

BRB No. 02-0228 BLA

PAULINE ANDREWS)	
(Widow of PAUL ANDREWS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Jordan H. Pecile, Hazleton, Pennsylvania, for claimant.

Rita Roppolo (Eugene Scalia, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (2001-BLA-0286) of Administrative Law

¹Claimant is Pauline Andrews, the miner's widow. The miner, Paul Andrews, filed a claim for benefits on October 20, 1987, which was denied on May 24, 1989. Director's Exhibit 17. The miner filed a second claim for benefits on February 13, 1990, and was awarded benefits on April 17, 1991. Director's Exhibit 17. The miner died on September 16, 1993, and claimant filed a survivor's claim on November 8, 1993. Director's Exhibits 1, 5. Administrative Law Judge Ralph A. Romano denied benefits on the survivor's claim on July 28, 1995, finding that claimant failed to establish that the miner's death was due to pneumoconiosis. Claimant filed an appeal with the Board. However, on April 29, 1996, the

Judge Robert D. Kaplan denying benefits on a survivor's 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).² The administrative law judge found that claimant failed to

Board issued an order dismissing the appeal as abandoned. Director's Exhibit 23. On August 2, 1996, claimant filed a request for modification, which Judge Romano denied on June 27, 1997, finding that there was no mistake of fact in his prior decision denying benefits. On appeal to the Board, the case was remanded to Judge Romano with instructions to consider the medical opinion of Dr. Karlavage on modification. *Andrews v. Director, OWCP*, BRB No. 97-1479 BLA (June 17, 1998) (unpublished). On June 13, 2000, Judge Romano denied benefits, finding that claimant failed to establish that the miner's death was due to pneumoconiosis, and thus failed to establish a mistake in a determination of fact. Director's Exhibits 45. Claimant appealed to the Board and submitted new evidence. The Board then remanded the case for the district director to consider claimant's submission of new evidence as a request for modification. The district director denied the request for modification. Subsequently, the case was assigned to Administrative Law Judge Robert D. Kaplan, who held a hearing on August 2, 2001.

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

establish a mistake in a determination of fact and, thus, denied modification pursuant to 20 C.F.R. §725.310 (2000).³ Accordingly, benefits were denied.

on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³The amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims, such as this one, which were pending on January 19, 2001. 20 C.F.R. §725.2.

On appeal, claimant contends that the administrative law judge erred in excluding from the record Dr. Simelaro's medical opinion, which claimant had submitted in support of her request for modification to demonstrate that the ultimate fact of entitlement was mistakenly decided. Claimant urges the Board to vacate the denial of benefits and remand the case for the administrative law judge to consider Dr. Simelaro's opinion in determining whether claimant established a mistake in fact, pursuant to Section 725.310 (2000), by establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Director, Office of Workers' Compensation Programs (the Director), filed a motion to remand the case to the administrative law judge for further consideration, arguing in support of claimant's position that the administrative law judge erred in excluding Dr. Simelaro's medical report from the record on the sole ground that it could have been submitted in prior proceedings.⁴ Director's Brief at 4.

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 the 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).

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 (2000), *see* 20 C.F.R. §725.2(c), within a year of a final order, a party may request modification of a denial based upon a change in conditions or a mistake in a determination of fact. Modification may be granted in a survivor's claim only if there was a mistake in a determination of fact in the earlier decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In determining whether claimant has established a mistake in a determination of fact pursuant to Section 725.310 (2000), the administrative law judge must consider all of the evidence of record to determine if it is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), *modifying* 14 BLR 1-156 (1990); *Wojtowicz, supra*.

In this case, the administrative law judge advised the parties that in considering a survivor's case involving modification, the only additional evidence that is admissible would be "newly discovered evidence" which he defined as "evidence which was not available with reasonable diligence for submission at the prior proceeding." Decision and Order at 3. He

⁴ The Board accepts the Director's Motion to Remand as his response brief and herein decides this case on the merits. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994).

then excluded from admission into the record Dr. Simelaro's report, dated August 17, 1999, as it was in existence and available at a prior proceeding. *Id* at 6. Although the Director objected to the admission of Dr. Simelaro's report into evidence at the hearing, Hearing Transcript at 7, both claimant and the Director now argue on appeal that the administrative law judge should not have excluded Dr. Simelaro's report from the record on the sole ground that this evidence should have been submitted in earlier proceedings. We agree with the parties' arguments on appeal.

The modification provision set forth in 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 (2000), is a broad reopening provision, and the United States Supreme Court has held that modification may be based on new evidence, cumulative evidence, or further reflection on the evidence in the original record. 33 U.S.C. §922; *see Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has repeatedly recognized that the remedial nature of the statute requires a liberal construction to assure widespread benefits to miners, *see Kline v. Director, OWCP*, 877 F.2d 1175, 12 BLR 2-346 (3d Cir. 1989), and that, consistent with *O'Keefe*, the modification provision should be broadly construed to permit a reopening of the case with no limitation on particular factual errors. *Keating*, 71 F.3d at 1123, 20 BLR at 2-62. In view of this authority, we agree with the position of claimant and the Director, that the administrative law judge cannot exclude Dr. Simelaro's report simply because it was available to claimant during a prior proceeding. Consequently, we vacate the administrative law judge's denial of benefits and remand this case for the administrative law judge to admit Dr. Simelaro's report into the record and to consider all evidence for a mistake in fact, including the ultimate fact of entitlement. *See O'Keefe, supra; Keating, supra*. The administrative law judge must then consider whether modification has been established 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 (2000).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge