[BLR cite: *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993)]

BRB No. 90-0595 BLA

JOHN NATALONI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Robert A. Mazzoni (Mazzoni & Mazzoni), Scranton, Pennsylvania, for claimant.

Patricia M. Nece (David S. Fortney, Deputy Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: BROWN and DOLDER, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (89-BLA-0986) of Administrative Law Judge Paul H. Teitler denying a request for 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). The administrative law

judge found the evidence insufficient to establish a change in

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

claimant's condition or a mistake in a determination of fact in the previous denial of benefits.[1] The administrative law judge therefore denied claimant's request for modification pursuant to 20 C.F.R. §725.310. On appeal, claimant contends that the administrative law judge failed to comply with Administrative Procedure Act requirements because he failed to discuss certain medical evidence of record. See 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 Director, Office of Workers' Compensation Programs (the Director), responds, seeking affirmance of the decision below.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Claimant initially filed a claim on August 25, 1981. (Director's Exhibit 1). After a formal hearing, claimant was denied benefits, on September 18, 1985. (Director's Exhibit 20). The Board affirmed the denial of benefits on December 15, 1987. (Director's Exhibit 27). Claimant filed a second application on November 8, 1988 (Director's Exhibit 28), which was considered a request for modification pursuant to Section 725.310 since it was filed within a year of the denial by the Board. The request was denied by the deputy commissioner on December 22, 1988. (Director's Exhibit 30).

U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in failing to discuss medical evidence which supports his claim. Claimant specifically mentions x-ray readings by Dr. McGuire which are positive for pneumoconiosis (Director's Exhibits 11, 12), a blood gas study with abnormal, albeit nonqualifying results (Director's Exhibit 8), and a medical report by Dr. Patel (Director's Exhibit 6), all of which, claimant states, are corroborated by his testimony. Although claimant correctly contends that the administrative law judge did not discuss this evidence in his decision, all of the evidence referred to by claimant was in the record prior to the September 18, 1985 decision denying benefits and was considered by Administrative Law Judge Robert M. Glennon. Since the administrative law judge was evaluating a request for modification at 20 C.F.R. §725.310, he properly considered whether claimant established a change in conditions or a mistake in fact. See Kovac v. BCNR Mining Corporation, 14 BLR 1-156 (1990), modified on recon., 16 BLR 1-71 (1992). In determining whether claimant has established a change in conditions, the administrative law judge is obligated to perform an independent assessment of the newly 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 Kovac, supra. In the case at bar,

claimant was not awarded benefits initially because the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202 and 718.204(c), and the Board, in Nataloni v. Director, OWCP, BRB No. 85-2485 BLA (Dec. 15, 1987)(unpub.), affirmed the administrative law judge's finding that claimant failed to establish total disability. In finding that claimant failed to establish a change in conditions, the administrative law judge properly found that the weight of the newly submitted evidence was insufficient to establish either element of entitlement, since none of the new evidence was favorable to claimant.[2] See Decision and Order at 5. As none of the evidence supports claimant's position, we affirm the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to Section 725.310 as rational and supported by substantial evidence.

[2] The only new evidence, which was discussed by the administrative law judge, is two negative readings of an April 10, 1989 x-ray, a nonqualifying pulmonary function study, a nonqualifying arterial blood gas study, and a doctor's report diagnosing hypertension and osteoarthritis, but no pulmonary impairment. (Director's Exhibits 34, 35). There is also a reading by Dr. Greene (of the same x-ray) in the case file which has no exhibit number and was not discussed by the administrative law judge. However, it is negative for pneumoconiosis, and therefore could not support claimant's contentions.

Claimant may also be entitled to modification pursuant to Section 725.310 by establishing a mistake in fact. Subsequent to the administrative law judge's Decision and Order denying modification, the Board determined that, unlike a change in condition, the administrative law judge is bound to consider the entirety of the evidentiary record, and not merely the newly submitted evidence, in making a determination of mistake in fact upon modification. See Kovac, supra. However, since claimant bears the burden of proof to establish a mistake in fact, and the record does not reveal that claimant has attempted to identify a mistake in fact at any stage of the request for modification, we hold that the administrative law judge's failure to consider the entirety of the evidentiary record on this issue constitutes harmless error, see Larioni v. Director, OWCP, 6 BLR 1-1276 (1984), and thus we affirm the administrative law judge's finding that claimant failed to establish a mistake in fact as rational and supported by substantial evidence. Accordingly, since we affirm the administrative law judge's finding that claimant failed to establish a change in condition or mistake in fact, we further affirm the administrative law judge's determination that claimant is not entitled to modification pursuant to Section 725.310, and thus, contrary to claimant's contention, the administrative law judge was not bound to consider the entirety of the medical evidence in a review of the merits of this claim. See Kovac, supra.

Accordingly, the administrative law judge's Decision and Order denying claimant's request for modification is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge