BRB No. 04-0408 BLA

BEN PENNINGTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	DATE ISSUED: 02/28/2005
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird & Baird, PSC), Pikeville, Kentucky, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5139) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) on a claim for benefits 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] The procedural history of this case is as follows. Claimant's December 16, 1993 application for benefits was denied by Administrative Law Judge J. Michael O'Neill. On claimant's appeal, the Board affirmed the denial of benefits. *Pennington v. Leeco, Inc.*, BRB No. 96-1314 BLA (Apr. 28, 1997)(unpub.). On January 6, 1998, claimant requested modification. Administrative Law Judge Robert L. Hillyard issued a Decision and Order on Modification – Denial of Benefits, which the Board affirmed. *Pennington v. Leeco, Inc.*, BRB No. 99-0962 BLA (Sept. 18, 2000)(unpub.). Director's Exhibit 1.

On March 5, 2001, less than one year later, claimant submitted a new application for benefits. Director's Exhibit 1. In a Proposed Decision and Order Memorandum of Conference issued on March 23, 2001, the district director ordered that "claimant's application is hereby withdrawn in accordance with the written request." Director's Exhibit 1; *see also* Director's Exhibit 16. After the case was transferred to the Office of Administrative Law Judges, employer filed a Motion to Remand to the District Director, asserting that the district director lacked the authority to allow the withdrawal of claimant's 1993 application for benefits pursuant to the Board's decision in *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002)(*en banc*). The administrative law judge issued an Order Denying Motion for Remand; Order Finding Withdrawal Improper, dated September 11, 2003. The administrative law judge determined that the district director erred by granting claimant's request to withdraw his 1993 claim. Based on *Clevenger*, the administrative law judge found that the district director did not have the authority to approve claimant's withdrawal request under 20 C.F.R. §725.306. Therefore, the administrative law judge found that claimant's March 5, 2001 claim constitutes a request for modification pursuant to 20 C.F.R. §725.310 (2000).

At the hearing, the parties discussed the posture of the claim. Claimant agreed with employer's statement that the current claim is a request for modification of an "old Reg[ulation]" case. Hearing Transcript at 8-9. In his Decision and Order – Denial of Benefits, issued on January 14, 2004, the first issue the administrative law judge addressed was the status of the claim. The administrative law judge determined that although withdrawal would be "inappropriate" under *Clevenger*, Decision and Order at 4, "the rule of Clevenger cannot be applied retroactively to invalidate the Order of Withdrawal. Accordingly, the prior claims of record will be considered not to have been

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

filed and any evidence submitted in conjunction with the prior claims will not be considered." Decision and Order at 5.

Turning to the merits of entitlement, the administrative law judge found that employer's stipulation to twenty-two years of coal mine employment is supported by the record, and he adjudicated this claim pursuant to the amended regulations at 20 C.F.R. Part 718. The administrative law judge noted that the 2001 amendments to the regulations limit the amount of evidence that may be admitted, but since "at the hearing the parties were under the mistaken impression that this claim would be treated as a request for modification, thereby not subject to the evidentiary limitations[,]…neither party has submitted a pre-hearing report indicating which submissions are to be considered pursuant to [20 C.F.R.] Section 725.414(a)." Decision and Order at 6-7. The administrative law judge stated that "Rather than arbitrarily choosing evidence to fulfill the limitations set forth in Section 725.414(a), I find that the parties' mutual misunderstanding and agreement to not be limited by the amended regulations waive the evidentiary limitations set forth in Section 725.414(a)." Decision and Order at 7. The administrative law judge considered all of the evidence submitted since claimant's 2001 application for benefits, and found it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge also found this evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the evidence. Claimant asserts that the administrative law judge erred in finding that the evidence does not establish the existence of pneumoconiosis, or total disability. Claimant also asserts that the administrative law judge erred in considering evidence exceeding the evidentiary limitations of 20 C.F.R. §725.414. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter brief, wherein he asserts that the administrative law judge erred in changing his finding to allow claimant's withdrawal of his 1993 claim.

The Director specifically asserts that under *Clevenger*, once Judge Hillyard's May 28, 1999 Decision and Order became effective, the claim could no longer be withdrawn. The Director asserts that because an administrative law judge is obligated to apply the law in effect at the time he renders his decision, the administrative law judge erred in concluding that *Clevenger* cannot be applied retroactively. The Director also asserts that because the 2001 application for benefits should have been treated as a request for modification of claimant's 1993 application for benefits, the administrative law judge did not err by admitting all of the newly developed evidence since the evidentiary limitations of 20 C.F.R. §725.414 do not apply. In addition, the Director contends that the administrative law judge's evaluation of the newly submitted evidence constitutes a

determination that claimant has not established a change in conditions. Finally, the Director asserts that claimant has waived any argument regarding modification based on a mistake in a determination of fact.

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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge erred by not applying *Clevenger* in this case. The district director did not have the authority to grant withdrawal of claimant's 1993 claim once a decision on the merits, issued by an adjudication officer, became effective. 20 C.F.R. §725.306; *Clevenger*, 22 BLR 1-193. Therefore, claimant's 2001 application for benefits, which was filed within one year of the Board's September 18, 2000 Decision and Order, constitutes a request for modification of the 1993 claim, rather than a new claim for benefits.[2] 20 C.F.R. §725.310 (2000); *Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990). Consequently, we vacate the administrative law judge's Decision and Order – Denial of Benefits, and remand the case to the administrative law judge for consideration of claimant's case on modification under 20 C.F.R. §725.310 (2000).[3] On remand, the administrative law judge must apply the law on modification at Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.§922, as incorporated into the Act by 30 U.S.C. §932(a); and 20 C.F.R. §725.310 (2000); and as enunciated by the United States Court of Appeals for the Sixth Circuit in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

[2] Because we hold that claimant's 2001 application for benefits constitutes a request for modification, claimant's arguments regarding the evidentiary limitations of 20 C.F.R. §725.414 are moot. The evidentiary limitations contained in Section 725.414 do not apply to claims for benefits filed before January 19, 2001. 20 C.F.R. §725.2.

[3] Although Section 725.310 has been revised, these revisions apply only to claims filed on or after January 19, 2001. *See* 65 Fed. Reg. 79920 (2000).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge