BRB No 00-0653 BLA

ESTATE OF JOEL S. STENSON Claimant-Petitioner v. CRESCENT HILLS COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand-Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Estate of Joel S. Stenson, Daisytown, Pennsylvania, *pro se*.

Hilary S. Daninhirsch (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Jennifer U. Toth (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: McGRANERY and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order on Remand-Denying Benefits (98-BLA-0392) of Administrative Law Judge Daniel L. Leland rendered 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).[2] The miner filed the current application for benefits on June 14, 1984. Director's Exhibit 1. The claim, now being considered pursuant to the miner?s request for modification of the denial of benefits, is before the Board for the third time. Previously, the Board discussed fully this claim?s procedural history. *Stenson v. Crescent Hills Coal Co*., BRB Nos. 98-1204 BLA, 97-0711 BLA (Dec. 13, 1999)(unpub.). Accordingly, we now focus only on those procedural aspects relevant to the issues raised in this appeal of the administrative law judge?s decision to deny modification.

The administrative law judge denied benefits in a Decision and Order on Remand issued on January 15, 1997. Director's Exhibit 135. The miner timely requested modification on March 19, 1997 and submitted additional medical evidence. Director's Exhibit 139. The district director denied modification, the miner requested a formal hearing, and the case was referred to the Office of Administrative Law Judges. Director's Exhibits 143, 146, 154, 155. However, the administrative law judge issued an order in which he determined that ?a new administrative hearing is unnecessary.? Order, March 9, 1998. Thereafter, the administrative law judge denied modification in a Decision and Order issued on May 27, 1998.

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[1] Claimant is the estate of Joel S. Stenson, the miner. Mr. James F. Rohaley, of Daisytown, Pennsylvania, requested, on behalf of claimant, that the Board review the administrative law judge?s decision. Because Mr. Rohaley is neither an attorney nor a lay representative, the Board considers claimant to be proceeding without formal representation and will therefore review this appeal under the general standard of review. *See* 20 C.F.R. ??802.202(d)(2), 802.211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co*., 19 BLR 1-88 (1995)(Order).

[2] 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.

Upon consideration of the miner?s appeal, the Board affirmed the administrative law judge?s finding that a change in conditions was not established, but vacated the denial of modification and remanded the case for the administrative law judge to consider all the evidence for any mistake of fact. [1999] *Stenson*, slip op. at 10; *see Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-61-63 (3d Cir. 1995); *O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971). Additionally, in accordance with the Board?s case law at the time, the Board rejected the allegation that the administrative law judge erred in not holding a hearing, and held that ?on remand, the determination as to the necessity of a hearing on the issue of modification is within the administrative law judge?s discretion as trier-of-fact.? [1999] *Stenson*, slip op. at 12. Finally, because both the miner and his wife had died, the Board instructed the administrative law judge to first determine whether there was a proper party to the claim. [1999] *Stenson*, slip op. at 2 n.1

On remand, no hearing was held. In his Decision and Order on Remand-Denying Benefits, the administrative law judge found that the miner?s estate is the proper party to the claim, concluded that no mistake in fact was established, and denied modification.

On appeal, claimant generally challenges the denial of benefits and contends that the administrative law judge erred in denying claimant?s request for a hearing on modification. Employer responds, urging affirmance. The Director, Office of Workers? Compensation Programs (the Director), responds, requesting that the Board remand this case to the administrative law judge for a hearing.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals for the District of Columbia granted limited 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 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 March 2, 2001, to which claimant and the Director have responded.[3]

[3] The Director states that none of the regulations at issue in the lawsuit affect the outcome of this case. By letter dated March 12, 2001, claimant argues that he is entitled to benefits but he does not address whether any of the challenged regulations affect the outcome of this case.

Based upon 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, we will proceed with the adjudication of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board?s scope of review is defined by statute. The administrative law judge?s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. ?921(b)(3), as incorporated into the Act by 30 U.S.C. ?932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Subsequent to the issuance of the administrative law judge?s Decision and Order on Remand-Denying Benefits, the Board held that a hearing must be held on modification if one is requested, unless the parties waive their right to a hearing or a motion for summary judgment is properly granted. *Pukas v. Schuylkill Contracting Co*., 22 BLR 1-69, 1-71-72 (2000). As the Board stated in *Pukas*:

> Section 22 of the Longshore and Harbor Workers? Compensation Act (LHWCA) specifies that modification requests are to be reviewed ?in accordance with the procedure prescribed in respect of claims in section [19 of the LHWCA, 33 U.S.C. ?919].? 33 U.S.C. ?922, as incorporated into the Act by 30 U.S.C. ?932(a); *accord* 20 C.F.R. ?725.310(b)(?[m]odification proceedings shall be conducted in accordance with the provisions of [20 C.F.R. Part 725, setting forth the procedures for the adjudication of black lung claims] as appropriate?); *see Robbins v. Cyprus Cumberland Coal Co*., 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998). Section 19 of the LHWCA, in turn, provides for a hearing to be held whenever a party so requests. 33 U.S.C. ?919(c).
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> In addition to the statute, the regulations addressing black lung claims provide that ?[i]n any claim for which a formal hearing is requested or ordered, . . ., the [district director] shall refer the claim to the Office of Administrative Law Judges for a hearing.? 20 C.F.R. ?725.421(a). The regulations also provide that ?[a]ny party to a claim (*see* ?725.360) 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.
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> Thus, as both claimant and the Director contend, 30 U.S.C. ?932(a), as

> implemented by 20 C.F.R. ??725.450, 725.451, 725.421(a), mandates 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, *see* 20 C.F.R. ?725.461(a), or a party requests summary judgment, *see* 20 C.F.R. ?725.452(c). *See also* 20 C.F.R. ?725.310(c); *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 498, 22 BLR 2-1, 2-12-13 (4th Cir. 1999); *Robbins, supra*; *Cunningham v. Island Creek Coal Co*., 144 F.3d 388, 390, 21 BLR 2-384, 2-388-89 (6th Cir. 1998); *Arnold v. Peabody Coal Co*., 41 F.3d 1203, 1208-09, 19 BLR 2-22, 2-33 (7th Cir. 1994); *Worrell v. Consolidation Coal Co*., 8 BLR 1-158, 1-160 (1985).

Pukas, 22 BLR at 1-71-72.

Consequently, we vacate the administrative law judge?s Decision and Order on Remand-Denying Benefits and remand the case to the administrative law judge to conduct a hearing *de novo* on claimant?s request for modification pursuant to Section 725.310[4] unless such hearing is waived[5] by the parties or summary judgment is granted. *See Keating, supra*.

[4] Employer argues that there is no reason to remand for a hearing as ?the [miner] is obviously unavailable for testimony. . . .? Employer's Brief at 6. The party to this claim is the miner?s estate, which could submit expert testimony, present oral argument, or request permission at a hearing to introduce additional documentary evidence. *See* 20 C.F.R. ??725.455(b), (d), 725.456, 725.457. Accordingly, we reject employer?s argument. *See Robbins*, 146 F.3d at 429, 21 BLR at 2-505-06 (rejecting harmless error analysis where a requested hearing is not held).

[5] In the March 12, 2001 letter filed in response to the Board?s order directing the parties to address the impact of the challenged regulations, claimant?s ?lay person? appears to request that the case be decided on the record only. Claimant?s Letter at 1. The applicable regulation provides that a waiver of the right to a hearing must be made by all parties in writing and must be filed with the administrative law judge. 20 C.F.R. ?725.462(a). Accordingly, we will remand this case for the requested hearing to be held or for a proper waiver to be made.

Accordingly, the administrative law judge?s Decision and Order on Remand-Denying Benefits is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON
Administrative Appeals Judge