

BRB No. 96-1761 BLA

WALTER E. ELKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
EASTERN ASSOCIATED COAL	)	
CORPORATION	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order Denying Modification of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

Karen Rapaport Esser (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Modification (96-BLA-0812) of Administrative Law Judge Daniel A. Sarno, Jr. 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). Administrative Law Judge Clement J. Kichuk denied claimant's first application for benefits on June 28, 1989 because he found that the medical evidence failed to establish either the existence of pneumoconiosis or total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Claimant did not appeal the denial but instead filed a second application for benefits more than one year after the denial of the first claim. Director's Exhibit 1. Judge Sarno considered and denied

the duplicate claim on the grounds that, although the new evidence established a material change in conditions pursuant to 20 C.F.R. §725.309(d), the medical evidence as a whole failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).

On appeal, the Board affirmed the administrative law judge's denial of benefits as supported by substantial evidence. *Elkins v. Eastern Associated Coal Corp.*, BRB No. 94-0197 BLA (Dec. 22, 1994)(unpub.); Director's Exhibit 71. Claimant filed an appeal with the United States Court of Appeals for the Fourth Circuit which was dismissed for lack of jurisdiction. Director's Exhibits 73, 74. Subsequently, claimant, by counsel, requested modification by letter to the district director dated October 6, 1995. Director's Exhibit 75. Claimant's letter stated that a medical report by Dr. Rasmussen was attached for consideration. *Id.* However, no such report appears with the copy of the modification request in the record. Furthermore, the Director, Office of Workers' Compensation Programs (the Director), and employer state that no report was attached to the copies served on them. Director's Motion at 1; Employer's Brief at 14. The district director forwarded the claim to the administrative law judge without ruling on the modification request, noting that "no new evidence has been submitted." Director's Exhibit 76 at 2.

Judge Sarno denied modification, noting that no new report by Dr. Rasmussen was attached to claimant's modification request. The administrative law judge found that, if claimant was referring to the report by Dr. Rasmussen already in the record, such report was considered previously, and concluded that the record demonstrated no mistake in a determination of fact or change in conditions pursuant to 20 C.F.R. §725.310.

On appeal, claimant argues that the administrative law judge failed to consider the new report by Dr. Rasmussen which, claimant asserts, was submitted with his modification request, and is attached to his brief.<sup>1</sup> Claimant's Brief at 1. Employer responds, urging affirmance. The Director responds, urging that the Board treat claimant's appeal as a request for modification and remand the case to the district director for further proceedings.

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<sup>1</sup> No medical report is attached to the Board's copy of claimant's appeal brief filed on October 28, 1996. As was the case with claimant's modification request, the Director and Employer state that their copies of claimant's brief contain no attachments. Director's Motion at 2; Employer's Brief at 14. By letter dated December 12, 1996, claimant's counsel sent a copy of a September 20, 1995 medical report by Dr. Rasmussen to the Director, employer, the district director, and the Board, apologizing for "any omissions in this regard." Claimant's Letter, Dec. 12, 1996.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

Claimant's sole contention is that the administrative law judge failed to consider the new report by Dr. Rasmussen which claimant asserts was attached to his request for modification. Claimant's Brief at 1. Our review is confined to the record as it was developed below. 20 C.F.R. §802.301. Review of the record as it existed on modification reveals no new report from Dr. Rasmussen, and we see no indication that any party received such a report from claimant's counsel until after he filed this appeal. Therefore, substantial evidence supports the administrative law judge's finding that there was no new report for him to consider.<sup>2</sup> Inasmuch as claimant alleges no other error with respect to the administrative law judge's analysis pursuant to Section 725.310, we affirm his finding that neither a change in conditions nor a mistake in a determination of fact was established on the record before him.<sup>3</sup> See *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Cox v. Benefits Review Board*, 791 F. 2d 445, 9 BLR 2-46 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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<sup>2</sup> We note that claimant did not move for reconsideration in an attempt to bring the allegedly submitted report to the administrative law judge's attention.

<sup>3</sup> Claimant may, within one year of the denial of benefits, file a petition for modification with the district director. 20 C.F.R. §725.310; see *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Accordingly, the administrative law judge's Decision and Order Denying Modification is affirmed.

SO ORDERED.

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BETTY JEAN HALL  
Chief Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge