

BRB No. 96-1250 BLA

BILLY R. JESSEE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
CLINCHFIELD 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 Second Request for Modification of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Billy R. Jessee, Castlewood, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order Denying Second Request for Modification (95-BLA-1120) of Administrative Law Judge Jeffrey Tureck 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 second time. Initially, Administrative Law Judge Nicholas J. Laezza denied benefits on the grounds that the evidence failed to establish the

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<sup>1</sup> Claimant is Billy R. Jessee, the miner, who filed this claim for benefits on March 22, 1985. Director's Exhibit 1.

existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Director's Exhibit 38. Within one year of the denial, claimant requested modification pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence. Director's Exhibit 39. Administrative Law Judge Robert M. Glennon denied modification because he found that the newly-submitted evidence failed to establish either the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 70. Pursuant to claimant's appeal, the Board vacated the denial of benefits and remanded the case in part for the administrative law judge to consider both the old and the new evidence relevant to the existence of pneumoconiosis and total respiratory disability pursuant to Section 725.310. *Jessee v. Clinchfield Coal Co.*, BRB No. 92-1180 BLA (Jun. 23, 1993); Director's Exhibit 75. Subsequent to the issuance of the Board's decision and prior to the issuance of the administrative law judge's Decision and Order on remand, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, issued its decision in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), which changed the law regarding modification by requiring that the administrative law judge consider the entirety of the record to determine whether it demonstrates a mistake in a determination of fact or a change in conditions.

On remand, Judge Glennon denied modification because he found that the newly-submitted evidence failed to establish the existence of pneumoconiosis, and therefore did not establish a change in conditions. Director's Exhibit 76. Claimant timely requested modification and submitted additional medical evidence. Director's Exhibit 77. Judge Tureck considered the evidence submitted with claimant's second modification request, adopted Judge Glennon's weighing of the evidence submitted with the first modification request, and concluded that a change in conditions under Section 725.310 was not established because the new evidence failed to establish the existence of pneumoconiosis.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, noting that the issue is whether the administrative law judge's modification analysis meets the requirements of *Jessee*.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In addition, 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 or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). In *Jessee*, the Fourth Circuit court explained that the administrative law judge exercises broad discretion on modification.

[A] claimant may simply allege that the ultimate fact -- disability due to pneumoconiosis -- was mistakenly decided, and the [administrative law judge] may, if he so chooses, modify the final order on the claim. There is no need for a smoking-gun factual error, changed conditions, or startling new evidence.

*Jessee*, 5 F.3d at 724, 18 BLR at 2-28; see also *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The court deferred to the Director's interpretation of Section 725.310, holding that the administrative law judge "ha[s] the duty and full authority to review any and all prior findings of fact under the modification procedure." *Jessee*, 5 F.3d at 724, 18 BLR at 2-38.

Under *Jessee*, claimant's request for modification triggered the administrative law judge's authority to consider the entirety of the record.<sup>2</sup> However, the administrative law judge considered only the new evidence regarding the existence of pneumoconiosis. Decision and Order Denying Second Request for Modification at 2-4. The record contains previously-submitted evidence relevant to the existence of pneumoconiosis, as well as previously-submitted and newly-submitted evidence relating to respiratory disability. Although the administrative law judge incorporated Judge Glennon's two prior decisions, we note that in neither of those decisions did Judge Glennon account for all of the old and new evidence. Director's Exhibits 70, 75, 77. Therefore, we must vacate the administrative law judge's finding and remand the case for him to determine whether the entirety of the record demonstrates a mistake in a determination of fact, or a change in conditions since the previous denial of benefits under Section 725.310 in accord with *Jessee, supra*.

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<sup>2</sup> Although *Jessee* does not require claimant to allege a mistake of fact or a change in conditions, we note that at the hearing, claimant's attorney challenged "[t]he overall findings," asserting that "it is the claimant's position that he is totally disabled by coal workers' pneumoconiosis which arose out of his employment . . . ." [1996] Hearing Transcript at 6.

Accordingly, the administrative law judge's Decision and Order Denying Second Request for Modification is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL  
Chief Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge