

BRB No. 97-1479 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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Pauline Andrews, Frackville, Pennsylvania, *pro se*.

Cathryn Celeste Helm (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹, without the assistance of counsel, appeals the Decision and Order

¹ Claimant 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. The administrative law judge denied benefits on the survivor's claim on July 28, 1995 and claimant filed a petition for modification on

(97-BLA-0316) of Administrative Law Judge Ralph A. Romano denying benefits 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). The administrative law judge found that claimant failed to establish a mistake in a determination of fact and, thus, denied modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs (the Director), responds urging the Board to remand the claim to the administrative law judge for further findings pursuant to Section 725.310.²

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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to 20 C.F.R. §725.310, claimant may, within a year of a final order, request modification of the order. Modification may be granted in a survivor's claim 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, the administrative law judge must consider all of the evidence of record to determine if the evidence 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*; *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

In the instant case, the administrative law judge considered the medical

August 2, 1996. Director's Exhibits 22, 28.

² 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).

opinions of Drs. Spagnolo and Mathur in determining that claimant failed to establish a mistake in a determination of fact pursuant to Section 725.310. Decision and Order at 4. However, the record also contains the report of Dr. Karlavage, who opined that the miner's pneumoconiosis caused his cardiac arrhythmia and worsened his arteriosclerotic heart disease, and brought upon his death in the form of a myocardial infarction and pulmonary failure. Director's Exhibit 20. Because the administrative law judge is required to consider all of the evidence of record in determining whether claimant has established a mistake in a determination of fact pursuant to Section 725.310, and this opinion is supportive of claimant's position, the administrative law judge erred in failing to consider Dr. Karlavage's opinion on modification. *Keating, supra; Nataloni, supra; Kovac, supra; Wojtowicz, supra; O'Keeffe*, 404 U.S. 254. Thus, we vacate the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact, and the denial of benefits, and remand the case for the administrative law judge to consider all of the evidence of record pursuant to Section 725.310.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge