BRB No. 99-0620 BLA

The Estate of BERNARD B. SHREWSBERRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order On Modification of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle), Pineville, West Virginia, for claimant.

William S. Mattingly and Kathy L. Snyder (Jackson & Kelly), Morgantown, West Virginia, for employer.

Edward Waldman (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:

Employer appeals the Decision and Order On Modification (97-BLA-1832) of Administrative Law Judge Samuel J. Smith awarding 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.[1] Originally, claimant filed a claim on October 26, 1978, Director's Exhibit 1. The case was referred for a hearing before Administrative Law Judge Ben L. O'Brien, who issued a Decision and Order Granting Benefits on March 24, 1989, Director's Exhibit 51. Judge O'Brien found twenty-four and one-half years of coal mine employment established, found that employer was the properly designated responsible operator and adjudicated the claim pursuant to 20 C.F.R. §727.203. Judge O'Brien found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(2) and further found that rebuttal of the interim presumption was not established pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, benefits were awarded.

Employer appealed and the Board affirmed Judge O'Brien's finding that claimant's work for the United Mine Workers of America (UMWA), subsequent to his work with employer, was not qualifying coal mine employment under the Act and, therefore, affirmed Judge O'Brien's finding that employer was the properly designated responsible operator, Director's Exhibit 61. *Shrewsberry v. Westmoreland Coal Co.*, BRB No. 89-1437 BLA (July 29, 1993)(unpub.). Next, the Board affirmed Judge O'Brien's finding that invocation of the interim presumption was established pursuant to Section 727.203(a)(2) and that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(1), but vacated Judge O'Brien's findings that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(2)-(4) and remanded the case for reconsideration.

On remand, the case was reassigned to Administrative Law Judge Daniel L. Stewart, who issued a Decision and Order On Remand Denying Benefits on May 11, 1994, Director's Exhibit 67. Judge Stewart found that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(2), but was established pursuant to Section 727.203(b)(3)-(4). Judge Stewart further found that entitlement was not established pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. Claimant appealed and the Board affirmed Judge Stewart's finding that rebuttal of the interim presumption was not established

[1] Subsequent to employer's appeal, the Board was informed by a letter from claimant's counsel dated December 7, 1999 that claimant, Bernard B. Shrewsberry, died on November 2, 1999. Claimant's counsel indicated that he has been retained by Alice A. Bailey Smith, the executrix of claimant's estate, to pursue claimant's claim on behalf of claimant's estate.

pursuant to Section 727.203(b)(2) as unchallenged, but also affirmed Judge Stewart's findings that rebuttal was established pursuant to Section 727.203(b)(4) and, therefore, that entitlement pursuant to Part 410, Subpart D, was precluded, Director's Exhibit 79. *Shrewsberry v. Westmoreland Coal Co.*, BRB No. 94-2528 BLA (Nov. 29, 1995)(unpub.). Thus, the Board affirmed Judge Stewart's Decision and Order On Remand Denying Benefits. 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 Court held that Judge Stewart's finding that rebuttal was established pursuant to Section 727.203(b)(4) was supported by substantial evidence and, therefore, affirmed the Board's Decision and Order affirming Judge Stewart's Decision and Order On Remand Denying Benefits, Director's Exhibit 81. *Shrewsberry v. Westmoreland Coal Co.*, No. 95-3203 (Jan. 7, 1997, 4th Cir.)(unpub.). Subsequently, on March 3, 1997, claimant filed a request for modification, along with new positive x-ray evidence, Director's Exhibit 82.

In his Decision and Order On Modification, at issue herein, the administrative law judge considered claimant's request for modification pursuant to 20 C.F.R. §725.310 in accordance with the standard enunciated by the Fourth Circuit in *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26-28 (4th Cir. 1993). Initially, the administrative law judge incorporated all of the evidence previously discussed in all of the previous decisions in this case, except as otherwise vacated by the Board or modified by the administrative law judge in his decision. Next, the administrative law judge found, consistent with the Board's original Decision and Order in this case, that claimant's work for the UMWA, subsequent to his work with employer, was not qualifying coal mine employment under the Act and, alternatively, found that the UMWA does not meet the regulatory definition of a responsible operator. Thus, the administrative law judge found that employer was the properly designated responsible operator.

The administrative law judge then considered all of the evidence of record and found that invocation of the interim presumption was not established pursuant to Section 727.203(a)(1), but was established pursuant to Section 727.203(a)(2)-(4). Thus, since invocation of the interim presumption was established pursuant to Section 727.203(a)(3)-(4), the administrative law judge found that claimant established a basis for modification based on a change in conditions pursuant to Section 725.310. Finally, the administrative law judge found that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(1)-(4). Thus, since rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3)-(4), the administrative law judge found that claimant also established a basis for modification based on a mistake in a determination of fact pursuant to Section 725.310. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred when weighing

the relevant medical opinion evidence in finding that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3) and (4) and, therefore, in finding a basis for modification established pursuant to Section 725.310 based on a mistake in a determination of fact. Alternatively, employer contends that the administrative law judge erred in failing to find a mistake in a determination of fact in regard to the prior finding in this case that employer was the properly designated responsible operator. Claimant responds, urging the Board to affirm the administrative law judge's Decision and Order On Modification awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, also responds, urging the Board to affirm the administrative law judge's finding that employer is the properly designated responsible operator in this case.

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).

Initially, employer contends that the administrative law judge erred in finding that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3) and (4) and, therefore, in finding a basis for modification established pursuant to Section 725.310 based on a mistake in a determination of fact. Specifically, employer contends that the administrative law judge erred in finding that the opinions of Drs. Zaldivar, Hippensteel, Fino and Kress were insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3) and (4).[2]

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. The intended purpose of modification based on a mistake in fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted" in an effort to render justice under the Act, *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254,

[2] Inasmuch as the administrative law judge's findings pursuant to Sections 727.203(a)(1)-(4) and 727.203(b)(1)-(2) are not challenged on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

257 (1971).

In order to establish rebuttal pursuant to Section 727.203(b)(3), in this case arising within the jurisdiction of the Fourth Circuit, employer must rule out the causal relationship between the miner's total disability and his coal mine employment, *see Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *see also Phillips v. Jewell Ridge Coal Co.*, 825 F.2d 408, 10 BLR 2-160 (4th Cir. 1987). In order to establish rebuttal pursuant to Section 727.203(b)(4), employer must establish both the absence of clinical pneumoconiosis and the absence of pneumoconiosis as more broadly defined by the Act and regulations, *i.e.*, the absence of any respiratory or pulmonary impairment arising out of coal mine employment. 30 U.S.C. §902(b); 20 C.F.R. §727.202; 20 C.F.R. §§727.203(b)(4); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1985).

The administrative law judge considered all of the relevant medical opinion evidence and found that the opinions of the West Virginia Occupational Pneumoconiosis Board, Director's Exhibit 3, and Drs. Cardona, Director's Exhibit 8, and Rasmussen, Director's Exhibit 43, supported entitlement and, therefore, would preclude rebuttal under subsections (b)(3) and (4). Decision and Order On Modification at 11, 20. The administrative law judge further found that Dr. Abernathy's opinion, Director's Exhibit 14, was equivocal and that Dr. Ranavaya's opinion, Director's Exhibit 90, was not sufficiently explained and, therefore, would not support rebuttal under subsections (b)(3) and (4). Decision and Order On Modification at 12, 19-21. In addition, the administrative law judge found that the preponderance of the x-ray evidence of record was negative for pneumoconiosis, Decision and Order On Modification at 22. Inasmuch as the administrative law judge's findings in regard to the x-ray evidence and that the opinions of Drs. Cardona, Rasmussen, Abernathy and Dr. Ranavaya do not support rebuttal under subsections (b)(3) and (4) are unchallenged on appeal, they are affirmed, *see Skrack, supra*.

Finally, the administrative law judge found that the newly submitted and original opinions of Drs. Zaldivar, Hippensteel, Fino and Kress were insufficient to establish rebuttal pursuant to subsections (b)(3) and (4) because they only applied the clinical definition of pneumoconiosis, rather than the legal or statutory definition of pneumoconiosis, in finding that claimant did not suffer from any impairment arising out of his coal mine employment.[3]

[3] Dr. Fino's originally opined that claimant suffered from a variable obstructive respiratory impairment, which he found was not consistent with a coal dust induced lung disease because simple coal workers' pneumoconiosis is a fixed and not a variable disease, Director's Exhibit 22. Dr. Fino found that claimant's impairment was consistent with asthma, which he noted is a disease of the general population not caused by coal dust inhalation, as well as smoking. Dr. Fino believed that coal dust played a "minimal" and "insignificant" role in claimant's impairment. On modification, Dr. Fino found that claimant

suffered from a variable obstructive respiratory impairment, which he found was not consistent with a coal dust induced lung disease, Employer's Exhibits 5, 14.

Dr. Kress' originally submitted an opinion finding that claimant suffered from a reversible obstructive impairment consistent with asthma and not attributable to pneumoconiosis or coal dust exposure, as he noted that asthma is not caused by coal dust, Director's Exhibits 24, 40. Dr. Kress stated that because there was no evidence of coal workers' pneumoconiosis, claimant's obstructive impairment was not related to his coal mine employment.

Dr. Zaldivar's originally submitted opinion also found that claimant suffered from a reversible obstructive impairment consistent with asthma, which he noted is a disease of the general population not caused by coal dust inhalation, Director's Exhibits 25, 38. On modification, Dr. Zaldivar again stated that claimant's reversible obstructive impairment which improved after exercise was consistent with asthma, and not a coal dust disease or

The administrative law judge found that they ruled out coal mine dust as a cause of claimant's asthma, based on a general and unsupported opinion that asthma is a disease of the general population not caused by coal dust, without considering whether claimant's claimant's asthma could satisfy the statutory definition of pneumoconiosis. Decision and Order On Modification at 16, 18.

Nevertheless, the Fourth Circuit previously held that the submitted opinions of Drs. Zaldivar, Kress and Fino "ruled out the existence of clinical and statutory pneumoconiosis" and, therefore, constituted substantial evidence in support of Judge Stewart's prior finding that rebuttal was established pursuant to subsection (b)(4), *see* Director's Exhibit 81; *Shrewsberry*, No. 95-3203 (Jan. 7, 1997, 4th Cir.)(unpub.). Thus, in light of the Fourth Circuit's holding, we vacate the administrative law judge's findings that the opinions of Drs. Zaldivar, Kress and Fino are insufficient to establish rebuttal of the interim presumption under subsections (b)(3) and (4) because they did not rule out the legal or statutory definition of pneumoconiosis or that claimant suffered from an impairment arising out of his coal mine employment.

Consequently, we vacate the administrative law judge's findings that rebuttal of the

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coal workers' pneumoconiosis, which he stated is a fixed, an irreversible disease, *see* Employer's Exhibit 16 at 30.

Finally, on modification, Dr. Hippensteel also found that claimant had an obstructive impairment which improved, which he found was not consistent with coal workers' pneumoconiosis, which he noted is a permanent, irreversible disease, but consistent with asthma, which he noted is a disease of the general population not caused by coal dust inhalation, Employer's Exhibits 2, 15. Dr. Hippensteel stated that because there was no x-ray evidence of coal workers' pneumoconiosis, it was not possible to implicate coal workers' pneumoconiosis or coal dust exposure as a causative factor in claimant's obstructive disease.

interim presumption was not established pursuant to Section 727.203(b)(3) and (4) and, therefore, that a basis for modification based on a mistake in a determination of fact was established pursuant to Section 725.310 and remand the case for reconsideration. On remand, the administrative law judge should resolve the conflicts in the medical evidence that support entitlement and the medical evidence which support rebuttal under subsections (b)(3) and (4), *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989). In this respect, the administrative law judge should reconcile his findings with those findings already addressed by the Fourth Circuit. Moreover, the administrative law judge should fully explain the specific bases for his decision, the weight assigned to the evidence and the relationship he finds between the evidence and his legal and factual conclusions, *see Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). Specifically, as employer contends, the administrative law judge should more fully explain the weight he gives the opinion issued by the West Virginia Occupational Pneumoconiosis Board that claimant suffers from a pulmonary impairment due to occupational pneumoconiosis, Director's Exhibit 3, and which findings he incorporated previous decisions in this case in resolving the conflicts in the medical evidence under subsections (b)(3) and (4).

Finally, employer contends that the administrative law judge erred in finding that claimant's job with the UMWA, subsequent to his work for employer, did not constitute qualifying coal mine employment[4] and, alternatively, contends that the administrative law judge erred in finding that the UMWA does not meet the regulatory definition of a "responsible operator." Thus, employer contends that the administrative law judge erred in finding that employer was the properly designated responsible operator.

Consistent with the Board's original Decision and Order in this case, *see* Director's Exhibit 61; *Shrewsberry*, BRB No. 89-1437 BLA, the administrative law judge found that

[4] Claimant worked for employer from November, 1949, until January, 1973, Director's Exhibits 2, 5, 44 at 35. Claimant then worked as an Occupational Health and Safety Representative for the UMWA from January, 1973, through January, 1989, Director's Exhibit 2; Hearing Transcript at 24-25. Claimant's job with the UMWA was created as a result of a collective bargaining agreement between the UMWA and the Bituminous Coal Operators Association, of which employer is a member, Hearing Transcript at 26, 28; Director's Exhibit 26 at 5. Claimant testified that his job entailed working with union and management representatives on health and safety issues, investigating injuries, accidents and safety grievances at coal mine sites and conducting safety inspections, Director's Exhibit 44 at 21, 31, 38; Director's Exhibit 26 at 7-9; Hearing Transcript at 29-30. However, claimant testified that he had no authority to enter a coal mine absent a request form either the union or management, Director's Exhibit 26 at 20-22.

claimant's job with the UMWA was not integral to the extraction or preparation of coal and, therefore, did not constitute qualifying coal mine employment under the Act. Decision and Order On Modification at 6-7. Alternatively, the administrative law judge further held that the UMWA does not meet the regulatory definition of a "responsible operator" pursuant to 20 C.F.R. §§725.492(a)(2) and 725.493.

As the administrative law judge held, the UMWA does not meet the regulatory definition of a "responsible operator." The UMWA is not an owner, lessee or other person who operates, controls or supervises a coal mine, is not an independent contractor performing services or construction at a mine and is not engaged in coal mine construction, maintenance and transportation, *see* 20 C.F.R. §§724.491(a)(1)-(2), 725.492(a)(2). Thus, employer is "the operator with which the miner had the latest periods of cumulative employment of not less than 1 year" that also satisfies the conditions of 20 C.F.R. §725.492(a)(2)-(4), *see* 20 C.F.R. §§725.493(a)(4); *Eastern Associated Coal Corp.*, 791 F.2d 1129, 1132 (4th Cir. 1986). Consequently, we affirm the administrative law judge's finding that employer is the properly designated responsible operator.[5]

[5] Inasmuch as we affirm the administrative law judge's finding that the UMWA does not meet the regulatory definition of a "responsible operator," we need not address employer's contentions regarding the administrative law judge's finding that claimant's job with the UMWA did not constitute qualifying coal mine employment.

Accordingly, the Decision and Order On Modification awarding benefits by the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge