

BRB No. 07-0946 BLA

L.H.)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 08/22/2008
)
 LODESTAR ENERGY, INCORPORATED)
)
 and)
)
 KENTUCKY EMPLOYERS MUTUAL)
 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 on the Record Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

L.H., Pikeville, Kentucky, *pro se*.

Stanley S. Dawson (Fulton & Devlin), Louisville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on the Record Denying Benefits (04-BLA-6791) of Administrative Law Judge Janice K. Bullard 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 claim for benefits on March 26, 2003. Director's Exhibit 2. The district director denied benefits on June 4, 2004, and claimant timely requested a hearing. Director's Exhibits 29, 30. Subsequently, the case was referred to the Office of Administrative Law Judges and a hearing was scheduled for August 8, 2006. Director's Exhibit 33. However, upon the withdrawal of claimant's lay representative, the administrative law judge issued an order on August 4, 2006, canceling the hearing and directing claimant to show cause, within fifteen days, why a decision on the record should not be entered. Twenty days later, the administrative law judge issued an order stating that, because claimant had not responded to the August 4th order, the administrative law judge would issue a decision on the record. In that decision, the administrative law judge credited claimant with twenty-nine years of coal mine employment,¹ and found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 Act and regulations mandate that an administrative law judge hold a hearing on any claim whenever a party requests such a hearing, *see* 20 C.F.R. §§725.421(a), 725.450, 725.451, unless one of the following exceptions is applicable: (1) the right to a hearing is waived, in writing, by the parties, *see* 20 C.F.R. §725.461(a); (2) a party requests summary judgment and the administrative law judge determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, *see* 20 C.F.R. §725.452(c); or (3) the administrative law judge notifies the parties by written order of her belief that a hearing is not necessary, allowing at least thirty days for the parties to respond, and no party requests that a hearing be held. *See* 20 C.F.R. §725.452(d). The record reflects that neither of the first two exceptions was

¹ The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

applicable, since claimant did not file a written waiver of his right to the requested hearing and no party moved for summary judgment. *See Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 429, 21 BLR 2-495, 2-504 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 390, 21 BLR 2-384, 2-388-89 (6th Cir. 1998); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000).

With respect to the third exception to the administrative law judge's duty to hold the requested hearing, Section 725.452(d) specifically provides:

If the administrative law judge believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the judge shall notify the parties by written order and allow at least 30 days for the parties to respond. The administrative law judge shall hold the oral hearing if any party makes a timely request in response to the order.

20 C.F.R. §725.452(d). By order dated August 4, 2006, the administrative law judge granted claimant's lay representative's request to withdraw, she canceled the hearing, and directed claimant to show cause, within fifteen days, why a decision on the record should not be issued.² When claimant had not responded within twenty days, the administrative

² The administrative law judge's August 4, 2006 order provided as follows:

Hearing in this matter is scheduled for August 8, 2006. By correspondence dated August 1, 2006, Claimant's lay representative . . . advised that work obligations required her to withdraw as representative, and a continuance was requested. [The lay representative] advised that she attempted to reach Claimant, but was unable to do so. On August 2, 2006, Employer filed its objection to a continuance, but agreed . . . to a Decision and Order on the record. My law clerk attempted to contact Claimant to secure his agreement to a Decision and Order on the record, but learned that Claimant's telephone was disconnected.

In consideration of the circumstances and the age of this claim, I find it appropriate to GRANT the lay representative's request to withdraw as representative. I further find it appropriate to direct Claimant to show cause in writing not more than fifteen (15) days from the date of this ORDER why a Decision and Order on the record may not be entered in this case.

The hearing now scheduled in this matter is canceled.

Order dated August 4, 2006, at 1. The record reflects that claimant's lay representative had requested the continuance mentioned by the administrative law judge so that claimant could seek an attorney.

law judge indicated that she would proceed with a decision on the record. The administrative law judge did not comply with Section 725.452(d) because she did not provide a thirty-day response period in her August 4, 2006 show cause order, or specify that a hearing would not be held unless a party made a timely request in response to that order. Because the Act and regulations mandate that a hearing be held if one is requested unless one of the exceptions applies, and the administrative law judge did not comply with the applicable exception pursuant to Section 725.452(d), we must vacate the administrative law judge's decision. *See* 33 U.S.C. §921(b)(3); *Allen v. Director, OWCP*, BRB No. 05-0716 BLA (Sept. 29, 2005)(unpub.)(holding that the administrative law judge's show cause order did not comply with Section 725.452(d)). We remand this case for the administrative law judge to conduct the hearing that claimant requested unless one of the exceptions is found to be applicable on remand.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge