BRB No. 06-0534 BLA

LINDA HOSKINS (Widow of OSCAR HOSKINS)	)	
Claimant-Petitioner	)	
v.	)	
EASTOVER MINING COMPANY c/o DUKE POWER COMPANY	)	DATE ISSUED: 12/20/2006
and	)	
UNDERWRITERS SAFETY & CLAIMS	)	
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 of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Linda Hoskins, Barbourville, Kentucky, *pro se*.[1]

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant,[2] representing herself, appeals the Decision and Order (05-BLA-5473) of Administrative Law Judge Robert D. Kaplan dismissing claimant's request for modification of 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).[3] This case involves claimant's request for modification of her denied survivor's claim.

Claimant filed a survivor's claim on January 16, 2001. Director's Exhibit 1. In a Decision and Order dated February 24, 2003, Administrative Law Judge Daniel J. Roketenetz found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Director's Exhibit 39. Accordingly, Judge Roketenetz denied benefits. *Id.* By Decision and Order dated October 22, 2003, the Board affirmed Judge Roketenetz's denial of benefits. *Hoskins v. Eastover Mining Co.*, BRB No. 03-0436 BLA (Oct. 22, 2003) (unpublished).

Claimant filed a request for modification on October 22, 2004.[4] While claimant's request for modification was pending before the Office of Administrative Law Judges, employer filed a motion for summary judgment, arguing that claimant's request for modification was not timely filed. By Order dated March 3, 2006, Administrative Law Judge Robert D. Kaplan (the administrative law judge) found that claimant's motion for modification was timely filed and, therefore, denied employer's motion. Employer filed

[2]Claimant is the surviving spouse of the deceased miner who died on August 24, 2000. Director's Exhibit 4.

[3]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.

[4]Although claimant's request for modification is not found in the record, the Director, Office of Workers' Compensation Programs (the Director), properly notes that "no one has expressly disputed that October 22, 2004 is the filing date of [claimant's] modification request." Director's Brief at 2.

a motion for reconsideration on March 10, 2006. On that same day, the administrative law judge issued an Order to Show Cause, wherein he stated that:

> As set forth in my prior Order, a request for modification must be filed within 365 days after a claim is denied. Employer agrees with the method for computing 365 days set forth in my prior Order, but notes that under this method the 365th day after October 22, 2003 was October 21, 2004. My ruling in the prior Order erroneously stated that the 365th day was October 22, 2004. This error arose because I overlooked the fact that the month of February 2004 contains 29 days rather than 28 days, as 2004 is a leap year.
>
> Accordingly, it appears that Employer is correct in stating that the request for modification was untimely filed under 20 C.F.R. §725.310 because it was not filed before the end of the day of October 21, 2004.

March 10, 2006 Order to Show Cause at 1.

The administrative law judge, therefore, ordered claimant to show cause in writing why his request for modification should not be dismissed as untimely. *Id.* Claimant filed a response on March 20, 2006, arguing that her request for modification was timely filed.

In a Decision and Order dated March 30, 2006, the administrative law judge found that claimant's request for modification was not timely filed. The administrative law judge, therefore, granted employer's motion for summary judgment and dismissed claimant's request for modification. On appeal, claimant generally contends that the administrative law judge erred in dismissing her request for modification. Employer responds in support of the administrative law judge's dismissal of claimant's request for modification. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, contending that the administrative law judge erred in finding that claimant's request for modification was not timely filed. The Director, therefore, requests that the Board reverse the administrative law judge's finding that claimant's request for modification was untimely filed and remand the case for consideration on the merits.

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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).

Relying upon the Board's decision in *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003), the administrative law judge found that a claimant has only 365 days in which to seek modification, even if a leap year is involved. Because October 22, 2004 was the 366th day after the Board's Oct. 22, 2003 Decision and Order,[5] the administrative law judge found that claimant's request for modification was untimely filed. For the reasons set forth below, we agree with the Director that claimant's modification request was timely filed.

Section 22 of the Longshore and Harbor Workers' Compensation Act, as incorporated into the Act by 30 U.S.C. §932(a), provides:

> Upon his own initiative, or upon the application of any party in interest…, [the administrative law judge] may…*at any time prior to one year after the rejection of a claim*, review a compensation case…and…issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation….

33 U.S.C. §922 (emphasis added).

The implementing regulation at 20 C.F.R. §725.310(a) (2000)[6] provides:

> Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the [administrative law judge] may…at any time *before one year after the denial of a claim*, reconsider the terms of…[the] denial of benefits.

20 C.F.R. §725.310(a) (2000) (emphasis added).

Thus, under the plain language of Section 22 of the Longshore Act and Section 725.310 (2000) of the black lung regulations, claimant had one year from the effective date of the Board's decision rejecting her claim in which to request modification. *See Gross, supra*.

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[5]The Board's October 22, 2003 Decision and Order became effective upon its issuance, thereby triggering the running of the one-year period. *See* 20 C.F.R. §725.502(a)(2) (An order issued by the Board shall become effective when it is issued).

[6]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

The regulations define a year as "a period of one calendar year." 20 C.F.R. §725.101(a)(32).[7] The regulations define a "calendar year" as "365 days, *or 366 days if one of the days is February 29*." 20 C.F.R. §725.101(a)(32) (emphasis added). In this case, subsequent to the Board's October 22, 2003 Decision and Order, one of the days in the relevant calendar year was February 29, 2004. Consequently, claimant had 366 days, not 365 days, within which to seek modification.[8] Because claimant filed her request for modification on October 22, 2004, the 366th day after the effective date of the prior denial, her request was timely. We, therefore, reverse the administrative law judge's finding that claimant's request for modification was not timely filed and remand the case to the administrative law judge for his consideration of claimant's modification request on the merits pursuant to Section 725.310 (2000). *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

[7]Revised Section 725.101(a)(32) became effective on January 19, 2001 and applies to all claims pending on that date.

[8]We agree with the Director that the administrative law judge's reliance upon *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003), to allow claimant only 365 days to file her request for modification, is misplaced. In *Gross*, the Board held that the phrase "prior to one year after the rejection of a claim" in Section 22 of the Longshore Act means "before the 365th day ends." *Gross*, 23 BLR at 1-15. However, in *Gross*, the 365th day was the last day of the year since a leap year was not involved. In *Gross*, the Board rejected employer's contention that the modification period ended on the 364th day after the rejection of a claim (*i.e.*, before the 365th day commences). Consequently, the Board's footnote in *Gross* that "[t]he discussion herein should be understood to include leap years" refers to a claimant having a full year to seek modification, even in leap years. *Gross*, 23 BLR at 1-15 n.7.

Accordingly, the administrative law judge's Decision and Order dismissing claimant's request for modification is reversed and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. MCGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge