BRB No. 96-1268 BLA

VICTOR J. CHUCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
PEGGS RUN COAL COMPANY	)	
	)	
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 of Nicodemo De Gregorio, Administrative Law Judge, United States Department of Labor.

John Orr Beck, Lisbon, Ohio, for claimant.

Hilary S. Zakowitz (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (96-BLA-466) of Administrative Law Judge Nicodemo De Gregorio denying claimant's petition for modification 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 claim has a long procedural history. Claimant filed a claim for benefits on September 22, 1976. Director's Exhibit 1. In his first Decision and Order, dated June 20, 1984, the administrative law judge credited claimant with at least ten years of coal mine

[1]Claimant is Victor J. Chuck, the miner. Director's Exhibit 1.

employment, found that employer conceded that invocation of the interim presumption was established pursuant to 20 C.F.R. §727.203(a), and found the medical evidence of record sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2). In addition, the administrative law judge determined that entitlement pursuant to 20 C.F.R. Part 410, Subpart D was precluded. Accordingly, benefits were denied.

On appeal, the Board vacated the administrative law judge's finding of rebuttal pursuant to Section 727.203(b)(2), but determined that the administrative law judge's findings were sufficient to support rebuttal pursuant to Section 727.203(b)(3). The Board, however, remanded the case to the administrative law judge, instructing him to consider entitlement pursuant to 20 C.F.R. Part 718 and 20 C.F.R. §410.490. *See Chuck v. Peggs Run Coal Co.*, BRB No. 84-1722 BLA (Nov. 27, 1987)(unpub.). In a Decision and Order on reconsideration issued on October 5, 1990, the Board modified its previous Decision and Order, holding that claimant is not entitled to consideration pursuant to Section 410.490. *See Chuck v. Peggs Run Coal Co.*, BRB No. 84-1722 BLA (Oct. 5, 1990)(unpub.). On remand, the administrative law judge found the evidence of record insufficient to establish entitlement to benefits pursuant to Part 718. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's Decision and Order. *See Chuck v. Peggs Run Coal Co.*, BRB No. 91-1222 BLA (Sep. 28, 1992)(unpub.). The Board also denied claimant's subsequent Motion for Reconsideration. *See Chuck v. Peggs Run Coal Co.*, BRB No. 91-1222 BLA (Feb. 4, 1993)(unpub.).

Claimant filed an appeal with the United States Court of Appeals for the Sixth Circuit, who issued an Order, dated March 14, 1994, remanding the case to the District Director in order to permit claimant to file a petition for modification pursuant to 20 C.F.R. §725.310. Upon considering the petition for modification, the administrative law judge determined that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to Section 725.310. Accordingly, the petition for modification was denied. In the instant appeal, claimant contends that the administrative law judge erred in denying the petition for modification. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate in this appeal.

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 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the

administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. Claimant contends that the administrative law judge erred in requiring him to prove that his respiratory impairment was due, at least in part, to pneumoconiosis and in finding that the evidence of record does not support modification. Claimant's Brief at 3-5.

In order to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3), employer must rule out a possible causal connection between a miner's disability and his coal mine employment. *See Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995). In this case, the Board previously determined that the evidence of record was sufficient to establish rebuttal pursuant to subsection (b)(3). *See Chuck,* slip op. of Nov. 27, 1987 at 3. Thus, in order to establish a change in conditions pursuant to Section 725.310, the newly submitted evidence must establish that claimant's condition has changed to an extent that precludes rebuttal pursuant to subsection (b)(3).

In the present Decision and Order, the administrative law judge considered the newly submitted evidence of record which consists of the opinions of four physicians. Decision and Order at 3-4; Director's Exhibits 41, 44, 50, 52; Claimant's Exhibit 1; Employer's Exhibits 1-3. Dr. Fino, in several reports and in deposition testimony, Dr. Garson, in deposition testimony, and Dr. Knight, in a report, all opined that claimant has no respiratory impairment. Director's Exhibits 41, 44, 50, 52; Employer's Exhibits 1-3. Dr. Kroh did not offer an opinion as to the existence of a respiratory impairment. Claimant's Exhibit 1. The administrative law judge properly found that the newly submitted evidence does not support a finding that claimant has a respiratory impairment and thus, does not establish that claimant's condition has changed to the extent that it would preclude rebuttal pursuant to subsection (b)(3). Decision and Order at 4; *Plesh, supra; Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Marcum v. Director, OWCP*, 11 BLR 1-2 (1987); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). The administrative law judge further properly found that the newly submitted evidence is not supportive of a finding that the prior determination that claimant does not have a respiratory impairment was mistaken. Decision and Order at 4; *Nataloni, supra; Kovac, supra; Wojtowicz, supra.* Further, because the newly submitted evidence is insufficient to establish the existence of a respiratory impairment, this evidence is also insufficient to establish either a change in conditions or a mistake in a determination of fact in regards to the administrative law judge's findings pursuant to Section 718.204(c). *See Kiewlak v. Director, OWCP*, 11 BLR 1-34 (1988); *Perry, supra; see also Cooper v. United States Steel Corp.,* 7 BLR 1-842 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Thus, we affirm the administrative law judge's denial of claimant's petition for modification. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

Accordingly, the administrative law judge's Decision and Order denying claimant's petition for modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge