BRB No. 99-1327 BLA

JAMES PHILLIPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BISHOP 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 Request for Modification of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

James Phillips, Bandy, Virginia, *pro se.*

Natalie D. Brown (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Request for Modification (96-BLA-1810) of Administrative Law Judge Paul A. Mapes 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 has a lengthy procedural history. In the initial Decision and Order issued on October 8, 1987,

[1]The procedural history of this case is set forth in detail in *Phillips v. Bishop Coal Co.*, BRB No. 88-0574 BLA (Jun. 28, 1990)(unpub.), Director's Exhibit 82; *Phillips v. Bishop Coal Co.*, BRB No. 92-0377 BLA (Mar. 31, 1994)(unpub.), Director's Exhibit 97; and *Phillips v. Bishop Coal Co.*, BRB No. 98-0208 BLA (May 6, 1999)(unpub.).

Administrative Law Judge John J. Forbes, Jr. credited claimant with thirty-seven or thirty-eight years of qualifying coal mine employment and adjudicated the claim, filed on September 26, 1977, pursuant to the provisions at 20 C.F.R. Part 727. Judge Forbes found that the evidence of record was both sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4) and insufficient to establish rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, benefits were awarded. Director's Exhibit 74.

On appeal, the Board affirmed Judges Forbes's findings that invocation was established pursuant to Section 727.203(a)(2)-(4) and that rebuttal was not established pursuant to Section 727.203(b)(1), (2), but vacated his findings pursuant to Section 727.203(b)(3) and remanded the case for Judge Forbes to provide a complete rationale thereunder. *Phillips v. Bishop Coal Co.*, BRB No. 88-0574 BLA (Jun. 28, 1990)(unpub.); Director's Exhibit 82. On remand, the case was reassigned to Administrative Law Judge G. Marvin Bober, who issued a Supplemental Decision and Order on Remand on October 21, 1991, and held that, because of a change in the applicable law, he would additionally need to review rebuttal under Section 727.203(b)(4). Judge Bober found the evidence insufficient to establish rebuttal at Section 727.203(b)(4), but sufficient to establish rebuttal at Section 727.203(b)(3) based on the opinions of Drs. Abernathy, Kress and Morgan, which ruled out pneumoconiosis as a contributing factor in claimant's total disability. Director's Exhibit 86. Judge Bober further found that entitlement under 20 C.F.R. Part 410, Subpart D was precluded, and consequently denied benefits. On appeal, the Board affirmed Judge Bober's finding of rebuttal under Section 727.203(b)(3), *Phillips v. Bishop Coal Co.*, BRB No. 92-0377 BLA (Mar. 31, 1994)(unpub.), Director's Exhibit 97, and the denial of benefits was subsequently affirmed by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises. *Phillips v. Director, OWCP*, No. 94-1561 (4th Cir. Feb. 23, 1995)(unpub.); Director's Exhibit 101.

Claimant, without the assistance of counsel, timely sought modification pursuant to 20 C.F.R. §725.310 on the sole ground of a mistake in a determination of fact. Claimant alleged that Judge Bober's finding of rebuttal pursuant to Section 727.203(b)(3) was in error because it conflicted with the Fourth Circuit's holdings in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), and *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1995). Director's Exhibit 102. In a Decision and Order Denying Request for Modification issued on October 8, 1997, Administrative Law Judge Paul A. Mapes found that Judge Bober's decision did not contain factual findings inconsistent with the Fourth Circuit's decisions in *Grigg* and *Warth*, and Judge Mapes did not consider any other ground for modification because of claimant's refusal to undergo another physical examination and claimant's decision to limit the scope of his modification request to *Grigg* and *Warth*. On

[2]Although claimant requested that the administrative law judge determine whether modification was appropriate based solely on the evidence contained in the record as of October 21, 1991, the date of issuance of Judge Bober's Decision and Order, *see* Director's

appeal, the Board held that Judge Mapes properly rejected the arguments specifically raised by claimant on modification, as Judge Mapes correctly concluded that there was no basis for finding that Judge Bober's factual findings with regard to the opinions of Drs. Morgan, Kress and Abernathy were inconsistent with the holdings in *Grigg* and *Warth.* In light of claimant's lack of representation below, however, and the Fourth Circuit's holding in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), that a claimant's general allegation of error is sufficient to require the administrative law judge to reconsider the entire record in addressing whether there was a mistake in a determination of fact under Section 725.310, the Board remanded the case for the administrative law judge to consider all of the evidence of record *de novo* in determining whether a mistake in fact was established. *Phillips v. Bishop Coal Co.*, BRB No. 98-0208 BLA (May 6, 1999)(unpub.).

In a Decision and Order Denying Request for Modification issued on September 7, 1999, the administrative law judge found no mistake in a determination of fact sufficient to support modification pursuant to Section 725.310, and consequently denied benefits. In the present appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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 consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. The administrative law judge properly reviewed the evidence of record pursuant to Section 725.310 *de novo*, and permissibly disagreed with the credibility determinations previously rendered by Judges

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Exhibit 102, Judge Mapes admitted into evidence two letters from Dr. Krishnan submitted by claimant in support of his assertion that was unable to undergo any further pulmonary evaluations. In light of *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), which set forth a new legal standard for weighing medical opinions concerning causation of disability, Judge Mapes additionally admitted into the record supplemental reports from Drs. Castle and Morgan, whose opinions were previously considered by Judge Bober, as well as a consultative review of the record by Dr. Fino. *See* Decision and Order at 3.

Forbes and Bober pursuant to Section 727.203(b)(3), *see Jessee, supra*, although he agreed with Judge Bober's ultimate conclusion that the evidence was sufficient to establish rebuttal thereunder. In evaluating the evidence relevant to subsection (b)(3) rebuttal, the administrative law judge accurately determined that, while Drs. Robinette, Goodykoontz and Krishnan diagnosed pneumoconiosis, no physician of record explicitly opined that pneumoconiosis contributed even in part to claimant's totally disabling respiratory impairment. Decision and Order at 6-7. The administrative law judge reasonably discounted the opinions of Drs. Abernathy and Morgan, which ruled out pneumoconiosis as a contributing factor in claimant's total disability and which were previously credited by Judge Bober, as he agreed with claimant's arguments that Dr. Morgan relied on an inaccurate length of claimant's coal mine employment and incorrectly believed that claimant's mining duties were all conducted above ground, and that Dr. Abernathy's opinion, that claimant's pulmonary problem would not have worsened after he ceased mining if the problem was attributable to coal dust exposure, was inconsistent with the progressive nature of pneumoconiosis. Decision and Order at 6. The administrative law judge acted within his discretion as trier-of-fact, however, in rejecting, as unpersuasive and unsupported by the record, claimant's arguments that the opinions of Drs. Castle, Fino and Kress were entitled to little or no weight on the grounds that Dr. Castle's opinion was inconsistent with the Act, Dr.

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[3]The administrative law judge additionally found that Judge Forbes, the original administrative law judge, made a mistake in a determination of fact by concluding that the evidence was sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1). Decision and Order at 5. We need not reach this finding, however, in light of our disposition of this case.

[4]Although he acknowledged that Dr. Goodykoontz diagnosed "advanced pneumoconiosis," Director's Exhibit 13, the administrative law judge reasonably declined to infer a connection between this diagnosis and claimant's disability because the physician's opinion was unsupported by any objective test results. Decision and Order at 7; *see generally Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

[5]Similarly, claimant's argument on appeal, that Drs. Castle, Fino and Kress merely ruled out clinical pneumoconiosis as a cause of disability but did not consider legal pneumoconiosis, as defined by the Act and its implementing regulations, is unsupported by the record, *see* Director's Exhibits 57, 110; Employer's Exhibits 1, 2, 4. Further, contrary to claimant's assertions, these physicians' opinions are consistent with the holding in *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), that a causal connection can be ruled out pursuant to Section 727.203(b)(3) if positive evidence explains all of any impairment present and attributes it solely to sources other than coal mine employment.

[6]Although claimant argued that Dr. Castle's opinion was hostile to the Act because the

Fino failed to recognize the full extent of claimant's respiratory disability or the diagnostic importance of physical examinations and work histories, and Dr. Kress's opinion was unreasoned. Decision and Order at 6-7; Director's Exhibits 54, 57, 110; Employer's Exhibits

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physician testified that radiographic evidence of pneumoconiosis does not suggest an impairment unless accompanied by physiologic changes, *see* Employer's Exhibit 1 at 30-31, and that the only evidence in the record of coal dust being involved with claimant was his coal mine employment history, *see* Employer's Exhibit 1 at 17, the administrative law judge determined that the opinions Dr. Castle expressed were neither unreasonable nor inconsistent with the Act. Decision and Order at 6, n. 6.

[7]The administrative law judge reasonably rejected claimant's argument that Dr. Fino erroneously believed that claimant did not have a disabling lung impairment because the physician indicated that claimant had the respiratory capacity to perform the work of a car dropper. The administrative law judge reviewed Dr. Fino's report and determined that Dr. Fino assumed that the work of a car dropper was purely sedentary, but the physician added that claimant would not be capable of performing the job "if there is any labor involved," *see* Director's Exhibit 100, thus the administrative law judge concluded that Dr. Fino accurately assessed the extent of claimant's impairment. Decision and Order at 6, n. 6. A review of Dr. Fino's deposition testimony additionally reveals that the physician opined that, from a respiratory standpoint, claimant could do light labor but not moderate or heavy labor, and that claimant could not perform light labor with bursts of heavy labor. Employer's Exhibit 4 at 9-10. We reject claimant's argument on appeal that this conclusion is inconsistent with the objective evidence of record which shows that claimant's severe lung impairment renders him incapable of performing even light labor, as the interpretation of medical data is for the medical experts. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). The administrative law judge also reviewed Dr. Fino's testimony and, while acknowledging that one passage could be interpreted as suggesting that the physician saw no diagnostic value in physical examinations or work histories, the administrative law judge concluded that, when viewed in context, it appeared that Dr. Fino believed that such factors were not the sole basis for evaluating a patient's condition, but had to be correlated with objective test results before making a diagnosis. Decision and Order at 6-7, n. 6; *see* Employer's Exhibit 4 at 6-8.

[8]The administrative law judge was unpersuaded by claimant's argument that the opinion of Dr. Kress should be rejected on the grounds that the physician incorrectly ruled out emphysema as a diagnosis and asserted that the length of time since claimant last engaged in coal mining ruled out coal dust exposure as a cause of impairment. While Dr. Kress's initial report indicated that lung volume studies conducted in 1985 ruled out emphysema as a diagnosis, Director's Exhibit 54, the administrative law judge determined that in his second report, Dr. Kress diagnosed emphysema after reviewing more recent lung function test results, Director's Exhibit 57. Additionally, after reviewing both reports, the administrative law judge concluded that Dr. Kress's comments concerning the length of time since the claimant's last exposure to coal dust pertained solely to his diagnosis of chronic bronchitis.

1, 2, 4. Although Dr. Robinette indicated that he did not believe any physician could state whether claimant's impairment was due either to smoking or to coal dust exposure, Director's Exhibit 68, the administrative law judge permissibly determined that Dr. Robinette's bare assertion, devoid of any medical rationale, was entitled to less weight than the detailed and fully explained opinions of Drs. Castle, Fino and Kress, *see generally Clark v. Karst-Robbins Coal* Co., 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), that claimant's disability was unrelated to dust exposure in coal mine employment and was attributable solely to smoking, which the administrative law judge found sufficient to establish subsection (b)(3) rebuttal. Decision and Order at 7; *see Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Grigg, supra*; *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). The administrative law judge's findings and inferences pursuant to Section 727.203(b)(3) are supported by substantial evidence, and we may not substitute our judgment. *See generally Anderson v. Valley Camp of Utah, Inc*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's findings thereunder and affirm his denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

Decision and Order at 7, n. 6.