BRB No. 00-0117 BLA

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

Appeal of the Decision and Order On Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

James C. Yates, Haysi, Virginia, *pro se*.

Jeffrey S. Goldberg (Henry L. Solano, 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the aid of counsel,[1] the Decision and Order On Remand (96-BLA-1717) of Administrative Law Judge Clement J. Kichuk denying benefits on a survivor's 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

[1] Claimant's appeal was filed on claimant's behalf by Ron Carson of Stone Mountain Health Services of Vansant, Virginia, but Mr. Carson is not representing claimant on appeal. *See* 20 C.F.R. §§802.211(e), 802.220; *Shelton v. Claude v. Keen Trucking Co.*, 19 BLR 1-88 (1995).

Board for the third time.[2] Previously, in a Decision and Order issued on September 12, 1997,

[2] Claimant originally filed a claim with the Social Security Administration on June 27, 1973, Director's Exhibit 65, which was denied on November 2, 1973, Director's Exhibits 30, 44-45, 65. Claimant filed a second claim with the Department of Labor on October 6, 1986, Director's Exhibit 1. Ultimately, in a Decision and Order issued on January 16, 1992, Administrative Law Judge Quentin P. McColgin found twenty-five years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718, Director's Exhibit 125. Judge McColgin found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4) and that total disability was not established, *see* 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant appealed and the Board affirmed Judge McColgin's finding that total disability was not established pursuant to Section 718.204(c) and, therefore, affirmed the denial of benefits, Director's Exhibit 141. *Yates v. D O & W Coal Co.*, BRB No. 92-1014 BLA (Aug. 30, 1993)(unpub.). Claimant appealed the Board's Decision and Order to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. The Fourth Circuit affirmed Judge McColgin's finding that total disability was not establish and, therefore, that entitlement was not established pursuant to Part 718, Director's Exhibit 145. *Yates v. D O & W Coal Company, Inc.*, No.93-2304 (4th Cir. Sep. 28, 1994) (unpub.). However, the Fourth Circuit vacated the Board's affirmance of Judge McColgin's denial of benefits and remanded the case for a determination as to whether an election card had been filed by claimant for review of his original denied claim, or whether there was good cause for claimant's failure to file an election card, and, consequently, for a determination as to whether claimant's original claim was still viable and entitled to consideration pursuant to the interim presumption under 20 C.F.R. §727.203. The Fourth Circuit further held that, if it were determined on remand that claimant's original claim was viable, Judge McColgin's finding that total disability was not established pursuant to Part 718, which was affirmed by the Fourth Circuit, precludes a finding of invocation of the interim presumption pursuant to Section 727.203(a)(2)-(4). However, the Fourth Circuit instructed the administrative law judge to consider the x-ray evidence pursuant to Section 727.203(a)(1) on remand, if reached. Finally, the Fourth Circuit held that, if entitlement was found to be established on remand, the administrative law judge should determine whether liability lies with employer or whether it should transfer to the Black Lung Disability Trust Fund (Trust Fund).

In a Decision and Order On Remand issued on July 13, 1995, Judge McColgin determined that good cause was established for claimant not having filed an election card for review of his original, denied claim and, therefore, found that claimant's original claim was viable, Director's Exhibit 149. Thus, Judge McColgin considered the claim pursuant to the interim presumption at Section 727.203. Although Judge McColgin noted that the Fourth Circuit held that invocation of the interim presumption was precluded pursuant to Section

Administrative Law Judge Edith Barnett properly considered a request for modification filed by claimant on the record, based on the parties waiver of their right to a hearing, *see* 20 C.F.R. §725.461(a); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000). Judge Barnett considered the newly submitted x-ray evidence and medical opinion evidence and found that it was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (4). Judge Barnett further found that no new pulmonary function study or blood gas study evidence was submitted in order to establish invocation pursuant to 20 C.F.R. §727.203(a)(2)-(3). Thus, Judge Barnett found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. Finally, Judge Barnett found that claimant failed to establish a mistake in a determination of fact under Section 725.310 regarding Judge McColgin's prior Decision and Order finding that invocation was not established pursuant to Section 727.203(a)(1). Accordingly, benefits were denied.

727.203(a)(2)-(4), Judge McColgin further found that the pulmonary function study and blood gas study evidence did not establish invocation at Section 727.203(a)(2) and (a)(3). Judge McColgin also found that the x-ray evidence did not establish the existence of pneumoconiosis or, therefore, invocation pursuant to Section 727.203(a)(1). In addition, Judge McColgin found that claimant failed to establish entitlement pursuant to Part 718. Accordingly, benefits were denied.

Claimant filed a request for modification on March 6, 1996, at issue herein, Director's Exhibit 150. Subsequently, on April 22, 1996, the district director dismissed employer from the case, Director's Exhibit 155.

Claimant appealed and the Board vacated Judge Barnett's finding that the newly submitted x-ray evidence was insufficient to establish invocation of the interim presumption under Section 727.203(a)(1) and remanded the case for a determination as to whether the x-ray rereading prohibition set forth at Section 413(b) of the Act, 30 U.S.C. §923(b); *see also* 20 C.F.R. §727.206(b)(1), is applicable under the facts of this case, *i.e.*, whether the record contains evidence, which, if credited, demonstrates a significant and measurable pulmonary or respiratory impairment.[3] *Yates v. Director, OWCP*, BRB No. 98-0139 BLA (Oct. 14, 1998)(unpub.). However, the Board affirmed Judge Barnett's finding that the newly submitted medical opinion evidence was insufficient to establish invocation pursuant to Section 727.203(a)(4) and that claimant did not establish a change in conditions under Section 727.203(a)(2) and (a)(3), *see* 20 C.F.R. §§725.310; 727.203(a)(2), (3). In addition, the Board held that Judge Barnett erred in restricting her consideration of whether claimant established a mistake in a determination of fact pursuant to Section 725.310 to a review of the prior decision of record from Judge McColgin. Thus, the Board vacated Judge Barnett's finding that claimant failed to establish a mistake in a determination of fact pursuant to Section 725.310 and remanded the case for a review of the entirety of the claim, including any and all prior findings of fact and decisions, to determine whether the evidence of record supports a finding of a mistake in a determination of fact.

[3] In all claims filed before January 1, 1982, Section 413(b) of the Act, 30 U.S.C. §923(b), prohibits the Director, Office of Workers' Compensation Programs (the Director), from having certain x-rays reread except for purposes of determining quality, *see Tobias v. Republic Steel Corp.*, 2 BLR 1-1277 (1981). This prohibition is applicable when each of the following threshold requirements has been met: 1) the physician who originally read the x-ray is either board certified or board eligible; 2) there is other evidence of a significant and measurable pulmonary or respiratory impairment; 3) the x-ray was performed in compliance with the requirements of the applicable quality standards and was taken by a radiologist or qualified radiologic technician; and 4) there is no evidence that the claim was fraudulently represented, *see* 20 C.F.R. §727.206(b)(1); *Auxier v. Director, OWCP*, 4 BLR 1-717 (1982).

Because Judge Barnett was no longer with the Office of Administrative Law Judges, the case was reassigned without objection on remand to Judge Kichuk (hereinafter, the administrative law judge). Initially, the administrative law judge found that the record does not contain credible evidence which demonstrates that claimant suffers from a "significant and measurable pulmonary or respiratory impairment" and, therefore, found that the x-ray rereading prohibition set forth at Section 413(b) of the Act, 30 U.S.C. §923(b), was inapplicable. The administrative law judge further found that the original and the newly submitted x-ray evidence did not establish the existence of pneumoconiosis or, therefore, invocation of the interim presumption pursuant to Section 727.203(a)(1). The administrative law judge found that the x-ray evidence did not establish a change in conditions pursuant to Section 725.310 and further found no mistake in a determination of fact pursuant to Section 725.310 regarding whether the x-ray evidence established the existence of pneumoconiosis. The administrative law judge found that entitlement was not established pursuant to Section 727.203 and, furthermore, that entitlement was not established pursuant to 20 C.F.R. Part 410, Subpart D. Finally, the administrative law judge found that no mistake in a determination of fact was established pursuant to Section 725.310 in regard to any of the prior decisions of record. Accordingly, benefits were denied. Claimant's appeal, at issue herein, followed. The Director, Office of Workers' Compensation Programs (the Director), responds, urging that the administrative law judge's Decision and Order On Remand denying benefits be affirmed.

In an appeal filed by a claimant without the aid of counsel, the Board will consider the issue raised to be whether the Order below is supported by substantial evidence, *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1985). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that if a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Initially, the administrative law judge found no credible evidence demonstrating that claimant suffers from a "significant and measurable pulmonary or respiratory impairment" and, therefore, found the Section 413(b) prohibition inapplicable. Decision and Order On Remand at 6-7. Specifically, the administrative law judge noted that the Fourth Circuit had previously affirmed Judge McColgin's finding that total disability was not established pursuant to Part 718 and had, therefore, held that invocation of the interim presumption pursuant to Section 727.203(a)(2)-(4) was precluded, *see* Director's Exhibit 145. Moreover, Judge McColgin subsequently found that the pulmonary function study and blood gas study evidence of record is non-qualifying under Section 727.203(a)(2) and (a)(3), *see* Director's Exhibit 149; Director's Exhibits 7, 9, 51, 104.[4] In addition, as the administrative law judge noted, claimant did not submit any new pulmonary function study or blood gas study evidence on modification.

[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 20 C.F.R. §727.203(a)(2), (3), respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §727.203(a)(2), (3).

Regarding the medical opinion evidence of record, the administrative law judge noted that, as the Board held previously, claimant had not submitted any new medical opinions on modification addressing claimant's respiratory or pulmonary condition. Regarding the previously submitted medical opinion evidence, the administrative law judge noted that only Dr. Sutherland found that claimant suffered from a significant and disabling respiratory impairment, Director's Exhibits 23, 45, while Dr. Paranthaman found only a mild impairment, Director's Exhibit 8, Dr. Dahhan found no significant impairment, Director's Exhibits 104, 107, Drs. Castle, Director's Exhibits 24, 51, 111, Endres-Bercher, Director's Exhibit 51, and Fino, Director's Exhibits 110, 112, found no impairment and Dr. Lane reported no impairment, Director's Exhibit 116. The administrative law judge found, within his discretion, that Dr. Sutherland's opinion was not supported by the objective evidence of record, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984). It is for the administrative law judge, as the trier-of-fact, to determine whether an opinion is documented and reasoned, *see Trumbo*, *supra*; *Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge if his findings are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, the administrative law judge's finding that there is no credible evidence demonstrating that claimant suffers from a "significant and measurable pulmonary or respiratory impairment"is affirmed as supported by substantial evidence, *see Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Sheckler v. Director, OWCP*, 7 BLR 1-128 (1984); *see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).[5] Consequently, inasmuch as the administrative law judge's finding is supported by substantial evidence, the administrative law judge's holding that the x-ray rereading prohibition set forth at Section 413(b) of the Act, 30 U.S.C. §923(b); *see also* 20 C.F.R. §727.206(b)(1); *Auxier v. Director, OWCP*, 4 BLR 1-717 (1982), is inapplicable is affirmed.

Next, the administrative law judge considered the x-ray evidence of record, which consists of fifty-eight readings of thirteen x-rays, Decision and Order On Remand at 7-8. The administrative law judge noted that all thirteen x-rays, including the three new x-rays submitted on modification, had been either only read as negative or had been read as negative

[5] In *Ondecko*, the Supreme Court held that the reference to the "burden of proof" in §7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), refers to the burden of persuasion, and therefore held that when the evidence is evenly balanced, the claimant must lose pursuant to Section 7(c), *see Ondecko*, *supra*.

by an equal or greater number of physicians who had either similar or superior qualifications as board-certified radiologists and/or B-readers[6] than the physicians who provided positive x-ray readings. *See* Director's Exhibits 10-13, 22, 34-36, 42,-43, 45-46, 49, 51-52, 56, 65, 78, 100, 104-105, 133, 153, 156-163. Thus, the administrative law judge properly found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis based on the weight of the negative readings from physicians who were both board-certified radiologists and/or B-readers, *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see also Ondecko*, *supra*; *Clark*, *supra*; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Consequently, the administrative law judge's finding that invocation of the interim presumption was not established pursuant to Section 727.203(a)(1) and, therefore, that a change in conditions was not established pursuant to Section 725.310, is affirmed as supported by substantial evidence.[7]

Finally, the administrative law judge properly considered all of the prior decisions of

[6] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[7] In addition, inasmuch as the administrative law judge's finding that the preponderance of the evidence fails to establish that claimant suffers from a pulmonary impairment or disability is supported by substantial evidence, the administrative law judge's finding that entitlement is not established under Part 410 , Subpart D, Decision and Order On Remand at 9, is affirmed. *See Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981).

record and found that no mistake in a determination of fact was established pursuant to Section 725.310 in regard to any of the prior findings, Decision and Order On Remand at 9-11. Inasmuch as the administrative law judge's finding is supported by substantial evidence, it is affirmed. Consequently, the administrative law judge's finding that claimant failed to establish a basis for modification pursuant to Section 725.310 is affirmed as rational and supported by substantial evidence, *see Jessee, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge