

BRB No. 97-0824 BLA

THURL SILCOX)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	DATE ISSUED:
LABOR)	
)	
Respondent)	DECISION AND ORDER

Appeal of the Decision and Order on Remand of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Thurl Silcox, Grundy, Virginia, *pro se*.

Dorothy L. Page (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, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the Decision and Order on Remand (92-BLA-1337) of Administrative Law Judge Gerald M. Tierney denying claimant's request 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 case is before the Board for the third time on claimant's request for

¹ Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1988)(Order).

modification.² In the original decision concerning modification, Administrative Law Judge Victor Chao (Judge Chao) found the newly submitted evidence insufficient to establish the existence of pneumoconiosis or that claimant's totally disabling respiratory condition was

² In the original Decision and Order based on claimant's March 4, 1986 filing date, Administrative Law Judge Ben L. O'Brien (Judge O'Brien) found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). While noting the presence of a totally disabling respiratory impairment, he further found that the medical evidence was insufficient to establish that the impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge O'Brien denied benefits.

On appeal, the Board affirmed the denial of benefits, holding that Judge O'Brien's finding at Section 718.204(b) was supported by substantial evidence. In addition, the Board declined to affirm the administrative law judge's finding of no pneumoconiosis under Section 718.202(a)(1) inasmuch as the administrative law judge failed to properly weigh the x-ray evidence. However, the Board determined that the error in the administrative law judge's weighing of this evidence was harmless based on its affirmance of the finding that claimant failed to establish that his total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). *Silcox v. Director, OWCP*, BRB No. 90-0192 BLA (Mar. 19, 1991)(unpub.).

due to pneumoconiosis and, therefore, found the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, Judge Chao denied benefits.

On appeal, the Board vacated Judge Chao's denial of benefits and remanded the case for the administrative law judge to render specific findings concerning Dr. Iosif's opinion pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b).³ *Silcox v. Director, OWCP*, BRB No. 93-1632 BLA (Nov. 10, 1994) (unpub.). In addition, the Board held that the administrative law judge must also determine whether the record as a whole demonstrated a mistake in a determination of fact in the prior decision pursuant to Section 725.310, see *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). *Id.*

On remand, due to the retirement of Judge Chao, the case was assigned to Administrative Law Judge Gerald M. Tierney (the administrative law judge). The administrative law judge found that the opinion of Dr. Iosif was too non-specific and ambiguous to support a finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.201. He, therefore, found the newly submitted evidence insufficient to establish a change in conditions pursuant to Section 725.310. The administrative law judge further found that there was no mistake in a determination of fact pursuant to Section 725.310. Accordingly, the administrative law judge denied claimant's request for modification.

Pursuant to claimant's second appeal, the Board vacated the administrative law judge's denial of claimant's request for modification, holding that the administrative law judge did not provide a sufficient rationale for finding the evidence insufficient to establish a mistake in a determination of fact. *Silcox v. Director, OWCP*, BRB No. 95-1716 BLA (June 26, 1996)(unpub.). Initially, the Board affirmed the administrative law judge's finding that the opinion of Dr. Iosif was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and, thus, insufficient to establish a change in conditions under Section 725.310. *Id.* slip op. at 3-4. Based on its previous affirmance of the administrative law judge's finding that the remainder of the newly submitted evidence was insufficient to establish a change in conditions under Section 725.310, see *Silcox*, BRB No. 93-1632 BLA, slip op. at 4-5, the Board affirmed the administrative law judge's finding that claimant failed to establish a change in conditions

³ The Board affirmed Judge Chao's finding that the newly submitted was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) and that Judge Chao properly discredited Dr. Robinette's opinion pursuant to 20 C.F.R. §718.202(a)(4). *Silcox v. Director, OWCP*, BRB No. 93-1632 BLA, slip op. at 4-5 (Nov. 10, 1994) (unpub.).

pursuant to Section 725.310. *Silcox*, BRB No. 95-1716 BLA, slip op. at 4. Nonetheless, the Board remanded the case to the administrative law judge for further consideration of whether there was a mistake in a determination of fact in the prior decision. Specifically, the administrative law judge was instructed to discuss whether the x-ray evidence of record supports a finding of a mistake in a determination of fact. *Id.*, slip op. at 5.

On remand, the administrative law judge considered all of the x-ray evidence of record and found it insufficient to establish the existence of pneumoconiosis and, thus, insufficient to establish a mistake in a determination of fact. The administrative law judge then reinstated his earlier Order in this case, thus, denying claimant's request for modification.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, the Director, Office of Workers' Compensation Programs, urges affirmance of the administrative law judge's denial of claimant's request for modification as supported by substantial evidence.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, once a request for modification has been filed, regardless of the grounds stated, if any, the administrative law judge must reconsider all of the evidence in addressing whether there was a mistake in a determination of fact pursuant to Section 725.310. See *Jessee, supra*; *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Included in the determination of a mistake of fact is the determination of the ultimate fact, which is claimant's entitlement to benefits. *Jessee, supra*.

In finding that the weight of the x-ray evidence of record was negative for the existence of pneumoconiosis pursuant to Section 718.202(a)(1),⁴ the administrative law judge correctly determined that the record contains nine readings of the six x-ray films of record by readers who possess the best qualifications, as B readers and Board-certified

⁴ The record contains eighteen interpretations of six x-ray films, of which eight were read as negative for the existence of pneumoconiosis, seven were positive and three reports were not phrased in terms of the ILO classification for x-ray interpretations. Director's Exhibits 9, 10, 14, 15, 22, 23, 26, 27, 33, 35, 45, 50, 51, 60; 20 C.F.R. §§718.102(b), 718.202(a)(1).

radiologists, and, of these nine readings, six were interpreted as negative for the existence of pneumoconiosis, including the two most recent films.⁵ *Id.*; see Director's Exhibits 23, 26, 27, 35, 50, 51, 60. Inasmuch as the administrative law judge reasonably exercised his discretion as fact-finder in relying on the superior qualifications of the physicians who are dually qualified as B readers and Board-certified in Radiology, we affirm his finding that the weight of the x-ray evidence by these physicians is negative for the existence of pneumoconiosis. Decision and Order on Remand at 2; 20 C.F.R. §718.202(a)(1); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); see also *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Consequently, we affirm the administrative law judge's finding that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Based on the facts of this case, therefore, the administrative law judge properly found the evidence of record insufficient to establish a mistake in a determination of fact pursuant to Section 725.310. See *Jessee, supra*. Since the Board has previously affirmed the administrative law judge's finding that the newly submitted evidence of record was insufficient to establish a change in conditions pursuant to Section 725.310, see *Silcox*, BRB No. 93-1632 BLA, slip op. at 4-5; *Silcox*, BRB No. 95-1716 BLA, slip op. at 3-4, we affirm the administrative law judge's denial of claimant's request for modification pursuant to Section 725.310. See *Jessee, supra*; see also *Aerojet-General Shipyards, Inc. v. O'Keeffe*, 404 U.S. 254 (1971); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

⁵ The administrative law judge further found that two of the three x-ray interpretations by physicians who are B readers were negative for the existence of pneumoconiosis. Decision and Order on Remand at 2; Director's Exhibits 9, 15, 45.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge