the sole issue for consideration was whether claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), Administrative Law Judge Lesniak analyzed the medical opinion evidence, particularly the report of Dr. Sherman, and remanded the case to the district director for Dr. Sherman to conduct supplemental testing and to render an unequivocal opinion with respect to this issue. Director's Exhibit 32 at 4-5; *see* Director's Exhibits 24, 26, 27, 37.[4] Based upon a

[2] It is undisputed that claimant suffers from chronic bronchitis related to coal dust exposure in his coal mine employment and is totally disabled due to dyspnea. Director's Exhibits 8, 17, 24, 26, 27, 37; *see* Hearing Transcript at 10-11, 13, 27, 32.

[3] The administrative law judge erroneously cited 20 C.F.R. §725.309(d), rather than 20 C.F.R. §725.309(c), Director's Exhibit 32 at 3, which is the applicable regulation inasmuch as claimant filed his first application for benefits on January 24, 1973 and the second application on June 13, 1977, rendering both claims subject to review under 20 C.F.R. Part 727. *See* 20 C.F.R. §725.309(c); Director's Exhibit 17.

[4] On March 24, 1997, Dr. Sherman opined that the "most likely cause" of

pulmonary function study claimant performed on March 6, 1997, Dr. Sherman rendered a supplemental opinion on March 24, 1997. Director's Exhibits 38, 41. The district director reviewed this additional evidence and again, denied benefits. Director's Exhibit 39. Thereafter, claimant requested a formal hearing but later cancelled this request, thereby waiving his right to a hearing, and requested that a decision be made based on the record, which Administrative Law Judge Lesniak granted.

Due to the unavailability of Administrative Law Judge Lesniak, the case was reassigned to Administrative Law Judge Richard A. Morgan (administrative law judge), who found that claimant had previously established a material change in conditions pursuant to Section 725.309 inasmuch as the Director had previously conceded the existence of pneumoconiosis arising out of coal mine employment and total disability. Next, the administrative law judge found that claimant failed to demonstrate that his pneumoconiosis was a contributing cause of his total disability pursuant to Section 718.204(b). Accordingly, the administrative law judge denied benefits. Decision and Order After Remand at 7.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, the Director urges affirmance of the administrative law judge's Section 718.204(b) determination that claimant's total disability is not due to pneumoconiosis. However, the Director also contends that the case should be remanded because an earlier claim filed on June 13, 1977 was never finally denied.

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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of

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claimant's disabling dyspnea on exertion is cardiac, but also stated, "it is possible, however, that a significant pulmonary impairment does exist that was not detected by spirometry or chest x-ray. Lung volume, diffusion capacity, and cardiopulmonary stress test studies could add information that may either change or support this opinion." Director's Exhibits 24, 26, 27, 37.

fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director contends that the instant case should be remanded because the claim filed on June 13, 1977 was never finally denied, and therefore, because this claim is pending, entitlement to benefits should be considered under the interim criteria set forth in 20 C.F.R. Part 727. Specifically, the Director asserts that, within one year of the Department of Labor's (DOL) most recent denial of the June 1977 claim, claimant submitted additional evidence after the denial and suggested that DOL reconsider the claim, which DOL never acknowledged. Consequently, the Director avers that claimant's submission of evidence and request for reconsideration constituted a timely request for modification pursuant to Section 725.310 that was not decided, therefore, the June 1977 claim has never been fully adjudicated. The Director's contentions have merit.

The procedural posture of this case, as provided *seriatim,* is complex. Claimant filed a Part B application for benefits with the Social Security Administration (SSA) on January 24, 1973. This claim was denied by a claims examiner on June 20, 1973 and on April 6, 1974. Thereafter, claimant filed a duplicate application for benefits with DOL on June 13, 1977, which was denied by a claims examiner on May 9, 1979 and on September 23, 1980. In a letter written by his attorney on October 8, 1980, claimant disagreed with the September 1980 denial and requested copies of the file. DOL neither acknowledged claimant's letter nor reviewed the claim. Four years later, claimant's new attorney entered his appearance for claimant and requested copies of the file on February 2, 1984. Again, DOL failed to respond or review the claim and claimant's counsel submitted yet another request on August 8, 1984. The claims examiner finally responded on October 19, 1984, informing claimant that the claim was "still open" and requesting claimant to submit the report of Dr. Lee. By letter dated March 5, 1985, the claims examiner informed claimant that she had not received Dr. Lee's report. On August 28, 1986, claimant's counsel filed Dr. Lee's report with additional medical records, but noted that he had previously filed Dr. Lee's report in March of 1985 when it was initially requested. After considering the newly submitted evidence, DOL denied the claim on October 28, 1986. Thereafter, claimant's counsel requested that the record remain open in order to file, no later than November 20, 1986, current medical reports. However, neither claimant nor counsel submitted additional medical evidence or requested a formal hearing, and hence, DOL deemed the claim administratively closed on January 15, 1987. On January 19, 1987, counsel responded, stating only, "we did request a hearing within the 60 days period [sic]." Nevertheless, the claims examiner replied on February 5, 1987, finding that the claim was administratively

closed because the file was devoid of a request for a hearing or newly submitted evidence since the prior October 1986 denial. Notwithstanding the claims examiner's findings, claimant's counsel submitted a pulmonary function study with a cover letter dated February 4, 1987. Director's Exhibit 17.

Consequently, claimant took no further action with respect to his June 1977 claim. He filed a third application for benefits on March 10, 1995, Director's Exhibit 1, which DOL denied on August 11, 1995. Director's Exhibit 13. On October 10, 1995, claimant submitted additional evidence and requested a formal hearing. Director's Exhibit 14. Administrative Law Judge Lesniak held a formal hearing on August 20, 1996 and rendered his decision thereafter.

Section 725.310(a) provides that:

> Upon his or her own initiative, or upon the request of any party on grounds of a change in condition or because of a mistake in a determination of fact, the deputy commissioner may, at any time before ... one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

20 C.F.R. §725.310. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, recently reiterated its well established modification standard in *Consolidation Coal Co. v. Borda,* F.3d , BLR , No. 98-1109 (4th Cir. Mar. 15, 1999), holding that "a request for modification need not meet formal criteria," and "there is no need for a smoking-gun factual error, changed conditions, or startling new evidence." *Borda, slip op.* at 4, *citing I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6 (CRT)(4th Cir. 1996), *cert. denied*, 117 S.Ct. 49 (1996); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

We hold that claimant's October 1980 letter disagreeing with the claims examiner's form letter denial constituted a request for modification, and thus, preserved the claim's status as pending. Claimant's October 1980 letter was timely submitted, having been sent within one year of the September 1980 denial of his claim. It "unambiguously expressed dissatisfaction" with DOL's denial of the claim such that "a reasonable person reading [claimant's October 1980] letter would be put on notice that [claimant] was requesting reconsideration of the denial of his claim," *Borda, slip. op.* at 4. The Department never responded to claimant's several challenges of the September 1980 form letter denial or his attorneys' repeated requests for copies of the file. Furthermore, because DOL failed to reconsider the claim for four years, and then only to inform claimant that his claim was "still open" and to request additional medical evidence, there was never a *final* denial of the

1977 claim. We, therefore, hold that claimant's June 1977 claim is a pending and viable claim. *See* 20 C.F.R. §725.309(c); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 92 S.Ct. 405 (1971); *Banks v. Chicago Grain Trimmers Assn.*, 390 U.S. 459, 88 S.Ct. 1140 (1968); *Borda, supra; Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Inasmuch as claimant's October 1980 letter was a request for modification, his June 1977 claim remained viable because it was pending on reconsideration. Consequently, when claimant filed his third claim for benefits on March 10, 1995, that claim merged into his still pending 1977 claim. *See* 20 C.F.R. §725.309(c). Hence, the merged claim is governed by the Part 727 interim regulations applicable to the 1977 claim, as opposed to the Part 718 regulations which would have been applicable to the March 1995 claim standing alone. *See Borda, supra*. We, therefore, remand this case to the administrative law judge for him to adjudicate the instant case pursuant to the Part 727 interim regulations.[5]

[5] In the original Order of Remand, Administrative Law Judge Lesniak credited claimant with "at least" fifteen years of qualifying coal mine employment. Director's Exhibit 32 at 2. This determination, which is not adverse to claimant, was not previously challenged by the Director. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

With respect to adjudication of the claim under Part 727, the Director attempts to clarify his previously conceded issues in this case by now arguing that, although he conceded that claimant was totally disabled during the formal hearing held on August 20, 1996, *see* Hearing Transcript at 10-11, 13, 27, 32,[6] he never conceded that this disability was, in fact, *respiratory*, and therefore, "do[es] not view the [total disability] concession as mandating invocation of the interim presumption under 20 C.F.R. §727.203(a)." Director's Letter Brief at 5. On remand, the administrative law judge must determine whether the Director's concession of total disability in the instant case mandates a finding of invocation of the interim presumption pursuant to Section 727.203(a)(4). *See* 20 C.F.R. §727.203(a), (b).

In the event the administrative law judge does not find entitlement under Part 727, he is instructed to determine whether claimant established entitlement to benefits under 20 C.F.R. Part 410, Subpart D. *Muncy v. Wolfe Creek Colleries Coal Co.*, 3 BLR 1-627 (1981). The Board, 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). Inasmuch as the administrative law judge may find claimant entitled to benefits pursuant to 20 C.F.R. Part 727, we only render the following holding in the event that the claim becomes subject to review under Part 410, Subpart D.

With respect to 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 under Part 410, Subpart D. *Shaw v.*

[6] There was no dispute at the hearing that the provisions set forth at Part 718 were applicable to claimant's March 1995 claim. *See* 20 C.F.R. §718.1. Consequently, the only type of compensable total disability in a case filed under the Part 718 regulations is one that arises from a respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243, 19 BLR 2-1, 2-5-6 (4th Cir. 1994).

Cementation Co. of America, 10 BLR 1-114, 1-116 (1987); *Migalich v. Director, OWCP*, 2 BLR 1-27 (1979).

In the instant case, in addressing whether the total disability was due to pneumoconiosis, the administrative law judge permissibly found Dr. Sherman's opinion unequivocal and thus entitled to dispositive weight, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). The administrative law judge also found this opinion more recent than other reports that were fifteen or twenty years older, contained an adequately explained diagnosis and conclusion, rendered by a physician with superior pulmonary expertise, *see Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985), and included a thorough review of all the medical evidence of record, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1998)(when assessing conflicting medical opinions, administrative law judges should consider qualifications of experts, explanation of medical opinions, documentation underlying physicians' medical judgments, and sophistication and bases of diagnoses); *accord Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); Decision and Order After Remand at 7; Director's Exhibits 24, 26, 27, 37, 38, 41. Accordingly, we hold that because the administrative law judge rationally found that the evidence of record fails to demonstrate total disability due to pneumoconiosis, *see* 20 C.F.R. §§410.422, 410.426, claimant is precluded from entitlement to benefits under the permanent criteria of Part 410, Subpart D. *See Shaw, supra; Migalich, supra*.

Accordingly, the Decision and Order After Remand of the administrative law judge denying benefits is affirmed in part and vacated in part, and the case is remanded for proceedings 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