BRB No. 98-1384 BLA

JAMES W. SHELTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLAUDE V. KEEN TRUCKING COMPANY	)	DATE ISSUED: 8/18/99
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

James W. Shelton, Cedar Bluff, Virginia, for claimant.

Gregory S. Feder (Arter & Hadden LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order on Modification Denying Benefits (97-BLA-0676) of Administrative Law Judge Jeffrey Tureck 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). Initially, claimant filed a claim for benefits in December 1991. Director's Exhibit 1; *see also* Director's Exhibit 2. Administrative Law Judge Charles P. Rippey found that claimant established 17.25 years of coal mine employment. Moreover, Judge Rippey found that the evidence was insufficient

[1] Tim White, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, on behalf of claimant, requested an appeal of the administrative law judge's Decision and Order on Modification Denying Benefits, but Mr. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.[2] Director's Exhibit 48. Claimant appealed, and the Board affirmed Judge Rippey's denial of benefits. Director's Exhibit 52. *Shelton v. Claude V. Keen Trucking Co.*, BRB No. 94-3940 BLA (Sept. 22, 1995). Subsequently, claimant filed a request for modification. Director's Exhibit 53. Administrative Law Judge Tureck (the administrative law judge) found that claimant failed to establish either a change in conditions or a mistake in a determination of fact. *See* 20 C.F.R. §725.310. Accordingly, modification was denied.

Claimant, in the present appeal, contends generally that the administrative law judge erred by denying benefits. Employer has filed a response advocating affirmance of the administrative law judge's denial of modification. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not respond to the present appeal unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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 may establish modification by establishing either a change in conditions since the issuance of a previous decision or a mistake in a determination of fact in the previous decision. 20 C.F.R. §725.310(a). In considering whether a change in conditions has been established pursuant to Section 725.310, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior claim. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The United States Court of Appeals for the Fourth Circuit, under whose jurisdiction the instant case arises, has held that a claimant's allegation of general error is sufficient to require the administrative law judge to reconsider the entire record in addressing whether there was a mistake in a determination of fact pursuant to Section 725.310. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*,

[2] In the instant case, Judge Rippey found at the hearing that the evidence seemed overwhelming that claimant was totally disabled due to a respiratory impairment, and the parties agreed that the issues to be decided were whether claimant had pneumoconiosis or whether he was totally disabled due to pneumoconiosis.

404 U.S. 254 (1971).

With regard to change in conditions, the administrative law judge correctly found that the only evidence claimant presented on modification was a qualifying pulmonary function study performed on September 22, 1995. Director's Exhibit 53. The administrative law judge reasonably found that the pulmonary function study, standing alone, does not aid claimant in establishing that he has pneumoconiosis. *See Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987). Moreover, the administrative law judge properly found that employer presented four new x-ray readings, all of which were negative for pneumoconiosis, Employer's Exhibits 1-4, and new reports from Drs. Sargent and Fino, both of whom concluded that claimant does not have pneumoconiosis.[3] Employer's Exhibits 1, 6. Therefore, we affirm the administrative law judge's finding that the newly submitted evidence does not establish a change in conditions. *See Nataloni*, *supra*.

However, we vacate the administrative law judge's finding that there was no mistake of fact. The administrative law judge found that claimant failed to establish a mistake in fact because Judge Rippey's finding of no pneumoconiosis was affirmed by the Board, claimant had not pointed to any mistakes in his evaluation of the evidence, and the evidence filed in connection with the modification proceeding was consistent with the evidence in the record before Judge Rippey. Under *Jessee*, a claimant does not have to point specifically to any mistakes in the prior determination and the administrative law judge is required to make a *de novo* review of all the evidence.[4] Therefore, we vacate the administrative law judge's no mistake finding and remand the case to the administrative law judge for further consideration pursuant to *Jessee*.

[3] In addition, the record contains a newly submitted deposition of Dr. Sargent. At the deposition, Dr. Sargent opined that claimant's history of coal dust exposure played no role in the development of claimant's obstructive lung disease. Employer's Exhibit 5, Deposition at 5. Inasmuch as Dr. Sargent's opinion does not support a finding that claimant suffers from pneumoconiosis, 20 C.F.R. §718.201, any error by the administrative law judge in not mentioning Dr. Sargent's deposition is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4] Moreover, the principle of finality does not apply in cases where claimants seek to modify prior decisions. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Accordingly, we affirm in part and vacate in part the administrative law judge's Decision and Order on Modification Denying Benefits, and remand for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge