BRB No. 96-0980 BLA

JAMES A. BARKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
PEABODY COAL COMPANY	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order Denying Modification and Order on Reconsideration of Frank D. Marden, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr. (Culley & Wissore), Raleigh, Illinois, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order and Order on Reconsideration (92-BLA-0505) of Administrative Law Judge Frank D. Marden denying benefits 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 third time. Initially, Administrative Law Judge Lawrence E. Gray accepted the parties' stipulation that the medical evidence established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(4), but found that rebuttal of the presumption was

[1] Claimant is James A. Barker, the miner, who filed this claim for benefits on January 9, 1980. Director's Exhibit 1.

established pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4), and further found that claimant had not established entitlement pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, he denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding pursuant to Section 727.203(b)(4) as supported by substantial evidence, and noted that entitlement under 20 C.F.R. Part 718 was precluded by the administrative law judge's finding that the evidence failed to establish the existence of pneumoconiosis. *Barker v. Peabody Coal Co.*, BRB No. 86-1576 BLA (Oct. 31, 1989)(unpub.). On November 27, 1989, claimant filed a motion with the Board requesting remand of the case for modification proceedings. The Board treated claimant's filing as a motion for reconsideration, which the Board denied because claimant asserted no grounds for reconsideration. *Barker v. Peabody Coal Co.,* BRB No. 86-1576 BLA (Jun. 28, 1990)(unpub. Order). The Board noted that claimant could seek modification by filing a petition for modification with the district director within one year of the Board's October 1989 Decision and Order. [1990] *Barker*, slip op. at 2. On April 29, 1991, claimant filed a motion for modification with the district director, contending that he had not been served with the Board's June 28, 1990 order. The district director denied modification. Claimant sought further consideration before the administrative law judge, who denied claimant's request for modification as untimely. Claimant requested reconsideration, which the administrative law judge denied.

Pursuant to claimant's appeal, the Board corrected the portion of its June 28, 1990 order which had given claimant one year from October 31, 1989 to seek modification. *Barker v. Peabody Coal Co.*, BRB No. 94-0304 BLA (Jan. 26, 1995)(unpub.). The Board held that claimant's motion to remand, which the Board had treated as a request for reconsideration, vested jurisdiction with the Board and consequently stayed the time in which claimant could request modification. [1995] *Barker*, slip op. at 2-3. The Board concluded that, because claimant's April 29, 1991 request for modification was filed within one year of the Board's June 28, 1990 ruling on claimant's motion for reconsideration, the request for modification was timely. Accordingly, the Board remanded the case for the administrative law judge to consider modification. *Id*.

On remand, the case was reassigned, without objection, to Judge Marden, who found that the evidence failed to establish either a mistake of fact or a change in conditions pursuant to Section 725.310 and, accordingly, denied benefits. Claimant requested reconsideration, which the administrative law judge denied.

On appeal, claimant contends that the administrative law judge erred by finding that a change in conditions was not established. Claimant additionally contends that the administrative law judge erred in weighing the physicians' credentials. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

[2] We affirm as unchallenged on appeal the administrative law judge's findings that the evidence failed to establish a mistake in a determination of fact pursuant to 20 C.F.R.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

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 Section §725.310, provides that a party may request modification of the award or denial of benefits on the grounds that a change in conditions has occurred or because a mistake in the determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). Pursuant to Section 725.310, the administrative law judge must independently assess the new evidence in conjunction with the old evidence to determine if the weight of the new evidence is sufficient to establish the element or elements that earlier defeated entitlement, *Napier v. Director, OWCP*, 17 BLR 1-111 (1993);*Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

Claimant contends that the administrative law judge erred in finding that a change in conditions was not established when Dr. Tuteur stated that claimant's respiratory impairment had progressed. Claimant's Brief at 2. As did Judge Gray, Judge Marden accepted the parties' stipulation that claimant suffers from a totally disabling respiratory impairment pursuant to Section 727.203(a)(4). [1996] Decision and Order at 3-4. Thus, the issue on modification was whether the newly-submitted evidence, considered in conjunction with the old evidence, met employer's rebuttal burden. For the reasons discussed below, we conclude that the administrative law judge permissibly found that the evidence established rebuttal. Therefore, we reject claimant's contention.

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§725.310 or entitlement pursuant to 20 C.F.R. Part 718. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Pursuant to Section 727.203(b)(4), the administrative law judge permissibly found the newly-submitted x-ray readings, considered in conjunction with the original x-ray readings, to be negative for pneumoconiosis,[3] [1996] Decision and Order at 5-7, a finding that claimant does not challenge. The administrative law judge also correctly noted that "none of the new medical opinions submitted diagnoses clinical pneumoconiosis." [1996] Decision and Order at 11. The administrative law judge then considered the new medical opinions in conjunction with the previously submitted opinions regarding "the etiology of [c]laimant's totally disabling pulmonary impairment." [1996] Decision and Order at 7.

The medical opinions conflicted regarding whether claimant's severe chronic obstructive pulmonary disease (COPD) was significantly related to or aggravated by his coal dust exposure. *See* 20 C.F.R. §727.202. On this issue, the administrative law judge discussed at length the seven new opinions by Drs. Bruce, Tuteur, Browne, and Moore. Director's Exhibits 29, 30, 37, 41; Employer's Exhibits 9, 13; [1996] Decision and Order at 7-12. Ultimately, he accorded the greatest weight to the opinion of Dr. Tuteur, as supported by the previously-submitted opinion by Dr. Sanjabi, Director's Exhibit 23A, that

[3] Fourteen readings of four x-rays were submitted on modification, all of which were classified as either negative or unreadable. Director's Exhibits 29, 31, 41 at 10; Claimant's Exhibits 5, 6; Employer's Exhibits 1-3, 14-17. The administrative law judge's omission of Dr. Jaul's negative reading of the July 29, 1986 x-ray was therefore harmless. Director's Exhibit 29; *see Larioni v. Director,* OWCP, 6 BLR 1-1276 (1984). The administrative law judge mistakenly included two computed tomography (CT) readings--one positive and one negative--in his discussion of the x-ray evidence, but he ultimately resolved the CT readings in his discussion of the medical opinion evidence. [1996] Decision and Order at 5, 7-12.

claimant's advanced COPD was unassociated with the inhalation of coal dust.[4] The administrative law judge permissibly found Dr. Tuteur's opinion to be better-reasoned and explained than those of Drs. Browne and Bruce, because he found that Dr. Tuteur provided detailed explanations for his diagnoses which undermined the conclusions of Drs. Brown and Bruce. [1996] Decision and Order at 11-12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). He also permissibly found that Dr. Moore "did not specify the bases for his conclusions or diagnoses." [1996] Decision and Order at 10; *see Clark, supra*. The administrative law judge provided the additional rationale that Dr. Tuteur's opinion merited greater weight because he was Board-certified in both internal and pulmonary medicine, whereas Drs. Brown and Bruce were certified in internal medicine only.

On reconsideration, claimant informed the administrative law judge that Dr. Bruce's *curriculum vitae* was in the record and indicated that he was also Board-certified in internal medicine, and requested that the administrative law judge "take judicial notice that Dr. Browne is also [B]oard-certified in internal medicine and pulmonary disease." Claimant's Motion, Feb. 2, 1996, at 2. The administrative law judge permissibly found that, "even making adjustments for the stated qualifications of the examining physicians, I am convinced by the more well-reasoned and documented opinions by Drs. Tuteur and Sanjabi." Order on Reconsideration (affixed to Claimant's Motion at 1); *see Clark, supra*; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Contrary to claimant's contention, Claimant's Brief at 3, the administrative law judge provided a permissible rationale for his weighing of the medical opinion evidence. Inasmuch as the Board is not empowered to reweigh the evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), we reject claimant's contention and affirm the administrative law judge's finding that the new evidence, considered in conjunction with the old evidence, negates both clinical and statutory pneumoconiosis pursuant to Section 727.203(b)(4). *See Chastain v. Freeman*

[4] Dr. Tuteur diagnosed heart disease and "severe obstructive pulmonary disease due to cigarette smoke[-]associated giant bullous emphysema." Director's Exhibit 41 at 4-5. Dr. Tuteur opined that claimant's "bilateral bullous disease is . . . unassociated with . . . the inhalation of coal mine dust." Director's Exhibit 30 at 13. Based on his examination and testing of claimant, Dr. Tuteur concluded that "there is no convincing evidence to indicate the presence of any pneumoconiosis including . . . coalworkers' pneumoconiosis, asbestos related pleural or parenchymal disease, or silicosis." Director's Exhibit 41 at 5.

United Coal Mining Co., 919 F.2d 485, 14 BLR 2-130 (7th Cir. 1990), *pet. for reh'g denied*, 927 F.2d 969 (7th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order Denying Modification and Order on Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge