

BRB No. 01-848 BLA

OTTO MESSER)	
)	
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 - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Otto Messer, Manchester, Kentucky, *pro se*.

Jeffrey S. Goldberg (Eugene Scalia, 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:

Claimant, without assistance of counsel, appeals the Decision and Order (00-BLA-00836) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a miner’s request for modification of a previous denial of claims 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). The administrative law judge found that because “this claim was filed after March 31, 1980,” it must be adjudicated under 20 C.F.R. Part 718 (Decision and Order at 4). He then found that claimant had six and three quarters years of coal mine employment (*Id.*); the newly submitted x-ray evidence, in conjunction with the x-ray evidence already in the record, did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) (*Id.* at 6-9); “the overwhelming weight of medical authority . . . as documented by the more qualified physicians of record, demonstrates no evidence of pneumoconiosis, radiographic or otherwise . . .” (20 C.F.R. §718.202(a)(4); *Id.* at 9); and the

medical opinion evidence, objective laboratory data, and claimant's testimony did not establish total disability. 20 C.F.R. §718.204(b)(1)(ii); *Id.* at 9-11. Accordingly, benefits were denied.

Claimant appeals without the assistance of counsel, and in response the Director, Office of Workers' Compensation Programs (the Director) argues that: the administrative law judge erred in finding that the claim was filed after March 31, 1980, but the error is harmless; and the administrative law judge's findings that claimant failed to establish the presence of pneumoconiosis and total disability should be affirmed. However, the Director asserts that he has failed to fulfill his statutory duty to provide claimant with a complete pulmonary evaluation pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b), implemented by 20 C.F.R. §718.101(a)(2001). Therefore, he urges that the case be remanded to the district director to permit the Director to provide claimant with a complete pulmonary evaluation.

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law. 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 order to establish a right to a modification of a denial of benefits a claimant must show either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310 (1999).¹ In determining whether claimant has established a change in conditions, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *See Kovac v. BCNR Mining Corporation*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowica v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989); see also *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). In determining whether there has been a mistake in a determination of fact pursuant to Section 718.310, the administrative law judge must re-evaluate all of the evidence in the record. *Kovac, supra*.

¹ As this claim was pending on January 19, 2001, the revised Section 725.310 regulations do not apply. See 20 C.F.R. §725.2 (2001).

We agree with the Director that the administrative law judge erred in finding that the claim was filed after March 31, 1980, as the record indicates that it was filed in 1975. Director's Exhibit 1.² Therefore, the administrative law judge should have evaluated the

² The procedural history of this case is as follows: Claimant originally filed a claim with the Social Security Administration (SSA) on July 23, 1970. Director's Exhibit 99 n.1. SSA denied this claim on October 15, 1975. *Id.* Claimant then filed a claim with the Department of Labor (DOL) on December 9, 1975. Director's Exhibit 1. On April 4, 1978, while his second claim was still pending, claimant elected SSA review of his first claim under the 1977 Amendments to the Act. Director's Exhibit 99 n.1. SSA again denied the claim and forwarded it to DOL for further review along with the pending claim pursuant to 20 C.F.R. §727.103(c); *Id.* The district director denied the claim, and claimant requested a hearing with the Office of Administrative Law Judges. Director's Exhibits 20, 21. Following that hearing, Administrative Law Judge Jeffrey Tureck issued a Decision and Order which credited claimant with 6.75 years of coal mine employment and found that claimant failed to establish entitlement under 20 C.F.R. Part 410, Subpart D and 20 C.F.R. §410.490. Director's Exhibit 35. Following claimant's appeal, the Board issued a Decision and Order affirming the administrative law judge's denial of benefits. *Messer v. Director, OWCP*, BRB No. 86-1115 BLA (Nov. 30, 1988)(unpub.). Director's Exhibit 49. The Board subsequently denied claimant's motion for reconsideration. Director's Exhibit 51. Claimant appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the Board's Decision and Order. *Messer v. Director, OWCP*, 893 F.2d 1335 (1990)(table); Director's Exhibit 52. Claimant thereafter filed a timely motion for modification with the district director and submitted new evidence. Director's Exhibit 53. Following an administrative denial, Administrative Law Judge Richard D. Mills held a hearing and issued a Decision and Order awarding benefits on June 24, 1992. Director's Exhibit 66. The administrative law judge then denied the Director's motion for reconsideration. Director's Exhibit 70. Following the Director's appeal, the Board vacated the administrative law judge's award and remanded the case to him. *Messer v. Director, OWCP*, BRB No. 92-2713 BLA (May 26, 1994)(unpub.); Director's Exhibit 80. Administrative Law Judge Mills then issued another Decision and Order denying Benefits on November 18, 1994, and also denied claimant's motion for reconsideration. Director's Exhibits 81, 83. Following claimant's appeal, the Board affirmed the administrative law judge's finding that entitlement under Section 410.490 was not established, but remanded the case for him to consider entitlement pursuant to the Part 718 regulations. *Messer v. Director, OWCP*, BRB No. 95-0926 BLA (June 27, 1995)(unpub.); Director's Exhibit 90. On remand, the administrative law judge denied the claim pursuant to those regulations. Director's Exhibit 92. Following claimant's appeal, the Board affirmed the administrative law judge's denial of benefits. *Messer v. Director, OWCP*, BRB No. 96-0911 BLA (October 9, 1996)(unpub.); Director's Exhibit 99. Claimant then filed a second timely motion for modification, which was administratively denied and subsequently denied by Administrative Law Judge Joseph E. Kane on January 22,

evidence in the record under the 20 C.F.R. Part 410 regulations prior to turning to the Part 718 regulations.³ *Knuckles v. Director, OWCP*, 869 F.2d 996 (6th Cir. 1989). However,

1999. Director's Exhibit 110. Thereafter, claimant filed a third timely motion for modification, which was administratively denied. Director's Exhibits 111, 117. Claimant requested a hearing with the Office of Administrative Law Judges. Director's Exhibit 118. Following that hearing, Administrative Law Judge Daniel J. Roketenetz issued a Decision and Order denying benefits. This appeal followed.

³ In the interest of avoiding the repetition of error on remand if the case is again before the administrative law judge, we also note that the administrative law judge's analysis under Section 718.202(a)(4) is inadequate because it does not evidence an independent evaluation of the previously submitted evidence in light of the Section 718.202(a)(4) standard. The initial decision denying claimant benefits in 1986 found the evidence did not establish the existence of pneumoconiosis under Section 410.414 because under Section 410.414(a) claimant did not establish pneumoconiosis by x-ray evidence, Section 410.414(b) was not applicable, and

given the Director's concession that the Department of Labor failed to provide claimant with a complete, credible pulmonary evaluation at government expense as required by the Act and the regulations, the appropriate first step is to remand the case to the district director. 30 U.S.C. §923(b); 20 C.F.R. §718.101(a) (2001); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990) (en banc). Consequently, we vacate the decision of the administrative law judge denying benefits and remand this case to the district director in order to provide claimant with a complete and credible pulmonary evaluation. *See Petry, supra; Hall, supra.*

claimant did not establish a totally disabling chronic respiratory or pulmonary impairment arising out of coal mine employment pursuant to Section 410.414(c). Director's Exhibit 35 at 3-6. Because the language of Section 410.414(c) requires it, the administrative law judge's analysis focused on the failure of claimant to establish total disability and not on evidence of pneumoconiosis. *Id.* In this current request for modification the administrative law judge found generally that the previous evidence did not establish pneumoconiosis, but did not specifically evaluate that evidence in light of Section 718.202(a)(4). 20 C.F.R. §718.202(a)(4). Therefore, we cannot affirm the administrative law judge's finding that claimant failed to prove the existence of pneumoconiosis by medical opinion evidence pursuant to Section 718.202(a)(4).

Accordingly, the Decision and Order denying benefits is vacated and remanded to the district director, Office of Workers' Compensation Programs, for further proceedings 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