BRB No. 97-1587 BLA

HOWARD PETERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
WESTMORELAND COAL COMPANY)		
	)	
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 - Denying Modification of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Howard Peters, Dryden, Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

Sarah M. Hurley (Marvin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of legal counsel,[1] appeals the Decision and Order

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law

(97-BLA-00899) of Administrative Law Judge Vivian Schreter-Murray denying benefits on a request for modification in 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, who decided the case on the record, originally credited claimant with twenty-three and one-half years of coal mine employment, adjudicated the claim pursuant to 20 C.F.R. Part 718 and found that the evidence of record was insufficient to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a)(1)-(4), or total disability, *see* 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. Claimant appealed and in *Peters v. Westmoreland Coal Co.*, BRB No. 96-0667 BLA (Nov. 20, 1996) (unpub.), the Board affirmed the denial of benefits. Within one year of the denial, claimant submitted new evidence to the district director and requested modification of the denial, but the request was denied. Claimant then requested a formal hearing and the case was referred to the Office of Administrative Law Judges. The administrative law judge decided this case on the record and found that the recently submitted evidence was insufficient to establish a change in conditions that would warrant modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. In the instant appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge improperly denied claimant a hearing on his request for modification.

In an appeal filed by a claimant 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, are supported by substantial evidence, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

---

judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Initially, we consider the Director's assertion concerning the administrative law judge's failure to hold a hearing on modification. The Board has held that an administrative law judge is not required to hold a hearing on modification, but rather has "the discretion to decide whether a modification hearing is necessary to render justice in a particular case." *See Napier v. Director, OWCP*, 17 BLR 1-111, 1-113 (1993). The administrative law judge noted that she initially scheduled and convened a formal hearing in this case in Abingdon, Virginia, on May 23, 1995, but that claimant failed to appear and that his lay representative requested that a decision be issued on the evidence of record at that time. Decision and Order at 2. In claimant's request for modification, the administrative law judge also noted that although claimant's lay representative requested a formal hearing, the documentary evidence is determinative in this case and "their appearances would serve no useful purpose." Decision and Order at 2. Thus, claimant was not afforded a hearing before the administrative law judge, even though he requested one at the time he submitted the new evidence. Claimant is proceeding in this claim without representation by legal counsel and has not been provided the opportunity to testify on his own behalf since failing to appear at the initial hearing. In view of the unique facts presented in this case, we believe that the administrative law judge's determination to render a decision on the record does not render justice, and we agree with the Director that based on the facts of this case, claimant is entitled to a hearing. We, therefore, vacate the administrative law judge's denial of benefits and remand the case to the administrative law judge to reconsider claimant's request for a formal hearing on his modification request.

Further, the administrative law judge did not review all of the evidence of record and the prior findings of fact to ascertain whether a mistake was made pursuant to *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Therefore, on remand the administrative law judge must determine whether the previous findings of fact were in error. *See Jesse; Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

Accordingly, the Decision and Order - Denying Modification of the administrative law judge is vacated and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge