BRB No. 03-0653 BLA

HOMER L. ANDERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 07/01/2004
	)	
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, 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[1] appeals the Decision and Order Denying Benefits (03-BLA-0007) of Administrative Law Judge Daniel F. Solomon 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). This case is before the Board for the fifth time after the denial of claimant's fourth request for modification pursuant to 20 C.F.R. §725.310 (2000). The history of this case is set forth in the Board's most recent decision. *Anderson v. Clinchfield Coal Co.*, BRB No. 01-0187 BLA (Oct. 26, 2001)(unpub.). Director's Exhibit

[1] Claimant filed his application for benefits on August 22, 1978. Director's Exhibit 1.

174. In the decision now before us, the administrative law judge found that the evidence failed to establish invocation of the interim presumption at Section 727.203(a)(1)-(4). Further, he found that even if the presumption were invoked, the evidence would establish rebuttal of the presumption at Section 727.203(b)(3) and (4) by showing that claimant did not have pneumoconiosis and that he was not totally disabled by pneumoconiosis. The administrative law judge concluded, therefore, based on a review of the entire record that claimant failed to show 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 argues that the newly submitted evidence establishes both that a mistake in a determination of fact was made in the prior denial of benefits and that the new evidence submitted in support of the modification request establishes a change in condition. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating that he will not participate in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant first contends that the administrative law judge erred in not finding that a mistake in a determination of fact and a change in condition were established. Specifically, claimant alleges that the evidence first submitted with his claim was sufficient to establish the existence of pneumoconiosis and that subsequent administrative law judges erred in finding that the existence of pneumoconiosis was not established.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held, that in adjudicating petitions for modification, "the factfinder is in no way bound by the findings supporting the original [decision]. The sum of a *de novo* review and a *de novo* process is a new adjudication. If the claimant comes out on the losing end of this new adjudication, it does no violence to the statutory language to deem the result 'the rejection of a claim'." *Betty B Coal Company v. Director, OWCP* [*Stanley*], 194 F.3d 491, 499, 22 BLR 2-1, 2-13 (4th Cir. 1999).

[2] We affirm the administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(1)-(3) because they are 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 18-19.

The administrative law judge was not, therefore, bound by initial findings of entitlement made by the district director in 1979 and 1980, but was entitled to perform an independent assessment of the newly submitted evidence, in conjunction with previously submitted evidence, to determine whether a basis for modification had been established. *See Stanley*, 194 F.3d at 499, 22 BLR at 2-13; *Kovac v. BCNR*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989); *Cooper v. Director, OWCP*, 11 BLR 1-95, 1-97 (1988); *Yates v. Armco Steel Corp.*, 10 BLR 1-132 (1987); *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255, 93 S.Ct. 405, 407 (1971); Director's Exhibits 21, 24. Contrary to claimant's argument, therefore, the administrative law judge was not bound by earlier findings of pneumoconiosis.

Claimant also contends that the newly submitted evidence demonstrates a change in conditions as it shows that his condition has worsened over time. As support for this argument, claimant points to the increase in the frequency and dosage of his breathing medications over the years, the qualifying blood gas study conducted in 1995, and the recent opinions of his treating physicians which were based on physical examinations, qualifying blood gas studies, and x-ray readings.

In considering the newly submitted medical opinion evidence, the administrative law judge accorded greater weight to the opinions of Drs. Castle and Fino than to the opinions of Drs. Ulrich and Robinette, claimant's treating physicians, because he found them better supported by the objective medical evidence of record and because they discussed the test results on which they relied and related the testing to their findings. This was rational. 20 C.F.R. §718.104(d)(5); *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*). Accordingly, the administrative law judge properly found that claimant failed to establish that he was totally disabled by a respiratory impairment as opposed to the heart condition found by Drs. Castle and Fino. 20 C.F.R. §727.203(a)(4); *see Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994).

Claimant also argues that the administrative law judge has erred in weighing the evidence of cor pulmonale. Claimant contends that he has established the existence of cor pulmonale based on the reports of his treating physician, Dr. Robinette which is supported by objective medical evidence. The administrative law judge acknowledged Dr. Robinette's diagnosis of cor pulmonale, but found that Dr. Robinette's opinion, like Dr. Ulrich's, offered no explaination for this diagnosis. The administrative law judge, therefore, permissibly rejected Dr. Robinette's opinion. *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149. Nor, contrary to claimant's argument, would a finding of cor pulmonale establish the presence of a totally disabling respiratory impairment. 20 C.F.R. §727.203(a)(4).

Claimant further argues that the administrative law judge erred in finding the presumption rebutted under Section 727.203(b)(3) and (4). Because we affirm the administrative law judge's finding that the interim presumption was not invoked, however, we need not address claimant's arguments regarding rebuttal. 20 C.F.R. §727.203(a).

In addition, claimant alleges that the administrative law judge did not properly weigh the evidence in light of *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993) and *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994) because employer must rule out the causal relationship between the miner's disability and coal mine employment. We need not reach this argument, however, since the administrative law judge permissibly found that claimant did not establish a totally disabling respiratory impairment. 20 C.F.R. §727.203(a)(4).

Claimant additionally asserts that the administrative law judge did not properly weigh the evidence in light of the "strenuous" exertional requirements of his usual coal mine employment. This argument is rejected, however, since the administrative law judge found that claimant was not totally disabled as the result of a respiratory impairment. 20 C.F.R. §727.203(a)(4). Employer's Exhibits 2, 17; *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997).

Finally, claimant argues that the administrative law judge erred in applying the regulations at Part 718 rather than Part 727 to this claim. This argument is rejected, however, inasmuch as the administrative law judge did consider the claim under Part 727 even though he also refers to the Part 718 regulations at various points in his decision. *See* Decision and Order at 14-16, 24-25.

Because substantial evidence supports the administrative law judge's findings, and claimant presents no basis to disturb the administrative law judge's determination, *see Mays v. Piney Mountain Coal Co.*, 21 BLR 1-59, 1-64 (1997)(Dolder, J., concurring and dissenting), 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 (2000). *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge