

BRB No. 89-0415 BLA

MONROE K. LAMBERT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ITMANN COAL COMPANY)	DATE ISSUED:
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	ON RECONSIDERATION

Appeal of the Decision and Order Denying Benefits of Robert M. Glennon, Administrative Law Judge, United States Department of Labor.

Richard G. Rundle (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Mary Jane Brown and Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer has filed a timely Motion for Reconsideration of the Board's Decision and Order in *Lambert v. Itmann Coal Co.*, BRB No. 89-0415 BLA (July 23, 1990)(unpublished). In its Decision and Order, the Board affirmed the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310; however, inasmuch as the administrative law judge's analysis on the issue of whether claimant established a change in conditions

was premised on the previous standard of rebuttal at 20 C.F.R. §727.203(b)(2), the Board remanded this case for the administrative law judge to review the evidence in light of the current standard set forth in *Sykes v. Director, OWCP*, 812 F.2d 134, 10 BLR 2-95 (4th Cir. 1987), in determining whether claimant has established a change in conditions sufficient to support modification under Section 725.310 and, if so, to reconsider rebuttal at subsection (b)(2) in light of said standard.

In support of its Motion for Reconsideration, employer notes that the change in law affecting subsection (b)(2) rebuttal has also altered the standard for establishing rebuttal pursuant to 20 C.F.R. §727.203(b)(3), see *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), thus employer contends that it will be denied due process if the current standard for establishing subsection (b)(2) rebuttal is applied on remand but rebuttal under subsection (b)(3) is precluded. Upon review, we grant the Motion for Reconsideration filed by employer. 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301, 802.407, 802.409.

We note that at the time the Board issued its Decision and Order in the instant case, it was unclear whether the method of rebuttal at subsection (b)(3) remained available to employer. See *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178, 13 BLR 2-294 (4th Cir. 1990), *reh'g denied* (1990). In light of the Supreme Court's decision in *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991), however, we modify our Decision and Order herein and direct the administrative law judge to adjudicate the merits of this claim under the current standards of rebuttal at subsections (b)(2) and (b)(3), see *Sykes, supra*, *Massey, supra*, if on remand he finds the evidence sufficient to support modification pursuant to Section 725.310. See *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Accordingly, we grant employer's Motion for Reconsideration and the relief requested, and so modify our original Decision and Order in this case.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge