

BRB No. 93-1581 BLA

DWAINE C. RASNAKE )

)  
Claimant-Petitioner )

)  
v. )

)  
YOGI MINING COMPANY )  
) DATE ISSUED:  
Employer-Respondent )

)  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

)  
Party-in-Interest ) DECISION and ORDER

Appeal of the Revised Decision and Order of Frederick D. Neusner,  
Administrative Law Judge, United States Department of Labor.

Gregory M. Wade (Stone Mountain Health Services), Castlewood, Virginia, for  
claimant.

Ramesh Murthy (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for  
employer.

Before: , , and , Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, with the assistance of a lay representative, the Decision  
and Order (87-BLA-1750) of Administrative Law Judge Frederick D. Neusner  
denying modification 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). Claimant filed a claim for benefits on February 16, 1981 which was

denied by the district director on June 17, 1981. No further action was taken on this claim. Claimant filed a second claim for benefits on April 21, 1986. Upon considering this claim pursuant to 20 C.F.R. Part 718, Administrative Law Judge John J. Forbes issued a Decision and Order denying benefits, dated August 15, 1988, in which he determined that claimant established the existence of pneumoconiosis but that claimant failed to establish total disability due to pneumoconiosis. On July 7, 1989, Claimant filed additional evidence, which was deemed a motion for modification. Upon considering the motion for modification pursuant to 20 C.F.R. §725.310, the administrative law judge determined that claimant submitted no evidence or argument concerning a mistake in a determination of fact and that the evidence developed after the 1988 hearing failed to establish a change in conditions. Accordingly, claimant's motion for modification was denied. Claimant appeals this denial. Employer responds in support of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman &*

*Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Upon considering claimant's motion for modification pursuant to Section 725.310, the administrative law judge first determined that because claimant did not offer any evidence or argument concerning a mistake in a determination of fact, his motion for modification must be decided on the basis of his evidence establishing a change in conditions subsequent to the August 15, 1988 Decision and Order. See Decision and Order denying modification at 4. This determination is in error as the United States Court of Appeals for the Fourth Circuit, the circuit in which this claim arose, has held, in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), that the administrative law judge may modify the final order on a claim if a claimant simply alleges that the ultimate fact was mistakenly decided. The Court stated further that there is no need for a "smoking-gun factual error, changed conditions, or startling new evidence." See *Jessee*, 5 F.3d at , 18 BLR at 2-28. Thus, the administrative law judge erred in stating that claimant was required to offer evidence or argument concerning a mistake in a determination of fact. As a result, the administrative law judge's denial of modification pursuant to Section 725.310 is vacated and the case is remanded for the administrative law judge to determine whether there was a mistake in a determination of fact pursuant to Section 725.310.

Prior to determining that claimant failed to establish a change in conditions pursuant to Section 725.310, the administrative law judge stated that the issues decided by Judge Forbes in his 1988 Decision and Order are law of the case and

cannot be relitigated by him. See Decision and Order denying modification at 2. The administrative law judge then considered the medical opinions of Drs. Sutherland and Sargent, both of which were submitted after the 1988 hearing, and stated that this evidence, "which was considered with the law of the case and supplementary findings on the entire record", is insufficient to sustain claimant's burden of proof pursuant to Section 725.310. See Decision and Order denying modification at 5. The administrative law judge's findings are in error, however, as the Board has held that upon considering a claim pursuant to Section 725.310, the administrative law judge's role is to consider any contested issue *de novo*. See *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990). Additionally, the Board has held that, 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. See *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Thus, as the administrative law judge failed to consider the contested issues *de novo* and to consider the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to Section 725.310 is vacated and the administrative law judge is instructed to make further findings regarding whether

claimant established a

change in conditions pursuant to Section 725.310 on remand.

Accordingly, the administrative law judge's Decision and Order denying modification is vacated and the case is remanded for further findings consistent with this opinion.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge