

Chapter 23

Petitions for Modification under 20 C.F.R. § 725.310

I. Generally

The modification provisions at Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, incorporated into the Black Lung Benefits Act at 30 U.S.C. § 932(a), provide the statutory authority to modify benefits orders. Thus, a decision awarding or denying benefits in a black lung claim may be modified (increased, decreased, or terminated) at the behest of the claimant, employer, or District Director upon demonstrating either (1) a "change in conditions," or (2) a "mistake in a determination of fact." 20 C.F.R. § 725.310.

For a discussion of the evidentiary limitations at 20 C.F.R. §§ 725.310 and 725.414 on modification, see Chapter 4. For a discussion of withdrawal of a petition for modification, see Chapter 26.

A. Proponent of petition carries burden

In *D.S. v. Ramey Coal Co.*, 24 B.L.R. 1-33 (2008), the Board held "the proponent of an order terminating an award of benefits" has the burden of "disproving at least one element of entitlement."

B. Mistake (or change) of law, not a basis for modification

1. Generally

An allegation of a mistake or change of law, however, does not constitute proper grounds for modification. *Donadi v. Director, OWCP*, 12 B.L.R. 1-166 (1989).

2. Circumvention of law, not a proper basis for modification

In *Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317 (4th Cir. 2012) (*Sharpe II*) (C.J. Agee, dissenting), *cert. denied*, Case No. 12-865 (June 24, 2013), the Fourth Circuit upheld the Board's denial of Employer's petition for

modification on grounds that its consideration would “not render justice under the Act.” Among the reasons for denying Employer’s modification petition in the miner’s claim, the court found the motive behind the petition was “patently improper.” It noted, where “a modification request is aimed at thwarting a good faith claim or defense,” consideration of the request does not “render justice under the act.” Here, the court stated:

. . . allowing employers to regularly use modification to evade application of the collateral estoppel doctrine and the irrebuttable presumption of death due to pneumoconiosis would effectively eradicate those entrenched legal principles.

Notably, however, the court determined it would “leave open the question of whether such an improper motive can ever be outweighed by a strong interest in accuracy underlying the modification statute.”

With regard to whether Mrs. Sharpe could invoke the doctrine of “offensive nonmutual collateral estoppel” in her survivor’s claim to bar re-litigation of the existence of complicated coal workers’ pneumoconiosis, the court held she could. The court also concluded the mere filing of a modification petition by Employer in the miner’s claim did not “alter the finality” of the decision awarding benefits; rather, it “pertain[ed]” to a decision that had become final.

C. Discretionary ruling on procedural issue, not a basis for modification

By unpublished decision in *Bowman v. Director, OWCP*, BRB No. 03-0720 BLA (Sept. 10, 2004) (unpub.), the Board held an Administrative Law Judge’s “discretionary determination that the Director established good cause for the untimely submission of Dr. Green’s report is not subject to modification because (the Administrative Law Judge) was resolving a procedural matter that is not within the scope of issues that are subject to modification, *i.e.*, issues of entitlement.” The Board further stated the “proper recourse for correction of error, if any, would have been a timely appeal or motion for reconsideration, neither of which were timely pursued.”

D. Modification available to any party

1. Generally

A modification petition may be filed by the District Director, Claimant, or Employer. In *Branham v. Bethenergy Mines, Inc.*, 21 B.L.R. 1-79 (1988) (J. McGranery, dissenting), Claimant was initially awarded benefits by an

Administrative Law Judge, and the decision was affirmed by the Board. However, Employer filed a petition for modification, and another Administrative Law Judge concluded a "mistake in a determination of fact" had been made such that Claimant was not entitled to benefits. The Board rejected Claimant's argument that Employer's modification request constituted an improper collateral attack on the original Administrative Law Judge's decision.

The Board further held it was proper for the second Administrative Law Judge to reopen the record for the submission of new evidence, stating "[o]ne could hardly find a better reason for rendering justice than that it would be unjust or unfair to require an employer to pay benefits to a miner who does not meet the requirements of the Act." In a dissenting opinion, Judge McGranery asserted modification should not become an avenue for Employer to retry its case, and make "a better showing on the second attempt." She noted Claimant prevailed by a preponderance of the evidence but "Employer, with its superior resources, shifted the balance" on modification. Judge McGranery, therefore, concluded the interests of justice had not been served by reopening the case on modification. *See also King v. Jericol Mining, Inc.*, 246 F.3d 822 (6th Cir. 2001) (modification is available to claimants and employers).

2. Medical examinations and testing on modification

In *Kern v. Walcoal, Inc.*, ___ B.L.R. ___, BRB No. 12-0561 BLA (July 30, 2013), the Board adopted the positions of Claimant and the Director, OWCP to hold Employer was not automatically entitled to have the miner examined and tested in conjunction with its petition for modification. The plain language of 20 C.F.R. § 725.203(d) addresses the duration and cessation of entitlement and provides the following:

Upon reasonable notice, an individual who has been finally adjudged entitled to benefits shall submit any additional tests or examinations the Office deems appropriate, and shall submit medical reports and other relevant evidence the Office deems necessary, *if an issue arises pertaining to the validity of the original award.*

20 C.F.R. § 725.203(d) (italics added). The Board rejected Employer's argument that this regulation is in conflict with 20 C.F.R. § 725.310(b), which provides each party "shall be entitled to submit" certain medical testing and reports on modification. Employer maintained 20 C.F.R. § 725.310(b) should be controlling where a petition for modification is filed.

In support of its decision, the Board cited to language in the preamble; *to wit*, "The Department emphasizes that the responsible operator does not have an absolute right to compel the claimant to submit to a medical examination for purposes of the modification petition." 65 Fed. Reg. 79,920, 79,962 (Dec. 20, 2000). The Board indicated an employer would be entitled to have the miner tested or examined where the "claimant filed a request for modification and obtained a new examination." However, the Board noted, "The present case is distinguishable in that employer filed a request for modification and claimant has not submitted any newly developed medical evidence."

In addressing the standard to be applied by the Administrative Law Judge, the Board stated:

In cases in which the issue has been squarely raised, the Board has held that an administrative law judge must determine, on a case-by-case basis, whether employer has raised a credible issue pertaining to the validity of the original adjudication, such that an order compelling claimant to submit to examinations or tests would be in the interests of justice. *Stiltner v. Wellmore Coal Corp.*, 22 B.L.R. 1-37, 1-40-42 (2000)(en banc); *Selak [v. Wyoming Pocahontas Land Co.]*, 21 B.L.R. 1-173, 1-177-79 (1999)(en banc)].

As a result, the claim was remanded, and the Board directed:

On remand, the administrative law judge must determine whether employer raised a credible issue pertaining to the validity of the original adjudication. . . so that an order compelling claimant to submit to examinations or tests would be in the interest of justice.

. . .

In addition, when the administrative law judge reaches the merits of employer's request for modification, he must be mindful that modification does not automatically flow from a finding that there has been a change in conditions or a mistake in a determination of fact. Modifying an award or denial must additionally render justice under the Act.

Slip op. at p. 11. A petition for review of the Board's decision was filed by Employer with the Fourth Circuit Court of Appeals.

E. Two-level inquiry

For any modification petition, whether filed by the District Director, Claimant, or Employer, the fact-finder must engage in two levels of inquiry. As a threshold matter, the fact-finder must weigh factors such as the diligence and motive of the petitioning party, accuracy of outcome, and the futility of any outcome to a modification proceeding. Then, if it is determined these threshold factors support consideration of the modification petition, the fact-finder must conduct *de novo* review of the claim to determine whether a "mistake in a determination of fact" was made in the prior adjudication and/or, if appropriate, whether a "change in conditions" since the prior adjudication is established.

1. Benefits Review Board

In *D.S. v. Ramey Coal Co.*, 24 B.L.R. 1-33 (2008), motive, diligence, and accuracy must be considered in determining the propriety of a modification petition. In *Branham v. Bethenergy Mines, Inc.*, 21 B.L.R. 1-79 (1998)(J. McGranery, dissenting), the Board expressed a preference for "accuracy" over finality.

2. Fourth Circuit

In *Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317 (4th Cir. 2012) (*Sharpe II*) (C.J. Agee, dissenting), *cert. denied*, Case No. 12-865 (June 24, 2013), the Fourth Circuit upheld the Board's denial of Employer's petition for modification on grounds that its consideration would "not render justice under the Act."

Sharpe I set the stage

In *Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007) (*Sharpe I*), the court remanded Mr. Sharpe's black lung claim and directed, prior to consideration of Employer's petition for modification on the merits, the Administrative Law Judge must make a threshold determination regarding its propriety. To that end, the *Sharpe I* court noted:

. . . a proper exercise of discretion should lead the adjudicators to assess, in addition to the need for accuracy, the diligence and motive of Westmoreland in seeking modification . . . , the possible futility of . . . modification, and other factors that may bear on whether [modification] will 'render justice under the act.'

Sharpe I, 495 F.3d at 134. And, the court set forth a specific series of questions for the Administrative Law Judge to consider on remand:

Why did Westmoreland wait to seek modification under § 725.310(a) until June 2000, two months after Mr. Sharpe's death, and nearly seven years after the BRB had affirmed his living miner's award (a decision that Westmoreland never appealed)?

Should Westmoreland's motive in seeking modification be deemed suspect?

Was the Modification Request part and parcel of Westmoreland's defense in Mrs. Sharpe's claim for survivor's benefits, which had been filed less than two months earlier?

Is the Modification Request futile or moot, in that no overpayments made to Mr. Sharpe could be recovered?

Is the Modification Request akin to a request for an advisory opinion, in that a favorable resolution thereof will have no impact on the living miner's claim?

Id. at 133.

The Administrative Law Judge's Findings on Remand

On remand, the Administrative Law Judge found Employer's modification petition of the award in the miner's claim was proper. He held a hearing, admitted the miner's "Last Will and Testament," and concluded no monies in the miner's estate could be recovered if Westmoreland prevailed in overturning the award on modification.

Nevertheless, the Administrative Law Judge concluded filing of the petition was not futile "because reconsideration of the 1993 finding that Mr. Sharpe suffered from complicated pneumoconiosis 'might be the only way in which Westmoreland could protect itself from an automatic award of benefits in [Mrs. Sharpe's] survivor's claim.'" Here, the Administrative Law Judge explained Mrs. Sharpe may be entitled to application of "offensive nonmutual collateral estoppel" in her survivor's claim to bar re-litigation of the existence of complicated coal workers' pneumoconiosis established in the miner's claim. In essence, he concluded, Mrs. Sharpe would be

automatically entitled to benefits in her claim based on the finding of complicated coal workers' pneumoconiosis in the miner's claim.

At this point, the Administrative Law Judge held "an employer's objective to thwart a survivor's claim (or a potential survivor's claim) is sufficient basis for finding that modification of a miner's claim is not a futile act, regardless of whether the employer could recoup the payment of benefits it made to the miner." He further concluded only Westmoreland was prejudiced by its lack of diligence:

. . . where a party's action is not prohibited by law it should not be precluded simply because the party is motivated by self-interest.

In the end, the Administrative Law Judge found Employer's modification petition was proper, and he reversed his earlier award of benefits in the miner's claim.

The court's reaction in *Sharpe II*

On appeal for the second time, the court emphasized "an ALJ possesses broad – but not unlimited – discretion in ruling on modification requests." Citing to *O'Keefe v. Aerojet-Gen. Shipyards, Inc.*, 404 U.S. 254 (1971), the court agreed "[t]he plain import" of 20 C.F.R. § 725.310 is to allow for correction of mistakes based on new evidence, cumulative evidence, or further reflection on evidence initially submitted. On the other hand, the court stressed "due consideration must yet be given to whether modification would render justice under the Black Lung Benefits Act," which is remedial in nature, and has the purpose of providing benefits to qualified miners and their survivors. As a result, the court stated, "The basic criterion is whether reopening will 'render justice under the act.'"

In considering the propriety of Westmoreland's modification petition, the court found it was undisputed that consideration of the petition was "futile" in the sense that no monies could be recovered from the miner's estate even if Westmoreland was successful. Beyond this, the court found the motive behind the petition was "patently improper." It noted, where "a modification request is aimed at thwarting a good faith claim or defense," consideration of the request does not "render justice under the act." Here, the court stated:

. . . allowing employers to regularly use modification to evade application of the collateral estoppel doctrine and the

irrebuttable presumption of death due to pneumoconiosis would effectively eradicate those entrenched legal principles.

Notably, however, the court determined it would “leave open the question of whether such an improper motive can ever be outweighed by a strong interest in accuracy underlying the modification statute.”

With regard to whether Mrs. Sharpe could invoke the doctrine of “offensive nonmutual collateral estoppel” in her survivor’s claim to bar re-litigation of the existence of complicated coal workers’ pneumoconiosis, the court held that she could. The court stated mere filing of a modification petition by Employer in the miner’s claim did not “alter the finality” of the decision awarding benefits; rather, it “pertain[ed]” to a decision that had become final.

3. Sixth Circuit

By unpublished decision in *Wilson v. Peabody Coal Co.*, BRB No. 09-0770 BLA (Aug. 11, 2010)(unpub.), a case arising in the Sixth Circuit, the Board affirmed the Administrative Law Judge’s denial of Employer’s petition for modification because reopening the claim would not “render justice under the Act.” In particular, the miner was awarded benefits by an original deciding Administrative Law Judge, and the award was affirmed by the Board on appeal.

On modification, Employer asserted the original deciding Administrative Law Judge made a mistake in a determination of fact in weighing the chest x-ray evidence. In the original claim, Employer did not provide the *curriculum vitae* of two of its physicians documenting that they were board-certified radiologists and NIOSH-certified B-readers, but it sought to do so in conjunction with the modification proceeding. In denying Employer’s modification petition, the Administrative Law Judge properly concluded Employer “showed a lack of diligence from the beginning of this claim when it disregarded—either through ignorance or indifference—the well-established rule that a party must prove the credentials of its experts.” The Administrative Law Judge noted Employer had multiple opportunities to cure this deficiency, including while the original claim was pending before the District Director and Administrative Law Judge.

Citing to *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 B.R.B.S. 68 (1999), Employer argued its modification petition cannot be denied solely because evidence was available at an earlier stage in the proceeding. The Board recognized, however, “the interest in arriving at the ‘correct’ result does not always override the interest in finality.” As a result,

in *Wilson*, the Board concluded Employer's modification petition was properly denied:

The facts here – where the employer failed to submit critical evidence, then attempted to use modification to correct the oversight – are similar to those in *Kinlaw*, where the Board upheld the administrative law judge's finding that reopening the claim would not render justice under the Act, because the employer there was attempting to correct its own mistake in failing to develop its expert's testimony in the initial litigation. *Kinlaw*, 33 BRBS at 73-75. Detecting no abuse of discretion, we affirm the administrative law judge's finding that employer exhibited a lack of diligence in establishing the radiological qualifications of its experts.

Slip op. at 10. The Board agreed Employer's motive in requesting modification was improper as it sought to "remedy its own failure to timely submit the radiological qualifications of its experts, *i.e.* its own litigation mistake."

4. Seventh Circuit

The Seventh Circuit Court of Appeals, in *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533 (7th Cir. 2002)(J. Wood, dissenting), discussed the criteria an Administrative Law Judge should consider on modification. Employer filed a second petition for modification of an award of survivor's benefits based, in part, on evidence which could have been submitted at the original hearing, or during an earlier modification proceeding. The Administrative Law Judge denied Employer's petition for modification on grounds it was not in the interests of justice under the Act. She reasoned all of the evidence that Old Ben proffered, or attempted to obtain in the second modification proceeding, was available during the first modification proceeding, and a modification proceeding is not intended to allow a party to simply retry its case when it thinks it can make a better showing by presenting evidence that it could have, but did not present earlier. The Administrative Law Judge concluded, "To do so would allow the Employer, under the guise of an allegation of mistake, to retry its case simply because it feels that it can make a better showing the next time around."

Ultimately, the claim was appealed to the Seventh Circuit. Here, the Director argued in support of Old Ben; *to wit*, the Administrative Law Judge and Board applied the incorrect legal standard, and the Administrative Law Judge should be required to reopen the matter and reevaluate the award of

benefits. The Director argued a timely requested modification of a mistaken decision should be denied only if the moving party has engaged in such contemptible conduct, or conduct that renders its opponent so defenseless, it could be said that correcting the decision would not render justice under the Act.

The Seventh Circuit accepted the position of Old Ben and the Director. The court found it owed deference to the Director's position. Citing the Supreme Court decisions in *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459 (1968) and *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1972), the court concluded "a broad reading of Section 22" permits reconsideration of the ultimate question of fact without submitting any new evidence. From this, the court determined the language, structure and case law interpreting Section 22 articulates a preference for accuracy over finality in the substantive award.

The court held, "[W]hether requested by a miner or an employer, a modification request cannot be denied out of hand based solely on the number of times modification has been requested or on the basis that the evidence may have been available at an earlier stage in the proceeding." The Court then discussed the factors to be considered in determining whether granting modification serves justice under the Act:

. . . we do not believe that only sanctionable conduct constitutes the universe of actions that overcomes the preference for accuracy. For example, just as the remedial purpose of the Act would be thwarted if an ALJ were required to brook sanctionable conduct, the purpose also would be thwarted if an ALJ were required to reopen proceedings if it were clear from the moving party's submissions that reopening could not alter the substantive award. So too, an ALJ would be entitled to determine that an employer was employing the reopening mechanism in an unreasonable effort to delay payment.

. . .

In making that determination, the ALJ will no doubt need to take into consideration many factors including the diligence of the parties, the number of times that the party has sought reopening, and the quality of the new evidence which the party wishes to submit. These and other factors deemed relevant by the ALJ in a particular case ought to be weighed not under an amorphous 'interest of justice' standard, but under the frequently articulated 'justice under the Act' standard, *O'Keefe*, 404 U.S. at 255. This distinction is not simply one of

semantics. The latter formulation cabins the discretion of the ALJ to keep in mind the basic determination of Congress that accuracy of determination is to be given great weight in all determinations under the Act.

The court reiterated "finality simply is not a paramount concern of the Act," and it remanded the case because "the ALJ gave no credence to the statute's preference for accuracy over finality . . ."

See also Zeigler Coal Co. v. Director, OWCP [Villain], 312 F.3d 332, 334 (7th Cir. 2002).

F. Petition for modification of denial of subsequent claim, standard of review

By unpublished decision in *Reed v. Markfork Coal Co.*, BRB No. 10-0170 BLA (Feb. 22, 2011)(unpub.), the Administrative Law Judge applied the proper legal standard for considering the miner's petition for modification of the denial of a subsequent claim. Citing to *Hess v. Director, OWCP*, 21 B.L.R. 1-141 (1998), the Board stated "the (threshold) issue properly before the administrative law judge was whether the new evidence submitted with the request for modification, establishes a change in an applicable condition of entitlement." Here, because the original claim was denied for failure to demonstrate a totally disabling respiratory impairment, the Board held the Administrative Law Judge properly found this threshold issue met on grounds that newly submitted evidence established the presence of complicated pneumoconiosis.

In a case arising under the pre-amendment regulations, *J.P.L. v. Shady Lane Coal Corp.*, BRB No. 07-0941 BLA (Aug. 28, 2008) (unpub.), the Board held, in "considering a request for modification of the denial of a duplicate claim, which was denied based upon a failure to establish a material change in conditions, the administrative law judge must determine whether the evidence developed in the duplicate claim, including any evidence submitted with the request for modification, establishes a material change in conditions."

G. Modification of attorney fee award, not permitted

By unpublished decision in *Crabtree v. Queen Anne Coal Co.*, BRB No. 10-0301 BLA (Jan. 31, 2011)(unpub.), the Board upheld the Administrative Law Judge's order dismissing Employer's petition for modification of an attorney fee award. On appeal, Employer maintained the Administrative Law Judge was obliged to determine whether the fee award contained a

"mistake in a determination of fact" regarding Claimant's counsel's hourly rate. The Board disagreed. Citing to *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 B.R.B.S. 41 (1997), the Board held an attorney fee award "does not concern 'compensation' or 'the terms of an award or denial of benefits' as required under Section 22 of the Longshore and Harbor Workers' Compensation Act," such that the award is not subject to modification.

II. Procedural issues

A. One year time limitation

Modification may be sought at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim. 20 C.F.R. § 725.310(a).

1. Denial by Administrative Law Judge, effective when "filed" with District Director

In *Wooten v. Eastern Assoc. Coal Corp.*, 20 B.L.R. 1-20 (1996), the Administrative Law Judge held a modification petition was untimely because he issued a decision and order denying benefits on June 23, 1992, the decision was filed with the District Director on July 1, 1992, and Claimant did not file a modification petition until June 23, 1993. Citing to the language 20 C.F.R. § 725.310, the Administrative Law Judge concluded Claimant should have filed the petition before one year lapsed from the date of denial of the claim and, therefore, the petition was "one day late." The Board reversed to state the following:

We . . . construe the phrase, 'denial of a claim' in Section 725.310 to mean the 'effective' denial of a claim pursuant to Section 21(a) of the Longshore Act and Section 725.479(a). Because a decision and order becomes effective only when filed in the office of the district director, we agree with the Director that the time within which to seek modification is one year from the date on which the decision and order is filed, not from its issuance date.

Thus, the claim was remanded for consideration of Claimant's timely petition.

2. Denial by Benefits Review Board, effective when issued

In *Gross v. Dominion Coal Corp.*, 22 B.L.R. 1-8 (2003), the one-year time period for filing a modification petition of the Board's denial is from the date the denial became effective, *i.e.* the date on which the decision is filed with the Clerk of the Board (the same date on which the decision is issued). 20 C.F.R. §§ 802.403(b), 802.406, 802.407(a), and 802.410(a); *Stevedoring Servs. of America v. Director, OWCP [Mattera]*, 29 F.3d 513 (9th Cir. 1994); *Butcher v. Big Mountain Coal, Inc.*, 802 F.2d 1506 (4th Cir. 1986); *Pifer v. Florence Mining Co.*, 8 B.L.R. 1-498 (1986).

3. For claims filed on or before January 19, 2001

a. Seven days added for mailing

In *Oreder v. Paramont Mining Co.*, BRB No. 88-1835 BLA (Dec. 27, 1990)(unpub.), a pre-amendment claim, the Board held modification petitions sent by mail are allowed one year and seven days for filing pursuant to 20 C.F.R. § 725.311(c) of the regulations. The provisions at 20 C.F.R. § 725.311(c) (2000) state, "Whenever any notice, document, brief or other statement is served by mail, 7 days shall be added to the time within which a reply or response is required to be submitted." 20 C.F.R. § 725.311(c).

b. Transfer liability from Trust Fund, filing within one year of last payment

In *USX Corp. v. Director, OWCP*, 978 F.2d 656 (11th Cir. 1992), the Eleventh Circuit held, where the District Director erroneously transfers liability from Employer to the Trust Fund, the Department of Labor's request for modification under 20 C.F.R. § 725.310 to transfer liability back to Employer is timely only if filed within one year of Employer's last payment, and not the last payment by the Trust Fund.

c. Circuit court opinion "final" when petition for rehearing denied

In *Youghioghny and Ohio Coal Co. v. Milliken*, 200 F.3d 942 (6th Cir. 1999), *cert. denied*, 121 S. Ct. 58 (2000), the Sixth Circuit held Claimant filed a timely request for modification on February 5, 1990, where the circuit court issued its decision on January 23, 1989, and then denied Claimant's untimely petition for rehearing on March 23, 1989. The circuit court held its

affirmance of the denial of benefits was not "final" until it issued the March 1989 mandate denying Claimant's petition for rehearing.

4. For claims filed after January 19, 2001

a. Applicability

In *Gross v. Dominion Coal Corp.*, 22 B.L.R. 1-8 (2003), the Board applied the amended time computation provisions at 20 C.F.R. § 725.311 to a petition for modification filed after January 19, 2001, which related to a claim pending on January 19, 2001. 20 C.F.R. § 725.2.

b. Seven days not added for mailing

In *Gross v. Dominion Coal Corp.*, 22 B.L.R. 1-8 (2003), the Board held, under the amended regulations, Claimant's modification petition had to be filed within one year of the date of issuance of the Board's denial, and the Administrative Law Judge is not permitted to add seven days to the modification period. In footnote 5 of its decision, the Board stated the "Director deleted the seven-day grace period rule in part because it had generated confusion as to the deadline for filing a modification petition. 65 Fed. Reg. 79,920, 79,977 (Dec. 20, 2000)."

c. Saturdays, Sundays, and holidays, effect of

In *Gross v. Dominion Coal Corp.*, 22 B.L.R. 1-8 (2003), the Board issued its denial of Claimant's appeal on November 6, 1998. Claimant was required to file his modification petition by November 6, 1999. However, because November 6, 1999 was a Saturday, Claimant had until Monday, November 8, 1999 to file the petition.

B. Multiple modification petitions permitted

1. Benefits Review Board

In *Garcia v. Director, OWCP*, 12 B.L.R. 1-24 (1988), the Board held "the one year period for modification set forth in § 725.310 begins to run anew from the date of each denial." Thus, the *Garcia* decision permits the filing of multiple modification petitions relating back to a single claim, thereby affording any party the opportunity to continually submit new evidence or arguments for consideration under the less stringent modification standard at 20 C.F.R. § 725.310 as opposed to the standard for multiple claims at 20 C.F.R. § 725.309.

The Board in *Garcia* noted the regulations provide "for the continued availability of modification proceedings within one year following a denial by the (District Director) even after the (District Director) has considered modification once." Citing its own cases, the Board asserted "[f]urther justification for this conclusion is the rule that a party may request modification of the denial of a claim by the Administrative Law Judge within one year after the conclusion of appellate proceedings."

2. Fourth Circuit

In *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999), the circuit court rejected Employer's arguments that (1) a petition for modification "is available for one year after the first rejection of a claim," and (2) multiple petitions for modification are not permitted. The court held, to the contrary, the "modification procedure is flexible, potent, easily invoked, and intended to secure 'justice under the act.'" It determined multiple modification petitions may be filed in a single claim.

C. Informal communication sufficient to constitute petition for modification

As opposed to a subsequent claim under 20 C.F.R. § 725.309, which requires the filing of a formal application for benefits (*i.e.* Form CM-911), any communication, no matter how informal, may serve as a request for modification under 20 C.F.R. § 725.310.

In *Cobb v. Schirmer Stevedoring Co.*, 2 B.R.B.S. 132 (1975), *aff'd*, 577 F.2d 750 (9th Cir. 1978), a phone call from Claimant (memorialized by the District Director), wherein Claimant stated he was dissatisfied with his compensation, constituted a request for modification. And, in *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942 (6th Cir. 1999), *cert. denied*, 121 S. Ct. 58 (2000), the Sixth Circuit concluded a letter, wherein Claimant stated she *intended* to file a petition for modification, was sufficient to constitute a modification request at 20 C.F.R. § 725.310.

1. Survivor's claim may qualify as modification petition

Under some circumstances, a survivor's claim, filed within one year of the administrative denial of a miner's claim, may be construed as a request for modification of the denial of the miner's claim. *Kubachka v. Windsor Power Coal Co.*, 11 B.L.R. 1-171, 1-173 n. 1 (1988).

2. Submission of work evaluation questionnaires

The Third Circuit held, in an unpublished decision, Claimant's submission of "work evaluation questionnaires" constituted a request for modification. *USX Corp. v. Director, OWCP*, Case No. 94-3122 (3rd Cir. Sept. 29, 1994)(unpub.). The court reasoned, "Because of the informal nature of the proceedings and the remedial nature of the Act, the courts that have considered this issue have given the claimant wide latitude." The court further stated, "A claimant need not use 'magic words' when requesting modification."

3. Must be filed by a party

The Third Circuit held an informal communication must come from the District Director, or one of the parties to constitute a petition for modification. Thus, a letter from claimant's doctor was not a modification petition. *Bethenergy Mines, Inc. v. Director, OWCP and Delores Koscho*, Nos. 91-3330 and 89-2750 (3rd Cir. Apr. 2, 1992) (unpub.).

D. Exclusion of evidence on modification

1. For claims filed on or before January 19, 2001

In *Shertzer v. McNally Pittsburgh Manufacturing Co.*, BRB No. 97-1121 BLA (June 26, 1998) (unpub.), the Board held the Administrative Law Judge erred in admitting evidence submitted on modification where the evidence was in existence at the time the Administrative Law Judge issued his original decision. Specifically, the Board concluded certain *Director's Exhibits* should not have been admitted as evidence on modification because "this evidence was in existence but was not made available to the administrative law judge at the time the administrative law judge issued his 1994 Decision and Order." The Board stated 20 C.F.R. § 725.456(d) and *Wilkes v. F&R Coal Co.*, 12 B.L.R. 1-1 (1988) "mandates the exclusion of withheld evidence in the absence of extraordinary circumstances."

However, the Board issued a contrary unpublished decision in *Andrews v. Director, OWCP*, BRB No. 02-0228 BLA (Dec. 23, 2002) (unpub.), a case involving a survivor's claim applying the pre-amendment regulations. The Board held it was error for the Administrative Law Judge to exclude a medical report submitted by Claimant to establish a mistake in a determination of fact under 20 C.F.R. § 725.310, where the medical report was available (and could have been submitted) at the time of the original hearing. The Board agreed with Claimant and the Director that the Administrative Law Judge "should not have excluded Dr. Simelaro's report

from the record on the sole ground that this evidence should have been submitted in earlier proceedings."

2. For claims filed after January 19, 2001

The language at 20 C.F.R. § 725.456(b)(1) requires the exclusion of evidence on the responsible operator issue in the absence of "extraordinary circumstances." On the other hand, the amended regulatory provisions at 20 C.F.R. § 725.414 no longer prohibit withholding medical evidence at the District Director's level, and then presenting the evidence to the Administrative Law Judge.

E. Medical reexamination on modification

1. For claims filed on or before January 19, 2001

In *Selak v. Wyoming Pocahontas Land Co.*, 21 B.L.R. 1-173 (1999) (en banc), the Administrative Law Judge erred in concluding Employer was not entitled to a reexamination of Claimant in support of Employer's modification petition because "the matter was within the district director's discretion." The Board noted, "While the regulations do not afford employer an absolute right to compel an examination of the miner at any time, if an employer proffers some evidence to demonstrate that its request to have claimant re-examined is reasonable under the circumstances it may request to have the miner re-examined." The Board further stated, "When a claimant declines a re-examination, employer bears the burden of demonstrating that the refusal is unreasonable."

In *Selak*, benefits were awarded under 20 C.F.R. Part 727. Because of Claimant's uncontrollable blackouts caused by epilepsy, rebuttal under 20 C.F.R. § 727.203(b)(2) was not available. Subsequently, Employer learned Claimant worked as a driver for an assisted-living group, which "suggested that his non-respiratory totally disabling impairment . . . was under control and . . . was no longer totally disabling." As a result, the claim was remanded to the Administrative Law Judge for *de novo* consideration of Employer's request for re-examination of the miner in support of its modification petition. See also *Stiltner v. Wellmore Coal Corp.*, 22 B.L.R. 1-37 (2000) (en banc on recon.).

By unpublished decision in *Caudill v. Cumberland River Coal Co.*, BRB No. 00-1185 BLA (Sept. 26, 2001)(unpub.), *aff'd.*, 2006 WL 3345416, Case No. 05-3680 (6th Cir., Nov. 17, 2006) (unpub.), the Board cited its decisions in *Stiltner v. Wellmore Coal Corp.*, 22 B.L.R. 1-37, 1-40-42 (2000) (en banc) and *Selak v. Wyoming Pocahontas Land Co.*, 21 B.L.R. 1-173, 1-

177-78 (1999)(en banc), and held it is within the Administrative Law Judge's discretion to order reexamination of a miner on modification. The Board stated the issue to be determined by the Administrative Law Judge is whether Employer raised a credible issue pertaining to the validity of the original adjudication such that an order compelling a claimant to submit to examinations or tests on modification would be in the interest of justice. This holding was based on pre-amendment regulations at 20 C.F.R. § 718.404(b) (2000), which appear in similar form under the amended regulations at 20 C.F.R. § 725.203(d). Moreover, the Board held, because the District Director listed "modification" as an issue on the CM-1025, the parties need not move to amend the CM-1025 to specifically include the medical issues of entitlement. Rather, the Board concluded a petition for modification "includes whether the ultimate fact of entitlement was correctly decided."

2. For claims filed after January 19, 2001

Under the amended regulations, each party is entitled to submit one medical opinion on modification (which may require examination of the miner). 20 C.F.R. §§ 725.310 and 725.414. *But see* the discussion of *Rose v. Buffalo Mining Co.*, 23 B.L.R. 1-221 (2007), and related cases at Chapter 4. In *Rose*, the Board held:

[W]here a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. § 725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit additional medical evidence allowed by 20 C.F.R. § 725.310(b).

Id. at 1-228. *But see* page 23.3 for special considerations regarding medical examinations and testing on modification.

F. Failure to timely controvert original claim; limitation on scope of modification

See Chapters 26 and 28 for further discussion of the failure to timely controvert a claim.

1. For claims filed on or before January 19, 2001

In *Eastern Assoc. Coal Corp. v. Director, OWCP [Duelley]*, Case No. 03-1604 (4th Cir. July 29, 2004) (unpub.), the court held, where Employer

failed to establish "good cause" for its failure to timely controvert a claim, it could not seek reconsideration of the merits of the claim on modification. The court reasoned Employer "may not use a motion for modification to circumvent the consequences of its failure to file a timely controversion." The only issue properly considered on modification under the circumstances is whether the adjudication officer properly found "good cause" was not established for failure to timely controvert the original claim.

In *Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472 (6th Cir. 2009), Employer was barred from re-litigating the issue of its untimely controversion on modification at 20 C.F.R. § 725.310. The court reasoned "there would be little use in having a default provision (at § 725.413(b)) in the first place if everything could be reopened by a subsequent request for modification."

Under the facts of the case, the court noted, in connection with the miner's 1993 subsequent claim, Employer failed to file a controversion within the prescribed 30-day time period. As a result, the Administrative Law Judge awarded benefits. The court upheld the finding that Employer failed to timely controvert the miner's 1993 claim, and the miner was awarded benefits. Moreover, the court held Employer's explanation that "notice of the initial award got 'lost-in-the-shuffle'" did not constitute "good cause" sufficient to waive the 30 day time deadline at 20 C.F.R. § 725.413(b) (1993). The court stated:

To this day, Arch has offered little to support its good-cause argument—there are no affidavits or other evidence in the record that would provide some detail to the attorney's vague assertion of a personnel problem.

. . .

Here, without any evidence explaining why or how the purported personnel problems caused the missed deadline or any evidence of the counsel's diligence once the problem was identified, it cannot be said that the ALJ abused her discretion in denying Arch's request to file an untimely controversion.

2. For claims filed after January 19, 2001

In *Clark v. Old Ben Coal Co.*, BRB No. 10-0658 BLA (July 26, 2011)(unpub.), Employer filed a petition for modification of a survivor's claim, which was awarded based on Employer's failure to timely respond to notices issued by the District Director. The Administrative Law Judge held modification constituted an improper avenue of relief for this purpose, and

the modification petition was denied. On appeal, the Board disagreed. It held, on remand, the Administrative Law Judge must determine whether Employer “excusable neglect” for its failure to timely respond to the District Director’s notices such that it was entitled to litigate the survivor’s claim on the merits. And, if “excusable neglect” is not established, the Board directed that the Administrative Law Judge consider Safeco’s modification petition under 20 C.F.R. § 725.310.

Notably, where the pre-amendment regulations penalized an employer for failure to “timely controvert” a claim, the Board held the amended regulations contain no such penalty:

The administrative law judge appeared to have applied the provisions of the regulation at 20 C.F.R. § 725.413 (2000), which have since been deleted, and their contents incorporated into 20 C.F.R. § 725.412. See 20 C.F.R. §§ 725.412, 725.413. Section 725.413 (2000) provided that “[i]n a case where an operator has failed to respond to notification, such failure shall be considered a waiver of such operator’s right to contest the claim, unless the operator’s failure to respond to notice is excused for good cause shown

Slip op. at 8, n. 7.

III. Commencement with the District Director

Modification proceedings are initiated before the District Director, not an Administrative Law Judge or the Benefits Review Board. 20 C.F.R. § 725.310(b). At the conclusion of modification proceedings, the District Director may issue a proposed decision and order, forward the claim for a hearing, or, if appropriate, deny the claim by reason of abandonment. 20 C.F.R. § 725.310(c).

Prior to 1972, the District Director had full adjudicatory authority over claims, including modifications. However, the 1972 Amendments vested adjudicatory authority over claims with the Office of Administrative Law Judges and, consequently, in *Craig v. United Church of Christ, Commission on Racial Justice*, 3 B.L.R. 1-300 (1981), and *Curry v. Beatrice Pocahontes Co.*, 3 B.L.R. 1-306 (1981), the Board held the District Director had no authority to modify an award of an Administrative law Judge. This principle was subsequently upheld in *Cornelius v. Drummond Coal Co.*, 9 B.L.R. 1-40 (1986).

A. The Benefits Review Board

Any petition for modification must be initiated with the District Director for an initial determination of all issues raised. *Ashworth v. Blue Diamond Coal Co.*, 11 B.L.R. 1-167 (1988).

B. Circuit courts of appeals

Several circuit courts of appeals conclude modification proceedings must commence with the District Director. *Saginaw Mining Co. v. Mazzuli*, 818 F.2d 1278 (6th Cir. 1987); *Director, OWCP v. Peabody Coal Co. (Sisk)*, 837 F.2d 295 (7th Cir. 1988); *Director, OWCP v. Palmer Coking Coal Co. (Manowski)*, 867 F.2d 552 (9th Cir. 1989); *Lee v. Consolidation Coal Co.*, 843 F.2d 159 (4th Cir. 1988); *Director, OWCP v. Kaiser Steel Corp. (Aupon)*, 860 F.2d 377 (10th Cir. 1988); *Director, OWCP v. Drummond Coal Co. (Cornelius)*, 831 F.2d 240 (11th Cir. 1987).

IV. Review by the Administrative Law Judge

A. De novo review

In evaluating a request for modification under 20 C.F.R. § 725.310, it is not enough that the Administrative Law Judge conduct a substantial evidence review of the District Director's findings. Rather, the parties are entitled to *de novo* consideration of the issues. *Kovac v. BCNR Mining Corp.*, 14 B.L.R. 1-156 (1990), *aff'd on recon.*, 16 B.L.R. 1-71 (1992); *Dingess v. Director, OWCP*, 12 B.L.R. 1-141 (1989); *Cooper v. Director, OWCP*, 11 B.L.R. 1-95 (1988). *See also* 20 C.F.R. § 725.310(c).

B. Entitlement to a hearing

1. For claims filed on or before January 19, 2001

a. Benefits Review Board

In *Pukas v. Schuylkill Contracting Co.*, 22 B.L.R. 1-69 (2000), the Board determined an Administrative Law Judge is required to hold a hearing on modification, even though the petition for modification was filed with the District Director. Only when all parties waive their right to a hearing, or request summary decision, may the Administrative Law Judge not hold a hearing. *See also Gump v. Consolidated Coal Co.*, BRB Nos. 98-0453 BLA and 94-0578 BLA (Dec. 18, 1998) (unpub.) (Employer entitled to an oral hearing on modification).

b. Sixth and Seventh Circuits

The Sixth and Seventh Circuits hold a hearing is required on modification, unless waived by the parties in writing. In *Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7th Cir. 1994), the court held it was error for the Administrative Law Judge to deny Claimant's request for a hearing on modification. In so holding, the court stated:

Given Dr. Fitzpatrick's reading of the recent x-ray as positive for pneumoconiosis, the validity of Dr. Hessel's analysis should have been determined after a hearing. Instead, the ALJ improperly substituted his judgment for that of a qualified physician.

. . .

Congress obviously intended that the weighing of conflicting evidence be done after a hearing on whether to award benefits When a full hearing has been held, the ALJ may then make an informed determination. At such a hearing, Drs. Hessel and Fitzpatrick may testify and be questioned, and other evidence not involving rereadings may be received.

In *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388 (6th Cir. 1998), the Sixth Circuit held the Administrative Law Judge, to whom a black lung claim was reassigned, erred in denying Claimant an oral hearing on modification. In support of its conclusion, the Sixth Circuit cited to the Act and regulations and stated, *inter alia*, a party is entitled to a hearing on request, and the District Director must forward the file to the Office of Administrative Law Judges. It also cited to *Lukman v. Director, Office of Workers' Compensation Programs*, 896 F.2d 1248 (10th Cir. 1990), a case involving a subsequent claim under 20 C.F.R. § 725.309, and to *Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7th Cir. 1994).

The Sixth Circuit found, because the original deciding Administrative Law Judge was no longer with the agency, a modification case was properly reassigned to another Administrative Law Judge after notice was provided to the parties. Claimant argued "that it was error to change the ALJ assigned to his case during the pendency of his proceeding." The court cited to 29 C.F.R. § 18.30, which authorizes the Chief Administrative Law Judge to reassign a claim where the original deciding Administrative Law Judge is no longer available. It then concluded, "As no party objected to the reassignment after notice and because the proper procedures for reassignment were followed, we find no merit in Cunningham's argument."

Again, in *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425 (6th Cir. 1998), the court held an Administrative Law Judge is required to hold an oral hearing on modification:

A hearing is not necessary if all parties give written waiver of their rights to a hearing and request a decision on the documentary record. (citation and footnote omitted). The only other instance in the regulations which permits a decision without holding a requested hearing is when a party moves for summary judgment, and the ALJ determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See 20 C.F.R. § 725.452(c). As the Director points out, '[t]here is no regulatory provision which would permit an administrative law judge to initiate summary judgment proceedings sua sponte.' (citation omitted).

2. For claims filed after January 19, 2001

The amended regulations at 20 C.F.R. § 725.452(d) require an oral hearing be held in every claim, unless (1) summary judgment is issued, or (2) the parties fail to timely respond to the Administrative Law Judge's notice of intent to decide the matter without an oral hearing:

If the administrative law judge believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the administrative law judge shall notify the parties by written order and allow at least 30 days for the parties to respond. The administrative law judge shall hold the oral hearing if any party makes a timely request in response to the order.

20 C.F.R. § 725.452(d).

C. Proper review of the record

1. "Change in conditions"

a. Defined

The circuit courts and Benefits Review Board hold, for purposes of establishing modification, the phrase "change in conditions" refers to a change in the claimant's physical condition. See *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982); *Director, OWCP v. Drummond*

Coal Co., 831 F.2d 240 (11th Cir. 1987); *Lukman v. Director, OWCP*, 11 B.L.R. 1-71 (1988) (*Lukman II*).

Even if no new evidence is submitted, or newly submitted evidence does not support a change in condition, the fact-finder must review the entire record to determine whether a "mistake in a determination of fact" has been made. See e.g., *Amax Coal Co. v. Franklin*, 957 F.2d 355 (7th Cir. 1992) (letter from miner's physician indicating that the miner may have black lung disease did not establish a "change in conditions," but was sufficient to warrant reopening the claim based upon a "mistake in a determination of fact"). For further discussion of "mistake in a determination of fact," see this chapter, *infra*.

b. Scope of review

In determining whether a "change in conditions" is established, the fact-finder must conduct an independent assessment of the newly submitted evidence (all evidence submitted subsequent to the prior denial), and consider it in conjunction with the previously submitted evidence to determine if the weight of the new evidence is sufficient to demonstrate an element of entitlement previously adjudicated against a claimant. *Kingery v. Hunt Branch Coal Co.*, 19 B.L.R. 1-6 (1994) ("change in conditions" not established where the existence of pneumoconiosis by chest x-ray was demonstrated in the original claim, and claimant merely submitted additional positive x-ray readings on modification); *Napier v. Director, OWCP*, 17 B.L.R. 1-111 (1993); *Nataloni v. Director, OWCP*, 17 B.L.R. 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 B.L.R. 1-156 (1990), *aff'd on recon.*, 16 B.L.R. 1-71 (1992).

And, even if a "change in conditions" is not established, evidence in the entire claim file must be reviewed to determine whether a "mistake in a determination of fact" was made. This is required even where no specific mistake of fact has been alleged. *Worrell, supra*; *Jessee, supra*; *Kingery, supra*; *Kovac, supra*.

c. Submission of "new" evidence required to support change in condition

- Change cannot be based on evidence pre-dating prior decision

On reconsideration in *Kovac, supra*, the Board stated modification proceedings based on a possible mistake of fact need not be predicated on newly submitted evidence but, if a modification proceeding is based on an

alleged change in conditions, then new evidence must be submitted in support of the petition.

Resubmission of evidence in the record prior to issuance of the original decision (or a new report that merely reviews evidence in existence at the time of the prior decision) is insufficient to demonstrate a "change in conditions." *Kingery, supra*. However, evidence generated after issuance of the prior decision, which is based on medical data (x-ray studies, physical examinations, pulmonary function testing, blood gas testing, CT-scans, and the like) generated after the prior decision, may be considered.

- Consideration of withheld evidence

In a claim filed prior to January 19, 2001, evidence excluded under 20 C.F.R. § 725.456(d) (2000), because it was in existence at the time the claim was before the District Director and withheld, cannot support modification in the absence of "extraordinary circumstances." *Wilkes v. F & R Coal Co.*, 12 B.L.R. 1-1 (1988).

The amended regulatory provisions at 20 C.F.R. § 725.456 deleted the requirement that medical evidence generated when the claim is pending before the District Director cannot be withheld. As a result, it appears the holding in *Wilkes* would not apply to a claim adjudicated under the amended regulations.

2. "Mistake in a determination of fact"

In *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1972), the United States Supreme Court held a "mistake in a determination of fact" on modification may be based on new evidence, cumulative evidence, or further reflection on evidence already considered in a previous determination. In conjunction with every petition for modification, the fact-finder must determine whether a "mistake in a determination of fact" was made in the prior determination. This is so regardless of whether a specific allegation of factual error was made by the petitioning party, or whether the party offered any new evidence or argument on the issue.

For example, the Board holds, in any case involving a modification petition, the fact-finder should review the claim for a "mistake in a determination of fact," regardless of whether a mistake is specifically alleged. *Kingery v. Hunt Branch Coal Co.*, 19 B.L.R. 1-6 (1994); *Jessee, supra*; *Worrell, supra*. And, the amended regulations at 20 C.F.R. § 725.310(c) provide, "In any case forwarded for hearing, the Administrative Law Judge assigned to hear such case shall consider whether any additional

evidence submitted by the parties demonstrates a change in condition and, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact." 20 C.F.R. § 725.310(c).

a. May include challenge to ultimate issues of entitlement

Several circuit courts of appeals conclude the phrase, "mistake in a determination of fact" must be interpreted broadly, and it includes any challenge to the ultimate issue of whether the miner is totally disabled due to pneumoconiosis.

- Third Circuit

In *Keating v. Director, OWCP*, 71 F.3d 1118 (3rd Cir. 1995), the Third Circuit held, on modification, "the [ALJ] must review all evidence of record - any new evidence submitted in support of modification as well as the evidence previously of record - and 'further reflect' on whether any mistakes [of] fact were made in the previous adjudication of the case." By unpublished decision, in *USX Corp. v. Director, OWCP*, Case No. 94-3122 (3rd Cir. Sept. 29, 1994)(unpub.), the Third Circuit stated, "It is 'irrelevant' that a claimant fails to plead a mistake of fact or change in conditions"

- Fourth Circuit

In *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993), the Fourth Circuit held a request for modification may be based on an allegation "that the ultimate fact -- disability due to pneumoconiosis -- was mistakenly decided"

- Sixth Circuit

In *Consolidation Coal Co. v. Director, OWCP [Worrell]*, 27 F.3d 227 (6th Cir. 1994), the Sixth Circuit adopted the Fourth Circuit's position in *Jessee*, and held a modification petition need not specify any factual error or change in conditions. Indeed, a claimant may allege the ultimate fact--total disability due to pneumoconiosis--was wrongly decided, and request review of the record on this basis. Moreover, the court stated the adjudicator "has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions."

Similarly, in *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6th Cir. 1997), the Sixth Circuit reiterated, in a claim involving a petition for

modification, "the fact-finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence for any mistake in fact or change in conditions." It noted the standard for opening the record on modification is "very low."

- Seventh Circuit

The Seventh Circuit Court of Appeals holds the modification provisions are to be interpreted generously. *Amax Coal Co. v. Franklin*, 957 F.2d 355 (7th Cir. 1992). Under *Franklin*, "mistake in a determination of fact" incorporates mixed questions of law and fact, including the "ultimate fact" of whether the claimant is entitled to benefits under the Act. *Id.* at 358.

b. Party bound by acts of attorney

By unpublished decision in *Hilliard v. Old Ben Coal Co.*, BRB No. 99-0933 BLA (June 30, 2000)(unpub.), the Board upheld the Administrative Law Judge's finding that Employer was bound by the acts of its attorney who, without Employer's knowledge, abandoned his law practice:

Apparently without notice to employer, employer's counsel, Wayne R. Reynolds, abandoned his law practice at some point during the consideration of employer's first request for modification, which was denied by Judge Burke. Employer asserts that under these circumstances, it would be unjust to allow an award of benefits when the evidence of record clearly does not support a finding of entitlement. We reject employer's argument, as the general rule is that a party is bound by the actions of its attorney, no matter how negligent or incompetent, and that a party dissatisfied with the actions of its freely chosen counsel has a separate action against such counsel in another forum for his negligence. (citations omitted).

c. Evidence obtained using forged release, excluded from consideration

In *Williams v. Old Ben Coal Co.*, BRB No. 00-0272 BLA (Dec. 28, 2000) (unpub.), the Administrative Law Judge properly excluded the opinions of Drs. Naeye, Caffrey, Hutchins, and Kleinerman after finding Employer's counsel obtained autopsy records of the miner from the coroner's office by submitting a signed release by the survivor with a forged date next to it. The Board determined the Administrative Law Judge acted within his discretion in excluding evidence obtained "by employer through misrepresentation of claimant's consent to release the medical records."

d. Scope of review

- Consider all evidence

The United States Supreme Court, in *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971), indicated all evidence of record should be reviewed in determining whether "a mistake in a determination of fact" has been made. The Court stated, on modification, the fact-finder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." See also *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993); *Kovac, supra*; *Director, OWCP v. Drummond Coal Co. (Cornelius)*, 831 F.2d 240 (11th Cir. 1987).

- The amended regulations

The amended regulations at 20 C.F.R. § 725.310(c) provide, "In any case forwarded for hearing, the Administrative Law Judge assigned to hear such case shall consider whether any additional evidence submitted by the parties demonstrates a change in condition and, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact." 20 C.F.R. § 725.310(c).

e. Correcting misidentified carrier

In the Sixth Circuit, the District Director properly utilized modification proceedings to correct misidentification in the case of the responsible *carrier*, even where a final compensation order was issued against the operator. *Caudill Construction Co. v. Abner*, 878 F.2d 179 (6th Cir. 1989). This claim was decided under pre-amendment regulations.

f. Survivor's claim

In a survivor's claim, the sole ground for modification is whether a mistake in a determination of fact occurred. This is because there can be no change in the deceased miner's condition.

Turning to the issue of whether a "mistake in a determination of fact" was made in the survivor's claim, in *V.M. v. Clinchfield Coal Co.*, 24 B.L.R. 1-65 (2008), it was proper to apply collateral estoppel to establish coal workers' pneumoconiosis in the survivor's claim, where there was an award of benefits in the miner's claim, and no autopsy evidence was offered.

Under the facts of the claim, the first Administrative Law Judge concluded, despite the fact there was no autopsy evidence offered in the survivor's claim, collateral estoppel could not be applied because the miner's claim was awarded prior to issuance of *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000) (requiring evidence submitted under 20 C.F.R. § 718.202(a)(1)-(4) be weighed together prior to finding the presence of pneumoconiosis), whereas the survivor's claim was filed after issuance of *Compton*. The Administrative Law Judge denied benefits in the survivor's claim.

The survivor subsequently filed a petition for modification. A second Administrative Law Judge reviewed the claim to assess whether a mistake in a determination of fact had been made. The Administrative Law Judge concluded collateral estoppel should have been applied in the survivor's claim pursuant to *Collins v. Pond Creek Mining Co.*, 468 F.3d 213 (4th Cir. 2006) after also determining that application of the doctrine would not be unfair to Employer under the factors set forth in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) and *Polly v. D & K Coal Co.*, 23 B.L.R. 1-77 (2005). Upon consideration of evidence in the claim, benefits were awarded.

The Board adopted the Director's position, and held it was proper to find a mistake in a determination of fact in the original adjudication of benefits in the survivor's claim; namely, coal workers' pneumoconiosis was established via application of collateral estoppel on modification. Moreover, because coal workers' pneumoconiosis was established in the survivor's claim, the Board held it was proper for the Administrative Law Judge to accord less weight to medical opinions of physicians who did not find the disease present.

3. Responsible operator designation on modification

a. For claims filed on or before January 19, 2001

In *Collins v. J & L Steel (LTV Steel)*, 21 B.L.R. 1-182 (1999), a case was referred to an Administrative Law Judge for a hearing on Claimant's petition for modification. After referral of the claim, the Director moved the claim be remanded to the District Director's office to name an employer and its carrier as potential responsible parties. The motion was denied on grounds that the parties were properly dismissed in a previous proceeding. The Director did not appeal the denial of its motion to remand. A hearing was held, and the Administrative Law Judge awarded benefits against the Black Lung Disability Trust Fund based, in part, on the Director's stipulation as to the presence of pneumoconiosis.

In its appeal, the Director maintained the Administrative Law Judge's refusal to remand the claim constituted error. The Board held, however, the Trust Fund must remain liable for the payment of benefits as the Director should have taken an interlocutory appeal of the Administrative Law Judge's order denying a remand. The Board reasoned it has accepted interlocutory appeals "when undue hardship and inconvenience can be avoided." The Board distinguished the facts of this case from those presented in *Director, OWCP v. Oglebay Norton*, 877 F.2d 1300 (6th Cir. 1989), *Lewis v. Consolidation Coal Co.*, 15 B.L.R. 1-37 (1990), and *Beckett v. Raven Smokeless Coal Co.*, 14 B.L.R. 1-43 (1990), where the "new operator was actually identified before an administrative law judge had conducted a hearing and the claimant had not been awarded benefits by an administrative law judge against another operator or the Trust Fund." Rather, in this case, the Board stated the Director had an obligation to appeal the Administrative Law Judge's refusal to remand the claim to rename a potential responsible operator and carrier:

The Director chose not to appeal. In so doing, the Director risked a finding of entitlement and the application of *Crabtree* to this case. It is now too late for the Director to ask for remand to rename Clinchfield and (the West Virginia Coal Workers' Pneumoconiosis Fund) as the responsible operator/carrier because if either of them were held to be the responsible operator, claimant would be unduly prejudiced by having to relitigate the claim. At the hearing, the Director stipulated to the existence of pneumoconiosis arising out of coal mine employment. (citation omitted). Since neither Clinchfield nor CWPF is bound by the Director's stipulation regarding these elements of entitlement, claimant would be required to litigate the issues of the existence of pneumoconiosis and whether pneumoconiosis arose out of coal mine employment, as well as to relitigate the other issues.

Id. at 1-187.

b. For claims filed after January 19, 2001

With regard to identification of the proper responsible operator on modification, the Department states the following in its comments to the amended regulations:

The Department disagrees that the regulations will always prevent an operator from seeking modification of a responsible

operator determination based on newly discovered evidence. It is true, however, that the regulations limit the types of additional evidence that may be submitted on modification and, as a result, an operator will not always be able to submit new evidence to demonstrate that it is not a potentially liable operator.

The Department explained in its previous notices of proposed rulemaking that the evidentiary limitations of §§ 725.408 and 725.414 are designed to provide the district director with all of the documentary evidence relevant to the determination of the responsible operator liable for the payment of benefits. The regulations recognize, and accord different treatment to, two types of evidence: (1) documentary evidence relevant to an operator's identification as a potentially liable operator, governed by § 725.408; and (2) documentary evidence relevant to the identity of the responsible operator, governed by §§ 725.414 and 725.456(b)(1).

. . .

The operator's ability to seek modification based on additional documentary evidence will thus depend on the type of evidence that it seeks to submit. Where the evidence is relevant to the designation of the responsible operator, it may be submitted in a modification proceeding if extraordinary circumstances exist that prevented the operator from submitting the evidence earlier. For example, assume that the miner's most recent employer conceals evidence that establishes that it employed the miner for over a year, and that as a result an earlier employer is designated the responsible operator. If that earlier employer discovers the evidence after the award becomes final, it would be able to demonstrate that extraordinary circumstances justify the admission of the evidence in a modification proceeding.

That same showing, however, will not justify the admission of evidence relevant to the employer's own employment of the claimant. Under § 725.408, all documentary evidence pertaining to the employer's employment of the claimant and its status as a financially capable operator must be submitted to the district director.

65 Fed. Reg. 79,976 (Dec. 20, 2000).

Under the amended regulations at 20 C.F.R. § 725.465(b), "The administrative law judge shall not dismiss the operator designated as

the responsible operator by the district director, except upon the motion or written agreement of the Director." 20 C.F.R. § 725.465(b).

V. Onset date for the payment of benefits

A. For claims filed on or before January 19, 2001

The Board holds, on modification, the date of filing the underlying claim serves as the earliest date from which benefits may be paid. *Garcia v. Director, OWCP*, 12 B.L.R. 1-24 (1988). However, in *Eifler v. Director, OWCP*, 926 F.2d 663 (7th Cir. 1991), the Seventh Circuit drew a distinction between modification based on a mistake in a determination of fact, and modification based on a change in conditions. Specifically, a change in conditions, which requires that the claimant demonstrate that the miner's condition has worsened since the prior denial, entitles the claimant to benefits from the date of the change in conditions (which must be subsequent to the prior denial). A mistake in a determination of fact, however, may result in an onset date which is long before the date of the prior denial.

B. For claims filed after January 19, 2001

Twenty C.F.R. § 725.503(d) was amended to address the date of onset of benefits payments in claims involving modification petitions. It distinguishes between an award based on mistake of fact, and an award based on change in conditions:

(d) If a claim is awarded pursuant to section 22 of the Longshore Act and § 725.310, then the date from which benefits are payable shall be determined as follows:

(1) Mistake in fact. The provisions of paragraphs (b) or (c) of this section, as applicable, shall govern the determination of the date from which benefits are payable.

(2) Change in conditions. Benefits are payable to a miner beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge. Where the evidence does not establish the month of onset, benefits shall be payable to

such miner from the month in which the claimant requested modification.

20 C.F.R. § 725.303(d). For additional discussion of onset, see Chapter 17.

VI. Review of entire claim without "mistake of fact" or "change in conditions" analysis, harmless error

If the adjudicator fails to make a specific finding as to whether a "mistake in a determination of fact" or "change in conditions" exists, but decides the claim in its entirety on the merits, it is harmless error as "the modification finding is subsumed in the administrative law judge's findings on the merits of entitlement." *Motichak v. Bethenergy Mines, Inc.*, 17 B.L.R. 1-14 (1992); *Kott v. Director, OWCP*, 17 B.L.R. 1-9 (1992).