

BRB No. 97-0775 BLA

JOHN H. JOHNSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOLIDATION 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 Supplemental Decision and Order on Remand of Edith Barnett, Administrative Law Judge, United States Department of Labor.

Sparkle Bonds (Virginia Black Lung Association), Richlands, Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

Edward Waldman (Marvin Krislov, Deputy Solicitor for National Operations; 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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order on Remand (94-BLA-0634) of Administrative Law Judge Edith Barnett 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 case is before the Board for the fourth time. The administrative law judge found that the evidence failed to establish a change in conditions pursuant to 20 C.F.R.

§725.310(a), as it was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2), (4). Accordingly, the administrative law judge denied the claim.

The procedural history of this claim is as follows: claimant filed an application for benefits with the Department of Labor on December 10, 1979. Director's Exhibit 1. Following a formal hearing, Administrative Law Judge Edward J. Murty issued a Decision and Order on August 28, 1986 denying the claim pursuant to the regulations at 20 C.F.R. Part 727 based upon his finding that invocation of the interim presumption was not established. Director's Exhibit 46. The Board affirmed the administrative law judge's denial of benefits pursuant to Part 727. *Johnson v. Consolidation Coal Co.*, BRB No.86-2808 BLA (August 18, 1988)(unpub.). Claimant then appealed to the United States Court of Appeals for the Fourth Circuit. The Court vacated the Board's affirmance of the administrative law judge's findings, and remanded the case for reconsideration of invocation of the interim presumption at Section 727.203(a)(2), and, if necessary, rebuttal at Section 727.203(b). *Johnson v. Consolidation Coal Co.*, No. 88-1767 BLA (Oct. 27, 1989)(unpub.). Director's Exhibit 66. On remand, Judge Murty again found that the evidence failed to establish invocation at Section 727.203(a), and thereby, denied the claim in a Decision and Order issued April 10, 1990. Director's Exhibit 68. Following claimant's second appeal, the Board affirmed Judge Murty's denial of benefits. *Johnson v. Consolidation Coal Co.*, BRB No. 90-1434 BLA (Feb. 26, 1992)(unpub.). Director's Exhibit 78. Claimant then submitted a motion for modification pursuant to Section 725.310(a) with additional medical evidence on August 24, 1992. Director's Exhibit 81. Administrative Law Judge Edith Barnett denied claimant's motion for modification by Decision and Order dated January 17, 1995. On appeal, the Board vacated the administrative law judge's findings at Section 727.203(a)(2), (4), and remanded the case for more complete findings thereunder. Included in the Board's instructions was the requirement that the administrative law judge determine if the evidence establishes a mistake in a determination of fact pursuant to Section 725.310(a). *Johnson v. Consolidation Coal Co.*, BRB No. 95-1014 BLA (May 23, 1996)(unpub.)(Smith, J., dissenting in part). In a Supplemental Decision and Order on Remand issued February 7, 1997, Judge Barnett again denied claimant's motion and benefits. It is from this decision that claimant files the instant appeal.

On appeal, claimant challenges the administrative law judge's determination that the pulmonary function study evidence is insufficient to establish invocation at Section 727.203(a)(2). Specifically, claimant contends that the administrative law judge erred in rejecting Dr. Forehand's pulmonary function studies solely on the basis that his tests did not include the requisite tracings, and therefore failed to comply with the quality standards. Claimant also challenges the administrative law judge's finding that the opinion evidence fails to establish invocation at Section 727.203(a)(4). Claimant asserts that it was error for the administrative law judge to reject Dr. Forehand's opinion based upon his reliance upon invalid pulmonary function tests, when claimant alleges that Dr. Forehand's tests are valid. Claimant also asserts that the evidence is insufficient to establish rebuttal at Section 727.203(b), despite the fact that the administrative law judge rendered no findings with respect to rebuttal. Employer, in response, urges affirmance of the administrative law

judge's determination at Section 727.203(a)(2), (4), and thus, her denial of benefits. Employer, however, takes issue with the administrative law judge's finding that claimant's usual coal mine employment requires moderately heavy exertion. Employer's Brief at 10-11. The Director, Office of Workers' Compensation Programs (the Director), in response, argues that the administrative law judge's findings at Section 727.203(a)(2), (4) are supported by substantial evidence, and he urges affirmance of those findings. The Director asserts, however, that the administrative law judge erred by failing to obey the Board's previous instructions to render a specific finding as to whether the evidence establishes a mistake in a determination of fact, as required, pursuant to Section 725.310(a), and he urges remand, solely for a such a finding.

The Board's scope of review is defined by statute. 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially challenges the administrative law judge's finding that the pulmonary function studies of record fail to establish invocation of the interim presumption pursuant to Section 727.203(a)(2). Claimant asserts that Dr. Forehand's two pulmonary function studies, dated January 18, 1991 and July 22, 1992, Director's Exhibit 81, are sufficient to establish invocation thereunder. Claimant argues that the administrative law judge erred in rejecting these two studies in question based upon her finding that they do not comply with the quality standards. Claimant cites *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990) for the proposition that evidence cannot be rejected solely for non-compliance with the quality standards. We disagree. The administrative law judge correctly noted that both of Dr. Forehand's pulmonary function tests failed to contain the requisite three tracings. See 20 C.F.R. §§410.430; 727.206. In fact, no spirometric tracings are of record, as noted by Dr. Michos, Director's Exhibits 81, 82. The regulation at 20 C.F.R. §410.430 requires three spirometric tracings for any pulmonary function study to be valid under Part 727 in claims filed prior to March 31, 1980, regardless of the dates that the tests are performed or received into evidence. 20 C.F.R. §410.430. Further, the regulation at 20 C.F.R. §727.206(a) precludes invocation based upon pulmonary function study evidence if tracings are omitted. 20 C.F.R. §727.206(a); see *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Clay v. Director, OWCP*, 7 BLR 1-82 (1984); see also *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). In *Gorzalka*, the Board held that the administrative law judge could not exclude evidence based upon the quality standards under Part 718, because those quality standards are not mandatory. *Gorzalka*, 16 BLR at 1-51. The instant case is subject to different quality standards, applicable to the Part 727 regulations. In the instant case, the administrative law judge considered Dr. Forehand's pulmonary function studies but ultimately rejected them because they failed to meet the regulatory requirements at Sections 410.430; 727.206(a). We hold that the administrative law judge's finding, that Dr. Forehand's pulmonary function studies fail to conform to the required quality standards, and thus, cannot establish invocation at Section 727.203(a)(2) is supported by substantial evidence, and is in accordance with applicable law. We affirm, therefore, the administrative

law judge's finding that the evidence is insufficient to establish invocation at Section 727.203(a)(2).

Claimant also challenges the administrative law judge's finding that the evidence fails to establish invocation at Section 727.203(a)(4). Claimant asserts that the administrative law judge improperly discounted Dr. Forehand's medical opinion, despite the fact that his pulmonary function studies were not in technical compliance with the quality standards. We agree. The administrative law judge found that Dr. Forehand's opinion implies that claimant is unable to return to his prior coal mine employment as a foreman but she accorded Dr. Forehand's opinion little weight as unreasoned in view of his reliance on invalid pulmonary function studies. Dr. Forehand submitted two different medical opinions. The first, dated January 18, 1991 relied upon qualifying pulmonary function studies later invalidated by Dr. Michos. Director's Exhibit 81. Dr. Forehand submitted a second opinion, however, dated July 21, 1992, wherein he relies upon qualifying blood gas studies to conclude that claimant was totally disabled due to coal dust exposure, and the record does not contain evidence which would invalidate Dr. Forehand's blood gas study results. Director's Exhibit 81. Dr. Forehand also based his opinion on claimant's 48 year history of underground coal mining and radiographic evidence of interstitial thickening. *Id.* The administrative law judge's finding therefore to discredit this opinion solely upon the basis of invalidated pulmonary function studies is not supported by substantial evidence. *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984). We must therefore vacate the administrative law judge's finding that the evidence fails to establish invocation pursuant to Section 727.203(a)(4), and thereby, fails to establish a change in conditions pursuant to Section 725.310(a). *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). On remand, the administrative law judge must reconsider Dr. Forehand's most recent opinion at Section 727.203(a)(4), and determine whether claimant has established a change in conditions or a mistake in a determination of fact pursuant to Section 725.310(a).¹ See *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

¹ Since the administrative law judge made no findings with respect to rebuttal, we need not address claimant's contentions pursuant to Section 727.203(b), or employer's "contentions" with respect to claimant's usual coal mine employment, as they are rendered moot by our disposition of the case. See *Cochran v. Consolidated Coal Co.*, 12 BLR 1-136 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Accordingly, the administrative law judge's Supplemental Decision and Order on Remand is affirmed in part, vacated in part and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge