BRB No. 01-0268 BLA

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

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Matthew Justus, Hurley, Virginia, *pro se*.

Sarah M. Hurley (Howard M. Radzely, Acting 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 and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (00-BLA-0352) of Administrative Law Judge Stuart A. Levin denying benefits on a claim[1] filed

[1] Claimant initially filed a claim for benefits with the Department of Labor on March 21, 1978, Director's Exhibit 122, which was finally denied by Administrative Law Judge Giles J. McCarthy in a Decision and Order issued on January 5, 1989. Judge McCarthy found that claimant established invocation of the interim presumption of totally disabling pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1), but that employer established rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(2), (3). Judge McCarthy also found that claimant failed to establish entitlement under 20 C.F.R. Part 410, Subpart D. Subsequent

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).[2] The administrative law judge found

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to an appeal by claimant, the Board affirmed Judge McCarthy's finding of rebuttal under subsection (b)(3) and that claimant failed to establish entitlement under Part 410, and affirmed the denial of benefits in *Justus v. Director, OWCP*, BRB No. 89-0253 BLA (Jul. 30, 1992)(unpub.). Director's Exhibit 62. Claimant filed an appeal with the United States Court of Appeals for the Fourth Circuit, and in *Justus v. Director, OWCP*, No. 92-1998 (Nov. 18, 1992)(unpub.), the court vacated the Board's holding at Section 727.203(b)(3), and remanded the case to the administrative law judge. Director's Exhibit 63. Administrative Law Judge Donald W. Mosser issued a Decision and Order on Remand again finding rebuttal under subsection (b)(3) and denying benefits. Director's Exhibit 65. Subsequently, the Board vacated that denial of benefits in *Justus v. Director, OWCP*, BRB No. 93-2253 BLA (Aug. 29, 1995)(unpub.), and remanded the case to the district director in order to reopen the record for the submission of new evidence on the issue of (b)(3) rebuttal. Director's Exhibits 72, 73. Subsequently, on October 31, 1997 Administrative Law Judge Richard A. Morgan issued a Decision and Order denying benefits. Director's Exhibit 93. The Board affirmed the denial in *Justus v. Director, OWCP*, BRB No. 98-0392 BLA (Dec. 3, 1998)(unpub.). Director's Exhibit 104. On March 22, 1999, claimant filed a timely request for modification Judge Morgan's denial, which was denied by Administrative Law Judge Stuart A. Levin. That denial is before us on appeal now. Director's Exhibit 108.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

The regulations contained in 20 C.F.R. Part 727 are not affected by the recent amendments to the regulations.

that the instant claim constituted a request for modification and was governed by the standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Decision and Order at 2. Reviewing all the evidence of record, the administrative law judge concluded that no mistake in a determination of fact, nor change in condition was shown and, therefore, rebuttal of the interim presumption of totally disabling coal workers' pneumoconiosis pursuant to 20 C.F.R. §727.203(b)(3) was again established. Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of benefits.

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); *Stark v. Director, OWCP*, 9 BLR 1-361 (1986). We must affirm the administrative law judge's Decision and Order if the findings of 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that employer must affirmatively rule out the causal relationship between the miner's total disability and his coal mine employment, *see Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), or state without equivocation that claimant suffered no respiratory or pulmonary impairment of any kind, *see Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995), *rev'g on other grds*, 18 BLR 1-59 (1984)(*en banc*); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *see generally Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995).

In the instant case, the administrative law judge concluded that although Dr. Rasmussen noted that claimant had pneumoconiosis and that a ventilatory study revealed a slight pulmonary impairment, he nonetheless opined that claimant had "no significant loss of lung function," and that his "coal mine dust exposure [had] not led to any significant loss of respiratory function." The administrative law judge also noted Dr. Rasmussen unequivocally stated, in a supplemental letter, that "[I]n the case of Mr. Justus, the impairment in function is clearly insufficient to render him disabled and is, in fact, non-significant." Director's Exhibits 75, 79. Thus, the administrative law judge rationally found that the opinions of Drs. Rasmussen were sufficient to establish rebuttal under Section 727.203(b)(3). Decision and

Order at 10. Additionally, the administrative law judge permissibly accorded greatest weight to the opinion of Dr. Rasmussen based on Dr. Rasmussen's "impressive credentials," *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Corp.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1986), and because his opinion was best supported by the underlying documentation. *See Hicks, supra*; *Akers, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, the administrative law judge permissibly accorded little weight to the opinions of Drs. Cardona and Sutherland, that claimant's total disability prevented a return to coal mine employment and was due to coal mine dust, Director's Exhibit 16, because they failed to provide credible support for their conclusions. *See Clark, supra*; *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). Accordingly, the administrative law judge has provided affirmable bases for his conclusion that employer has established rebuttal of the interim presumption at Section 727.203(b)(3). *See Massey, supra*. Because employer has established rebuttal of the interim presumption pursuant to Section 727.203(b)(3), we must affirm the administrative law judge's denial of modification and benefits. *See* 20 C.F.R. §727.203(b)(3); *Jessee, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge