JUDGES' BENCHBOOK
OF THE
BLACK LUNG BENEFITS ACT

PREPARED BY THE U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC

AUGUST 2001

CHAPTER 23
Petitions for Modification Under § 725.310

Chapter 23

Chapter 23
Petitions for Modification Under § 725.310

I. Generally
[III(G)]

The modification provisions at § 22 of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 922, are incorporated into the Black Lung Benefits Act by 30 U.S.C.§ 932(a), and they provide the statutory authority to modify orders and awards. An award in a black lung claim may be modified (increased, decreased, or terminated) at the behest of the claimant, employer, or district director upon demonstrating that a "change in conditions" has occurred or there is a "mistake in a determination of fact." 20 C.F.R. § 725.310. 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).[1] Moreover, modification is available to both claimants and employers. *King v. Jericol Mining, Inc.*, 246 F.3d 822 (6th Cir. 2001).

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). In cases where the administrative law judge has issued a decision and order, the period for modification does not commence to run until the administrative law judge's decision is "filed" with the 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 where he issued a decision and order denying benefits on June 23, 1992, the decision was filed with the district director on July 1, 1992, but Claimant did not file a modification petition until June 23, 1993. Citing to the language § 725.310, the

---

[1] Employers, as well as claimants, have a right to file a petition for modification. In *Branham v. Bethenergy Mines, Inc.*, 20 B.L.R. 1-27 (1996), the Board vacated an administrative law judge's denial of Employer's petition for modification to state the following:

> [A]n administrative law judge may not invoke the remedial nature of the BLBA to conclude, as a matter of law, that modification on behalf of a party opposing entitlement could never render justice under the Act.
>
> . . .
>
> Section 22 accords both a claimant and a party respondent access to the means by which an award or denial of a compensation claim may be reopened.

The Board reiterated that modification may be based upon new evidence or further reflection upon the evidence already submitted.

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. *See also Orender v. Paramont Mining Co.*, BRB No. 88-1835 BLA (Dec. 27, 1990)(unpub.) (modification petitions sent by mail are allowed one year and seven days for filing pursuant to § 725.311(c) of the regulations).

In *USX Corp. v. Director, OWCP*, 978 F.2d 656 (11th 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.

In *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942 (6th 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.

It is noteworthy that, under the December 2000 amendments to the regulations, subsection (d) has been added to § 725.311 and it states the following with regard to computation of time periods:

> (d) In computing any period of time described in this part in which the period within which to file a response commences upon receipt of a document, it shall be presumed, in the absence of evidence to the contrary, that the document was received on the seventh day after it was mailed. In any case in which a provision of this part requires a document to be sent to a person or party by certified mail, and the document is not sent by certified mail, but the person or party actually received the document, the document shall be deemed to have been sent in compliance with the provisions of this part. In such a case, any time period which commences upon the service of the document shall commence on the date the document was received.

20 C.F.R. § 725.311(d) (Dec. 20, 2000).

B. Multiple modification petitions

In *Garcia v. Director, OWCP*, 12 B.L.R. 1-24 (1988), the claimant filed his initial claim on January 8, 1974, which was denied by the District Director on January 7, 1980. The claimant submitted additional evidence in October of 1980 (within one year of the denial) which the District Director denied under the modification provisions at 20 C.F.R. § 725.310. A "duplicate claim" was filed by the miner on November 25, 1981 (more than one year after the January 7, 1980 denial, but less than one year from the denial of modification), and it also was denied by the District Director under 20 C.F.R. § 725.309 for failure to establish a "substantial change in condition."

The Board stated that the district director erred in denying the November 25, 1981 filing under the duplicate claim provisions at 20 C.F.R. § 725.309, holding that the "duplicate claim" was a modification request since "the one year period for modification set forth in § 725.310 begins to run anew from the date of each denial" issued by the district director. Consequently, the November 25, 1981 "duplicate claim" was filed less than one year after the "last denial of the initial claim (issued on February 9, 1981) and thus met the requirements of § 725.310, merging into the claimant's initial claim filed on January 8, 1974." Finally, due to a merger of the modification with the initial 1974 claim, the Board held that it was proper for the administrative law judge to adjudicate the claim under Part 727, based upon the January 8, 1974 filing date.

The *Garcia* decision permits the filing of an infinite number of modification petitions in 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 § 725.310 as opposed to that for duplicate claims at § 725.309. The Board in *Garcia* bases 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 asserts that "[f]urther justification for this conclusion is the rule that a party may request modification of the denial of a claim by the Judge within one year after the conclusion of appellate proceedings."

In *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999), the circuit court likewise rejected Employer's argument that a petition for modification "is available for one year after the first rejection of a claim" and that 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 modification petition

Any communication, no matter how informal, may serve as a request for modification. In *Cobb v. Schirmer Stevedoring Co.*, 2 B.R.B.S. 132 (1975), *aff'd*, 577 F.2d 750 (9th Cir. 1978), a phone call from the claimant which is memorialized by the district director, wherein the claimant stated that he was dissatisfied with his compensation, was held to be a sufficient request for modification.

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 (April 2, 1992) (unpublished).

1. Survivor's claim may qualify as modification petition

It is noteworthy that, under some circumstances, a survivor's claim filed within one year of the administrative denial of a miner's claim can 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 (3d 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."

D. Exclusion of evidence on modification

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."

E. No "absolute right" to medical re-examination on modification

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.).

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).

Prior to 1972, the district director had full adjudicatory authority over claims and their 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 a 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 clarified its procedures for processing modification petitions in *Penoyer v. R & F Coal Co.*, 9 B.L.R. 1-12 (1986). In *Penoyer*, it was determined that when an appeal was pending before the Board, the administrative law judge who originally tried the case was the most appropriate person to evaluate the modification petition. Where no appeal was pending, a modification petition was properly initiated with the district director; however, the district director was merely to process the petition, gather evidence, notify the parties of the proceeding, and forward the case to the administrative law judge for resolution of the issues raised in the petition.

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 (6th Cir. 1987); *Director, OWCP v. Peabody Coal Co. (Sisk)*, 837 F.2d 295 (7th Cir. 1988); *Director, OWCP v. Palmer Coking Coal Co. (Manowski)*, 867 F.2d 552 (9th Cir. 1989); *Lee v. Consolidation Coal Co.*, 843 F.2d 159 (4th Cir. 1988); *Director, OWCP v. Kaiser Steel Corp. (Aupon)*, 860 F.2d 377 (10th Cir. 1988); *Director, OWCP v. Drummond Coal Co. (Cornelius)*, 831 F.2d 240 (11th Cir. 1987). The Board subsequently held that it would remand all petitions for modification to the district director for an initial determination of all issues raised. *Ashworth v. Blue Diamond Coal Co.*, 11 B.L.R. 1-167 (1988).

IV. Review by the administrative law judge

A. *De novo* review

In evaluating a request for modification under § 725.310, it is not enough that the administrative law judge conduct a substantial evidence review of the district director's finding. Rather, the claimant is entitled to *de novo* consideration of the issue. *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).

B. Entitlement to a hearing

1. Prior to applicability of December 2000 regulations

In earlier decisions, the Board held that an administrative law judge has the discretion, but is not required, to conduct a formal hearing on the issue of modification. *Kovac*, *supra*; *Wojtowicz v. Duquesne Light Co.*, 12 B.L.R. 1-162, 1-165 n.3 (1989). Indeed, because entitlement to benefits is determined primarily from the medical evidence of record and, in most cases, the miner has already testified, it would not be necessary to conduct another oral hearing unless the miner's last coal mine employment or specific issues regarding the length and conditions of his or her employment remain. Indeed, the Board upheld the denial of a hearing even where one was requested by the parties. In *Middleton v. Great Western Coal Resources Coal Co.*, 93-1063 BLA (Oct. 14, 1994)(unpub.), the Board held that where a hearing is requested, the administrative law judge must notify the parties that he or she does not intend to hold a hearing and issue an order setting forth the date on which the record will close prior to adjudication.

The Sixth and Seventh Circuits, on the other hand, 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 (7th Cir. 1994) wherein 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. Hessl'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. Hessl 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 (6th 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 which state, *inter alia*, that a party is entitled to a hearing upon request and the district director must forward the file to the OALJ. It also cited to *Lukman v. Director, Office of Workers' Compensation Programs*, 896 F.2d 1248 (10th Cir. 1990), a case involving a subsequent claim under § 725.309, and to *Arnold v. Peabody Coal Co.*, 41 F.3d 1203 (7th 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 (6th Cir. 1998), the Sixth Circuit cited to *Cunningham* to state that an administrative law judge is required to hold an oral hearing on modification upon request of a party. 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).

The Board has subsequently altered its position on this issue to hold that a hearing is required on modification unless it is waived by the parties. In *Pukas v. Schuylkill Contracting Co.*, 22 B.L.R. 1-69 (2000), the Board held that an administrative law judge is required to hold a hearing on modification even where the petition for modification was filed with the district director. The Board noted that, only when both parties waive their right to a hearing or request summary judgment, may the administrative law judge not hold a hearing.

In *Gump v. Consolidated Coal Co.*, BRB Nos. 98-0453 BLA and 94-0578 BLA (December 18, 1998) (unpublished), the Board held that Employer was entitled to an oral hearing on modification. The administrative law judge had "stated that since there were no credibility determinations to be made and no party indicated that a hearing was necessary, the petition for modification would be decided on the record." The Board concluded that this was error because Employer was denied an oral hearing "even though it requested one at the time it submitted the new evidence at the district director level." In sum, the Board held that, because Employer did not waive its right to an oral hearing or request a decision on the record, it was entitled to an oral hearing.

2. After applicability of December 2000 regulations

The amended regulations at § 725.452(d) require that an oral hearing be held in every claim unless summary judgment is issued or 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) (Dec. 20, 2000).

C. Proper review of the record

1. "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 (1st Cir. 1982); *Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987); *Lukman v. Director, OWCP*, 11 B.L.R. 1-71 (1988) (*Lukman II*). *See, e.g., Amax Coal Co. v. Franklin*, 957 F.2d 355 (7th 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 evidential 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 evidence is sufficient to demonstrate an element or elements of entitlement which were 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 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).

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) (Dec. 20, 2000).

c. Submission of new evidence required

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

d. Insufficient evidence submitted

Re-submission of evidence which was in the record prior to issuance of the original decision is insufficient to demonstration a "change in conditions." *King, supra.* However, evidence generated after issuance of the original decision may be properly considered. On the other hand, evidence which would have been excluded under § 725.456(d), because it was in existence at the time of the hearing and withheld, cannot support modification in the absence of "extraordinary circumstances." *Wilkes v. F & R Coal Co.*, 12 B.L.R. 1-1 (1988).

2. "Mistake in a determination of fact"

a. Defined to 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.

Benefits Review Board. The Board has upheld the right of an employer to file a petition for modification and challenge findings in a claimant's favor made in an earlier decision. For example, 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 whose decision was affirmed by the Board but, by petition for modification filed by Employer, a second administrative law judge concluded that a "mistake in a determination of fact" had been made and 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.

The Board has, however, limited the evidence admitted by Employer on modification under certain circumstances. By unpublished decision in *Hilliard v. Old Ben Coal Co.*, BRB No. 99-0933 BLA (June 30, 2000), the Board affirmed an administrative law judge's exclusion of evidence supporting Employer's petition for modification as it "could have been obtained before the miner's claim for benefits was adjudicated or when employer's first request for modification was before Judge Burke." In addition, the Board concluded that:

> . . . the administrative law judge properly extended this reasoning to employer's request for permission to obtain the report of the miner's autopsy. The miner died two years before Judge Burke's denial of employer's first petition for modification. Thus, employer could have sought and submitted this report at an earlier juncture.

Slip op. at 6. The Board also held that the administrative law judge properly held Employer to be 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).

Slip op. at 5-6.

In another unpublished decision, *Williams v. Old Ben Coal Co.*, BRB No. 00-0272 BLA (Dec. 28, 2000), the Board held that the administrative law judge properly excluded the opinions of Drs. Naeye, Caffrey, Hutchins, and Kleinerman upon 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."

Third Circuit. In *Keating v. Director, OWCP*, 71 F.3d 1118 (3d Cir. 1995), the court 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 (3d Cir. Sept. 29, 1994), the Third Circuit expressed its agreement with the Sixth Circuit's *Worrell* decision, *infra*, to state that "[i]t is 'irrelevant' that a claimant fails to plead a mistake of fact or change in conditions . . .."

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

Sixth Circuit. In *Consolidation Coal Co. v. Director, OWCP [Worrell]*, 27 F.3d 227 (6th 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." In *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6th 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." In *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942 (6th 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. It noted that the standard for opening the record on modification is "very low." *See also King v. Jericol Mining, Inc.*, 246 F.3d 822 (6th Cir. 2001) (modification is available to claimants and employers).

Seventh Circuit. 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 (7th Cir. 1992). *See also O'Keefe v. Aerojet-General Shipyards Inc.*, 404 U.S. 254, 256 (1971). Thus, 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. No allegation of mistake necessary

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 such is specifically alleged. *Kingery v. Hunt Branch Coal Co.*, 19 B.L.R. 1-6 (1994). *See also* 20 C.F.R. § 725.310(c) (Dec. 20, 2000).

c. Scope of evidentiary review

The United States Supreme Court, in *O'Keefe 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" has made and 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 (4th Cir. 1993); *Kovac, supra; Director, OWCP v. Drummond Coal Co. (Cornelius)*, 831 F.2d 240 (11th Cir. 1987).

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) (Dec. 20, 2000).

d. 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).

e. 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.

3. New operator named on modification

a. Prior to applicability of December 2000 regulations

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 upon the administrative law judge's finding 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, upon 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 (6th 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 December 2000 regulations

With regard to identification of the proper responsible operator on modification, the Departments 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) Documentary 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.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 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) (Dec. 20, 2000).

V. Onset date for the payment of benefits

A. Prior to applicability of December 2000 regulations

The Board holds that, where benefits are awarded on modification, and because a petition for modification merges with the originally filed claim, the date of the originally filed claim controls the regulations which are applicable to the modification petition claim and it also 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 (7th Cir. 1991), the Seventh Circuit drew a distinction between modification based upon a mistake of fact and one based upon 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 of fact, however, may result in an onset date which is long before the date of the prior denial.

B. After applicability of December 2000 regulations

Under the new regulations, § 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) (Dec. 20, 2000).

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 of fact" or "change in conditions" exists, but instead 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).