BRB No. 00-0607 BLA

HOLBERT BOYLES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: _____
	)	
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 Granting Modification and Terminating Benefits of J. Michael O'Neill, Administrative Law Judge, and the Decision and Order on Motion for Reconsideration of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Jack N. Vanstone (Vanstone & Kornblum Attorneys), Evansville, Illinois, for claimant.

Michael J. Pollack (Arter & Hadden LLP), Washington, D.C., for employer and carrier.

Richard A. Seid (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY,

Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Modification and Terminating Benefits of Administrative Law Judge J. Michael O'Neill and the Decision and Order on Motion for Reconsideration of Administrative Law Judge Daniel J. Roketenetz (97-BLA-1596) on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] Judge O'Neill granted employer's request for modification, filed with the Board, and terminated claimant's benefits. Judge Roketenetz subsequently denied claimant's motion for reconsideration.[2]

On appeal, claimant contends that Judge O'Neill lacked jurisdiction to issue his Decision and Order. Employer responds, urging affirmance of the decisions below. Claimant has filed a reply brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand. Claimant responds to the Director's motion and argues that the claim should not be remanded but the decisions below should be vacated. Employer opposes the Director's motion and claimant has filed a response thereto.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Judge Roketenetz was reassigned this case subsequent to the death of Administrative Law Judge O'Neill.

parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which claimant, employer and the Director have responded. Each party asserts that the regulations at issue in the lawsuit do not affect the outcome of this case. Employer also argues that if the Board determines to the contrary, then the case must be stayed for the duration of the lawsuit. Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The relevant procedural history is as follows: Claimant filed his claim in 1979. Director's Exhibit 1. Subsequent to a hearing, Administrative Law Judge Parlen L. McKenna awarded benefits in 1985. He found that claimant established invocation of the interim presumption of total disability due to pneumoconiosis at 20 C.F.R. §727.203(a)(2)[3] and that employer failed to establish rebuttal under 20 C.F.R. §727.203(b). Director's Exhibit 24. Employer appealed.

In its 1987 Decision and Order, the Board vacated Judge McKenna's finding of invocation at Section 727.203(a)(2) and remanded the case to the administrative law judge for further consideration of the pulmonary function study evidence. The Board rejected employer's arguments challenging Judge McKenna's finding that employer failed to establish rebuttal and indicated that if, on remand, the administrative law judge again found invocation at Section 727.203(a)(2), Judge McKenna's finding that employer failed to establish rebuttal would be affirmed. The Board thus vacated Judge McKenna's award of benefits and remanded the case to the administrative law judge. Director's Exhibit 25. Judge McKenna again found invocation under Section 727.203(a)(2) and awarded benefits in 1988. Director's Exhibit 26. Employer again appealed. The Board affirmed the award of benefits in 1989, rejecting employer's arguments at Sections 727.203(a)(2), (b)(2) and (b)(3). Director's Exhibit 27. Employer petitioned for review before the United States Court of Appeals for the Seventh Circuit. In 1992, the court vacated the Board's decision and

[3]The regulations contained in 20 C.F.R. Part 727 are not affected by the recent amendments to the regulations.

remanded the case, directing the administrative law judge to reconsider the validity of certain pulmonary function study evidence. Given the remand order, the court did not address employer's argument that, even assuming that invocation was properly established, employer established rebuttal. Director's Exhibit 28.

Judge O'Neill held a hearing on April 6, 1995, and the parties submitted additional evidence. Judge O'Neill awarded benefits in his March 13, 1996 Decision and Order. He found invocation of the interim presumption established at Section 727.203(a)(2), and determined that the issue of rebuttal was not before him and declined to address employer's rebuttal arguments. Director's Exhibit 29. Employer again appealed.

While employer's appeal was pending, employer filed the following two documents: (1) Petition for Review and Supporting Brief or, in the Alternative, Motion for Remand, filed on May 20, 1996; and (2)"Motion for Remand/Request for Modification Per Section 725.310," filed on June 24, 1996. In the former filing, employer requested, *inter alia*, that the case be remanded to the administrative law judge "with instructions to complete the modification proceedings which have been initiated and to consider the new evidence submitted by the parties as to all of the entitlement issues." In the latter filing, employer requested that the case be remanded to the district director so that the district director could undertake modification proceedings.[4] Employer alleged that the evidence it submitted to Judge O'Neill, while the case was on remand from the Seventh Circuit, established rebuttal; namely it established that claimant is not totally disabled due to pneumoconiosis. Employer noted that Judge O'Neill had declined to consider the rebuttal issue and asserted that he did not consider employer's new evidence. Employer thus asserted the existence of a mistake in a determination of fact in the "prior ALJ decisions awarding benefits to Claimant." Director's Exhibit 30. Claimant urged the Board to deny employer's motion, and argued that pursuant to 20 C.F.R. §725.310(b)(2000), neither the Board nor the judge has the authority to receive a request for modification. *See* 20 C.F.R. §725.310 (2000).

On April 30, 1997, the Board granted employer's Motion to Remand for Modification and dismissed the appeal. The Board remanded the case to the district director for modification proceedings. Director's Exhibit 31. On remand, the district director afforded the parties thirty days in which to submit additional evidence or to identify evidence submitted to Judge O'Neill, subsequent to the case's remand by the Seventh Circuit, which employer alleged had not been considered by Judge O'Neill. Director's Exhibit 32. On June 27, 1997, the district director referred the case to the Office of Administrative Law Judges for

[4]The regulation at 20 C.F.R. §725.310 (2000) was amended. The changes to 20 C.F.R. §725.310 do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

a formal hearing, identifying the issues, including modification, and making no initial findings. Director's Exhibit 34. On July 17, 1997, claimant filed with the administrative law judge a motion to dismiss employer's "Motion for Remand/Request for Modification Per Section 725.310," and alleged that the request was improperly filed with the Board and that it was not based upon a proper ground for modification.

On August 4, 1998, without having held a hearing and without ruling on claimant's motion, Judge O'Neill issued his Decision and Order Granting Modification and Terminating Benefits. Claimant's subsequent Motion for Reconsideration was denied by Judge Roketenetz. Claimant argued on reconsideration that the administrative law judge erred in failing to address claimant's July 17, 1997 motion to dismiss employer's motion for modification and in considering the merits of employer's motion for modification. In his Decision and Order Granting Modification and Terminating Benefits, Judge O'Neill indicated that the most recent hearing in this case was held before him on April 6, 1995. Decision and Order at 2. He further noted that in his 1996 decision awarding benefits, he found:

> that the valid pulmonary function test values had been properly relied on to invoke a presumption of total disability due to pneumoconiosis, 20 C.F.R. §727.203(a)(2). I declined to address arguments that even if the presumption was invoked, that the employer's evidence rebutted the presumption. In this modification proceeding, I am required to revisit the entire record and determine whether even the ultimate determination of claimant's entitlement was mistaken, considering the new evidence, cumulative evidence, or just by further reflection on the original evidence submitted and received into the record. *See O'Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254 (1971).

Decision and Order at 2. He determined that claimant established invocation of the interim presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §727.203(a)(1) and (a)(2). Judge O'Neill further found that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2) and (b)(3). He concluded:

> The petition for modification on grounds of mistake of fact, filed by the employer and carrier, is granted. Holbert Boyles is not entitled to receive black lung benefits and his award must, regrettably, be terminated.

Decision and Order at 10. Accordingly, the claim was denied.

Claimant filed a Motion for Reconsideration, arguing that Judge O'Neill erred by not ruling on claimant's motion to dismiss employer's motion for modification, filed before the

Board, and further erred in considering modification where employer never requested modification before the district director, never identified a mistake in a determination of fact in the prior award of benefits, and where claimant was given no opportunity to respond to any alleged mistake. Judge Roketenetz denied claimant's Motion for Reconsideration and indicated:

> Judge O'Neill is now deceased and the matter has been assigned to the undersigned to consider the pending Motion for Reconsideration. In reviewing the applicable regulations I find no specific authority for a judge other than the one who originally decided the case to rule on a Motion for Reconsideration. Nevertheless I have reviewed the Claimant's argument, in light of Judge O'Neill's Decision and Order, and find no compelling reasons that would cause me to alter his conclusions.

Decision and Order on Motion for Reconsideration at 1.

Claimant contends that Judge O'Neill had no jurisdiction to issue his Decision and Order on modification for several reasons:

> because a Petition to Modify had **never** been filed with the [district director], because a petition to modify had **never** been filed anywhere, because a Petition to modify was not filed within one year of Administrative Law Judge Parlen M. McKenna's Decision of January 6, 1988, and because a mistake in the determination of a fact or a change in condition was never identified.

Claimant's Brief at 9 (emphasis in original). Claimant argues that without identifying the issues and giving claimant an opportunity to respond, and without giving claimant a hearing, Judge O'Neill lacked jurisdiction.[5] Employer contends that Judge O'Neill had jurisdiction to issue his decision on modification as employer properly brought modification proceedings. Claimant has filed a reply brief.

Citing *Pukas v. Schuylkill Contracting Co.,* 22 BLR 1-69 (2000), the Director argues that Judge O'Neill erred by not convening a formal hearing inasmuch as the district director

[5]By letter dated September 5, 2000, claimant submitted the following case in support of its appellate brief: *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991).

forwarded the claim to the Office of Administrative Law Judges for a formal hearing. The Director also disagrees with claimant's position that Judge O'Neill lacked jurisdiction to issue a decision on modification on the ground that employer never filed a request for modification with the district director. The Director notes employer's request that the Board remand the case to the district director for modification proceedings, and asserts that the lack of a separate request for modification from employer to the district director is irrelevant. The Director urges the Board to vacate the decisions below and moves for a remand of the case to the administrative law judge for a formal hearing.

Claimant agrees with the Director's argument that Judge O'Neill erred by not conducting a formal hearing. Claimant contends, however, that the case should not be remanded but rather that the decisions below should be vacated for lack of jurisdiction.[6] Employer argues that the Director's Motion is out of order, untimely filed, and lacks merit. Employer notes that by Order dated June 21, 2000, the Board granted the Director ten days in which to file her response brief. Employer asserts:

> The Director did not comply. Instead, on June 29, 2000, the Director filed a motion to remand this case alleging that three years ago, when this case was transmitted to the Office of Administrative Law Judges, Judge O'Neill should have held a hearing. The Director's motion is very much out of time and out of order. It is also incorrect.

[6]Contrary to claimant's indication, the district director made no initial finding before transferring the case to the Office of Administrative Law Judges for a hearing. Director's Exhibit 34; Boyles' Response to Director's Motion to Remand at 5.

Employer's Opposition to Director's Motion to Remand at 2. Employer argues that while the Director's argument (that there was no need for employer to file a separate formal modification request with the district director) is responsive to claimant's argument, the Director introduced a new allegation of error, namely that Judge O'Neill erred by not convening a hearing. Employer argues that the Director was required to assert this allegation of error in the form of a cross-appeal within the time provided at 20 C.F.R. §802.205(b).[7] Employer adds that there is also no reason for the Board to order a remand of the case as claimant does not allege that he was deprived of any right to a hearing and does not contest Judge O'Neill's findings on the merits of the claim. Employer further asserts that no case law cited by the Director would require a remand of the case for a hearing.[8] Claimant responds that employer's statement, contained in its opposition to the Director's Motion, that "Only medical questions were raised by employer's petition," *see* Employer's Opposition to Director's Motion to Remand at 5, is incorrect as no medical questions were raised by employer because employer never filed a petition for modification.

The cental issue in this case is whether Judge O'Neill had jurisdiction to consider employer's request for modification, where such request was filed with the Board in the form of a motion to remand to the district director for modification proceedings under Section 725.310(2000) and where employer did not file a separate request with the district director.

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by Section 725.310(2000), provides that upon his own initiative, or upon 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(a)(2000). 20 C.F.R. §725.310(b)(2000) provides:

> Modification proceedings shall be conducted in accordance with the provisions of this part as appropriate. Additional evidence may be submitted by any party

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[7]The regulation at 20 C.F.R. §802.205 was not affected by the recent amendments to the regulations.

[8]Employer indicates that it has been unable to find the Board's decision in *Pukas v. Schuylkill Contracting Co.,* 22 BLR 1-69 (2000), and asks the Director to supply it with a copy so that employer could respond to the Director's argument based thereon. *Pukas* was issued on May 10, 2000 and Employer's Opposition to the Director's Motion to Remand was filed on July 20, 2000. Employer filed no subsequent pleading in this regard.

> or requested by the deputy commissioner. Modification proceedings shall not be initiated before an administrative law judge or the Benefits Review Board.

20 C.F.R. §725.310(b)(2000).[9]

Claimant's contention that Judge O'Neill was without jurisdiction to consider modification where employer did not formally file a request for modification with the district director and never identified a mistake in a determination of fact contained in Judge O'Neill's March 13, 1996 Decision and Order awarding benefits, lacks merit. The record reveals that on May 20, 1996, while the case was in payment status and the employer's appeal in BRB No. 96-0893 BLA was pending before the Board, employer filed with the Board its "Petition for Review and Supporting Brief or, In the Alternative, Motion for Remand." Therein, employer argued:

1. the ALJ erred by failing to complete the Section 725.310 modification proceedings he initiated and to consider the new, current medical evidence he directed the parties to develop as to all of the entitlement issues;
2. the ALJ erred by failing to find that the Section 727.203(a) interim presumptions [sic] are rebutted on the basis that Claimant is not totally disabled on a pulmonary or respiratory basis; and
3. the ALJ erred by failing to find that the interim presumptions [sic] are rebutted on the basis that Claimant's pulmonary impairment did not arise out of his coal mine employment[.]

[9]The "deputy commissioner" is now referred to as the "district director."

Employer's Petition for Review and Supporting Brief or, in the Alternative, Motion to Remand at 2.[10] Employer urged the Board to reverse the March 13, 1996, January 6, 1988, and March 13, 1985 decisions issued by the Office of Administrative Law Judges and to deny the claim, or, in the alternative, to remand the case to the administrative law judge for reconsideration of the rebuttal issues; or to remand the case to the administrative law judge with instructions to complete the modification proceedings that have been initiated and to consider the new evidence submitted by all the parties as to all of the entitlement issues; and to grant all further appropriate relief. The Board granted employer's motion contained in its Petition for Review, dismissed the appeal, and remanded the case to the district director for consideration of employer's request for modification based on a mistake in fact. Director's Exhibit 31. The district director transferred the case to the Office of Administrative Law Judges:

> for a formal hearing in accordance with Section 422(a) of [the Act]... and the Regulations pertaining thereto... [a]s provided in 20 C.F.R. §725.463, the hearing will be confined to those issues contested by the Director or the Employer as indicated below by a checkmark.

Director's Exhibit 34. The issue of modification is checked as an issue contested by employer. *Id.* Employer thus duly requested, and received from the Board, an order remanding the case for modification proceedings under Section 725.310(2000). Thus, when the claim was subsequently transferred to the administrative law judge by the district director, the administrative law judge had jurisdiction to consider the contested issue of modification which was not resolved by the district director. 20 C.F.R. §§725.310(2000), 725.450; *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996). Modification proceedings were thus not initiated before the Board in violation of Section 725.310(b)(2000) as claimant contends, but rather, the Board remanded the case for those proceedings before the district director. No other action by employer was necessary to perfect this process and thus, claimant's assertions to the contrary are rejected.

Further, there is no merit to claimant's argument that employer's request for modification was untimely filed since it was not filed during the year following Judge McKenna's 1988 Decision and Order awarding benefits. The claim was in payment status and thus employer could file its request for modification "at any time before one year from the date of the last payment of benefits." 20 C.F.R. §725.310(a)(2000). Employer's request for modification was thus timely filed.

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[10]The record therefore refutes claimant's assertion that employer never identified a mistake in a determination of fact in Judge O'Neill's March 13, 1996 Decision and Order awarding benefits.

We next address whether Judge O'Neill should have held a hearing on employer's modification request prior to issuing his decision on modification, in which he found that claimant was not entitled to the benefits he had been previously awarded and terminated those benefits. Claimant contends that the administrative law judge was without jurisdiction to determine the modification issue as claimant was not provided with an opportunity to respond to employer's request for modification and Judge O'Neill issued his decision without holding a hearing. The Director moves for remand of the case for a hearing in light of Judge O'Neill's failure to hold a hearing on modification, and cites *Pukas* in support of her motion. Employer opposes the Director's motion and argues that the motion is out of order as the Director therein raises a new assignment of error, namely Judge O'Neill's failure to hold a hearing on modification, which must be made in a cross-appeal. Employer further asserts that the motion was not timely filed, and lacks merit.

As an initial matter, contrary to employer's contention, claimant sufficiently raised the issue of the propriety of Judge O'Neill's consideration of employer's request for modification without providing a hearing on the issue. Claimant specifically argues in his Petition for Review, that "No hearing was held. Holbert Boyles was not given an opportunity to respond," Petition for Review at 8, and "Holbert Boyles did not have an opportunity to respond to a claim that there was either a mistake in a determination of fact nor [sic] a change in condition, whether by submitting evidence or by brief. There was no hearing," *Id.* at 12. Claimant further states that:

> [Judge] O'Neill's decision does not identify any change in condition nor [sic] any mistake in a determination of fact, but instead gives Peabody Coal Company a new decision.... There was no hearing. Holbert Boyles was not given an opportunity to respond.... Without identifying the issues and giving Holbert Boyles an opportunity to challenge and respond and without giving Holbert Boyles a hearing, [Judge] O'Neill had no [j]urisdiction or [a]uthority to issue his decision of August 4, 1998.

Petition for Review at 12-13. Based on the foregoing, we hold that claimant sufficiently raised the issue of the propriety of the administrative law judge's failure to hold a hearing on modification. Therefore, we reject employer's challenge to the Director's Motion to Remand based on its argument that the Director improperly raises this issue therein, without claimant having raised it in the first instance in his appellate brief. We hold that Director, in fact, did not raise any new argument, but responded to claimant's arguments and therefore properly filed a Motion to Remand, as opposed to a cross-appeal.

We also find merit in the contentions of claimant and the Director that the claimant was due a hearing on modification. The regulation at 20 C.F.R. §725.450 provides, in pertinent part, that any party to a claim shall have a right to a hearing concerning any contested issue of fact or law unresolved by the district director. 20 C.F.R. §725.450. 20

C.F.R. §725.451provides that any party may request in writing a hearing on any contested issue or fact once the district director has finalized proceedings. 20 C.F.R. §725.451.[11] In *Pukas*, 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*, 22 BLR at 1-72. In the instant case, once the district director completed the evidentiary development of the record on modification, he forwarded the case to the Office of Administrative Law Judges for a "formal hearing." Director's Exhibit 34. The employer made no separate request for a hearing. In this regard, we recognize that the claimant in *Pukas*, after receiving the district director's proposed order denying modification, filed a request for a formal hearing. *Pukas*, 22 BLR at 1-71. Thus, *Pukas* is distinguishable from the instant case on its facts. Nonetheless, given the facts of the instant case, wherein the district director made no initial finding on modification, but advised the parties that the case was being transferred for a "formal hearing" on all contested issues, including modification, we hold that employer was not required to file a request for a formal hearing in order to invoke his right to a hearing on modification.

Based on the foregoing, we vacate Judge O'Neill's Decision and Order on modification and Judge Roketenetz's denial of claimant's request for reconsideration thereof. We remand the case to the administrative law judge for a hearing on employer's request for modification.

Accordingly, Judge O'Neill's Decision and Order Granting Modification and Terminating Benefits and Judge Roketenetz' Decision and Order on Motion for Reconsideration are vacated, and the case is remanded to the administrative law judge for a formal hearing on employer's modification request.

SO ORDERED.

BETTY JEAN HALL, Chief

[11]20 C.F.R. §725.450 and 20 C.F.R. §725.451 were revised only to change "deputy commissioner" to "district director" and to add, in Section 725.451, a reference to 20 C.F.R. §725.419. 65 Fed. Reg. 80,078.

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge