

BRB No. 04-0334 BLA

RAYMOND D. JONES)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 01/11/2005
)	
DIRECTOR, OFFICE OF WORKERS')	
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

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order on remand (2001-BLA-0493) of Administrative Law Judge Robert D. Kaplan on a request for modification of a duplicate 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 previously.¹ By Decision and Order dated April 30, 2003, the Board affirmed the administrative law judge's finding that claimant failed to establish a change in conditions, but held that the administrative law judge "erred in determining that claimant waived the issue of a mistake in a determination of fact and in failing to review all the relevant evidence of record." *Jones v. Director, OWCP*, BRB No. 02-0525 BLA (Apr. 30, 2003)(unpub.). The Board remanded the case to the administrative law judge, instructing him that unless claimant specifically and affirmatively waived the mistake issue, the administrative law judge should address the issue. *Jones*, slip op. at 4, 7.

¹ The lengthy procedural history of this case is summarized in our prior decisions, *Jones v. Director, OWCP*, BRB Nos. 02-0525 BLA (Apr. 30, 2003), 98-1179 BLA, 98-1179 BLA-A (June 8, 1999), and 87-2607 BLA (June 30, 1989) (unpublished).

On remand, the administrative law judge again found that claimant waived the issue of a mistake in a determination of fact, and thus declined to consider whether there was a mistake in a determination of fact in the prior denial pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that he did not waive the issue of a mistake in a determination of fact and requests that the Board remand the case for the administrative law judge to consider whether there was a mistake in a determination of fact in the prior denial. Additionally, claimant reiterates his arguments, previously rejected by the Board, that the administrative law judge erred in finding that claimant failed to establish a change in conditions.² The Director, Office of Workers' Compensation Programs did not file a response brief.

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 this 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).

Claimant's argument regarding the mistake in a determination of fact issue has merit. The instant case arises within the Third Circuit where the United States Court of Appeals has broadly interpreted 20 C.F.R. §725.310, which sets forth the procedures to obtain modification of a black lung decision without regard to whether the party seeking modification is represented by counsel. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62-63 (3d Cir. 1995). In its prior decision, the Board noted that claimant need only "allege that the ultimate fact of entitlement was wrongly decided," that there is no need for a "'smoking gun' factual error, changed in conditions, or startling new evidence," and that "at a minimum, the administrative law judge must review all of the evidence of record - any new evidence submitted in support of modification, as well as the evidence previously of record - and 'further reflect' on whether any mistakes of fact were made in the previous adjudication of the case." *Jones*, slip op. at 3.

On remand, the administrative law judge conceded that at the hearing claimant did not specifically waive the issue of mistake in a determination of fact, but found that claimant "accepted the condition that if he failed to submit any explanation of the

² Because the Board previously affirmed the administrative law judge's finding that the newly submitted evidence did not establish a change in conditions, and claimant presents no reason to depart from the law of the case on this issue, we need not address claimant's renewed contentions. See *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

foundation for finding a mistake in fact, this avenue was foreclosed to him.” Decision and Order at 4. The administrative law judge found that claimant made no effort to explain what, if any, mistakes were made in the prior denial of the claim at the hearing, did not file a post-hearing brief, provided no argument against waiver in his Response to Director’s Motion to Remand filed with the Board on September 12, 2002 and failed to file a brief after the waiver issue was highlighted in the Board’s Decision and Order. The administrative law judge concluded that claimant “clearly and specifically agreed that if he failed to proffer argument supporting a finding that there was a mistake in a determination of fact that he waived that contention” and that when claimant “failed to submit such argument, his waiver became effective.” *Id.*

Contrary to the administrative law judge’s findings, because claimant contended that the “ultimate fact” was wrongly decided, he need not submit further explanation of the foundation for finding a mistake in a determination fact to raise the issue for decision.³ *Keating*, 71 F.3d at 1123, 20 BLR at 2-62-63; *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). Consequently, we vacate the administrative law judge’s finding that claimant waived the issue of a mistake in a determination of fact and remand the case to the administrative law judge to review the previously submitted evidence and to determine if there was a mistake in a determination of fact, even the ultimate fact of entitlement. *Keating*, 71 F.3d at 1123, 20 BLR at 2-62-63.

³ Moreover, the Board noted previously that the “issue of whether claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) is unchallenged.” *Jones* slip op. at 3 n.3. In the Director’s December 5, 2003 brief to Judge Kaplan, the Director conceded that subsequent to the final denial of claimant’s initial claim in 1989, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Because the Director conceded that claimant established a material change in conditions under Section 725.309 (2000), the administrative law judge has the duty to consider all the record, including the evidence submitted with the previous claim, to determine whether it supports a finding of entitlement. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Allen v. Mead Corp.*, 22 BLR 1-61 (2000).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the 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

REGINA C. McGRANERY
Administrative Appeals Judge