

BRB No. 96-0299 BLA

JOSEPH O. GROSS)

)
Claimant-Petitioner)

)
v.)

)
JEWELL RIDGE COAL COMPANY)

)
Employer-Respondent) DATE ISSUED:

)
DIRECTOR, OFFICE OF WORKERS')

COMPENSATION PROGRAMS, UNITED)

STATES DEPARTMENT OF LABOR)
)

Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Petition for Modification of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Joseph O. Gross, Whitewood, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant¹, without the assistance of counsel², appeals the Decision and Order on Petition for Modification (94-BLA-1061) of Administrative Law Judge Charles P. Rippey denying benefits on a

¹Claimant is Joseph O. Gross, the miner, who filed a claim for benefits on May 12, 1976, which was denied when the Board issued a Decision and Order affirming the administrative law judge's Decision and Order on Remand denying benefits. Director's Exhibit 1; *Gross v. Jewell Ridge Coal Co.*, BRB No. 82-0261 BLA (Dec.

26, 1991)(unpub.). Claimant requested modification of the denial of benefits on October 12, 1992. Director's Exhibit 94.

²Tim White, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested an appeal on behalf of claimant but is not representing him on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, BRB No. 94-3940 BLA (May 19, 1995) (Order).

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 claim is before the Board for the fourth time. The administrative law judge, in considering claimant's modification request, determined that claimant established a material change in conditions, considered all of the newly submitted evidence pursuant to 20 C.F.R. §727.203(a), and found that claimant failed to establish invocation of the interim presumption and entitlement to benefits under 20 C.F.R. Part 410. Accordingly, benefits were denied. On appeal, claimant generally challenges the denial of benefits. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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'Keeffe 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. The district director must review the request and may grant modification if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In the instant case, the administrative law judge considered three newly submitted x-ray reports and determined that claimant established a "material modification of his condition." Decision and Order at 2. The administrative law judge then considered all of the newly submitted evidence and found that it did not support invocation of the interim presumption pursuant to Section 727.203(a). Decision and Order at 2-5.

Initially, we note that the administrative law judge erred in failing to determine whether claimant established a mistake in a determination of fact pursuant to Section 725.310. See *Jessee, supra*. Thus, we vacate the denial of benefits and remand the case for the administrative law judge to consider whether claimant established a mistake in a determination of fact pursuant to *Jessee*.

Further, the administrative law judge erred in determining that claimant failed to establish a change in conditions pursuant to Section 725.310. In determining whether claimant has established a change in conditions pursuant to Section 725.310, 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. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

In this case, the administrative law judge failed to consider the newly submitted evidence in conjunction with the previously submitted evidence. The administrative law judge merely weighed the newly submitted evidence and determined that it was insufficient to establish invocation pursuant to Section 727.203(a). Decision and Order at 2-5. Thus, we vacate the administrative law judge's finding that claimant failed to establish a "material modification in conditions" and instruct him to reconsider whether claimant established a change in conditions pursuant to Section 725.310.

Accordingly, the administrative law judge's Decision and Order on Petition for Modification denying benefits is vacated and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge