

BRB No. 05-0799 BLA

VIRGINIA H. HORN)	
(Widow of CONGH H. HORN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JEWELL RIDGE MINING CORPORATION)	
)	DATE ISSUED: 05/30/2006
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

Joseph E. Wolfe (Wolfe, Williams, and Rutherford), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-0197) of Administrative Law Judge Jeffrey Tureck 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).¹ The miner's claim at issue herein was filed on March 18, 1977, and is

¹ Claimant is Virginia H. Horn, the widow of the miner Congh H. Horn, who died on June 3, 1997. Claimant is pursuing the miner's claim filed on March 18, 1977.

now being considered pursuant to claimant's request for modification of the denial of benefits pursuant to 20 C.F.R. §725.310 (2000).² The claim is before the Board for the fourth time. The Board summarized the claim's full procedural history in its last decision in this case. *Congh v. Jewell Ridge Coal Corp.*, BRB No. 99-1318 BLA (Nov. 30, 2000)(unpub.); Director's Exhibit 154. Consequently, we will focus on the procedural details relevant to the administrative law judge's decision denying claimant's modification request.

In a Decision and Order on remand issued on February 22, 2002, Administrative Law Judge Clement J. Kichuk found that because the weight of the x-ray evidence did not establish the existence of pneumoconiosis, claimant was not entitled to invocation of the interim presumption of 20 C.F.R. §727.203(a)(1) that the miner was totally disabled due to pneumoconiosis. Director's Exhibit 159 at 9. Judge Kichuk further found that invocation of the interim presumption was established by the pulmonary function study evidence pursuant to 20 C.F.R. §727.203(a)(2), but employer rebutted the presumption pursuant to 20 C.F.R. §727.203(b)(4) by proving that the miner did not have pneumoconiosis. Director's Exhibit 159 at 1, 10-17. Accordingly, Judge Kichuk denied benefits.

Thereafter, claimant timely requested modification. Director's Exhibit 163. The district director denied the modification request and claimant requested a hearing, but the parties later waived their right to a hearing and requested a decision on the record. Director's Exhibits 179, 180; *see* 20 C.F.R. §725.461(a); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000). Accordingly, the administrative law judge cancelled the hearing and determined this case on the record.

The administrative law judge credited the miner with approximately twenty years of coal mine employment,³ and found that claimant did not establish either a change in conditions or a mistake in a determination of fact to justify modification of the denial of benefits. Specifically, the administrative law judge found that the x-ray evidence of record did not establish the existence of pneumoconiosis and thus did not invoke the interim presumption at 20 C.F.R. §727.203(a)(1). Additionally, the administrative law judge found that the better reasoned medical opinion evidence did not establish that the previous determination under 20 C.F.R. §727.203(b)(4) that the miner did not have

² The revised regulation at 20 C.F.R. §725.310 does not apply to claims, such as the miner's, which were pending on January 19, 2001. 20 C.F.R. §725.2(c).

³ The record indicates that the miner's last coal mine employment occurred in Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

pneumoconiosis was incorrect. Accordingly, the administrative law judge denied claimant's modification request.

On appeal, claimant asserts that the administrative law judge erred in his consideration of the medical evidence when he discredited Dr. Perper's opinion that the miner had pneumoconiosis.⁴ Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.⁵

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Modification of a denial of benefits is available based upon a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310 (2000). The administrative law judge has the authority to consider all the evidence for any mistake of fact, including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

Pursuant to 20 C.F.R. §727.203(b)(4), the administrative law judge considered four medical opinions. Drs. Robinette and Perper diagnosed the miner with pneumoconiosis, while Drs. Castle and Fino opined that he did not have pneumoconiosis. Director's Exhibit 173; Claimant's Exhibit 1; Employer's Exhibits 6, 12-15. The administrative law judge explained that he discounted Dr. Robinette's opinion because it was not well-reasoned or explained, and because it was based on "erroneous positive x-ray evidence." Decision and Order at 7. The administrative law judge also found Dr. Perper's opinion "unhelpful" because Dr. Perper rejected the "clearly negative" x-ray evidence without explaining persuasively why highly qualified doctors were wrong in their assessment of the miner's x-rays. Decision and Order at 8. The administrative law judge also questioned Dr. Perper's reasoning when he pointed to the miner's employment

⁴ On September 7, 2005, the Board ordered claimant to show cause within ten days of receipt of the order why her appeal should not be dismissed for failure to file a petition for review. On September 19, 2005, claimant filed her petition for review. Employer has filed its response brief. The Board hereby accepts claimant's petition for review and employer's response, and will proceed with the adjudication of this case.

⁵ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant did not establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

history as support for a diagnosis of pneumoconiosis and relied on discredited x-ray readings diagnosing the miner with complicated pneumoconiosis. Additionally, the administrative law judge found that, because there was no biopsy or autopsy evidence regarding the existence of pneumoconiosis, Dr. Perper's qualifications in pathology were "not overly relevant in this case." Decision and Order at 7. By contrast, the administrative law judge gave "greater weight" to the opinions of Drs. Fino and Castle because these physicians were "more qualified in the areas of internal medicine and pulmonary disease." Decision and Order at 9.

Claimant contends that the administrative law judge erred in discounting Dr. Perper's opinion because Dr. Perper's expertise is in the field of pathology. Claimant's Brief at 3. We disagree. Since the administrative law judge must consider the physicians' respective qualifications, he reasonably found that Dr. Castle's and Dr. Fino's credentials in internal medicine and pulmonary disease were more relevant in this case, considering that there was no autopsy or biopsy evidence. 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). Claimant argues further that the administrative law judge improperly discredited Dr. Perper's opinion that several x-ray readers missed the diagnosis of pneumoconiosis, when Dr. Perper cited a medical study in support of his opinion. Claimant's Brief at 3-4. Again, we disagree with claimant. The administrative law judge considered Dr. Perper's reference to a 1996 medical study reporting that radiologists sometimes failed to diagnose cases of pneumoconiosis that were later established pathologically. Decision and Order at 8; Claimant's Exhibit 1 at 24. The administrative law judge was within his discretion to find that Dr. Perper did not explain why those study results "mean[t] that the radiologists in this case are incorrect in their diagnosis." Decision and Order at 8; see *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Underwood v. Elkay Mining*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997).

Likewise, we find no merit in claimant's contentions that the administrative law judge erred in discounting Dr. Perper's reliance on the number of years the miner worked in coal mine employment, and erred in finding that Dr. Perper did not point to sufficient medical evidence of pneumoconiosis. Claimant's Brief at 4-5. The analysis of the reasoning of a medical opinion is for the administrative law judge, and there was substantial evidence to support the administrative law judge's findings. *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32. Claimant essentially requests a reweighing of the evidence, which we cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §725.203(b)(4), and his finding that claimant did not establish a basis for modifying the denial of benefits pursuant to 20 C.F.R. §725.310(2000).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge