

BRB No. 05-0991 BLA

HERSHEL LAWSON)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 08/30/2006
 INCOAL, INCORPORATED)
)
 and)
)
 AMERICAN BUSINESS & PERSONAL)
 INSURANCE MUTUAL, INCORPORATED)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order of Dismissal of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Hershel Lawson, Viper, Kentucky, *pro se*.

Laura Metkoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Order of Dismissal (03-BLA-6485) of Administrative Law Judge Thomas F. Phalen, Jr. 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). Claimant filed his application for

benefits on August 16, 2001. Director's Exhibit 2. The district director denied benefits and claimant requested a hearing. Director's Exhibits 34, 36. The administrative law judge found that he lacked jurisdiction to hear the claim because claimant's hearing request was not timely filed. Accordingly, the administrative law judge dismissed the claim and returned the case to the district director for consideration as a request for modification pursuant to 20 C.F.R. §725.310.

Claimant generally seeks review of the administrative law judge's order. Employer responds urging affirmance of the administrative law judge's Order of Dismissal. The Director, Office of Workers' Compensation Programs, has not filed a brief in 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 Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The record indicates that on April 22, 2003, the district director issued a Proposed Decision and Order denying benefits. Director's Exhibit 34. Whether claimant timely requested a hearing on the district director's proposed decision is governed by 20 C.F.R. §725.419, which provides, in relevant part:

(a) Within 30 days after the date of issuance of a proposed decision and order, any party may, in writing, request a revision of the proposed decision and order or a hearing

(d) If no response to a proposed decision and order is sent to the district director within the period described in paragraph (a) . . . the proposed decision and order shall become a final decision and order, which is effective upon the expiration of the applicable 30-day period. Once a proposed decision and order . . . becomes final and effective, all rights to further proceedings with respect to the claim shall be considered waived, except as provided in §725.310.

20 C.F.R. §725.419(a), (d). Section 725.310 provides for the modification of an award or denial at any time within one year of the last payment of benefits or the denial of benefits, based on a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). Thus, if no response is sent to the district director within thirty days of the issuance of a proposed decision and order, all rights to further claim proceedings are waived except those provided by the one-year modification provision.

Since the date of issuance of the district director's Proposed Decision and Order was April 22, 2003, claimant had until the expiration of the thirty-day period ending May 22, 2003 to send his hearing request to the district director. 20 C.F.R. §725.419(a), (d). The record indicates that forty-eight days later, on June 9, 2003, claimant sent a letter to the district director requesting an appeal, which was received by the district director on June 10, 2003.¹ Director's Exhibit 36. Consequently, as the administrative law judge found, the district director's Proposed Decision and Order became final as of the close of May 22, 2003, and claimant's letter received on June 10 did not constitute a timely hearing request. *See* 20 C.F.R. §725.419(a), (d); *Key v. Alabama By-Products Corp.*, 8 BLR 1-241 (Order)(1984).

Therefore, the administrative law judge properly determined that he "d[id] not have jurisdiction to hear the claim." Order of Dismissal at 2. However, because claimant's letter was filed within one year of the proposed Decision and Order, the administrative law judge correctly found that the letter should be treated as a timely request for modification pursuant to 20 C.F.R. §725.310. *See* 20 C.F.R. §§725.310(a); 725.419(d). Consequently, the administrative law judge properly dismissed the claim and ordered that the case be returned to the district director for consideration as a modification request.

¹ As the administrative law judge noted, claimant's handwritten letter is dated July 9, 2003, but the record indicates that the letter was received on June 10, 2003. Order of Dismissal at 2 n.3. Further review of the record indicates that the letter was postmarked on June 9, 2003. Director's Exhibit 36 at 3.

Accordingly, the administrative law judge's Order of Dismissal is affirmed and this case is remanded to the district director for modification proceedings.²

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

² Once the district director issues a decision on modification, the parties may request a hearing pursuant to the regulations. See 20 C.F.R. §725.419(a); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000).