

BRB No. 02-0220 BLA

DANIEL B. SUTHERLAND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
	)	
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 Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Daniel B. Sutherland, Haysi, Virginia, *pro se*.

Barry H. Joyner (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Modification (01-BLA-0165) of Administrative Law Judge Daniel F. Solomon on a claim<sup>1</sup> 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 on appeal before the Board for the fourth time. The procedural history of this case is set forth in the Board's prior

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<sup>1</sup> Claimant, Daniel B. Sutherland, filed his application for benefits on December 4, 1978. Director's Exhibit 1.

decision in *Sutherland v. Clinchfield Coal Co.*, BRB No. 98-0995 BLA (Apr. 9, 1999) (unpub.). Director's Exhibit 147. In that decision, the Board affirmed the administrative law judge's determination that claimant failed to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1) and additionally affirmed the administrative law judge's determination that claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment, and therefore, failed to demonstrate entitlement to benefits pursuant to the permanent criteria of 20 C.F.R. Part 410, Subpart D.

On September 16, 1999, claimant filed a petition for modification, accompanied by supporting evidence, pursuant to 20 C.F.R. §725.310. Director's Exhibit 148. After evaluating the evidence filed by the parties, the district director found that claimant established a change in conditions since the prior denial, and, therefore, granted claimant's request for modification and awarded benefits from May 1, 1999. Director's Exhibit 167. Employer appealed the district director's award of benefits on modification and requested that the case be transferred to the Office of Administrative Law Judges for a hearing. After the case was assigned to Administrative Law Judge Daniel F. Solomon (administrative law judge), claimant requested that a decision be made on the record. Because employer did not contest this request, the administrative law judge rendered a decision on the record finding: that the evidence was insufficient to establish a mistake in a determination of fact; that the newly submitted evidence was insufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to Section 727.203(a)(1)-(4); and that the district director erred in finding a change in conditions established and in granting claimant's request for modification. Accordingly, benefits were denied.

On appeal, claimant contends generally that the administrative law judge erred in failing to find invocation of the interim presumption of total disability due to pneumoconiosis and denying benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating that he is not participating in this appeal. Claimant has filed a reply brief responding to contentions raised by employer and urging that the case be remanded.

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 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).

After careful consideration of the administrative law judge's Decision and Order, the

arguments on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order Denying Modification is supported by substantial evidence and contains no reversible error. The newly submitted x-ray evidence consists of ten interpretations of two x-rays dated April 30, 1999 and June 28, 2000. In evaluating the newly submitted x-ray evidence, the administrative law judge found that the April 1999 film was read positive for the existence of pneumoconiosis by Dr. Alexander, a Board-certified radiologist and B-reader, and read negative for the existence of pneumoconiosis by Drs. Barrett, McLoud, Wheeler, and Scott, Board-certified radiologists and B-readers, and by Dr. Eryilmaz, a Board-certified radiologist. Director's Exhibits 148, 152, 153, 155, 158. The administrative law judge found that the June 2000 x-ray was read as negative for the existence of pneumoconiosis by Drs. Wheeler, Scott, and Binns, Board-certified radiologists and B-readers, and by Dr. Fino, a B-reader. Director's Exhibits 161, 162, 166. The administrative law judge accorded less weight to Dr. Alexander's sole, positive interpretation of the April 1999 film because all of the other physicians, with equivalent radiological expertise, who interpreted that film interpreted it as negative for the existence of pneumoconiosis and the subsequent x-ray, taken in June of 2000, was consistently interpreted as negative. Decision and Order Denying Modification at 8. This was rational. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.3d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Accordingly, we affirm the administrative law judge's finding that the new x-ray evidence was insufficient to invoke the interim presumption by establishing the existence of pneumoconiosis.

With respect to invocation of the interim presumption at Section 727.203(a)(2), there are two newly submitted pulmonary function studies dated May 5, 1999 and June 28, 2000 which yielded qualifying values.<sup>2</sup> Director's Exhibits 148, 151, 160. Dr. Kucera reviewed the May 1999 study and found that it was valid, Director's Exhibit 151, while Dr. Dahhan found the test invalid due to inconsistent effort based on a variation among the three FVC curves of greater than five percent, excessive hesitation, and an insufficient number of MVV trials. Director's Exhibit 160. Dr. Fino opined that the June 2000 test was unreliable and could not invoke the presumption because, although the study yielded qualifying FEV<sub>1</sub> and MVV values, the MVV values were not valid due to the lack of effort on claimant's part, and

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<sup>2</sup> A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at Sections 727.203(a)(2) and (3), respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §727.203(a)(2), (3).

because both he and the technician conducting the test found that claimant demonstrated poor effort on the entire test. Reviewing both the May 1999 and the June 2000 pulmonary function tests, Dr. Sherman opined that the May 1999 test was valid while the June 2000 was invalid due to variable effort on both vital capacities resulting in FEV<sub>1</sub> values that were not reproducible. Director's Exhibit 165. Similarly, Dr. Hippenstein evaluated the May 1999 and June 2000 studies and found both invalid because claimant's suboptimal effort produced a mild artifactual decrease in true spirometric values and the MVV performance results underestimated true lung function. Director's Exhibit 164. The administrative law judge, therefore, rationally found that the June 2000 study was unreliable based upon Dr. Fino's finding that the qualifying results were invalid due to claimant's poor effort. *See Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986); *Houchin v. Old Ben Coal Co.*, 6 BLR 1-1141, 1-1142 (1984); *Verdi v. Price River Coal Co.*, 6 BLR 1-1067, 1-1070 (1984); *Runc v. Director, OWCP*, 6 BLR 1-945, 1-946 (1984); *see also Prater v. Hite Preparation Corp.*, 829 F.2d 1363, 10 BLR 2-297 (6th Cir. 1987); *Sgro v. Rochester and Pittsburgh Coal Co.*, 4 BLR 1-370 (1981). Likewise, the administrative law judge also properly found that the June 2000 pulmonary function study was invalid because both Drs. Sherman and Hippenstein, who were Board-certified in internal medicine and pulmonary disease medicine, opined that claimant's effort on the test was poor. *See Peabody Coal Co. v. Brinkley*, 972 F.2d 880, 882, 16 BLR 2-129, 2-132 (7th Cir. 1992); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988). Because the administrative law judge, within a proper exercise of his discretion, assigned no weight to the June 2000 test since it lacked sufficient reliability to render the results credible, we affirm the administrative law judge's determination that that pulmonary function study was insufficient to establish invocation of the interim presumption at subsection (a)(2). *See Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 12 BLR 2-376, 2-387 (6th Cir. 1989); *Anderson v. Youghiogheny & Ohio Coal Co.*, 7 BLR 1-152 (1984). Similarly, the administrative law judge permissibly found that the May 1999 pulmonary function study was insufficient to establish invocation of the presumption at subsection (a)(2) because a review of the testing revealed that even though the FEV<sub>1</sub> results yielded qualifying values, only one MVV tracing was performed. The administrative law judge, therefore, credited Dr. Dahhan's opinion invalidating the May 1999 test over the contrary opinions of Drs. Kucera and Sherman because Dr. Dahhan found that there were an insufficient number of tracings and because the physicians validating the test failed to consider that it lacked the requisite number of MVV tracings. Decision and Order Denying Modification at 14; *see Wiley v. Consolidation Coal Co.*, 892 F.2d 498, 13 BLR 2-214 (6th Cir. 1989), modified on other grds on reh'g, 915 F.2d 1076, 14 BLR 2-89 (6th Cir. 1990); *Winchester, supra*; *Bueno v. Director, OWCP*, 7 BLR 1-337, 1-340 (1984); *Clay v. Director, OWCP*, 7 BLR 1-82 (1984); *Inman v. Peabody Coal Co.*, 6 BLR 1-1249 (1984); *Estes v. Director, OWCP*, 7 BLR 1-414 (1984). Accordingly, we affirm the administrative law judge's determination that claimant failed to establish invocation of the interim presumption under Section 727.203(a)(2) because this determination is rational and supported by substantial evidence.

Turning to Section 727.203(a)(3), the administrative law judge determined that the only newly submitted arterial blood gas study, dated June 28, 2000, produced non-qualifying values. Director's Exhibit 161. Hence, we affirm the administrative law judge's finding that the newly submitted blood gas study evidence was insufficient to establish invocation of the interim presumption under Section 727.203(a)(3). *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 8-9.

Likewise, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence does not establish invocation at Section 727.203(a)(4) because the only newly submitted medical opinion by Dr. Fino found that claimant does not have a totally disabling respiratory or pulmonary impairment. Director's Exhibit 161; Employer's Exhibit 1;<sup>3</sup> *see Wenanski v. Director, OWCP*, 8 BLR 1-487, 1-490 (1986); *Turner v. Director, OWCP*, 7 BLR 1-419, 1-421 (1984); Decision and Order Denying Modification at 15. Further, the administrative law judge concluded that, after reviewing the entire record, claimant failed to establish entitlement to the interim presumption at Section 727.203(a)(1)-(4) by a preponderance of the evidence. Because the administrative law judge properly found that claimant failed to satisfy his burden of establishing invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4) by a preponderance of the evidence, we affirm the administrative law judge's determination that claimant, likewise, failed to establish that he was entitled to modification of the prior denial pursuant to Section 725.310.

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<sup>3</sup> The administrative law judge's references to other medical reports consist of reports regarding the validity of the pulmonary function studies. Decision and Order Denying Modification at 15.

Accordingly, the Decision and Order Denying Modification of the administrative law judge is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge