



BRB No. 21-0488 BLA

CARL STEPP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STURGEON MINING COMPANY,	)	
INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL	)	DATE ISSUED: 12/06/2022
INSURANCE	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane,  
Administrative Law Judge, United States Department of Labor.

Carl Stepp, Winchester, Kentucky.

Lee Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville,  
Kentucky, for Employer.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without representation, Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Denying Benefits (2012-BLA-05986), issued on May 24, 2001, on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on June 8, 2011, and is before the Benefits Review Board for the second time.<sup>1</sup>

In his initial Decision and Order Denying Benefits dated September 8, 2016, the ALJ credited Claimant with three years of coal mine employment and thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).<sup>2</sup> Considering entitlement under 20 C.F.R. Part 718, he found Claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and denied benefits.

Claimant appealed, without representation, the ALJ's denial of benefits. The Board vacated the ALJ's finding of three years of coal mine employment and therefore his conclusion that Claimant could not invoke the Section 411(c)(4) presumption. *Stepp v. Sturgeon Mining Co., Inc.*, BRB No. 17-0020 BLA, slip op. at 5 (Oct. 30, 2017) (unpub.). However, the Board affirmed the ALJ's finding that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Thus, the Board vacated the denial of benefits and remanded the case to the ALJ for further consideration of whether Claimant established at least fifteen years of coal mine employment and total disability in order to invoke the Section 411(c)(4) presumption.

Claimant requested reconsideration, which the Board denied. *Stepp v. Sturgeon Mining Co., Inc.*, BRB No. 17-0020 BLA (Nov. 16, 2018) (Order) (unpub.). Because Claimant submitted new medical evidence with his request for reconsideration that the Board was precluded from considering, it was returned to him. *Id.*, slip op. at 2 n.1, citing 20 C.F.R. §802.301(a), (b). The Board informed Claimant that "[a]ny evidence that [C]laimant believes should be considered may be submitted to the district director with a request for modification within one year of the date of this order," and cited 33 U.S.C. §922

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<sup>1</sup> Claimant filed two prior claims in 2000 and 2007 but withdrew both of them. Director's Exhibit 23 at 13-14. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

<sup>2</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

and 20 C.F.R. §725.310 (the modification provision under the Act and its implementing regulation). *Id.*, slip op. at 2 n.1.

On January 10, 2019, Claimant submitted additional evidence to the ALJ, requesting modification and asserting he had nineteen years of coal mine employment. *See* Claimant's Handwritten Letter date-stamped January 10, 2019 to the Office of Administrative Law Judges' Cincinnati, Ohio office.

On remand, the ALJ acknowledged Claimant's request for modification but denied it as untimely filed without any further explanation. Decision and Order at 2, n.4. He noted only that Claimant could file a subsequent claim. *Id.* Thus the ALJ adjudicated the claim in accordance with the Board's remand instructions, finding Claimant established 2.96 years of coal mine employment and therefore did not invoke the Section 411(c)(4) presumption. Further noting the Board's affirmance of his finding that Claimant failed to affirmatively establish the existence of pneumoconiosis without the presumption, the ALJ denied benefits.

On appeal, Claimant generally challenges the ALJ's denial of benefits on remand. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

In an appeal filed by an unrepresented claimant, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

The regulation at 20 C.F.R. §725.310(a) governing modification of awards and denials provides in relevant part:

Upon his or her own initiative, or upon 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, at any time before one year from the date of the last

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<sup>3</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19.

payment of benefits, or at any before one year after the denial of a claim, reconsider the terms of an award of denial of benefits.

20 C.F.R. §725.310(a). It further provides, “Modification proceedings may not be initiated before an [ALJ] or the [Board].” 20 C.F.R. §725.310(b). Once a modification request is filed, the district director must review it, and may conduct an informal conference, issue a proposed decision and order, refer it to the Office of Administrative Law Judges (OALJ) for a hearing, or take other appropriate action. 20 C.F.R. §§725.310(c), 725.415(a), 725.416, 725.417. If the district director holds a conference, he must prepare a stipulation of contested and uncontested issues signed by the parties and the district director. 20 C.F.R. §725.417(a). Upon completion of proceedings by the district director, any party may request a hearing before the OALJ. 20 C.F.R. §725.451.

Because Claimant’s January 10, 2019 modification request was filed within one year of the Board’s November 16, 2018 Order Denying Reconsideration, the ALJ erred in summarily denying it as untimely. Instead, once the OALJ received Claimant’s modification request and supporting evidence,<sup>4</sup> the claim should have been remanded to the district director to process. *See Lee v. Consolidation Coal Co.*, 843 F.2d 159, 162-63 (4th Cir. 1988) (modification request remanded to the district director to consider it in the first instance); *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 1279, 1283 (6th Cir. 1987) (same). Consequently, we vacate the ALJ’s denial of benefits and remand the case to the district director for further proceedings on Claimant’s modification request. After the district director processes the claim, the case may be returned to the ALJ for a formal hearing and de novo review of the record as developed by the parties on modification.

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<sup>4</sup> Claimant’s January 10, 2019 letter to the ALJ requesting modification asserts he has nineteen years of coal mine employment; it also refers to a new doctor’s report and another doctor’s report that his counsel untimely submitted, but the letter contains no attachments. Claimant’s January 10, 2019 Letter. However, in a letter dated May 17, 2018, Claimant refers to an updated doctor’s report, and attached to that letter are Progress Notes from Baptist Health dated January 9, 2018, diagnosing chronic obstructive pulmonary disease and coal workers’ pneumoconiosis, and a computed tomography (CT) scan and pulmonary function study with the same date. Claimant’s May 17, 2018 Letter. The letter also includes Dr. Baker’s February 15, 2007 report. *Id.*

Accordingly, we vacate the ALJ's Decision and Order Denying Benefits, and remand this case to the district director for further proceedings consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge