

BRB No. 88-3827 BLA

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

Appeal of the Decision and Order - Denial of Benefits of Thomas W. Murrett, Administrative Law Judge, United States Department of Labor.

John Tabbitt, Nanticoke, Pennsylvania, pro se.

Before: SMITH and DOLDER, Administrative Appeals Judges, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order - Denial of Benefits (85-BLA-3742) of Administrative Law Judge Thomas W. Murrett 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 Vivian Schreter Murray adjudicated claimant's original claim filed on December 31, 1979, and credited claimant with three and one-half years of

qualifying coal mine employment. Reviewing the

*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).

claim pursuant to the provisions of 20 C.F.R. Part 410, Subpart D, Judge Murray found that claimant failed to establish the existence of pneumoconiosis, and accordingly, benefits were denied. Director's Exhibit 15. As claimant's subsequent claims were all filed within one year of the administrative law judge's Decision and Order issued on January 6, 1984, see Director's Exhibits 16, 16a, 17, the deputy commissioner found that they constituted a request for modification pursuant to the provisions of 20 C.F.R. §725.310, which he denied. Director's Exhibit 29. Claimant requested a formal hearing, which was held before Judge Murrett on February 23, 1988. Judge Murrett credited claimant with three and one-half years of qualifying coal mine employment, but found that claimant failed to establish either a change in conditions or a mistake in a determination of fact under Section 725.310, and consequently denied modification. Claimant appeals, contending that the evidence is sufficient to establish entitlement under the Act. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported

by substantial evidence. Stark v. Director, OWCP, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Modification may be granted if claimant establishes a mistake in a determination of fact or a change in conditions. 20 C.F.R. §725.310. Initially, we note that since claimant's later claims merge with the previous claim, the operative date of filing is that of the first Part C claim filed with the Department of Labor, i.e. December 31, 1979, and this date determines which substantive regulations apply. See Tackett v. Howell and Bailey Coal Co., 9 BLR 1-181 (1986); Chadwick v. Island Creek Coal Co., 7 BLR 1-883 (1985), aff'd en banc, 8 BLR 1-447 (1986). Following issuance of Judge Murray's Decision and Order, the United States Court of Appeals for the Third Circuit, in which appellate jurisdiction of this claim lies, held that all claims such as this one filed before March 31, 1980 but adjudicated after that date must be reviewed under 20 C.F.R. Part 718 rather than 20 C.F.R. Part 410, Subpart D where claimant fails to establish eligibility under 20 C.F.R. Part 727. See Caprini v. Director, OWCP, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987). The claim also must be reviewed under 20 C.F.R. §410.490 pursuant to Pittston Coal Group v. Sebben,

109 S.Ct. 414, 12 BLR 2-89 (1988). In the instant case, although Judge Murrett properly reviewed all of the evidence in the record, he failed to indicate which regulations he applied in determining that a change in conditions had not been established, and provided no analysis of his conclusion that claimant failed to establish a mistake in a determination of fact. Consequently, we vacate the administrative law judge's findings under Section 725.310, and remand the case for the administrative law judge to further discuss the issue of whether a mistake in a determination of fact may be established, and to reconsider the evidence under the regulations at Part 718 and Section 410.490 in determining whether a change in conditions may be established. On remand, the administrative law judge should also address the issue of whether the x-ray re-reading prohibition contained in Section 413(b) of the Act is applicable. 20 C.F.R. §§718.202(a)(1)(i), 727.206(b)(1).¹

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

¹ The administrative law judge, relying on the Social Security Administration records, credited claimant with every quarter of coal mine employment reflected therein. See Decision and Order at 3; Director's Exhibit 3. This is a reasonable method of computation which is within the administrative law judge's discretion as the trier-of-fact. See Dawson v. Old Ben Coal Co., 11 BLR 1-58 (1988); Vickery v. Director, OWCP, 8 BLR 1-430 (1986).

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

RENO E. BONFANTI
Administrative Law Judge