

BRB No. 05-0642 BLA

MARTHA McVEY	)	
(Widow of JESSIE COLLINS)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED: 04/11/2006
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order of Dismissal of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Martha McVey, Greenroad, Kentucky, *pro se*.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals, without the assistance of counsel, the Order of Dismissal (04-BLA-5733) of Administrative Law Judge Robert L. Hillyard (the administrative law judge), on a survivor's 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). The administrative law judge issued the Order of Dismissal on March 30, 2005, after claimant failed to respond to his Order to Show Cause issued on March 9, 2005. In his Order to Show Cause, the administrative law judge directed claimant to show cause why

---

<sup>1</sup> Claimant is Martha McVey, the widow of Jessie Collins, the miner, who died in 1963.

her case should not be dismissed for the failure of claimant, or any representative acting on her behalf, to attend the hearing scheduled for February 25, 2005.

The procedural history of this case is as follows. Claimant filed a claim for survivor's benefits in 1977.<sup>2</sup> In a Decision and Order – Denying Benefits, Administrative Law Judge Ralph A. Romano credited the miner with six years of coal mine employment and determined that claimant was a dependent surviving spouse. Judge Romano considered the claim under the regulations contained in 20 C.F.R. Part 410, and found the evidence insufficient to establish the existence of pneumoconiosis. Accordingly, he denied benefits. On appeal, the Board transferred Judge Romano's findings at Part 410, Subpart D, to the regulations contained in 20 C.F.R. Part 718, pursuant to *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). The Board held that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). In view of this holding and the miner's six years of coal mine employment, the Board determined that there was no need to remand the case for consideration under 20 C.F.R. §410.490. Accordingly, the Board affirmed the denial of benefits. *McVey v. Director, OWCP*, BRB No. 87-1839 BLA (May 17, 1989)(unpub.). The record contains a letter from claimant dated June 14, 1989, which was received by the district director on June 16, 1989. The record does not indicate that the Department of Labor ever responded to this letter.

The next action taken by claimant was on April 9, 2002, when she filed a new claim for benefits. Director's Exhibit 3. After processing by the district director, the case was transferred to the Office of Administrative Law Judges. Director's Exhibits 15-20, 22, 24, 25. A Notice of Hearing, issued on November 23, 2004, informed claimant that her hearing was scheduled for February 25, 2005. In a letter to claimant dated November 23, 2004, the administrative law judge advised claimant of the hearing date and he suggested that she obtain experienced representation. This letter included a form for claimant to complete and return, indicating who her representative would be. Claimant completed this form, indicating that she intended to represent herself.

In an Order to Show Cause issued on March 9, 2005, the administrative law judge noted that neither claimant, nor any representative for claimant, appeared at the hearing on February 25, 2005. The administrative law judge ordered claimant to show cause by

---

<sup>2</sup> 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

March 24, 2005, “why this case should not be dismissed for her failure to appear at the formal hearing.” March 9, 2005 Order to Show Cause.

On March 30, 2005, the administrative law judge issued an Order of Dismissal. The administrative law judge noted that claimant did not appear at the hearing scheduled for February 25, 2005, and that on March 9, 2005 he had issued an Order to Show Cause by March 24, 2005. The administrative law judge stated that claimant failed to respond to this order. Consequently, the administrative law judge dismissed the claim pursuant to 20 C.F.R. §725.466. March 30, 2005 Order of Dismissal.

By letter to the Board dated May 2, 2005, the Office of the Solicitor of Labor forwarded a document, which it had received on April 19, 2005, and which it described as claimant’s Notice of Appeal. In his response brief, the Director, Office of Workers’ Compensation Programs (the Director), asserts that the administrative law judge’s dismissal of this case was reasonable, as claimant failed to attend the hearing, and she did not respond to the administrative law judge’s Show Cause Order in a timely manner. The Director, therefore, urges the Board to affirm the administrative law judge’s Order of Dismissal.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (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 rational, supported by substantial evidence, and in accordance with applicable law. 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 Board reviews the administrative law judge’s procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*).

After consideration of the administrative law judge’s Order of Dismissal, and the procedural background of this case, we hold that the administrative law judge did not abuse his discretion in issuing his Order of Dismissal. Construing claimant’s June 14, 1989 letter as a request for modification which has not been addressed, claimant’s 1977 claim remains a pending claim. 20 C.F.R. §§725.310 (2000); 802.406. Pursuant to the regulations, claimant’s 2002 application for benefits thus merges with the pending 1977 claim, 20 C.F.R. § 725.309(b), which has not been finally adjudicated. *See Tackett v. Howell and Bailey Coal Co.*, 9 BLR 1-181 (1986). The hearing scheduled for February 25, 2005 thus constitutes claimant’s hearing on modification. *See generally Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000). The regulations provide that an administrative law judge may dismiss a claim upon the failure of claimant or his or her representative to attend a hearing without good cause. 20 C.F.R. §725.465(a)(1); *see generally Clevinger v. Regina Fuel Co.* 8 BLR 1-1 (1985). Prior to issuance of an Order

of Dismissal pursuant to 20 C.F.R. §725.466, the administrative law judge must issue an order to show cause why the claim should not be dismissed, and afford all parties a reasonable time to respond to such order. 20 C.F.R. §725.465(c).

Claimant did not appear at the scheduled hearing and she failed to respond on or before March 24, 2005, as directed in the Order to Show Cause. In view of these circumstances, we hold that the administrative law judge acted within his discretion in dismissing this claim pursuant to Sections 725.465(c) (2000) and 725.466, because of claimant's unexplained failure to attend the scheduled hearing. *See Clark*, 12 BLR at 1-153.

Accordingly, the administrative law judge's Order of Dismissal is affirmed.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge