BRB Nos. 05-0215 BLA
and 05-0215 BLA-A

JAMES D. CHARLES	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
KNOX CREEK COAL CORPORATION	)	DATE ISSUED: 09/29/2005
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Request for Modification of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

James D. Charles, Wolford, Virginia, *pro se*.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Request for Modification (04-BLA-0027) of Administrative Law Judge Mollie W. Neal rendered on a claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine

[1] Claimant, James D. Charles, filed his application for benefits on November 22, 1978. Director's Exhibit 1. Claimant's most recent request for modification, the subject of this appeal, was filed on May 12, 2003. Director's Exhibit 218.

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). Employer has filed a cross-appeal. This case is before the Board for the fourth time after the denial of claimant's fifth request for modification pursuant to 20 C.F.R. §725.310 (2000). The lengthy history of the case is set forth by the administrative law judge in her Decision and Order. Adjudicating this claim pursuant to the provisions set forth in 20 C.F.R. Part 727, the administrative law judge credited claimant with twenty-eight years and three months of qualifying coal mine employment and found that the newly submitted evidence failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). Further, the administrative law judge found that because claimant failed to establish a totally disabling respiratory impairment, entitlement to benefits was precluded under 20 C.F.R. Part 410, Subpart D. Therefore, the administrative law judge concluded, based on a review of all the evidence of record, that claimant failed to demonstrate either a mistake in a determination of fact or a change in conditions. Accordingly, the administrative law judge denied claimant's request for modification and denied benefits.

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 under Section 727.203(a) and, therefore, in failing to find a basis for modification of the prior denial.[2] In response, employer urges affirmance of the denial of benefits. Employer has also filed a cross-appeal arguing that, while the ultimate decision denying benefits in this case is rational and supported by substantial evidence, the administrative law judge erred by

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[2] Although claimant is not represented by counsel on appeal, he filed a *Pro Se* Statement in Support of Appeal in which he raised four allegations of error with respect to the administrative law judge's findings. Specifically, claimant argues that the administrative law judge erred: in admitting into the record the September 26, 2003 report of Dr. Fino since it did not include both pre-bronchodilator and post-bronchodilator results of the pulmonary function study associated with that examination; in failing to find the three qualifying pulmonary function studies dated December 23, 2002, August 29, 2003, and December 18, 2003 sufficient to invoke the interim presumption pursuant to Section 727.202(a)(2) and to demonstrate a mistake in a determination of fact or a change in conditions; and in failing to remand this case to the district director for the development of "valid" pulmonary function testing since all three qualifying pulmonary function studies were invalidated. Finally, claimant argues that the evidence of record is insufficient to establish rebuttal of the interim presumption under Section 727.202(b). Employer filed a Supplemental Response Brief urging affirmance of the administrative law judge's denial on the basis that claimant's contentions lack merit. Because claimant is not represented by counsel, we will review this case under the general standard of review and we will address claimant's arguments in the course of our application of that standard to the instant case. *See McFall v. Jewell Ridge Coal Co.,* 12 BLR 1-176 (1989).

refusing to summarily dismiss this claim on the basis that, because this proceeding involves claimant's fifth petition for modification, this multiple modification filing constitutes a clear abuse of the modification process. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response letter, disagreeing with employer's sole contention on cross-appeal that the case should be summarily dismissed. The Director urges the Board to reject employer's argument because employer lacks standing to cross-appeal since it was not aggrieved by the administrative law judge's Decision and Order denying benefits, employer waived the issue by failing to raise it before the administrative law judge below, and employer's assertion that claimant's multiple modification requests were an abuse of the modification process is not supported by any evidence of egregious conduct or contempt for the adjudicative process, citing *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976).[3]

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 is supported by substantial evidence and contains no reversible error because the administrative law judge properly found that claimant failed to establish a mistake in a determination of fact or a change in conditions pursuant to Section 725.310.

Relevant to Section 727.203(a)(1), the newly submitted x-ray evidence consists of six interpretations of two x-rays dated March 27, 2003 and September 26, 2003. In evaluating the newly submitted x-ray evidence, the administrative law judge found that the March 2003 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. Navani and Barrett, Board-certified radiologists and B-readers. Director's Exhibits 218, 222-224. The administrative law judge found that Dr. Alexander also interpreted the September 2003 x-ray as positive for the existence of pneumoconiosis while Dr. Scatarige, a

[3] We affirm the administrative law judge's determination regarding length of coal mine employment because this determination, which is not adverse to claimant, is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 6.

Board-certified radiologist and B-reader, and Dr. Fino, a B-reader, read this film as negative for the existence of pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibits 1, 3. The administrative law judge accorded less weight to the positive interpretations of the Dr. Alexander because all of the other physicians with equivalent radiological expertise who interpreted the March 2003 and September 2003 films read these films as negative for the existence of pneumoconiosis, which was consistent with the "overwhelming" majority of the negative x-ray interpretations by dually qualified radiologists of films from 1979 to 2001 contained in the record. 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); Decision and Order at 8. Because the administrative law judge properly conducted a qualitative and quantitative assessment of the x-ray evidence, 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 four newly submitted pulmonary function studies; the pulmonary function studies dated December 23, 2002, August 29, 2003, and December 17, 2003, yielded qualifying values[4] and the September 29, 2003 test did not have a value indicating the maximum voluntary ventilation. 20 C.F.R. §727.203(a)(2); Director's Exhibits 218; Claimant's Exhibits 1, 2; Employer's Exhibit 3. After reviewing the August 29, 2003 and December 17, 2003 pulmonary function studies, Dr. Fino, who is Board-certified in internal medicine and in the subspecialty of pulmonary diseases, concluded that both studies were invalid because the results underestimated claimant's true pulmonary function. With respect to the August 2003 test, Dr. Fino opined that the maximum voluntary ventilation tracings indicated a breathing frequency of less than 60 breaths per minute, erratic tidal volumes, and tidal volumes measuring less than 50-60% of the observed forced vital capacity. Employer's Exhibit 5. With respect to the December 2003 study, Dr. Fino reported that the forced vital capacity tracings indicated a lack of an abrupt onset and premature termination to exhalation, hesitancy and inconsistency in the expiratory flows, lack of plateauing and reproducibility in the expiratory curves, and complete lack of patient effort and cooperation. *Ibid*. Similarly, Dr. Castle, a Board-certified pulmonary specialist, opined that the August 2003, September

[4] 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).

2003, and December 2003 pulmonary function studies were invalid due to marked variability and less than maximal patient effort and that the December 2002 pulmonary function study was invalid because it had only one volume time curve and flow volume loop. Employer's Exhibit 6. After considering the newly submitted qualifying pulmonary function studies and, comparing these test results to the previously submitted studies which were qualifying but also invalidated due to suboptimal effort, lack of reproducibility, excessive variability, and premature termination, the administrative law judge rationally concluded that the new studies were unreliable because these tests were invalidated by physicians with demonstrated pulmonary expertise, for very similar, if not the same reasons that the previous tests were found unreliable. *See Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986); *Revnack v. Director,* OWCP, 7 BLR 1-771, 1-772-773 (1985) (consulting physician's opinion that pulmonary function study is unreliable as based on less than maximal effort must be considered under subsection (a)(2)); *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); *Runco 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); *see* Director's Exhibit 209 at 10-11. Consequently, the administrative law judge permissibly concluded that the newly submitted pulmonary function study evidence failed to demonstrate a mistake in her prior determination of fact or a change in claimant's condition. 20 C.F.R. §727.203(a)(2); s*ee 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); Decision and Order at 8-9. Because the administrative law judge, within a proper exercise of her discretion, assigned no weight to the newly submitted pulmonary function studies as they lacked sufficient reliability to render their results credible, we affirm the administrative law judge's determination that the pulmonary function study evidence was insufficient to establish invocation of the interim presumption at Section 727.203(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).

Turning to Section 727.203(a)(3), the administrative law judge determined that the only newly submitted arterial blood gas study dated September 26, 2003 produced non-qualifying values. Employer's Exhibit 3. 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); *Horn v. Jewell Ridge Coal Corp.*, 6 BLR 1-933, 1-938 (1984) (non-qualifying blood gas study values cannot support invocation at subsection (a)(3)); Decision and Order at 9.

Likewise, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish invocation at Section 727.203(a)(4). The newly submitted medical opinion evidence consists of three physicians' opinions. In a

report dated April 4, 2002, Dr. Sutherland opined that claimant's severe irreversible lung disease associated with multiple years of coal dust exposure renders claimant totally and permanently disabled. Director's Exhibit 215. After conducting a pulmonary evaluation of claimant on September 26, 2003 and reviewing additional medical records, Dr. Fino opined that claimant does not suffer from coal workers' pneumoconiosis or a respiratory impairment and retains the respiratory capacity to return to his former coal mine job. Employer's Exhibit 3. Dr. Castle reviewed medical records and, on February 4, 2004, opined that while claimant "may be" disabled as a result of cardiac disease, he does not suffer from coal workers' pneumoconiosis and there has been no deterioration in his pulmonary condition since the previous examinations since he retains the respiratory capacity to perform his previous coal mine work. Employer's Exhibit 6. In considering the newly submitted medical opinion evidence, the administrative law judge accorded determinative weight to the opinions of Drs. Fino and Castle and less weight to the opinion of Dr. Sutherland because she found that Drs. Fino and Castle not only possessed superior pulmonary experience and expertise but also that they rendered opinions that were thorough, well reasoned, and better supported by the objective medical evidence of record. This was rational. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8 (1996); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Because the administrative law judge specifically set forth the basis for her finding that the opinions of Drs. Fino and Castle were better reasoned and documented than that of Dr. Sutherland, we affirm her determination that the newly submitted medical opinion evidence was not only insufficient to establish invocation under Section 727.203(a)(4), but also insufficient to establish a mistake in a determination of fact or a change in claimant's condition when considered with the previously submitted physicians' opinions. 20 C.F.R. §727.203(a)(4); s*ee Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); Decision and Order at 9.

Because substantial evidence supports the administrative law judge's findings, we affirm the administrative law judge's finding that claimant did not establish invocation of the interim presumption, and we, therefore, affirm the administrative law judge's attendant finding that no mistake in a determination of fact or change in conditions was established pursuant to Section 725.310. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Furthermore, we summarily reject employer's contention that the administrative law judge erred by refusing to summarily dismiss this claim as an abuse of the modification process. While employer briefed this issue, employer has not provided, nor does our review of applicable case law reveal, any legal authority or prevailing precedent that stands for the

proposition that claimant abused the modification process by filing multiple petitions for modification. *See Betty B Coal Company v. Director, OWCP* [*Stanley*], 194 F.3d 491, 500, 22 BLR 2-1, 2-16 (4th Cir. 1999) ("If there are (or should be) abuse-based limits to repetitive requests for modification, this case is not the one to define them."). Accordingly, we deny employer's request to summarily dismiss the instant claim as a matter of law.

Accordingly, the Decision and Order Denying Request for 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