

BRB No. 93-1275 BLA

BRADFORD LONG)
)
 Claimant-Petitioner)
)
 v.)
)
 U.S. STEEL MINING COMPANY)
)
 Employer-Respondent) DATE ISSUED:
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)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-In-Interest) DECISION and ORDER

Appeal of the Decision and Order of Aaron Silverman, Administrative Law Judge, United States Department of Labor.

Bradford Long, McGrady, North Carolina, *pro se*.

Sarah M. Hurley (Thomas S. Williamson, Jr., 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, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (92-BLA-0450) of Administrative Law Judge Aaron Silverman denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant has filed five claims for benefits in this case. 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)(1988).

first claim was filed on April 3, 1973 and denied several times, the last being October 17, 1975, before being merged with claimant's second claim. The second claim was filed on November 10, 1975 and denied on January 26, 1981. Claimant submitted additional evidence after this denial and the claim was again denied on May 2, 1982. No further action was taken on this claim. Claimant filed a third claim on July 23, 1984 which was denied on October 31, 1984. On August 7, 1985, claimant requested a formal hearing on this claim and on August 28, 1985, the Department of Labor (DOL) sent a letter instructing claimant to submit additional evidence. Claimant did not respond to the request for additional evidence and, in a letter dated November 13, 1985, DOL instructed claimant that his claim was closed. On August 10, 1989, claimant filed a fourth claim which was denied on December 7, 1989. On April 13, 1990, claimant sent a letter requesting a hearing before an administrative law judge, to which DOL responded with a letter dated May 17, 1990, informing claimant that any additional evidence submitted within one year of the date of DOL's letter would be considered a request for modification. Claimant filed the present claim on May 17, 1991. In his Decision and Order, the administrative law judge considered the claim pursuant to 20 C.F.R. Part 718 and found that the evidence submitted since the prior denial of December 7, 1989 does not establish a material change in conditions and denied the claim as a duplicate claim pursuant to 20 C.F.R. §725.309(c) and (d). Claimant appeals this denial. The Director, Office of Workers' Compensation Programs (the Director), responds with a Motion to Remand on the grounds that claimant made a timely request for modification of the 1984 denial. The Director also disagrees with the administrative law judge's weighing of Dr. Stringer's medical report.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As the Director states, claimant's request for a formal hearing in 1985 was a request for modification. See *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). As there has been no determination as to whether claimant has established a change in conditions or a mistake in a determination of fact, the case is remanded to the administrative law judge for such a determination. See *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990). In determining whether claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, the administrative law judge must 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 the element or elements of entitlement which defeated entitlement in the prior decision. See *Jessee, supra; Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Also, as it appears that the administrative law judge failed to properly inform claimant of his right to have an attorney at the hearing, the administrative law judge must properly inform claimant of his right to be represented by an attorney of his choice, without charge to him. See *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); Hearing Transcript at 4.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge