BRB No. 96-1085 BLA

CALVIN D. DUNFORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
JEWELL RIDGE/SEE "B" MINING 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 of Nicodemo De Gregorio, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-BLA-0828) of Administrative Law Judge Nicodemo De Gregorio 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 has been before the Board once on the merits and is now before the Board pursuant to claimant's second request for modification.

Claimant's initial application for benefits filed on August 10, 1979 was denied by Judge De Gregorio on October 23, 1981. Director's Exhibits 1, 52. Pursuant to claimant's appeal, the Board affirmed the denial of benefits on September 28, 1984. *Dunford v.*

Jewell Ridge Coal Corp., BRB No. 81-2205 BLA (Sep. 28, 1984); Director's Exhibit 67. Within one year of the issuance of the Board's Decision and Order, claimant filed a second application which was treated as a request for modification under 20 C.F.R. §725.310. Director's Exhibits 68, 77. Administrative Law Judge John S. Patton denied modification on January 24, 1990.[1] Director's Exhibit 130. Pursuant to claimant's appeal, the Board, and subsequently, the United States Court of Appeals for the Fourth Circuit, affirmed the denial of benefits as supported by substantial evidence. *Dunford v. Jewell Ridge Coal Corp*., No. 92-2071 (4th Cir., Sep. 3, 1993)(unpub.), *aff'g* BRB No. 90-0645 BLA (Jan. 28, 1992)(unpub.); Director's Exhibits 138, 144. Three months after the issuance of the Fourth Circuit court's decision, claimant filed the present request for modification and submitted additional medical evidence. Director's Exhibit 147. The case was again heard by Judge De Gregorio, who apparently accepted Judge Patton's finding that invocation of the interim presumption was established pursuant to 20 C.F.R. §727.203(a)(2), but denied modification on the grounds that the newly-submitted evidence, considered under Part 718, failed to establish a change in conditions by showing that claimant had developed pneumoconiosis or become totally disabled since the date of the prior hearing. [1996] Decision and Order at 2-5.

On appeal, claimant contends that the administrative law judge failed to determine whether the record demonstrated that a mistake in a determination of fact was made in the prior denial of his claim pursuant to Section 725.310. Claimant further asserts that the administrative law judge failed to determine whether the evidence established rebuttal of the interim presumption. Claimant argues additionally that the administrative law judge erred in his weighing of the medical evidence. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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 725.310 provides that a party may request modification of the award or denial of benefits within one year on the grounds that a change in conditions has occurred

[1] Judge Patton found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(2) based on qualifying pulmonary function studies, but concluded that the evidence of record established rebuttal of the presumption pursuant to Section 727.203(b)(3)-(4). [1990] Decision and Order at 8, 12-13.

or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held pursuant to Section 725.310 that the administrative law judge has the authority to consider all of the evidence on modification to determine whether there has been a change in conditions or a mistake in a determination of fact, including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

In this case, the administrative law judge concluded that the mistake in fact issue was not before him because claimant asserted only a change in conditions. [1996] Decision and Order at 2. Contrary to the administrative law judge's finding, claimant need not allege a specific mistake in fact or change in conditions to trigger the administrative law judge's authority to reconsider the entirety of the record on modification.[2] *Jessee*, 5 F.3d at 724; 18 BLR at 2-28. Further, in considering the change in conditions issue, the administrative law judge confined his analysis to the newly-submitted evidence. [1996] Decision and Order at 3-5; *see Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993)(administrative law judge must consider new evidence in conjunction with previously submitted evidence for change in conditions). Because the administrative law judge did not consider the evidence under the correct standard, we must vacate his finding and remand the case for him to determine whether the entirety of the record demonstrates a change in conditions since the previous denial of benefits or a mistake in a determination of fact under Section 725.310 in accord with *Jessee, supra,* and *Nataloni, supra*. On remand, the administrative law judge must apply the adjudicatory criteria of Part 727 to this claim.[3] *See Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995).

---

[2] We note that the district director identified mistake of fact as a contested issue to be resolved at the hearing. Director's Exhibits 166, 170. At the hearing, claimant's counsel did not assert a mistake of fact or concede that there was none. [1995] Hearing Transcript at 6-7, 9.

[3] We reject the remainder of claimant's arguments, as the Board is not empowered to weigh the evidence. Claimant's Brief at 2-4; see *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co*., 12 BLR 1-77 (1988).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded for further consideration 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