

## **Chapter 23**

### **Petitions for Modification under § 725.310**

#### **I. Generally**

The modification provisions at Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, incorporated into the Black Lung Benefits Act at 30 U.S.C. § 932(a), provide the statutory authority to modify benefits orders. Thus, a decision awarding or denying benefits in a black lung claim may be modified (increased, decreased, or terminated) at the behest of the claimant, employer, or district director upon demonstrating either (1) a "change in conditions," or (2) a "mistake in a determination of fact." 20 C.F.R. § 725.310 (2000) and (2008); *King v. Jericol Mining, Inc.*, 246 F.3d 822 (6<sup>th</sup> Cir. 2001) (modification available to employers as well as claimants); *Branham v. Bethenergy Mines, Inc.*, 20 B.L.R. 1-27 (1996) (employer has a right to file a petition for modification). See also *D.S. v. Ramey Coal Co.*, 24 B.L.R. 1-\_\_\_\_, BRB No. 07-0789 BLA (June 25, 2008) ("the proponent of an order terminating an award of benefits" has the burden of "disproving at least one element of entitlement").

For a discussion of the evidentiary limitations at 20 C.F.R. §§ 725.310 and 725.414 (2008) on modification, see Chapter 4. For a discussion of withdrawal of a petition for modification, see Chapter 26.

#### **A. Mistake (or change) of law, not a basis for modification**

An allegation of a mistake or change of law, however, does not constitute proper grounds for modification. *Donadi v. Director, OWCP*, 12 B.L.R. 1-166 (1989).

#### **B. Judge's discretionary ruling on procedural issue, not a basis for modification**

By unpublished decision in *Bowman v. Director, OWCP*, BRB No. 03-0720 BLA (Sept. 10, 2004) (unpub.), the Board held that an administrative law judge's "discretionary determination that the Director established good cause for the untimely submission of Dr. Green's report is not subject to modification because (the judge) was resolving a procedural matter that is not within the scope of issues that are subject to modification, *i.e.*, issues of entitlement." The Board further stated that the "proper recourse for correction of error, if any, would have been a timely appeal or motion for reconsideration, neither of which were timely pursued."

## **II. Procedural issues**

### **A. One year time limitation**

Modification may be sought at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim. 20 C.F.R. § 725.310(a) (2000) and (2008).

#### **1. Denial by administrative law judge, effective when "filed" with district director**

In *Wooten v. Eastern Assoc. Coal Corp.*, 20 B.L.R. 1-20 (1996), the administrative law judge held that a modification petition was untimely because he issued a decision and order denying benefits on June 23, 1992, the decision was filed with the district director on July 1, 1992, and Claimant did not file a modification petition until June 23, 1993. Citing to the language 20 C.F.R. § 725.310 (2000), the administrative law judge concluded that Claimant should have filed the petition *before* one year lapsed from the date of denial of the claim and, therefore, the petition was "one day late." The Board reversed to state the following:

We . . . construe the phrase, 'denial of a claim' in Section 725.310 to mean the 'effective' denial of a claim pursuant to Section 21(a) of the Longshore Act and Section 725.479(a). Because a decision and order becomes effective only when filed in the office of the district director, we agree with the Director that the time within which to seek modification is one year from the date on which the decision and order is filed, not from its issuance date.

Thus, the claim was remanded for consideration of Claimant's timely petition.

#### **2. Denial by Benefits Review Board, effective when issued**

In *Gross v. Dominion Coal Corp.*, 22 B.L.R. 1-8 (2003), the one-year time period for filing a modification petition of the Board's denial is from the date that the denial became effective, *i.e.* the date on which the decision is filed with the Clerk of the Board (the same date on which the decision is issued). 20 C.F.R. §§ 802.403(b), 802.406, 802.407(a), and 802.410(a); *Stevedoring Servs. of America v. Director, OWCP [Mattera]*, 29 F.3d 513 (9<sup>th</sup> Cir. 1994); *Butcher v. Big Mountain Coal, Inc.*, 802 F.2d 1506 (4<sup>th</sup> Cir. 1986); *Pifer v. Florence Mining Co.*, 8 B.L.R. 1-498 (1986).

**3. Prior applicability of  
20 C.F.R. Part 725 (2008)**

**a. Seven days added for mailing**

In *Oreder v. Paramount Mining Co.*, BRB No. 88-1835 BLA (Dec. 27, 1990)(unpub.), the Board held that modification petitions sent by mail are allowed one year and seven days for filing pursuant to 20 C.F.R. § 725.311(c) (2000) of the regulations. The provisions at § 725.311(c) state that "[w]henever any notice, document, brief or other statement is served by mail, 7 days shall be added to the time within which a reply or response is required to be submitted." 20 C.F.R. § 725.311(c) (2000).

**b. Transfer liability from Trust Fund,  
filing within one year of last payment**

In *USX Corp. v. Director, OWCP*, 978 F.2d 656 (11<sup>th</sup> Cir. 1992), the Eleventh Circuit held that, where the district director erroneously transfers liability from the employer to the Trust Fund, the Department of Labor's request for modification under 20 C.F.R. § 725.310 to transfer liability back to the employer is timely only if filed within one year of the employer's last payment, and not the last payment of the Trust Fund.

**c. Circuit court opinion "final" when  
petition for rehearing denied**

In *Youghioghny and Ohio Coal Co. v. Milliken*, 200 F.3d 942 (6<sup>th</sup> Cir. 1999), *cert. denied*, 121 S. Ct. 58 (2000), the Sixth Circuit held that Claimant filed a timely request for modification on February 5, 1990, where the circuit court issued its decision on January 23, 1989 and then denied Claimant's untimely petition for rehearing on March 23, 1989. The circuit court held that its affirmance of the denial of benefits was not "final" until it issued the March 1989 mandate denying Claimant's petition for rehearing.

**4. After applicability of  
20 C.F.R. Part 725 (2008)**

**a. Applicability**

In *Gross v. Dominion Coal Corp.*, 22 B.L.R. 1-8 (2003), the Board applied the amended time computation provisions at 20 C.F.R. § 725.311 (2008) to a petition for modification filed after January 19, 2001, which related to a claim pending on January 19, 2001.

## **b. Seven days not added for mailing**

In *Gross v. Dominion Coal Corp.*, 22 B.L.R. 1-8 (2003), the Board held that, under the amended regulations, Claimant's modification petition had to be filed within 365 days of the date of issuance of the Board's denial and the administrative law judge is not permitted to add seven days to the modification period. In a footnote, the Board stated that the "Director deleted the seven-day grace period rule in part because it had generated confusion as to the deadline for filing a modification petition. 65 Fed. Reg. 79,920, 79,977 (Dec. 20, 2000)." *Id.* at footnote 5.

## **c. Saturdays, Sundays, and holidays, effect of**

In *Gross v. Dominion Coal Corp.*, 22 B.L.R. 1-8 (2003), the Board issued its denial of Claimant's appeal on November 6, 1998. Claimant was required to file his modification petition by November 6, 1999. However, because November 6, 1999 was a Saturday, Claimant had until Monday, November 8, 1999 to file the petition.

## **B. Multiple modification petitions permitted**

### **1. Benefits Review Board**

In *Garcia v. Director, OWCP*, 12 B.L.R. 1-24 (1988), the Board held that "the one year period for modification set forth in § 725.310 begins to run anew from the date of each denial." Thus, the *Garcia* decision permits the filing of multiple modification petitions relating back to a single claim, thereby affording any party the opportunity to continually submit new evidence or arguments to be considered under the less stringent modification standard at 20 C.F.R. § 725.310 (2008) as opposed to the standard for multiple claims at 20 C.F.R. § 725.309 (2008).

The Board in *Garcia* based its holding on the theory that the regulations provide "for the continued availability of modification proceedings within one year following a denial by the (district director) even after the (district director) has considered modification once." Citing its own cases, the Board asserted that "[f]urther justification for this conclusion is the rule that a party may request modification of the denial of a claim by the administrative law judge within one year after the conclusion of appellate proceedings."

### **2. Fourth Circuit**

In *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4<sup>th</sup> Cir. 1999), the circuit court rejected Employer's argument that (1) a petition for modification

"is available for one year after the first rejection of a claim" and (2) multiple petitions for modification are not permitted. The court held, to the contrary, that the "modification procedure is flexible, potent, easily invoked, and intended to secure 'justice under the act.'" It determined that multiple modification petitions may be filed in a single claim.

### **C. Informal communication sufficient to constitute petition for modification**

As opposed to a subsequent claim under 20 C.F.R. § 725.309 (2000) and (2008), which require the filing of a CM-911, any communication, no matter how informal, may serve as a request for modification under 20 C.F.R. § 725.310 (2000) and (2008).

In *Cobb v. Schirmer Stevedoring Co.*, 2 B.R.B.S. 132 (1975), *aff'd*, 577 F.2d 750 (9<sup>th</sup> Cir. 1978), a phone call from the claimant that is memorialized by the district director, wherein the claimant stated that he was dissatisfied with his compensation, constituted a sufficient request for modification. In *Youghioghny and Ohio Coal Co. v. Milliken*, 200 F.3d 942 (6<sup>th</sup> Cir. 1999), *cert. denied*, 121 S. Ct. 58 (2000), the Sixth Circuit concluded that a letter, wherein Claimant stated that she *intended* to file a petition for modification, was sufficient to constitute a modification request at 20 C.F.R. § 725.310.

#### **1. Survivor's claim may qualify as modification petition**

Under some circumstances, a survivor's claim, filed within one year of the administrative denial of a miner's claim, may be construed as a request for modification of the denial of the miner's claim. *Kubachka v. Windsor Power Coal Co.*, 11 B.L.R. 1-171, 1-173 n. 1 (1988).

#### **2. Submission of work evaluation questionnaires**

The Third Circuit held, in an unpublished decision, that the claimant's submission of "work evaluation questionnaires" constituted a request for modification. *USX Corp. v. Director, OWCP*, Case No. 94-3122 (3<sup>rd</sup> Cir. Sept. 29, 1994)(unpub.). The court reasoned that, "[b]ecause of the informal nature of the proceedings and the remedial nature of the Act, the courts that have considered this issue have given the claimant wide latitude." The court further stated that "[a] claimant need not use 'magic words' when requesting modification."

#### **3. Must be filed by a party**

The Third Circuit has ruled, however, that an informal communication must come from the district director or one of the parties to constitute a

petition for modification. Thus, a letter from claimant's doctor was not a modification petition. *Bethenergy Mines, Inc. v. Director, OWCP and Delores Koscho*, Nos. 91-3330 and 89-2750 (3<sup>rd</sup> Cir. Apr. 2, 1992) (unpub.).

#### **D. Exclusion of evidence on modification**

##### **1. Prior to applicability of 20 C.F.R. Part 725 (2008)**

In *Shertzer v. McNally Pittsburgh Manufacturing Co.*, BRB No. 97-1121 BLA (June 26, 1998) (unpub.), the Board held that the administrative law judge erred in admitting evidence submitted on modification where the evidence was in existence at the time the administrative law judge issued his original decision. Specifically, the Board concluded that certain *Director's Exhibits* should not have been admitted as evidence on modification because "this evidence was in existence but was not made available to the administrative law judge at the time the administrative law judge issued his 1994 Decision and Order." The Board stated that 20 C.F.R. § 725.456(d) and *Wilkes v. F&R Coal Co.*, 12 B.L.R. 1-1 (1988) "mandates the exclusion of withheld evidence in the absence of extraordinary circumstances."

However, the Board issued a contrary unpublished decision in *Andrews v. Director, OWCP*, BRB No. 02-0228 BLA (Dec. 23, 2002) (unpub.), a case involving a survivor's claim. The Board held that it was error for the administrative law judge to exclude a medical report submitted by Claimant to establish a mistake in a determination of fact under 20 C.F.R. § 725.310, where the medical report was available (and could have been submitted) at the time of the original hearing. The Board agreed with Claimant and the Director who argued that the administrative law judge "should not have excluded Dr. Simelaro's report from the record on the sole ground that this evidence should have been submitted in earlier proceedings."

##### **2. After applicability of 20 C.F.R. Part 725 (2008)**

The language at 20 C.F.R. § 725.456(b)(1) (2008) requires the exclusion of evidence on the responsible operator issue in the absence of "extraordinary circumstances." On the other hand, the amended regulatory provisions at 20 C.F.R. § 725.414 (2008) no longer prohibit withholding medical evidence at the district director's level and presenting such evidence to the administrative law judge.

## **E. Medical reexamination on modification**

### **1. Prior to applicability of 20 C.F.R. Part 725 (2008)**

In *Selak v. Wyoming Pocahontas Land Co.*, 21 B.L.R. 1-173 (1999)(en banc), the Board held that the administrative law judge erred in concluding that Employer was not entitled to a reexamination of Claimant in support of Employer's modification petition on grounds that "the matter was within the district director's discretion." The Board noted that "[w]hile the regulations do not afford employer an absolute right to compel an examination of the miner at any time, if an employer proffers some evidence to demonstrate that its request to have claimant re-examined is reasonable under the circumstances it may request to have the miner re-examined." The Board further stated that "[w]hen a claimant declines a re-examination, employer bears the burden of demonstrating that the refusal is unreasonable."

In *Selak*, benefits were awarded under Part 727. Because of Claimant's uncontrollable blackouts caused by epilepsy, rebuttal under subsection 727.203(b)(2) was not available. Subsequently, Employer learned that Claimant worked as a driver for an assisted-living group, which "suggested that his non-respiratory totally disabling impairment . . . was under control and . . . was no longer totally disabling." As a result, the claim was remanded to the administrative law judge for *de novo* consideration of Employer's request for re-examination in support of its modification petition. See also *Stiltner v. Wellmore Coal Corp.*, 22 B.L.R. 1-37 (2000) (en banc on recon.).

By unpublished decision in *Caudill v. Cumberland River Coal Co.*, BRB No. 00-1185 BLA (Sept. 26, 2001), *aff'd.*, 2006 WL 3345416, Case No. 05-3680 (6<sup>th</sup> Cir., Nov. 17, 2006) (unpub.), the Board cited to its decisions in *Stiltner v. Wellmore Coal Corp.*, 22 B.L.R. 1-37, 1-40-42 (2000) (en banc) and *Selak v. Wyoming Pocahontas Land Co.*, 21 B.L.R. 1-173, 1-177-78 (1999)(en banc) to hold that it is within the administrative law judge's discretion to order that a claimant be re-examined on modification. The Board stated that the issue to be determined by the administrative law judge is whether the employer has raised a credible issue pertaining to the validity of the original adjudication such that an order compelling a claimant to submit to examinations or tests on modification would be in the interest of justice. This holding was based on 20 C.F.R. § 718.404(b) (2000), which appears in similar form at 20 C.F.R. § 725.203(d) (2008). Moreover, the Board held that, because the district director listed "modification" as an issue on the CM-1025, the parties need not move to amend the CM-1025 to specifically include the medical issues of entitlement. Rather, the Board concluded that a petition for modification "includes whether the ultimate fact of entitlement was correctly decided."

## **2. After applicability of 20 C.F.R. Part 725 (2008)**

Under the amended regulations, each party is entitled to submit one medical opinion on modification (which may require examination of the miner). 20 C.F.R. §§ 725.310 and 725.414 (2008). *But see* the discussion of *Rose v. Buffalo Mining Co.*, 23 B.L.R. 1-221 (2007) and related cases at Chapter 4. In *Rose*, the Board held:

[W]here a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. § 725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit additional medical evidence allowed by 20 C.F.R. § 725.310(b).

*Id.*

### **F. Failure to timely controvert original claim; limitation on scope of modification**

In *Eastern Assoc. Coal Corp. v. Director, OWCP [Duelley]*, Case No. 03-1604 (4<sup>th</sup> Cir. July 29, 2004) (unpub.), the court held that, where an employer fails to establish "good cause" for its failure to timely controvert a claim, then it cannot seek to have the merits of the claim reconsidered by filing a petition for modification. The court reasoned that an employer "may not use a motion for modification to circumvent the consequences of its failure to file a timely controversion." The only issue properly considered on modification under the circumstances was whether the adjudication officer properly found that "good cause" was not established for failure to timely controvert the original claim.

## **III. Commencement with the district director**

Modification proceedings are to be initiated before the district director, not before an administrative law judge or the Benefits Review Board. 20 C.F.R. § 725.310(b). At the conclusion of modification proceedings, the district director may issue a proposed decision and order, forward the claim for a hearing, or, if appropriate, deny the claim by reason of abandonment. 20 C.F.R. § 725.310(c) (2000) and (2008).

Prior to 1972, the district director had full adjudicatory authority over claims, including modifications. However, the 1972 Amendments vested adjudicatory authority over claims with the Office of Administrative Law Judges and, consequently, in *Craig v. United Church of Christ, Commission on Racial Justice*, 3 B.L.R. 1-300 (1981), and *Curry v. Beatrice Pocahontes Co.*, 3 B.L.R.

1-306 (1981), the Board held that the district director had no authority to modify an award of an administrative law judge. This principle was subsequently upheld in *Cornelius v. Drummond Coal Co.*, 9 B.L.R. 1-40 (1986).

#### **A. The Benefits Review Board**

The Board holds that any petition for modification must be initiated with the district director for an initial determination of all issues raised. *Ashworth v. Blue Diamond Coal Co.*, 11 B.L.R. 1-167 (1988).

#### **B. Circuit courts of appeals**

Several circuit courts of appeals have concluded that all modification proceedings should commence with the district director. *Saginaw Mining Co. v. Mazzuli*, 818 F.2d 1278 (6<sup>th</sup> Cir. 1987); *Director, OWCP v. Peabody Coal Co. (Sisk)*, 837 F.2d 295 (7<sup>th</sup> Cir. 1988); *Director, OWCP v. Palmer Coking Coal Co. (Manowski)*, 867 F.2d 552 (9<sup>th</sup> Cir. 1989); *Lee v. Consolidation Coal Co.*, 843 F.2d 159 (4<sup>th</sup> Cir. 1988); *Director, OWCP v. Kaiser Steel Corp. (Aupon)*, 860 F.2d 377 (10<sup>th</sup> Cir. 1988); *Director, OWCP v. Drummond Coal Co. (Cornelius)*, 831 F.2d 240 (11<sup>th</sup> Cir. 1987).

### **IV. Review by the administrative law judge**

#### **A. De novo review**

In evaluating a request for modification under 20 C.F.R. § 725.310 (2000) and (2008), it is not enough that the administrative law judge conduct a substantial evidence review of the district director's findings. Rather, the parties are entitled to *de novo* consideration of the issues. *Kovac v. BCNR Mining Corp.*, 14 B.L.R. 1-156 (1990), *aff'd on recon.*, 16 B.L.R. 1-71 (1992); *Dingess v. Director, OWCP*, 12 B.L.R. 1-141 (1989); *Cooper v. Director, OWCP*, 11 B.L.R. 1-95 (1988). See also 20 C.F.R. § 725.310(c) (2008).

#### **B. Entitlement to a hearing**

##### **1. Prior to applicability of 20 C.F.R. Part 725 (2008)**

##### **a. Benefits Review Board**

In *Pukas v. Schuylkill Contracting Co.*, 22 B.L.R. 1-69 (2000), the Board determined that an administrative law judge is required to hold a hearing on modification, even though the petition for modification was filed with the district director. Only when all parties waive their right to a hearing or request summary judgment may the administrative law judge not hold a hearing. See also *Gump v. Consolidated Coal Co.*, BRB Nos. 98-0453 BLA and 94-0578 BLA

(Dec. 18, 1998) (unpub.) (employer entitled to an oral hearing on modification).

### **b. Sixth and Seventh Circuits**

The Sixth and Seventh Circuits held that a hearing was required on modification, unless it was waived by the parties in writing. In *Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7<sup>th</sup> Cir. 1994), the court held that it was error for the administrative law judge to deny a claimant's request for a hearing on modification. In so holding, the court stated:

Given Dr. Fitzpatrick's reading of the recent x-ray as positive for pneumoconiosis, the validity of Dr. Hessel's analysis should have been determined after a hearing. Instead, the ALJ improperly substituted his judgment for that of a qualified physician.

. . .

Congress obviously intended that the weighing of conflicting evidence be done after a hearing on whether to award benefits . . . .. When a full hearing has been held, the ALJ may then make an informed determination. At such a hearing, Drs. Hessel and Fitzpatrick may testify and be questioned, and other evidence not involving rereadings may be received.

In *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388 (6<sup>th</sup> Cir. 1998), the Sixth Circuit held that the administrative law judge, to whom a black lung claim was reassigned, erred in denying Claimant an oral hearing on modification. In support of its conclusion, the Sixth Circuit cited to the Act and regulations stating, *inter alia*, that a party is entitled to a hearing on request and the district director must forward the file to the Office of Administrative Law Judges. It also cited to *Lukman v. Director, Office of Workers' Compensation Programs*, 896 F.2d 1248 (10<sup>th</sup> Cir. 1990), a case involving a subsequent claim under §725.309, and to *Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7<sup>th</sup> Cir. 1994). The Sixth Circuit found that, because the original deciding administrative law judge was no longer with the agency, a modification case was properly reassigned to another administrative law judge after notice was provided to the parties. Claimant argued "that it was error to change the ALJ assigned to his case during the pendency of his proceeding." The court cited to 29 C.F.R. § 18.30 which authorizes the Chief Administrative Law Judge to reassign a claim where the original deciding administrative law judge is no longer available. It then concluded that "[a]s no party objected to the reassignment after notice and because the proper procedures for reassignment were followed, we find no merit in Cunningham's argument."

Again, in *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425 (6<sup>th</sup> Cir. 1998), the Sixth Circuit cited to *Cunningham* to state that an administrative

law judge is required to hold an oral hearing on modification. In so holding, the *Robbins* court stated the following:

A hearing is not necessary if all parties give written waiver of their rights to a hearing and request a decision on the documentary record. (citation and footnote omitted). The only other instance in the regulations which permits a decision without holding a requested hearing is when a party moves for summary judgment, and the ALJ determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See 20 C.F.R. § 725.452(c). As the Director points out, '[t]here is no regulatory provision which would permit an administrative law judge to initiate summary judgment proceedings sua sponte.' (citation omitted).

## **2. After applicability of 20 C.F.R. Part 725 (2008)**

The amended regulations at 20 C.F.R. § 725.452(d) (2008) require that an oral hearing be held in every claim, unless (1) summary judgment is issued, or (2) the parties fail to timely respond to the administrative law judge's notice of intent to decide the matter without an oral hearing:

If the administrative law judge believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the judge shall notify the parties by written order and allow at least 30 days for the parties to respond. The administrative law judge shall hold the oral hearing if any party makes a timely request in response to the order.

20 C.F.R. § 725.452(d) (2008).

### **C. Proper review of the record**

#### **1. Diligence, motive, and futility, the threshold determinations**

In *Sharpe v. Director, OWCP*, 495 F.3d 125 (4<sup>th</sup> Cir. 2007), the court noted that, "[i]mportantly, the modification of a black lung claim does not necessarily flow from a finding that a mistake was made on an earlier determination of fact." Under the facts of the case, Employer filed a petition for modification on a living miner's claim two months after the miner died and nearly seven years after a decision of the Benefits Review Board (Board) affirming that the miner was entitled to benefits on the basis that he suffered from complicated pneumoconiosis. In the meantime, the widow also filed a claim. Upon consolidating the claims, the administrative law judge initially

concluded that Employer had failed to present new evidence sufficient to establish that the miner did not suffer from complicated pneumoconiosis. As a result, Employer's petition for modification of the miner's claim was denied and benefits were awarded in the survivor's claim.

On appeal, the Board held that the administrative law judge erred in relying on findings of fact rendered by the previous judge and the Board directed that, on remand, the miner's claim must be reviewed *de novo*. On remand, the judge modified the miner's claim (more than four years after his death) and denied the miner's and survivor's claim. In so doing, the court noted that the judge applied the misguided remand instructions of the Board and "only assessed the factual accuracy of the complicated pneumoconiosis finding and failed to evaluate the other pertinent factors." The court stated that the administrative law judge and Board mistakenly assumed that Employer "had a right to modification of the living miner's claim upon simply establishing a mistake of fact." The court observed:

[N]one of the decisions on the Modification Request addressed the fact that Westmoreland waited nearly seven years to file the Request, none questioned Westmoreland's motive in filing its apparent response to the survivor's claim, and none otherwise addressed whether a reopening of the matter would render justice.

Here, the court focused on the discretionary language at 20 C.F.R. § 725.310(a) (2000) that, "[u]pon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director *may* . . . reconsider the terms of an award or denial of benefits." (emphasis added). The court noted that the administrative law judge's denial of benefits on remand only addressed one of the "factors relevant to an exercise of sound discretion"; *to wit*, whether a mistake of fact was made in the original decision on the miner's claim.

Citing to *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 547 (7<sup>th</sup> Cir. 2002), the Fourth Circuit noted the Seventh Circuit has "recognized that the diligence of a party seeking modification should be considered in a modification determination." *See also McCord v. Cephass*, 532 F.2d 1377, 1378 (D.C. Cir. 1976) (remanding for assessment of whether reopening would "render justice under the act" in light of the employer's four-plus years delay in pursuing modification). The Fourth Circuit held that, in addition to diligence, the adjudicator must consider a party's motive in seeking modification and whether the modification petition is futile or moot (*i.e.* whether the deceased miner had no estate such that any overpayment could not be recovered by the employer).

*See also D.S. v. Ramey Coal Co.*, 24 B.L.R. 1-\_\_\_\_, BRB No. 07-0789 BLA (June 25, 2008) (motive, diligence, and accuracy must be considered).

## **2. "Change in conditions"**

### **a. Defined**

The circuit courts and Benefits Review Board have held that, for purposes of establishing modification, the phrase "change in conditions" refers to a change in the claimant's physical condition. See *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1<sup>st</sup> Cir. 1982); *Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240 (11<sup>th</sup> Cir. 1987); *Lukman v. Director, OWCP*, 11 B.L.R. 1-71 (1988) (*Lukman II*).

Note, however, even if no new evidence is submitted, or newly submitted evidence does not support a change in condition, the fact-finder must review the entire record to determine whether a "mistake in a determination of fact" has been made. See e.g., *Amax Coal Co. v. Franklin*, 957 F.2d 355 (7<sup>th</sup> Cir. 1992) (letter from miner's physician indicating that the miner may have black lung disease did not establish a "change in conditions," but was sufficient to warrant reopening the claim based upon a "mistake in a determination of fact").

### **b. Scope of review**

In determining whether a "change in conditions" is established, the fact-finder must conduct an independent assessment of the newly submitted evidence (all evidence submitted subsequent to the prior denial) and consider it in conjunction with the previously submitted evidence to determine if the weight of the new evidence is sufficient to demonstrate an element or elements of entitlement previously adjudicated against claimant. *Kingery v. Hunt Branch Coal Co.*, 19 B.L.R. 1-6 (1994) ("change in conditions" not established where the existence of pneumoconiosis by chest x-ray was demonstrated in the original claim and claimant merely submitted additional positive x-ray readings on modification); *Napier v. Director, OWCP*, 17 B.L.R. 1-111 (1993); *Nataloni v. Director, OWCP*, 17 B.L.R. 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 B.L.R. 1-156 (1990), *aff'd on recon.*, 16 B.L.R. 1-71 (1992).

As previously noted, even if a "change in conditions" is not established, evidence in the entire claim file must be reviewed to determine whether a "mistake in a determination of fact" was made. This is required even where no specific mistake of fact has been alleged. *Worrell, supra*; *Jessee, supra*; *Kingery, supra*; *Kovac, supra*.

**c. Submission of "new" evidence required to support change in condition**

Change cannot be based on evidence pre-dating prior decision

On reconsideration in *Kovac, supra*, the Board stated that modification proceedings based on a possible mistake of fact need not be predicated on newly submitted evidence but, if a modification proceeding is based on an alleged change in conditions, then new evidence must be submitted in support of such allegation.

Resubmission of evidence that was in the record prior to issuance of the original decision (or a new report that merely reviews evidence in existence at the time of the prior decision) is insufficient to demonstrate a "change in conditions." *Kingery, supra*. However, evidence generated after issuance of the prior decision, which is based on medical data (x-ray studies, physical examinations, pulmonary function testing, blood gas testing, CT-scans, and the like) generated after the prior decision, may be considered.

Consideration of withheld evidence

In a claim filed prior to January 19, 2001, evidence that would have been excluded under 20 C.F.R. § 725.456(d) (2000), because it was in existence at the time the claim was before the district director and withheld, cannot support modification in the absence of "extraordinary circumstances." *Wilkes v. F & R Coal Co.*, 12 B.L.R. 1-1 (1988).

The amended regulatory provisions at 20 C.F.R. § 725.456 (2008) have deleted the requirement that medical evidence generated when the claim is pending before the district director cannot be withheld. As a result, it appears that the *Wilkes* holding would not apply to a claim adjudicated under the amended regulations.

**3. "Mistake in a determination of fact"**

**a. May include challenge to ultimate issues of entitlement**

The Board has yet to comprehensively define the phrase "mistake in a determination of fact." Several circuit courts of appeals have, however, concluded that it is to be interpreted broadly and includes any challenge to the ultimate issues of whether the miner is totally disabled due to pneumoconiosis.

In *Keating v. Director, OWCP*, 71 F.3d 1118 (3<sup>rd</sup> Cir. 1995), the Third Circuit held that, on modification, "the [ALJ] must review all evidence of record - any new evidence submitted in support of modification as well as the evidence previously of record - and 'further reflect' on whether any mistakes [of] fact were made in the previous adjudication of the case." By unpublished decision, in *USX Corp. v. Director, OWCP*, Case No. 94-3122 (3<sup>rd</sup> Cir. Sept. 29, 1994), the Third Circuit stated that "[i]t is 'irrelevant' that a claimant fails to plead a mistake of fact or change in conditions . . . ."

Similarly, in *Jessee v. Director, OWCP*, 5 F.3d 723 (4<sup>th</sup> Cir. 1993), the Fourth Circuit held that a request for modification may be based on an allegation "that the ultimate fact -- disability due to pneumoconiosis -- was mistakenly decided . . . ."

In *Consolidation Coal Co. v. Director, OWCP [Worrell]*, 27 F.3d 227 (6<sup>th</sup> Cir. 1994), the Sixth Circuit adopted the Fourth Circuit's position in *Jessee* that a modification petition need not specify any factual error or change in conditions and, indeed, the claimant may merely allege that the ultimate fact - total disability due to pneumoconiosis-- was wrongly decided and request that the record be reviewed on that basis. Moreover, the court stated that the adjudicator "has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions."

Similarly, in *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6<sup>th</sup> Cir. 1997), the Sixth Circuit reiterated that, in a claim involving a petition for modification, "the fact-finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence for any mistake in fact or change in conditions." It noted that the standard for opening the record on modification is "very low."

The Seventh Circuit Court of Appeals has noted that the reopening provision is to be interpreted generously to the claimant. *Amax Coal Co. v. Franklin*, 957 F.2d 355 (7<sup>th</sup> Cir. 1992). See also *O'Keeffe v. Aerojet-General Shipyards Inc.*, 404 U.S. 254, 256 (1971). Under *Franklin*, "mistake in a determination of fact" includes mixed questions of law and fact, including the "ultimate fact" of whether the claimant is entitled to benefits under the Act. *Id.* at 358.

#### **b. May be filed by Employer**

In *Branham v. Bethenergy Mines, Inc.*, 21 B.L.R. 1-79 (1998) (J. McGranery, dissenting), Claimant was initially awarded benefits by an administrative law judge and the decision was affirmed by the Board. However, Employer filed a petition for modification, and another administrative law judge concluded that a "mistake in a determination of fact" had been made such that Claimant was not entitled to benefits. The Board rejected Claimant's

argument that Employer's modification request constituted an improper collateral attack on the original administrative law judge's decision.

The Board further held that it was proper for the second administrative law judge to reopen the record for the submission of new evidence to state that "[o]ne could hardly find a better reason for rendering justice than that it would be unjust or unfair to require an employer to pay benefits to a miner who does not meet the requirements of the Act." In a dissenting opinion, Judge McGranery stated that modification should not become an avenue for Employer to retry its case and make "a better showing on the second attempt." She noted that Claimant prevailed by a preponderance of the evidence but "Employer, with its superior resources, shifted the balance" on modification. Judge McGranery, therefore, concluded that the interests of justice had not been served by reopening the case on modification. *See also King v. Jericol Mining, Inc.*, 246 F.3d 822 (6<sup>th</sup> Cir. 2001) (modification is available to claimants and employers).

### **c. Party bound by acts of attorney**

By unpublished decision in *Hilliard v. Old Ben Coal Co.*, BRB No. 99-0933 BLA (June 30, 2000), the Board upheld the administrative law judge's finding that Employer was bound by the acts of its attorney who, without Employer's knowledge, abandoned his law practice:

Apparently without notice to employer, employer's counsel, Wayne R. Reynolds, abandoned his law practice at some point during the consideration of employer's first request for modification, which was denied by Judge Burke. Employer asserts that under these circumstances, it would be unjust to allow an award of benefits when the evidence of record clearly does not support a finding of entitlement. We reject employer's argument, as the general rule is that a party is bound by the actions of its attorney, no matter how negligent or incompetent, and that a party dissatisfied with the actions of its freely chosen counsel has a separate action against such counsel in another forum for his negligence. (citations omitted).

*Id.*

### **d. Evidence obtained using forged release, excluded from consideration**

In *Williams v. Old Ben Coal Co.*, BRB No. 00-0272 BLA (Dec. 28, 2000) (unpub.), the Board held that the administrative law judge properly excluded the opinions of Drs. Naeye, Caffrey, Hutchins, and Kleinerman after finding that Employer's counsel obtained autopsy records of the miner from the

coroner's office by submitting a signed release by the survivor with a forged date next to it. The Board determined that the administrative law judge acted within his discretion in excluding evidence obtained "by employer through misrepresentation of claimant's consent to release the medical records."

**e. No allegation of mistake required**

The Board holds that, in any case involving a modification petition, the fact-finder should review the claim for a "mistake in a determination of fact," regardless of whether a mistake is specifically alleged. *Kingery v. Hunt Branch Coal Co.*, 19 B.L.R. 1-6 (1994); *Jessee, supra*; *Worrell, supra*. See also 20 C.F.R. § 725.310(c) (2008).

The amended regulations at § 725.310(c) provide that "[i]n any case forwarded for hearing, the administrative law judge assigned to hear such case shall consider whether any additional evidence submitted by the parties demonstrates a change in condition and, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact." 20 C.F.R. § 725.310(c) (2008).

**f. Scope of review**

Consider all evidence

The United States Supreme Court, in *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971), has indicated that all evidence of record should be reviewed in determining whether "a mistake in a determination of fact" was made. The Court stated that, under modification, the fact-finder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." See also *Jessee v. Director, OWCP*, 5 F.3d 723 (4<sup>th</sup> Cir. 1993); *Kovac, supra*; *Director, OWCP v. Drummond Coal Co. (Cornelius)*, 831 F.2d 240 (11<sup>th</sup> Cir. 1987).

The amended regulations

The amended regulations at 20 C.F.R. § 725.310(c) (2008) provide that "[i]n any case forwarded for hearing, the administrative law judge assigned to hear such case shall consider whether any additional evidence submitted by the parties demonstrates a change in condition and, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact." 20 C.F.R. § 725.310(c) (2008).

### **g. Correcting misidentified carrier**

In the Sixth Circuit, modification may be relied upon by the district director to correct misidentification in the case of the responsible *carrier* even where a final compensation order has been issued against the operator. *Caudill Construction Co. v. Abner*, 878 F.2d 179 (6th Cir. 1989).

### **h. Survivor's claim**

In a survivor's claim, the sole ground for modification is that there has been a mistake in a determination of fact. This is because there can be no change in the deceased miner's condition.

### **i. Preference for "accuracy over finality"**

#### Benefits Review Board

*Branham v. Bethenergy Mines, Inc.*, 21 B.L.R. 1-79 (1998).

#### Seventh Circuit

The Seventh Circuit Court of Appeals, in *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533 (7<sup>th</sup> Cir. 2002)(J. Wood, dissenting), discussed the criteria an administrative law judge should consider on modification.

Employer filed a second petition for modification of an award of survivor's benefits based, in part, on evidence which could have been submitted at the original hearing or during an earlier modification proceeding. The judge denied Employer's petition for modification as not in the interest of justice under the Act. She reasoned that all of the evidence that Old Ben proffered or attempted to obtain in the second modification proceeding had been available during the first modification proceeding, and that a modification proceeding is not intended to allow a party to simply retry its case when it thinks it can make a better showing by presenting evidence that it could have, but did not present earlier, "[t]o do so would allow the Employer, under the guise of an allegation of mistake, to retry its case simply because it feels that it can make a better showing the next time around."

Old Ben appealed to the Benefits Review Board, who affirmed the judge's decision. The Board held that the judge acted within her discretion by finding that reopening the case would not render justice under the Act. The Board reasoned that Old Ben is bound by the actions of its original counsel, no matter how negligent or incompetent, and that a party dissatisfied with the actions of its freely chosen counsel has a separate action against such counsel in another forum.

Old Ben appealed to the Seventh Circuit. The Director filed a brief in support of the position of Old Ben, arguing that the judge and the Board applied the incorrect legal standard and the judge should be required to reopen the matter and reevaluate the award of benefits. The Director argued to the court that a timely requested modification of a mistaken decision should be denied only if the moving party has engaged in such contemptible conduct, or conduct that renders its opponent so defenseless, that it could be said that correcting the decision would not render justice under the Act.

The Seventh Circuit accepted the position of Old Ben and the Director. The court found that it owed the usual deference to the Director given by Courts to agencies that interpret its own statutes and regulations. The Court cited the Supreme Court decisions in *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459 (1968) and *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1972), for the employment of "a broad reading of Section 22" to permit reconsideration of the ultimate question of fact without submitting any new evidence. The court determined that the language, structure and case law interpreting Section 22 articulates a preference for accuracy over finality in the substantive award.

The Court held that "whether requested by a miner or an employer, a modification request cannot be denied out of hand based solely on the number of times modification has been requested or on the basis that the evidence may have been available at an earlier stage in the proceeding." The Court then discussed the factors to be considered in determining whether granting modification serves justice under the Act:

. . . we do not believe that only sanctionable conduct constitutes the universe of actions that overcomes the preference for accuracy. For example, just as the remedial purpose of the Act would be thwarted if an ALJ were required to brook sanctionable conduct, the purpose also would be thwarted if an ALJ were required to reopen proceedings if it were clear from the moving party's submissions that reopening could not alter the substantive award. So too, an ALJ would be entitled to determine that an employer was employing the reopening mechanism in an unreasonable effort to delay payment.

. . .

In making that determination, the ALJ will no doubt need to take into consideration many factors including the diligence of the parties, the number of times that the party has sought reopening, and the quality of the new evidence which the party wishes to submit. These and other factors deemed relevant by the ALJ in a particular case ought to be weighed not under an amorphous

'interest of justice' standard, but under the frequently articulated 'justice under the Act' standard, *O'Keefe*, 404 U.S. at 255. This distinction is not simply one of semantics. The latter formulation cabins the discretion of the ALJ to keep in mind the basic determination of Congress that accuracy of determination is to be given great weight in all determinations under the Act.

The Court reiterated that "finality simply is not a paramount concern of the Act" and a remand of the case is required because "the ALJ gave no credence to the statute's preference for accuracy over finality . . ."

#### **4. Responsible operator designation on modification**

##### **a. Prior to applicability of 20 C.F.R. Part 725 (2008)**

In *Collins v. J & L Steel (LTV Steel)*, 21 B.L.R. 1-182 (1999), a case was referred to an administrative law judge for a hearing on Claimant's petition for modification. After referral of the claim, the Director moved that the claim be remanded to the district director's office to permit the naming of an employer and its carrier as potential responsible parties. The motion was denied based on grounds that the parties were properly dismissed in a previous proceeding. The Director did not appeal the denial of its motion to remand. A hearing was then held and the administrative law judge awarded benefits against the Black Lung Disability Trust Fund based, in part, on the Director's stipulation as to the presence of pneumoconiosis.

In its appeal, the Director maintained that the administrative law judge's refusal to remand the claim constituted error. The Board held, however, that the Trust Fund must remain liable for the payment of benefits stating that the Director should have taken an interlocutory appeal of the administrative law judge's order denying a remand. The Board reasoned that it has accepted interlocutory appeals "when undue hardship and inconvenience can be avoided." The Board distinguished the facts of this case from those presented in *Director, OWCP v. Oglebay Norton*, 877 F.2d 1300 (6<sup>th</sup> Cir. 1989), *Lewis v. Consolidation Coal Co.*, 15 B.L.R. 1-37 (1990), and *Beckett v. Raven Smokeless Coal Co.*, 14 B.L.R. 1-43 (1990), where the "new operator was actually identified before an administrative law judge had conducted a hearing and the claimant had not been awarded benefits by an administrative law judge against another operator or the Trust Fund." Rather, in this case, the Board stated that the Director had an obligation to appeal the administrative law judge's refusal to remand the claim to rename a potential responsible operator and carrier:

The Director chose not to appeal. In so doing, the Director risked

a finding of entitlement and the application of *Crabtree* to this case. It is now too late for the Director to ask for remand to rename Clinchfield and (the West Virginia Coal Workers' Pneumoconiosis Fund) as the responsible operator/carrier because if either of them were held to be the responsible operator, claimant would be unduly prejudiced by having to relitigate the claim. At the hearing, the Director stipulated to the existence of pneumoconiosis arising out of coal mine employment. (citation omitted). Since neither Clinchfield nor CWPf is bound by the Director's stipulation regarding these elements of entitlement, claimant would be required to litigate the issues of the existence of pneumoconiosis and whether pneumoconiosis arose out of coal mine employment, as well as to relitigate the other issues.

*Id.* at 1-187.

**b. After applicability of  
20 C.F.R. Part 725 (2008)**

With regard to identification of the proper responsible operator on modification, the Department states the following in its comments to the amended regulations:

The Department disagrees that the regulations will always prevent an operator from seeking modification of a responsible operator determination based on newly discovered evidence. It is true, however, that the regulations limit the types of additional evidence that may be submitted on modification and, as a result, an operator will not always be able to submit new evidence to demonstrate that it is not a potentially liable operator.

The Department explained in its previous notices of proposed rulemaking that the evidentiary limitations of §§ 725.408 and 725.414 are designed to provide the district director with all of the documentary evidence relevant to the determination of the responsible operator liable for the payment of benefits. The regulations recognize, and accord different treatment to, two types of evidence: (1) [d]ocumentary evidence relevant to an operator's identification as a potentially liable operator, governed by § 725.408; and (2) documentary evidence relevant to the identity of the responsible operator, governed by §§ 725.414 and 725.456(b)(1).

. . .

The operator's ability to seek modification based on additional documentary evidence will thus depend on the type of evidence

that it seeks to submit. Where the evidence is relevant to the designation of the responsible operator, it may be submitted in a modification proceeding if extraordinary circumstances exist that prevented the operator from submitting the evidence earlier. For example, assume that the miner's most recent employer conceals evidence that establishes that it employed the miner for over a year, and that as a result an earlier employer is designated the responsible operator. If that earlier employer discovers the evidence after the award becomes final, it would be able to demonstrate that extraordinary circumstances justify the admission of the evidence in a modification proceeding.

That same showing, however, will not justify the admission of evidence relevant to the employer's own employment of the claimant. Under § 725.408, all documentary evidence pertaining to the employer's employment of the claimant and its status as a financially capable operator must be submitted to the district director.

65 Fed. Reg. 79,976 (Dec. 20, 2000).

Note that, under the amended regulations at § 725.465(b), "The administrative law judge shall not dismiss the operator designated as the responsible operator by the district director, except upon the motion or written agreement of the Director." 20 C.F.R. § 725.465(b) (2008).

## **V. Onset date for the payment of benefits**

### **A. Prior to applicability of 20 C.F.R. Part 725 (2008)**

The Board holds that, where benefits are awarded on modification, and since a petition for modification relates back to the originally filed claim, the date of the originally filed claim serves as the earliest date from which benefits may be paid. *Garcia v. Director, OWCP*, 12 B.L.R. 1-24 (1988).

However, in *Eifler v. Director, OWCP*, 926 F.2d 663 (7<sup>th</sup> Cir. 1991), the Seventh Circuit drew a distinction between modification based on a mistake of fact and one based on a change in conditions. Specifically, the court noted that a change in conditions, which requires that the claimant demonstrate that the miner's condition has worsened since the prior denial, entitles the claimant to benefits from the date of the change in conditions (which must be subsequent to the prior denial). A mistake in a determination of fact, however, may result in an onset date which is long before the date of the prior denial.

## **B. After applicability of 20 C.F.R. Part 725 (2008)**

Under the new regulations, 20 C.F.R. § 725.503(d) has been amended to address the date of onset of benefits payments in claims involving modification petitions and it provides as follows:

(d) If a claim is awarded pursuant to section 22 of the Longshore Act and § 725.310, then the date from which benefits are payable shall be determined as follows:

(1) Mistake in fact. The provisions of paragraphs (b) or (c) of this section, as applicable, shall govern the determination of the date from which benefits are payable.

(2) Change in conditions. Benefits are payable to a miner beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge. Where the evidence does not establish the month of onset, benefits shall be payable to such miner from the month in which the claimant requested modification.

20 C.F.R. § 725.303(d) (2008).

## **VI. Review of entire claim without threshold modification analysis; harmless error**

If the adjudicator fails to make a specific finding as to whether a "mistake in a determination of fact" or "change in conditions" exists, but decides the claim in its entirety on the merits, it is harmless error as "the modification finding is subsumed in the administrative law judge's findings on the merits of entitlement." *Motichak v. Bethenergy Mines, Inc.*, 17 B.L.R. 1-14 (1992); *Kott v. Director, OWCP*, 17 B.L.R. 1-9 (1992).