

BRB No. 95-0474 BLA

CHARLES NAPIER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Charles Napier, Rose Hill, Virginia, *pro se*.

Jeffrey S. Goldberg (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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order (89-BLA-0771) of Administrative Law Judge Clement J. Kichuk denying modification 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).

This case is before the Board for the second time. Claimant's appeal from the initial

¹ Claimant is Charles Napier, the miner, who filed a claim for benefits on March 3, 1975. Director's Exhibit 1. Ron Carson, a benefits counselor with Stone Mountain Health Services of Jonesville, Virginia, requested an appeal on behalf of claimant but is not representing him on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, BRB No. 94-3940 BLA (May 19, 1995) (Order).

Decision and Order denying benefits issued by Administrative Law Judge Victor J. Chao on November 14, 1986 was

dismissed as untimely. Director's Exhibits 62, 63, 65. Thereafter, claimant filed a petition for modification pursuant to 20 C.F.R. §725.310 which was denied in a Decision and Order issued by Judge Kichuk on July 18, 1990. Director's Exhibit 81. Claimant appealed, and in *Napier v. Director, OWCP*, 17 BLR 1-111 (1993), the Board upheld the administrative law judge's determination to decide claimant's petition on the record and affirmed the denial of modification. Director's Exhibit 86.

Claimant filed another petition for modification on March 31, 1994 accompanied by additional evidence in the form of a report by Dr. J. Randolph Forehand.² The administrative law judge again decided claimant's petition for modification on the record. Noting that Dr. Forehand's report "comprised the sole content of the additional evidence" submitted by claimant, the administrative law judge found that there were "no credibility issues presented," and thus a hearing was not required. Decision and Order at 3.

Regarding modification, the administrative law judge noted that claimant had not raised the issue of a mistake in the determination of fact, but concluded that "upon review of the record before this Court I find that no such mistake is apparent in the record." Decision and Order at 3. The administrative law judge then considered the new evidence, finding that because Dr. Forehand did not diagnose pneumoconiosis, his report did not establish a change in conditions. Decision and Order at 4. Finally, the administrative law judge briefly summarized the evidence considered and the findings contained in the initial Decision and Order denying benefits and in his previous Decision and Order denying modification before concluding that "the new evidence submitted by the claimant . . . to establish [a] change in his condition serves instead to establish that there is no change in claimant's pulmonary condition." Decision and Order at 5. Accordingly, the administrative law judge denied modification.

On appeal, claimant generally challenges the denial of modification. The Director, Office of Workers' Compensation Programs (the Director), responds, urging remand because the administrative law judge failed to consider all the evidence of record on modification. Director's Brief at 5-7.

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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance

² Dr. Forehand did not diagnose pneumoconiosis, and he opined that hyperventilation, respiratory alkalosis during exertion, chronic anxiety, and heart disease caused claimant's disability. Director's Exhibit 87.

with law. 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).

Initially, we hold that the administrative law judge permissibly rendered a decision on the record. An administrative law judge is not required to hold a formal hearing on every request for modification and has the discretion to decide whether a modification hearing is necessary to render justice in a particular case. See *Napier, supra*; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). A hearing was held prior to the initial Decision and Order in this case, Director's Exhibit 60, and the administrative law judge acted within his discretion in determining that, because he found no credibility issues presented, a hearing on modification was unnecessary.

The Director, citing *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994) and *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993), contends that remand is required because the administrative law judge failed to consider the entire evidentiary record in determining whether a mistake in the determination of fact or a change in conditions was established. Director's Brief at 5-7. The Director's argument has merit.

Section 725.310 provides that a party may request modification of the award or denial of benefits on the grounds that a change in conditions has occurred or because a mistake in the determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held in *Worrell* that when a request for modification is filed, no matter the grounds stated, if any, the administrative law judge has the authority, if not the duty, to reconsider all the evidence to determine whether there is a mistake in the determination of fact or a change in conditions. *Worrell*, 27 F.3d at 230, 18 BLR at 2-296. Pursuant to Section 725.310, the administrative law judge must independently assess the new evidence in conjunction with the old evidence to determine if the weight of the new evidence is sufficient to establish the element or elements that earlier defeated entitlement. *Napier, supra*; *Nataloni, supra*; *Kovac v. BCNR Mining Light Co.*, 14 BLR 1-156 (1990) *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz, supra*; see *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

In this case, the administrative law judge improperly considered the mistake of fact issue and confined his change in conditions analysis to the newly submitted evidence. The administrative law judge stated that "upon review of the record" he found no mistake in the determination of fact, but did not explain his reconsideration of all the evidence, see *Worrell, supra*, thereby violating the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); see *Wojtowicz, supra*; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

Regarding his change in conditions analysis, the administrative law judge mentioned the evidence previously considered and summarized prior findings in the case, but did not independently assess all the evidence. A review of the record reveals evidence which, if

credited upon reconsideration, could establish invocation of the interim presumption pursuant to Section 727.203(a)(1), (3), and (4). Director's Exhibits 25, 41, 46, 55. Therefore, we vacate the administrative law judge's findings and remand the case for him to reconsider claimant's request for modification pursuant to Section 725.310 and in accord with *Worrell, supra*, and *Nataloni, supra*. See also *Napier, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____ JAMES F. BROWN
Administrative Appeals Judge

_____ REGINA C.
McGRANERY
Administrative Appeals Judge