BRB No. 92-0561 BLA

JUDAS LESTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOMINION COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denial of Modification of Giles J. McCarthy, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

Jill M. Otte (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: BROWN and McGRANERY, Administrative Appeals Judges, and

SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Modification (90-BLA-0863) of Administrative Law Judge Giles J. McCarthy denying

*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).

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). The administrative law judge determined that this claim, filed on June 6, 1978, was originally adjudicated by Administrative Law Judge Donald W. Mosser. In his initial Decision and Order, Administrative Law Judge Mosser credited claimant with more than thirty years of qualifying coal mine employment, but found the evidence insufficient to establish either invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a) or entitlement pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's findings pursuant to Part 410, Subpart D, but vacated his findings pursuant to Section 727.203(a) and remanded this case for reconsideration in light of *Stapleton v. Westmoreland Coal Co.,* 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986)(*en banc*). *Lester v. Dominion Coal Co.,* BRB No. 84-2719 BLA (June 11, 1987). On remand, the administrative law judge found invocation of the interim presumption established pursuant to Section 727.203(a)(1),[1] but further found that the evidence was both sufficient to establish rebuttal of that presumption pursuant to 20 C.F.R.

[1] Subsequent to the issuance of Administrative Law Judge Mosser's Decision and Order on Remand, the United States Supreme Court overruled *Stapleton*. *Mullins Coal Co., Inc. of Virginia v. Director, OWCP,* 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

§727.203(b)(2),[2] and insufficient to establish entitlement pursuant to 20 C.F.R. §410.490.[3] Consequently, the administrative law judge again denied benefits.

Claimant did not appeal the denial of benefits, but filed a timely request for modification pursuant to 20 C.F.R. §725.310. Decision and Order at 2; Director's Exhibit 95. Upon the district director's denial of modification, and after claimant's submission of further evidence and request for hearing, this case was forwarded to the Office of Administrative Law Judges for formal hearing, held before Administrative Law Judge Giles J. McCarthy. Director's Exhibits 96, 98, 99. Administrative Law Judge McCarthy found that since claimant failed to establish

[2] The administrative law judge found rebuttal established pursuant to 20 C.F.R. §727.203(b)(2) based on his finding that claimant was not totally disabled from a respiratory standpoint. Director's Exhibit 94 at 4. Subsequent to the issuance of the administrative law judge's Decision and Order on Remand, the United States Court of Appeals for the Fourth Circuit held that in order to establish subsection (b)(2) rebuttal, the party opposing entitlement must demonstrate that the miner is not disabled for any reason. *Sykes v. Director, OWCP,* 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987).

[3] Subsequent to the issuance of the administrative law judge's Decision and Order on Remand, in light of the United State Supreme Court's decision in *Pauley v. Bethenergy Mines, Inc.,* 111 S.Ct. 2524, 15 BLR 2-155 (1991), the Board held that 20 C.F.R. §410.490 does not apply to a case, such as this, which has been properly adjudicated pursuant to 20 C.F.R. Part 727. *See Whiteman v. Boyle Land and Fuel Co.,* 15 BLR 1-11 (1991)(*en banc*).

either a change in conditions or a mistake in a determination of fact, modification pursuant to Section 725.310 was not appropriate. Accordingly, benefits were again denied.

In the instant appeal, claimant challenges the administrative law judge's denial of modification pursuant to Section 725.310, and the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand in support of claimant's position.[4]

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 this Board and may not be disturbed. 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).

[4] The Board accepts the Director's Motion to Remand as her response brief herein and decides this case on its merits.

Claimant and the Director initially challenge the administrative law judge's finding that claimant neither alleged nor proved any mistake in a determination of fact pursuant to Section 725.310. In *Jessee v. Director, OWCP,* F.3d , BLR (4th Cir., Sept. 2, 1993), the Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this claim lies, held that a claimant need not allege a specific mistake of fact, but may simply allege that the ultimate fact, disability due to pneumoconiosis, was mistakenly decided.[5] This is sufficient to trigger a possible modification. The administrative law judge simply found, however, that there was no proof of any mistake of fact. Consequently, he denied modification. The Director contends that the administrative law judge's failure to provide a rationale for denying modification based on a mistake in a determination of fact, including an indication of the evidence he considered and the regulatory provisions involved, is violative of the Administrative Procedure Act and requires remand. *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), 30 U.S.C. §932(a). We agree. We, therefore, remand this case for the administrative law judge to review the record and the prior findings of fact, and determine whether modification based on a mistake in a determination of fact is appropriate in light of the holding in *Jessee, supra.*

Claimant and the Director next challenge the administrative law judge's finding that the new evidence submitted in support of modification was insufficient to establish the existence of pneumoconiosis at subsections (a)(1) and (a)(4),[6] and thus did not establish a change in conditions. Claimant argues that Administrative Law Judge McCarthy was bound by Administrative Law Judge Mosser's previous finding of subsection (a)(1) invocation, and therefore should merely have determined whether the new evidence was sufficient to preclude rebuttal of the interim presumption. The Director maintains that the administrative law judge should have conducted a *de novo* review of all contested issues, weighed all of the evidence of record, and readjudicated entitlement.

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[5] Contrary to claimant's assertion, this case does not arise within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit, inasmuch as claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200 (1989).

[6] We note that the proper inquiry at 20 C.F.R. §727.203(a)(4) is whether the evidence is sufficient to establish the existence of a totally disabling respiratory impairment rather than the existence of pneumoconiosis. Moreover, the administrative law judge did not address newly-submitted evidence relevant to invocation pursuant to subsections (a)(2) and (a)(3), *see* Director's Exhibits 95, 97, 100, 121, 122, and did not address the medical opinions of Drs. Myers and Sutherland, which are relevant to invocation at subsection (a)(4). *See* Director's Exhibit 95, Claimant's Exhibit 2.

Subsequent to the issuance of the administrative law judge's Decision and Order denying modification, the Board held that 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, 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. *Nataloni v. Director, OWCP,* 17 BLR 1-82 (1993). In the instant case, Administrative Law Judge Mosser previously denied benefits based on his finding that employer established subsection (b)(2) rebuttal, under the standard in effect at that time. Since Administrative Law Judge McCarthy did not address rebuttal, we vacate his finding that the new evidence was insufficient to establish a change in conditions. On remand, the administrative law judge must apply the standards currently in effect, *see generally Lynn v. Island Creek Coal Co.,* 12 BLR 1-146 (1989), and if he finds the new evidence sufficient to establish a change in conditions pursuant to Section 725.310, he must then consider the entire record and adjudicate entitlement pursuant to 20 C.F.R. Part 727 and 20 C.F.R. Part 410, Subpart D, under the current standards. *See Kovac v. BCNR Mining Corp.,* 14 BLR 1-156 (1990), *modified on recon.,* 16 BLR 1-71 (1992); *see also Thorn v. Itmann Coal Co.,* 3 F.3d 713, BLR (4th Cir. 1993); *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sykes v. DIrector, OWCP,* 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987); *Bethlehem Mines Corp. v. Massey,* 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984).

Accordingly, the Decision and Order-Denial of Modification of the administrative law judge denying benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge