PART III

PROCEDURAL ISSUES

G. MODIFICATIONS

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Act by 30 U.S.C. §932(a), provides that on his own initiative, or on the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits. *See* 20 C.F.R. §725.310.

The district director is authorized to modify an award or denial of benefits based upon a mistake in fact or change in conditions. It is well settled, however, that an error or a change of *law* is not a proper ground for modification. ***Stokes v. George Hyman Construction Co.***, 19 BRBS 110, 113 (1986); ***Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.***, 17 BRBS 183, 185 (1985); ***Swain v. Todd Shipyards Corp.***, 17 BRBS 124, 125 (1985); ***Donadi v. Director, OWCP***, 12 BLR 1-166 (1989), *aff'd on recon.*, 13 BLR 1-24 (1989). The modification procedure does not "render meaningless" the finality of a Decision and Order which is *not* appealed within the requisite appeal time. The appellate process concerns the legal validity of an award whereas the modification procedure is aimed toward reviewing factual errors in an effort to render justice under the Act. ***O'Keeffe v. Aerojet-General Shipyards, Inc.***, 404 U.S. 254 (1971). The intended purpose of modification based on a mistake in fact is to vest the fact-finder "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." ***O'Keeffe***, 404 U.S. at 257; *see* ***Director, OWCP v. Drummond Coal Co. [Cornelius]***, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987); ***Dobson v. Todd Pacific Shipyards Corp.***, 21 BRBS 174 (1988).

A request for modification need not be formal in nature. Any written notice by or on behalf of claimant within one year of an administrative denial evidencing an intention to make a request for modification may constitute a request for modification. ***Fireman's Fund Ins. Co v. Bergeron***, 493 F.2d 545 (5th Cir. 1974). For example, in ***Cobb v. Schirmer Stevedoring Co.***, 2 BRBS 132 (1975), *aff'd*, 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978), the Board held that a district director's written memorandum summarizing his telephone conversation with claimant was sufficient to constitute a modification request under Section 22 because the memorandum indicated that claimant was dissatisfied with his compensation. *See also* ***McKinney v. O'Leary***, 460 F.2d 371 (9th Cir. 1972); ***Madrid v. Coast Marine Construction Co.***, 22 BRBS 148 (1989); ***Searls v. Southern***

Construction Co., 11 BLR 1-161 (1988).

The Board has long held that in cases where a timely appeal is pending before the Board, modification is properly initiated not before the district director but before the administrative law judge who originally heard the case. ***Hoskins v. Director, OWCP***, 11 BLR 1-144 (1988); ***Hankins v. Director, OWCP***, 16 BLR 1-62 (1988); ***Yates v. Armco Steel Corp.***, 10 BLR 1-132 (1987); ***Sisk v. Peabody Coal Co.***, 9 BLR 1-213 (1986), *aff'd sub nom*. ***Director, OWCP v. Peabody Coal Co.***, 837 F.2d 295 (7th Cir. 1988); ***Cornelius v. Drummond Coal Co.***, 9 BLR 1-40 (1986), *aff'd sub nom*. ***Director, OWCP v. Drummond Coal Co. [Cornelius]***, 831 F.2d 240 (11th Cir. 1987); ***Curry v. Beatrice Pocahontas Co.***, 3 BLR 1-306 (1981).

The Board recently held, however, that it would remand petitions for modification to the district director, *see* ***Ashworth v. Blue Diamond Coal Co.***, 11 BLR 1-167 (1988); ***Haskins***, ***supra***, and thereby follow the holdings of several circuits of the United States Court of Appeal that proceedings must be initiated before the district director pursuant to Section 725.310. ***Lee v. Consolidation Coal Co.***, 843 F.2d 159, 11 BLR 2-106 (4th Cir. 1988); ***Saginaw Mining Co. v. Mazzulli***, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987); ***Director, OWCP v. Peabody Coal Co. [Sisk]***, 837 F.2d 295, 11 BLR 2-31 (7th Cir. 1988); ***Director, OWCP v. Palmer Coking Coal Co. [Manowski]***, 867 F.2d 552, BLR (9th Cir. 1989); ***Director, OWCP v. Kaiser Steel Corp. [Zupon]***, 860 F.2d 377, 12 BLR 2-25 (10th Cir. 1988); ***Director, OWCP v. Drummond Coal Co. [Cornelius]***, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987); ***Hoskins v. Director, OWCP***, 11 BLR 1-144 (1988). For cases arising in the Seventh, Ninth, Tenth, and Eleventh Circuits, the courts have explicitly indicated that a district director may only correct his or her own mistakes of fact and not those made by an administrative law judge. ***Sisk***, ***supra***; ***Manowski***, ***supra***; ***Zupon***, ***supra***; ***Cornelius***, ***supra***; *see generally* ***Yates v. Armco Steel Corp.***, 10 BLR 1-132 (1987).

The language of Section 22 of the LHWCA that identifies only the district director as the adjudication officer who may modify a decision is a relic of a time when district directors had full adjudicative authority over benefits claims. The adjudicative authority has been transferred to administrative law judges in order to satisfy the procedural requirements of the APA, leaving district directors principally with administrative functions. ***Cornelius***, ***supra***; ***Yates v. Armco Steel Corp.***, 10 BLR 1-132 (1987). The Board has stressed that in its view the district director's role in processing a modification petition is purely ministerial and administrative, *i.e.*, limited to processing the petition for modification and transfer to the Office of Administrative Law Judges under the same procedures applicable to other claims. *Id*.

In determining whether claimant has established a change in conditions pursuant to Section 725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is

sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. ***Nataloni v. Director, OWCP***, 17 BLR 1-82 (1993).

Where appeal is pending or where the administrative law judge's decision and order has become final, modification should be initiated with the district director. 20 C.F.R. §725.310; *see* ***Ashworth***, 11 BLR at 1-168; ***Hoskins***, 11 BLR at 1-145; ***Penoyer v. R & F Coal Co.***, 9 BLR 1-12, 1-16-17 (1986), *modified on recon*., 12 BLR 1-4 (1986)(en banc); *see also* ***Cooper v. Director, OWCP***, 11 BLR 1-95 (1988)(Ramsey, CJ., concurring).

In ***Garcia v. Director, OWCP***, 12 BLR 1-24 (1988), the Board noted the regulatory scheme providing for continuing availability of modification proceedings within one year following any denial by the district director, even after the district director has considered modification once. ***Garcia***, 12 BLR at 1-26. The adjudicative actions to be taken by the district director under Section 725.310(c) at the conclusion of modification proceedings all provide subsequent opportunities to seek modification of that action. *See* 20 C.F.R. §§725.310(c), 725.409(b), 725.418(a), 725.419(d), 725.421. To achieve the intent of Congress underlying Section 22, the parties, as well as the district director on his or her own motion, may request modification of *any* decision issued by the district director, as the condition of the miner may change, in view of the progressive nature of pneumoconiosis, or a mistake in fact could be discovered as the district director considers new evidence in the procedure. ***Stanley v. Betty B Coal Co.***, 13 BLR 1-72 (1990); *see generally* ***Orange v. Island Creek Coal Co.***, 786 F.2d 724, 8 BLR 2-192, 2-197 (6th Cir. 1986). Furthermore, the modification process remains available throughout appellate proceedings. *See* ***O'Keeffe v. Aerojet-General Shipyards, Inc.***, 404 U.S. 254 (1971); *see generally* ***Director, OWCP v. Peabody Coal Co., [Sisk]***, 837 F.2d 295, 11 BLR 2-31 (7th Cir. 1988); ***Director, OWCP v. Drummond Coal Co.***, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987); ***Ashworth v. Blue Diamond Coal Co.***, 11 BLR 1-167 (1988); ***Hoskins v. Director, OWCP***, 11 BLR 1-144 (1988).

If the one year period expires and modification is not available or availing, claimant may still file a new claim, *i.e.*, a duplicate claim, but must establish a "material change in conditions" pursuant to 20 C.F.R. §725.309(c), (d).

CASE LISTINGS

[fact-finder must determine if mistake in fact or change in condition had occurred; if so, whether reopening case would render justice under Act] ***Banks v. Chicago Grain Trimmers Asso., Inc.***, 390 U.S. 459 (1967); ***McCord v. Cephas***, 532 F.2d 1377, 3 BRBS 371, 376 (D.C. Cir. 1976); ***Wynn v. Clevenger Corp.***, 21 BRBS 290 (1988).

[district director's *ex parte* modification of award while case was pending before Board was unlawful on jurisdictional and due process grounds] ***Bartley v. L & M Coal Co.***, 7

BLR 1-243 (1984), *aff'd* 901 F.2d 1311, 13 BLR 2-414 (6th Cir. 1990).

[fact-finder erred in considering request for modification based on post-hearing x-ray without having original record; party petitioning for modification before fact-finder while appealing case must notify Board] ***Telban v. Carbon Fuel Co.***, 8 BLR 1-175 (1985).

[new evidence submitted for first time on appeal to Board may not be considered but claimant can seek modification for its review] ***Berka v. North American Coal Corp.***, 8 BLR 1-183 (1985).

[in appeal of denied claim before Board, it is not considered "rejected" within meaning of Section 22 until all appellate proceedings concluded] ***Hall v. Director, OWCP***, 8 BLR 1-193 (1985).

DIGESTS

Claimant waited until after the administrative law judge issued an unfavorable decision and order to seek to admit additional medical evidence. The Board held that this new evidence provided no basis upon which to grant modification as it failed to establish a mistake in fact or change of condition. ***Gill v. Director, OWCP***, 8 BLR 1-427 (1986).

The Board, distinguishing ***Saginaw Mining Co. v. Mazzulli***, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987), held that an administrative law judge has jurisdiction to consider a request for modification which is filed before the administrative law judge's Decision and Order becomes final pursuant to 20 C.F.R. §725.479. ***Hensley v. Grays Knob Coal Co.***, 10 BLR 1-88 (1987).

The Board held that the district director did not err in initiating modification proceedings *sua sponte* pursuant to 20 C.F.R. §725.310 on the basis of a mistake in a determination of fact in a previous district director's uncontested award of benefits. The Board also affirmed the administrative law judge's decision to conduct a *de novo* hearing, rejecting claimant's contention that she would have been given the opportunity to first appeal the district director's action in modifying the award of benefits. The Board also noted that where there has been no prior adjudication of the claim by an administrative law judge, the district director has the authority to modify a final order by another district director. ***Cooper v. Director, OWCP***, 11 BLR 1-95 (1988)(Ramsey, CJ., concurring); *cf.* ***Grissom v. Freeman United Mining Co.***, 10 BLR 1-96 (1987).

Claimant's letters stating objection to district director's denial and that it was becoming harder for claimant to work and breathe, and additional letter stating that claimant was disabled and that he had quit work, constitutes a request for modification. ***Searls v. Southern Ohio Coal Co.***, 11 BLR 1-161 (1988).

The district director need not issue his modification order within the one year period provided by Section 22; rather, the modification process need only be initiated within that time period, ***Banks v. Chicago Grain Trimmers Assoc.***, 390 U.S. 459, 88 S.Ct. 1140 (1968); ***Candado Stevedoring Corp. v. Willard***, 185 F.2d 23 (2d Cir. 1950); ***American Mutual Liability Ins. Co. of Boston v. Lowe***, 85 F.2d 625 (3d Cir. 1936). ***Searls v. Southern Ohio Coal Co.***, 11 BLR 1-161 (1988).

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

Evidence which would be excluded under 20 C.F.R. §725.456(d) because it was in existence at time of hearing and withheld, in the absence of extraordinary circumstances, cannot support modification under 20 C.F.R. §725.310. ***Wilkes v. F & R Coal Co.***, 12 BLR 1-1 (1988).

Claimant's telephone calls, as memorialized by the district director, are sufficient to constitute a request for modification because they indicate claimant's belief that there was a change in condition. ***Madrid v. Coast Marine Construction Co.***, 22 BRBS 148 (1989).

The Board held that the administrative law judge improperly assumed jurisdiction without allowing completion of the administrative process when she *sua sponte* issued an Order Setting Aside the [District Director's] Order to Show Cause in this Fourth Circuit case controlled by ***Lee v. Consolidation Coal Co.***, 843 F.2d 159, 11 BLR 2-106 (4th Cir. 1988). The district director had properly initiated the modification process pursuant to 20 C.F.R. §725.533(a)(1) based on newly discovered evidence that a portion of claimant's permanent state disability award was for pneumoconiosis. The Board vacated the administrative law judge's Order and remanded to the district director for completion of the modification proceedings pursuant to 20 C.F.R. §725.310 and the Board's holding in ***Hoskins v. Director, OWCP***, 11 BLR 1-144, 1-145 (1988). The Board noted that any party aggrieved by the district director's findings could appeal to the Office of Administrative Law Judges for a *de novo* review of any contested issues. ***Dingess v. Director, OWCP***, 12 BLR 1-141 (1989).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made, since there cannot be a change in the deceased miner's condition. The Board rejects the contention that, as a matter of law, modification in a survivor's claim may be based only on newly discovered evidence which was not reasonably available or ascertainable at the time of the hearing. The Board holds that the relevant inquiry for the administrative law judge is whether a mistake in a determination of fact was demonstrated, and, if so, whether reopening the case would render justice under the Act. The Board holds that an administrative law judge is not required to hold a

formal hearing on every modification request, but rather, has the discretion to decide whether a modification hearing is necessary to render justice in a particular case. The administrative law judge's disposition of a petition for modification must comport with the requirements of the APA. ***Wojtowicz v. Duquesne Light Co.***, 12 BLR 1-162 (1989).

Modification may be relied upon by the district director to correct misidentification in the case of a responsible carrier, even where a final compensation order has been issued against the operator. ***Caudill Construction Company v. Abner***, 878 F.2d 179, 12 BLR 2-335 (6th Cir. 1989).

In reaffirming its earlier decision, the Board rejected the Director's argument that four Supreme Court cases, *viz.*, ***O'Keeffe v. Aerojet-General Shipyards***, 404 U.S. 254 (1971); ***Banks v. Chicago Grain Trimmers Ass'n.***, 390 U.S. 459 (1968); ***O'Leary v. Brown-Pacific-Maxon, Inc.***, 340 U.S. 504 (1951); and ***Cardillo v. Liberty Mutual Ins. Co.***, 330 U.S. 469 (1947) required a different result, and reaffirmed its holding that the administrative law judge's order that benefits be paid for a period during which the miner was undisputedly engaged in coal mine employment constituted a legal, rather than factual, error which does not provide a basis for modification under Section 22 of the LHWCA, 33 U.S.C. §922, as incorporated by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310. ***Donadi v. Director, OWCP***, 13 BLR 1-24 (1989), *aff'g on recon.*, 12 BLR 1-166 (1989).

The administrative law judge did not err in considering the district director's petition for modification on the basis of a mistake in a determination of fact, where subsequent to the award of benefits to claimant as the surviving spouse, the Director presented newly discovered evidence showing that the miner had previously been married and not divorced from that spouse. The Board distinguished ***Wilkes***, ***supra***, in which evidence had already been obtained by OWCP when the case was originally before the administrative law judge. ***Cole v. Director, OWCP***, 13 BLR 1-60 (1989).

The one year period for modification under Section 725.310(a) begins to run anew from the date of each denial issued by the district director. ***Garcia v. Director, OWCP***, 12 BLR 1-24 (1988). The Board reaffirmed its holding in ***Garcia v. Director, OWCP***, 12 BLR 1-24 (1988) that the one year modification period provided for in Section 725.310 runs from the date of the issuance of the last denial of the claim in the administrative process, even after the district director has considered modification once. The Board held that since claimant's duplicate claim was filed within one year of the issuance of the district director's last denial, the duplicate claim constituted a timely request for modification of claimant's initial claim pursuant to 20 C.F.R. §725.310. ***Stanley v. Betty B Coal Co.***, 13 BRB 1-72 (1990).

The Board held that, in evaluating a claim on modification at 20 C.F.R. §725.310, the administrative law judge's role is not to conduct a substantial evidence review of the district director's findings. Rather, the proper role for the administrative law judge in the

resolution of any contested issue, including the issue of whether modification should be granted, is *de novo* consideration of that issue. In considering the modification issue, the administrative law judge must conduct an independent assessment of the newly submitted evidence to determine whether the newly submitted evidence, *including any evidence submitted subsequent to the district director's determination*, is sufficient to establish the requisite change in conditions or mistake in a determination of fact. ***Kovac v. BCNR Mining Corp.***, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

On reconsideration, the Board modified its Decision and Order in ***Kovac v. BCNR Mining Corp.***, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992), to emphasize that the modification process set forth therein implying that new evidence is a prerequisite for modification, applies only to those situations in which a change in condition at 20 C.F.R. §725.310 is alleged and new evidence has been submitted in support of the allegation. New evidence is not a prerequisite to modification based on an alleged mistake in a determination of fact. ***Kovac v. BCNR Mining Corp.***, 16 BLR 1-71 (1992), *modifying*, 14 BLR 1-156 (1990).

Interpreting Section 725.310, the Board held that an administrative law judge is not required to make a preliminary determination regarding whether claimant has established a basis for modification of the district director's denial of benefits prior to reaching the merits of entitlement. Rather, such a determination is subsumed into the administrative law judge's decision on the merits. Thus, the administrative law judge is not constrained by any rigid procedural process in adjudicating claims in which modification of the district director's decision is sought. ***Motichak v. Beth Energy Mines, Inc.***, 17 BLR 1-14 (1992) and ***Kott v. Director, OWCP***, 17 BLR 1-9 (1992).

In determining whether claimant has established a change in conditions pursuant to Section 725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. ***Nataloni v. Director, OWCP***, 17 BLR 1-82 (1993).

Because the Director failed to allege any error made by the administrative law judge in his mistake in fact determination regarding the original Decision and Order and as the administrative law judge had addressed the arguments advanced by claimant in support of modification below, the Board declined to remand this case and affirmed the administrative law judge's conclusion that claimant had failed to demonstrate a mistake in fact. The Board noted that an error or change in law is not a proper basis for the initiation of Modification procedures under Section 22, *citing* ***Donadi v. Director, OWCP***, 12 BLR 1-166 (1989), *aff'd on recon.*, 13 BLR 1-24 (1989). ***Napier v. Director, OWCP***, 17 BLR 1-111 (1993).

The Board held that because Section 21(a) of the Longshore Act and 20 C.F.R. §725.479(a) provide that a decision and order becomes effective only when it is filed in the office of the district director, the time within which to seek modification pursuant to 33 U.S.C. §922 is one year measured from the date on which the decision and order is filed, not from its issuance date. Thus, the Board concluded that claimant's modification request, filed within one year of the date upon which the Decision and Order on Remand denying benefits became effective, was filed before one year after the denial of the claim and therefore constituted a timely request for modification pursuant to 33 U.S.C. §922 and 20 C.F.R. §725.310. ***Wooten v. Eastern Associated Coal Corp.***, 20 BLR 1-20 (1996).

The party opposing entitlement in a claim arising under the Black Lung Benefits Act may petition for modification pursuant to Section 22 based on a mistake in determination of fact in order to reopen an award of benefits. The Board did not reach the issue of whether a respondent to a claim may reopen an award based on a change in conditions. ***Branham v. Bethenergy Mines, Inc.***, 20 BLR 1-27 (1996).

The principles of *res judicata* and collateral estoppel do not apply to foreclose the reopening of an award pursuant to Section 22. ***Branham v. Bethenergy Mines, Inc.***, 20 BLR 1-27 (1996).

The Board, in dicta, pointed out that, in spite of the progressive nature of the disease of pneumoconiosis and the humanitarian nature of the Act, it would be an abuse of discretion to deny a petition for modification on the basis that any attempt to reopen an award of benefits would not "render justice under the Act." Such inquiries must be made on a case by case basis. ***Branham v. Bethenergy Mines, Inc.***, 20 BLR 1-27 (1996).

The majority of the panel (JJs. Hall and Smith) affirmed the ALJ's denial of benefits on remand based on the grant of modification. The majority rejected claimant's argument that the ALJ erred by relying on newly submitted evidence to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The majority also rejected claimant's argument that employer's request for modification is a collateral attack on the prior award of benefits. In addition, the majority rejected claimant's assertion that employer did not present any new evidence in support of its request for modification which was not available at the time of the original hearing. The majority held that employer provided the medical reports of physicians who, subsequent to the original hearing, recanted their prior opinions that claimant was totally disabled due to pneumoconiosis. Finally, the majority held that the ALJ properly exercised his discretion in determining that reopening the case would render justice under the Act. In the dissenting opinion, J. McGranery contends that the ALJ failed to understand how to exercise his discretion in determining whether reopening the record would render justice under the Act because the reason he gave for granting modification was that the evidence before him persuaded him that claimant was not entitled to benefits. The

dissent contends that the ALJ's explanation demonstrates his failure to understand the proper exercise of his discretion because his rationale makes redundant a separate inquiry into whether granting modification would render justice under the Act. The dissent would hold that the interest of justice was not served by granting modification. ***Branham v. Bethenergy Mines, Inc.***, 21 BLR 1-79 (1998)(McGranery, J., dissenting).

Where a district director has denied modification of a duplicate claim (in a case which has not progressed beyond the district director level), the administrative law judge should consider whether the newly submitted evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), rather than determining whether claimant has established a basis for modification of the district director's denial of his duplicate claim. An administrative law judge may properly review, *de novo*, the issue of whether the evidence establishes a material change in conditions. ***Hess v. Director, OWCP***, 21 BLR 1-141 (1998).

The Board held that the administrative law judge erred in determining that claimant's 1996 submission of new evidence constituted a duplicate claim. The Board further held that the filing of an untimely motion for modification does not constitute a new claim. The Board recognized that the regulations provide that the filing of a signed statement indicating an intention to claim benefits may be considered to be the filing of a claim under certain circumstances. 20 C.F.R. §725.305. Upon receiving such a written statement, the DOL is required to notify the signer, in writing, that to be considered, the claim must be executed by the claimant on a prescribed form and filed with the DOL within six months of the mailing of the notice. 20 C.F.R. §725.305(b). Although the DOL provided claimant with such notification, there was no indication that claimant filed the prescribed form. The regulations provide that claims based upon written statements indicating an intention to claim benefits that are not perfected by filing the prescribed form "shall not be processed." 20 C.F.R. §725.305(d). The Board, therefore, held that there was no claim before the administrative law judge to adjudicate. ***Stacy v. Cheyenne Coal Co.***, 21 BLR 1-111 (1999).

The Director is not required, after a request by an employer to reopen a claim pursuant to Section 22, to compel a claimant to submit to a medical examination. ***Selak v. Wyoming Pocahontas Land Co.***, 21 BLR 1-173 (1999).

In a holding analogous to the holding in ***Selak v. Wyoming Pocahontas Land Co.***, 21 BLR 1-173 (1999), the Board, *en banc*, held that employer, pursuant to a request for modification, does not have an absolute right to compel claimant to respond to discovery requests or other requests for medical evidence. ***Stiltner v. Wellmore Coal Corp.***, 22 BLR 1-37 (2000)(Decision and Order on Reconsideration *En Banc*).

The Board held that the Act and regulations mandate that an administrative law judge hold a hearing on any claim, including a request for modification filed with the district director, whenever a party requests such a hearing, unless such hearing is waived by

the parties or a party requests summary judgment. ***Pukas v. Schuylkill Contracting Co.***, 22 BLR 1-69 (2000).

Neither the Act, nor the regulations require any inquiry into an employer's decision to appear at a hearing unrepresented by counsel. Moreover, an administrative law judge is not required to specifically inform an unrepresented employer of its right to counsel. While 20 C.F.R. §725.362(b) and the holding of the Board in ***Shapell v. Director, OWCP***, 7 BLR 1-304 (1984), recognize the policy concerns implicit in allowing claimants to proceed without counsel, the Board is unable to conclude that similar policy concerns are recognized by either the Act or the regulations when an employer is unrepresented by counsel. ***Mitchell v. Daniels Company***, 22 BLR 1-73 (2000).

The plain language of Section 22 provides for modification within one year of the rejection of a claim. Employer's argument that Section 22 imposes a 364-day time limit in which to request modification is therefore rejected. ***Gross v. Dominion Coal Corp.***, 23 BLR 1-8 (2003).

Where the 365th day following the claim's rejection was a Saturday, a time computation rule provided at revised 20 C.F.R. §725.311(c) gave the miner until the next day which was not a Saturday, Sunday, or legal holiday to file his modification petition with the district director. Because claimant filed his modification petition on the following Monday, his modification request was timely. ***Gross v. Dominion Coal Corp.***, 23 BLR 1-8 (2003).

Under the facts of this case involving a request for modification, the Board held that the administrative law judge's weighing of the medical opinion evidence was fully consistent with the amended regulations and ***Nat'l Mining Ass'n v. U.S. Dep't of Labor***, 292 F.3d 849 (D.C. Cir. 2002). The administrative law judge engaged in a proper evidentiary analysis: after finding that the earlier evidence did not establish the existence of pneumoconiosis, he reasonably focused primarily on the more recent evidence in determining whether claimant established a change in his condition, and permissibly relied on the later positive evidence, which he found was better reasoned than the contrary evidence, to find the existence of pneumoconiosis established. ***Workman v. Eastern Associated Coal Corp.***, 23 BLR 1-22 (Aug. 19, 2004)(Motion for Recon.)(*en banc*).

The Board held that the administrative law judge erred in concluding that claimant had not requested withdrawal of his petition for modification, deferring to the Director's interpretation of the regulations to allow for the withdrawal of a petition for modification in the same manner as a claimant is permitted to withdraw a claim under 20 C.F.R. §725.306. Citing ***Clevenger v. Mary Helen Coal Co.***, 22 BLR 1-193 (2002) (*en banc*), the Board agreed that, contrary to the administrative law judge's finding, the district director acted appropriately in allowing claimant to withdraw his modification request as there "had not been a decision on the merits issued by an adjudication officer" that was

effective prior to the date of claimant's letter advising that he did not wish to pursue modification. The Board held that claimant's withdrawn modification request was to be treated in the same manner as a withdrawn claim and was considered as never having been filed. ***W.C. v. Whitaker Coal Corp.***, BLR (Apr. 30, 2008).

The Board held that employer was not foreclosed from seeking modification of the district director's award of benefits despite employer's failure to respond to the district director's Schedule for the Submission of Additional Evidence (SSAE) or to take any action within thirty days of the district director's issuance of a Proposed Decision and Order (PDO). Under the revised regulatory provisions at 20 C.F.R. §725.412, the designated responsible operator is not required to affirmatively challenge claimant's entitlement to benefits. Thus, employer's failure to respond to the SSAE had no effect on claimant's burden to establish entitlement. Further, while the PDO became final after employer failed to respond within thirty days, it was still subject to modification. As the proponent of an order terminating an award of benefits, however, employer bears the burden of disproving at least one element of entitlement. Consistent with ***Sharpe v. Director, OWCP***, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007), the Board instructed the administrative law judge on remand to make an explicit determination as to whether granting modification would render justice under the Act. ***D.S. v. Ramey Coal Co.***, BLR (June 25, 2008).

The Board held that in granting claimant's request for modification of the denial of her survivor's claim, the administrative law judge rationally concluded that the prior administrative law judge's decision not to apply collateral estoppel to the finding of pneumoconiosis that was made in the deceased miner's claim contained a mistake in a determination of fact that was subject to modification. Specifically, the prior administrative law judge had determined that ***Island Creek Coal Co. v. Compton***, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), changed the law for determining the existence of pneumoconiosis, such that the issue of whether the miner had pneumoconiosis was not identical to the one previously litigated in the miner's claim in 1999. The United States Court of Appeals for the Fourth Circuit subsequently held that ***Compton*** did not change the law, and that the issue of pneumoconiosis remained the same in a post-***Compton*** survivor's claim. ***Collins v. Pond Creek Mining Co.***, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006). In light of this declaration of the law by the Fourth Circuit, and considering the breadth of mistake-in-fact modification, the Board held that the administrative law judge rationally concluded that the prior determination not to apply collateral estoppel to the issue of the existence of pneumoconiosis was subject to modification. ***V.M. v. Clinchfield Coal Co.***, BLR , BRB No. 07-0822 BLA (July 29, 2008).