BRB No. 08-0181 BLA

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| J.M., Sr.<br>(On Behalf of the Estate of R.M.)<br><br>Claimant-Petitioner<br><br>v.<br><br>PEABODY COAL COMPANY<br><br>and<br><br>OLD REPUBLIC INSURANCE COMPANY<br><br>Employer/Carrier-<br>Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 11/20/2008<br><br>DECISION and ORDER |

Appeal of the Decision and Order - Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denying Benefits (06-BLA-0035) of Administrative Law Judge Alan L. Bergstrom rendered 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).[2] This case involves the miner's request for modification of the denial of a claim he originally filed on March 16, 1978. Director's Exhibit 1. The Board discussed previously this claim's full procedural history.[3] The miner was initially awarded benefits on February 7, 1985. However, pursuant to employer's request for modification, filed on March 19, 1999, the miner was subsequently denied benefits on September 15, 2004. Thereafter, the miner requested modification on March 25, 2005, and the claim was referred to the administrative law judge.

The administrative law judge credited the miner with eighteen years of coal mine employment.[4] The administrative law judge initially rejected the miner's argument that employer's request for modification, filed on March 19, 1999, was untimely. The administrative law judge then considered the miner's request for modification, and found that the miner established a change in conditions by establishing invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(2), (4) (2000). However, the administrative law judge found that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(3), (4) (2000). Because the miner

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[1] Claimant, J.M., Sr., is the son of the miner, R.M., who died while this appeal was pending. Claimant is pursuing the appeal on behalf of his father's estate. [*J.M.*] *(On behalf of the Estate of* [*R.M.*]) *v. Peabody Coal Co.*, BRB No. 08-0181 BLA (Aug. 13, 2008)(order denying employer's motion to dismiss).

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former regulation remains applicable, we will cite to the 2000 version of the Code of Federal Regulations.

[3] [*R.M.*] *v. Peabody Coal Co.*, BRB No. 04-0150 BLA (Sept. 15, 2004)(unpub.); [*R.M.*] *v. Peabody Coal Co.*, BRB No. 02-0465 BLA (Dec. 13, 2002)(unpub.); Director's Exhibits 159, 170.

[4] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

did not establish entitlement pursuant to Part 727 (2000), the administrative law judge found that the miner did not establish a mistake in a determination of fact in the prior denial. *See* 20 C.F.R. §725.310 (2000). Thus, the administrative law judge declined to reopen the claim. The administrative law judge also found that entitlement was not established pursuant to 20 C.F.R. Part 718 because, although the miner established invocation of the presumption, pursuant to 20 C.F.R. §718.305, that he was totally disabled due to pneumoconiosis, employer rebutted the presumption by establishing that the miner's totally disabling pulmonary impairment was due solely to smoking and was not related to coal mine employment. Accordingly, the administrative law judge denied the miner's request for modification and denied benefits.

On appeal, claimant initially challenges the administrative law judge's finding that employer's request for modification was timely filed on March 19, 1999.[5] Claimant also contends that the administrative law judge erred in finding rebuttal established pursuant to 20 C.F.R. §727.203(b)(3), (4) (2000). In response, employer renews its request that this appeal be dismissed for lack of a proper party-in-interest, and, alternatively, urges affirmance of the administrative law judge's denial of benefits.[6] The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 725.310 (2000) provides that a party may request modification of an award or denial of benefits on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R.

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[5] We reject claimant's argument that employer's March 19, 1999 modification request was not timely filed. The Board has already held that employer's 1999 modification request was timely filed, and claimant does not argue that any exceptions to the law of the case doctrine apply. *See Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-246 (2003); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989-90 (1984); [*R.M.*], BRB No. 04-0150 BLA, slip op. at 3-4; *see also* Decision and Order at 7 n.7; 45; Employer's Brief at 10-11.

[6] We deny employer's renewed request to dismiss this appeal for lack of a proper party-in-interest. 20 C.F.R. §802.402(b); *see M.M. v. Universal Maritime APM Terminals*, 42 BRBS , BRB No. 08-213 and 08-0213A (June 27, 2008); [*J.M., Sr.*] *(On Behalf of the Estate of* [*R.M.*]), BRB No. 08-0181 BLA, Order at 1.

§725.310(a) (2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Pursuant to 20 C.F.R. Part 727 (2000), a miner who engaged in coal mine employment for at least ten years will be presumed to be totally disabled due to pneumoconiosis, arising out of coal mine employment, if one of the medical criteria set forth at 20 C.F.R. §727.203(a)(1)-(4) (2000) is met.[7] If the administrative law judge properly finds invocation of the interim presumption established pursuant to any subsection of Section 727.203(a) (2000), the burden shifts to the party opposing entitlement to establish rebuttal of the presumption by a preponderance of the evidence pursuant to one of the four methods provided in 20 C.F.R. §727.203(b)(1)-(4) (2000).[8] In this case, the administrative law judge found that the miner established invocation pursuant to Section 727.203(a)(2), (4) (2000), and that employer established rebuttal pursuant to Section 727.203(b)(3), (4) (2000).

Pursuant to Section 727.203(b)(3) (2000), the administrative law judge credited the new opinions of Drs. Dahhan, Rosenberg,[9] Renn, and Tuteur, that the miner's totally

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[7] In a living miner's claim, invocation of the interim presumption may be established through (1) a chest x-ray, biopsy, or autopsy establishing the existence of pneumoconiosis; (2) ventilatory studies establishing the presence of a chronic respiratory or pulmonary disease; (3) blood gas studies demonstrating the presence of an impairment in the transfer of oxygen from the lungs to the blood; or (4) other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishing the presence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §727.203(a)(1)-(4) (2000).

[8] Rebuttal may be established by proving that (1) the miner was performing his usual coal mine employment or comparable and gainful work; (2) the miner was able to perform his usual coal mine employment or comparable and gainful work; (3) the miner's disability did not arise in whole or in part out of his coal mine employment; or (4) the miner did not have pneumoconiosis. 20 C.F.R. §727.203(b)(1)-(4) (2000).

[9] Claimant does not challenge the administrative law judge's crediting of Dr. Rosenberg's opinion; thus, we affirm that determination as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983); *see* Employer's Brief at 13. Dr. Rosenberg opined that the miner did not have pneumoconiosis, but rather had a totally disabling respiratory or pulmonary impairment due to smoking, unrelated to his coal mine employment. Employer's Exhibit 5 at 20. Dr. Rosenberg based his opinion on

disabling pulmonary impairment was due to smoking and not pneumoconiosis, because they were persuasive in "analyz[ing] the Claimant's objective medical data against known studies of respiratory impairment and medical standards . . . ." Decision and Order at 39-40. Thus, the administrative law judge found that employer established rebuttal pursuant to Section 727.203(b)(3) (2000) based on these opinions. The administrative law judge did not credit the only other new opinion of record, that of Dr. Rasmussen, who stated that the miner was totally disabled due to legal pneumoconiosis. *See* Director's Exhibits 171, 193. The administrative law judge declined to discuss and weigh the old opinions of Drs. Calhoun, Chick, Getty, Norsworthy, O'Neill, and West, because he found "that reopening the prior record for consideration under Part 727 [2000] is unwarranted" since "the credible evidence of record fails to demonstrate a mistake in [a] determination of the findings of fact by the prior Administrative Law Judge . . . ." Decision and Order at 42.

Claimant first argues that the administrative law judge erred in crediting the new opinions of Drs. Dahhan, Renn, and Tuteur because these physicians did not examine the miner. Claimant argues further that the administrative law judge should have credited the old opinions of Drs. Calhoun, Chick, Norsworthy, and West "if a review of the entire medical evidence of record is deemed to be necessary."[10] Claimant's Brief at 9.

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several factors. Specifically, Dr. Rosenberg opined that the miner's marked decrease in FEV1 and diffusing capacity, and increased residual volume/total lung capacity and lung volumes, along with a bronchodilator response, indicated a respiratory impairment due to smoking and not coal mine employment. Employer's Exhibit 5 at 19; *see also* Employer's Exhibit 8 at 20.

[10] Dr. Calhoun examined the miner in 1976, and stated that the miner was totally disabled due to moderately advanced coal workers' pneumoconiosis. Director's Exhibit 12. Dr. Chick examined the miner in 1981, and opined that the miner had coal workers' pneumoconiosis, and was restricted to sedentary activities due to his coal workers' pneumoconiosis, mild obstructive ventilatory defect, and his 1975 mining accident involving head, neck, and shoulder injuries. Director's Exhibit 28. Dr. Norsworthy examined the miner in 1980, and concluded that the miner was totally disabled due to pneumoconiosis arising out of his coal mine employment. Director's Exhibit 129. Dr. West examined the miner in 1978, and rendered the same conclusion as that of Dr. Norsworthy. Director's Exhibit 13. The record also contains the opinions of Drs. Getty and O'Neill. Dr. Getty examined the miner in 1981, and stated that the miner did not have pneumoconiosis, and therefore was not totally disabled by it. Director's Exhibit 26. Dr. O'Neill reviewed the miner's medical records in 1984, and stated that the miner had no respiratory disability, and that it was "equivocal" as to whether the miner had coal workers' pneumoconiosis. Director's Exhibits 41, 42.

Claimant's contentions lack merit. The administrative law judge was not required to credit the opinions of the examining physicians; the opinions of treating physicians "get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2003). The administrative law judge, as fact finder, was required to decide whether the medical opinions were sufficiently documented and reasoned. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Thus, it was within the administrative law judge's discretion to determine that the opinions of Drs. Dahhan and Tuteur were persuasive, even though these doctors did not examine the miner. *Id.* In any event, the record reflects that Dr. Renn did, in fact, examine the miner on July 12, 2005.[11] Director's Exhibit 185.

Claimant next argues that the administrative law judge erred in crediting the new opinions of Drs. Dahhan, Renn, and Tuteur because these physicians did not "explain *how* the claimant's eighteen (18) years of coal mine employment and exposure to coal dust had no effect on his pulmonary impairments." Claimant's Brief at 7. We reject claimant's argument, as these physicians explained their opinions that the miner's totally disabling pulmonary impairment was due solely to smoking and was not related to coal dust exposure. Specifically, Dr. Dahhan opined that he did not relate the miner's pulmonary obstruction to a coal mine employment-related impairment because the miner had variable responses to bronchodilator, which Dr. Dahhan explained is incompatible with a diagnosis of pneumoconiosis, and he had a lengthy smoking history. Employer's Exhibits 1 at 3; 9 at 12.[12]

Dr. Renn explained that the miner had a marked increase in residual volume and total lung capacity (TLC), which Dr. Renn noted occurs in smoking, but not in coal mine-related impairments, and a low diffusing capacity level, incompatible with pneumoconiosis, to support his opinion that the miner's pulmonary obstruction was due to smoking and not coal mine employment. *See* Employer's Exhibits 3 at 3-5; 6 at 18, 20. Dr. Tuteur explained that it was five to forty-five times more likely that the miner's chronic obstructive pulmonary disease (COPD) was due to smoking and not coal mine employment. Employer's Exhibit 4 at 9; *see also* Employer's Exhibit 7 at 9.

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[11] We decline to address the administrative law judge's finding that reopening the prior record was unwarranted, as claimant alleges no specific error with regard to that finding. *See Cox v. Benefits Review Board*, 719 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

[12] Dr. Dahhan recorded that the miner had a twenty-six to twenty-seven pack-year history. Employer's Exhibit 9 at 13.

Additionally, Dr. Tuteur pointed out that the miner's variable pulmonary function studies, blood gas studies indicating no impairment of gas exchange, and normal or increased TLC indicated that the miner had COPD unrelated to his coal mine employment. Employer's Exhibit 7 at 25. As Drs. Dahhan, Renn, and Tuteur explained why they concluded that the miner's totally disabling lung disease was due to smoking and not coal mine employment, the administrative law judge permissibly relied on their opinions. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Claimant further argues that the administrative law judge erred in crediting the new opinions of Drs. Dahhan, Renn, and Tuteur because they opined "that the claimant did not even suffer from pneumoconiosis, a conclusion that is in direct conflict with every previous determination made in this matter." Claimant's Brief at 7-8. Claimant asserts that the administrative law judge should have credited Dr. Rasmussen's new opinion because it "confirms the numerous, previous reports of record (and the numerous, previous adjudications of record) which clearly indicate that the claimant's totally disabling respiratory impairment did indeed arise from coal worker's pneumoconiosis." Claimant's Brief at 9. We disagree. On modification, an administrative law judge is not bound by prior factual determinations. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156, 1-158 (1990), *modified on recon.*, 16 BLR 1-71, 1-72 (1992). Thus, the administrative law judge was not required, on the miner's modification request, to credit Dr. Rasmussen's new opinion because it was consistent with prior findings made in this case. As we reject all of claimant's arguments, and the new opinions of Drs. Dahhan, Renn, and Tuteur, establish that pneumoconiosis played no role in causing the miner's disability pursuant to Section 727.203(b)(3) (2000), we affirm the administrative law judge's finding thereunder. *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1120, 7 BLR 2-53, 2-65 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).[13]

Pursuant to Section 727.203(b)(4) (2000), the administrative law judge found that employer rebutted the presumption because the "medical evidence and controlling medical opinion, reviewed herein," demonstrated that the miner neither had simple nor complicated pneumoconiosis, or any respiratory impairment arising out of coal mine employment.[14] Decision and Order at 40. Claimant makes the same arguments at

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[13] Dr. Dahhan testified that he could rule out any connection between the miner's coal dust exposure and the development of his disabling lung disease. Employer's Exhibit 9 at 13. Dr. Renn stated that coal mine dust had no effect on the miner's pulmonary impairment. Employer's Exhibit 6 at 20. Dr. Tuteur testified that the miner's disabling pulmonary impairment was not caused or aggravated, in whole or in part, by his years of coal mine employment. Employer's Exhibit 7 at 26.

[14] All of the new x-ray evidence was negative for pneumoconiosis. Director's Exhibits 171 at 22; 185 at 11, 34, 45, 53, 55; 186 at 3; 187 at 3; 189 at 5; 190 at 4;

Section 727.203(b)(4) (2000) as he does at Section 727.203(b)(3) (2000). As the administrative law judge permissibly credited the new opinions of Drs. Dahhan, Renn, and Tuteur, and the new opinions of Drs. Dahhan, Renn, and Tuteur are substantial evidence that the miner had neither clinical nor legal pneumoconiosis, we affirm the administrative law judge's finding of rebuttal pursuant to Section 727.203(b)(4) (2000).[15] *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 304, 9 BLR 2-221, 2-223-24 (6th Cir. 1987). Consequently, we affirm the administrative law judge's finding that the miner did not establish a mistake in a determination of fact that would warrant a reopening of the claim.[16]

Pursuant to *Knuckles v. Director, OWCP*, 869 F.2d 996, 999, 12 BLR 2-217, 2-221 (6th Cir. 1989), the administrative law judge was required to consider entitlement pursuant to 20 C.F.R. Part 718, after finding that entitlement to benefits was not established under 20 C.F.R. Part 727 (2000). *See Knuckles*, 869 F.2d at 999, 12 BLR at 2-221. The administrative law judge found that entitlement pursuant to Part 718 was not established because the miner did not establish that his totally disabling respiratory or pulmonary impairment was due to his coal mine employment, based on the new opinions of Drs. Dahhan, Renn, and Tuteur. Decision and Order at 44-46. Our affirmance of the rebuttal findings pursuant to Section 727.203(b)(3), (4) (2000), that the miner did not have pneumoconiosis and that pneumoconiosis played no role in causing his disability, based on the opinions of Drs. Dahhan, Renn, and Tuteur, supports the administrative law judge's finding that the miner's totally disabling respiratory impairment was not due to his coal mine employment pursuant to Part 718, based on these same opinions. Thus,

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Employer's Exhibit 2. The administrative law judge did not consider the old x-ray evidence because he found that the credible evidence did not establish a mistake in a determination of fact. Decision and Order at 42.

[15] Drs. Dahhan, Renn, and Tuteur all opined that the miner did not have clinical or legal pneumoconiosis. Employer's Exhibits 1 at 2-3; 3 at 2-3; 4 at 10.

[16] The administrative law judge found that the new pulmonary function study and medical opinion evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §727.203(a)(2), (4) (2000), and thus established a change in conditions since the prior denial of the claim. Decision and Order at 40-42; *see* 20 C.F.R. §725.310 (2000). However, the administrative law judge also found that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(3), (4) (2000), and determined that this finding was consistent with the prior denial of the claim. Decision and Order at 42.

entitlement is precluded pursuant to Part 718.[17] *See generally Shupe v. Director, OWCP*, 12 BLR 1-200, 1-204 (1989)(*en banc*). Consequently, the administrative law judge's denial of the miner's request for modification and denial of benefits are affirmed.[18]

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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[17] Consideration of entitlement was not required pursuant to 20 C.F.R. §410.490, as the administrative law judge credited the miner with more than ten years of coal mine employment. *See The Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195, 201, 12 BLR 2-136, 2-144 (6th Cir. 1989).

[18] We deny claimant's request that this case be remanded to the administrative law judge for him to reconsider the claim, without reference to the miner's hearing testimony. The record does not reflect that the administrative law judge erred in allowing the miner to testify, or in considering the miner's testimony, in arriving at his decision. *See Elswick v. Eastern Associated Coal Corp.*, 2 BLR 1-1016, 2-1018 (1980). In any event, there is no indication that the administrative law judge relied on the miner's hearing testimony in reaching his decision to deny benefits. Additionally, we decline to consider Dr. Rice's November 2007 report, submitted by claimant for the first time on appeal, because the Board cannot consider evidence outside the record. 20 C.F.R. §802.301(a), (b); *Berka v. North Am. Coal Corp.*, 8 BLR 1-183, 1-184 (1985).