BRB No. 01-0467 BLA

VINCENT ROSSI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED:
	)	
INTERNATIONAL BUSINESS & MERCANTILE REASSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand from the Benefits Review Board and Order Denying Motion for Reconsideration of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer and carrier.

Rita Roppolo (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL,

Administrative Appeals Judges.

PER CURIAM:

Employer and carrier (employer) appeal the Decision and Order Awarding Benefits on Remand from the Benefits Review Board and Order Denying Motion for Reconsideration (97-BLA-0100) of Administrative Law Judge Ainsworth H. Brown (the administrative law judge) 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).[1] This case is before the Board for the second time. In *Rossi v. Reading Anthracite Co., Inc.*, BRB No. 99-0767 BLA (April 28, 2000)(unpub.), the Board held, *inter alia*, that the administrative law judge properly found that the x-ray evidence upon which employer sought to rely was not made part of the record. On the merits of the claim, the Board vacated the administrative law judge's finding that claimant established entitlement to the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304 (2000), and remanded the case for the administrative law judge to consider all of the relevant evidence. The Board also vacated the administrative law judge's onset date determination and instructed the administrative law judge to make a specific finding on remand, if reached.

[1]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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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 their appellate briefs in the instant case, employer and the Director, Office of Workers' Compensation Programs (the Director), argue that application of the challenged revised regulations would not affect the outcome of the case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by employer and the Director regarding the impact of the challenged regulations.

Subsequent to the Board's remand of the case, on July 14, 2000 employer filed a motion with the administrative law judge to reopen the record. The administrative law judge denied this motion on July 25, 2000, and following reconsideration on August 22, 2000. The administrative law judge determined that the Board had addressed the issue of the parties' failure to make certain x-ray evidence part of the record which, he indicated, "resolves the issue as far as I am concerned." Order Denying Reopening of the Record at 1. On September 6, 2000, employer filed a Petition for Modification pursuant to 20 C.F.R. §725.310 (2000) with the district director, and filed a Motion for Remand to the District Director and to Suspend the Briefing Order with the administrative law judge. On September 15, 2000, the administrative law judge summarily denied this motion, indicating that there had been no consultation with opposing counsel. On September 29, 2000, the administrative law judge issued his Decision and Order in which he awarded benefits. Employer moved for reconsideration and, on January 17, 2000, the administrative law judge issued his Order Denying Motion for Reconsideration. Therein, the administrative law judge determined, *inter alia*, that employer's request for modification was premature because, pursuant to 20 C.F.R. §725.480 (2000),[2] modification was available only after a final decision had been issued following the Board's Decision and Order vacating the administrative law judge's prior Decision and Order and remanding the case.

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[2]The regulation at 20 C.F.R. §725.480 (2000) underwent a technical revision only. Namely, the subsection (a) designation was dropped. The regulation provides:

> A party who is dissatisfied with a decision and order which has become final in accordance with §725.479 may request a modification of the decision and order if the conditions set forth in §725.310 are met.

20 C.F.R. §725.480.

On appeal, employer argues that the administrative law judge erred by not remanding the case to the district director for consideration of employer's request for modification. Employer argues that the administrative law judge did not have jurisdiction to consider the claim. Employer further argues that if the Board holds that the administrative law judge had jurisdiction to consider the claim, then the Board must vacate the award of benefits because employer was denied a fair hearing and the administrative law judge's finding of entitlement pursuant to 20 C.F.R. §718.304 (2000) is not supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief agreeing with employer's position that the administrative law judge erred by not remanding the case to the district director for consideration of employer's Petition for Modification. Claimant has not filed a brief in the appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Upon consideration of the facts of this case and the briefs filed on appeal, we agree with employer and the Director that the administrative law judge erred in not remanding the case to the district director for consideration of employer's Petition for Modification. 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..., on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner,[3] the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or 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. In turn, the implementing regulation at 20 C.F.R. §725.310(a) (2000)[4] provides:

[3]The district director was formerly referred to as the deputy commissioner.

[4]The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. 20 C.F.R. §725.2.

> 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 deputy commissioner may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

20 C.F.R. §725.310(a) (2000). These provisions make clear that a final decision is not a prerequisite to requesting modification. We thus vacate the administrative law judge's contrary determination.[5]

Based on the statutory and regulatory provisions set forth above, we also vacate the administrative law judge's determination that he was not required to remand this case to the district director for consideration of employer's Petition for Modification which was filed with the district director on September 6, 2000. 33 U.S.C. §922; 20 C.F.R. §725.310. Because the administrative law judge lacked jurisdiction to consider the claim once employer filed his Petition for Modification, we vacate the administrative law judge's Decision and

[5]In determining that a final decision was a prerequisite to a request for modification under 20 C.F.R. §725.310 (2000), the administrative law judge relied on 20 C.F.R. §725.480 (2000). While that regulation provides that any party dissatisfied with a decision and order which has become final may request modification of the decision and order under 20 C.F.R. §725.310 (2000), the regulation does not provide that only at that point in time may a request for modification be made.

Order Awarding Benefits on Remand from the Benefits Review Board and Order Denying Motion for Reconsideration.[6]

[6]In light of our decision to vacate the administrative law judge's Decision and Order Awarding Benefits on Remand from the Benefits Review Board and Order Denying Motion for Reconsideration, we do not reach employer's additional arguments challenging findings made by the administrative law judge therein. Specifically, employer also argues that the administrative law judge erred in awarding benefits pursuant to 20 C.F.R. §718.304 (2000) and abused his discretion and denied employer due process of law when he refused to reopen the record.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand from the Benefits Review Board and Order Denying Motion for Reconsideration are vacated and the case is remanded to the district director for consideration of employer's Petition for Modification.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge