

BRB No. 96-1476 BLA

EUGENE LOCKHART)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HARMAN MINING CORPORATION)	
)	
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 of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Eugene Lockhart, Grundy, Virginia, *pro se*.

Terri L. Bowman (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

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

¹Claimant is Eugene Lockhart, the miner, who filed a claim for benefits on September 1, 1983, which was denied on December 31, 1991. Director's Exhibits 1, 94. The Board affirmed the denial of benefits in a Decision and Order issued on June 23, 1993. *Lockhart v. Harman Mining Co.*, BRB No. 92-0868 BLA (Jun. 23, 1993)(unpub.). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, affirmed the Board's Decision and Order on December 7, 1993. Director's Exhibit 103. Claimant filed a petition for modification on October 26, 1994. Director's Exhibit 104.

(95-BLA-1486) of Administrative Law Judge Frederick D. Neusner 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). This claim is before the Board for the second time. The administrative law judge found that claimant failed to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. In the instant appeal, claimant generally contends that the administrative law judge erred in failing to modify the denial of benefits pursuant to Section 725.310. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate on appeal.

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'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. Modification may be granted 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). Further, if a claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the administrative law judge has the authority, without more (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), to modify the denial of benefits. See *Jessee, supra*. In determining whether claimant has established modification 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.*, 16 BLR 1-71 (1992), modifying 14 BLR 1-156 (1990); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

Initially, the administrative law judge found that claimant failed to establish a mistake in a determination of fact pursuant to Section 725.310. The administrative law judge stated:

As the record on its face does not provide a reason for contradicting the findings of Judge McCarthy, the Board, or the Court of Appeals, and because the Claimant did not suggest any reason to modify the decision of Judge McCarthy, further reflection on the existing record fails to support

modification without weighing new evidence of these facts.

Decision and Order at 3-4. The administrative law judge then considered whether claimant established at least one of the elements previously adjudicated against him by weighing the newly submitted evidence against the entire record. The administrative law judge then stated that the new evidence consists of medical records submitted by claimant and medical opinions submitted by employer. Decision and Order at 4; Claimant's Exhibit 1; Employer's Exhibits 1-27. The administrative law judge concluded by stating:

The regulatory remedy requires persuasive evidence and argument in support of the Claimant's position, if he is to be given relief. In brief, no argument directs the trier to evidence that was overlooked or misconstrued or to any reason to modify and alter the findings of fact by Judge McCarthy and no evidence of his deterioration after the end of 1991 appears of record. For these reasons it follows that modification is not supported by the further examination of record, and relief under 20 C.F.R. §725.310 must be denied.

Decision and Order at 4.

However, contrary to the administrative law judge's finding, the record contains newly submitted evidence which supports claimant's position. This evidence, which consists of four positive interpretations of x-rays taken in 1994 and a medical opinion from Dr. Sutherland, dated November 1, 1994, who opines that claimant is totally disabled due to coal workers' pneumoconiosis, was not discussed by the administrative law judge. Director's Exhibits 104, 106, 107, 109. The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). The failure of the administrative law judge to address all relevant evidence, explain his rationale, or clearly indicate the specific statutory or regulatory provisions involved in his decision, requires remand. An administrative law judge must provide a sufficient rationale that explains the relationship between the findings and conclusions and independently evaluate the evidence of record. If there is no independent evaluation of the evidence, the parties are deprived of their rights. *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984). In the instant case, because the administrative law judge failed to discuss all of the relevant evidence of record pursuant to Section 725.310, we must remand the claim for further discussion of the evidence of record pursuant to Section 725.310 in addressing whether claimant has established a change in condition. See *Brewster v. Director, OWCP*, 7 BLR 1-120 (1984); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Ridings v. C & C Coal Co. Inc.*, 6 BLR 1-227, 1-230 (1983); *Zeigler Coal Co. v. Sieberg*, 839 F.2d 1280, 11 BLR 2-80 (7th Cir. 1988);

Arnold v. Secretary of HEW, 567 F.2d 258, 259 (4th Cir. 1977); see also *Peabody Coal Co. v. Helms*, 859 F.2d 486 (7th Cir. 1988).

Additionally, as the administrative law judge stated that claimant did not suggest any reason to modify the prior decision, we must also vacate the administrative law judge's finding that claimant failed to establish a mistake of fact. Decision and Order at 3-4. Under *Jessee, supra*, claimant is not required to allege a specific factual error but may generally allege that the ultimate fact, *i.e.* entitlement, was wrongly decided. Thus, we vacate the administrative law judge's findings pursuant to Section 725.310 and remand the case for the administrative law judge to make an independent assessment of the evidence in determining whether modification is established.

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge