BRB No. 05-0636 BLA

MARY CHURCH (Widow of STEWARD CHURCH)	)	
Claimant-Petitioner	)	
v.	)	
SCAT COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/15/2006
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Tracey Alice Berry (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (05-BLA-5190) of Administrative Law Judge Daniel F. Solomon dismissing her modification request 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] The administrative law judge found that claimant's modification request was untimely, as he determined that it was filed three hundred and sixty-seven days after the district director's Proposed Decision and Order became effective. Decision and Order at 2. The administrative law judge concluded that because claimant did not request modification within one year of the previous denial, as required under 20 C.F.R. §725.310, her claim was a subsequent survivor's claim that he was required to deny pursuant to 20 C.F.R. §725.309(d)(3). Decision and Order at 2. Accordingly, the administrative law judge canceled the hearing and dismissed the claim. *Id*.

On appeal, claimant contends that the administrative law judge erred in finding the modification request untimely. Employer responds, asserting that substantial evidence supports the administrative law judge's dismissal of the claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand asserting that the administrative law judge's finding is not consistent with the applicable regulations and that further fact finding is required to determine if the modification request is timely. Employer has responded to the Director's motion and asserts that the Director's interpretation of the regulations is incorrect.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that her petition for modification was timely filed under Section 725.310 because she requested modification less than one year after the date on which she received the district director's proposed decision. Claimant's Brief at 3-5. The

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[1] Claimant is Mary Church, the miner's widow. The miner, Steward Church, died on June 30, 2002. Claimant filed a survivor's claim on October 21, 2002. The district director denied this claim in a proposed decision and order issued on June 26, 2003. Director's Exhibits 2, 4, 19. Claimant subsequently filed a modification request dated July 28, 2004, which the district director denied on August 3, 2004. Director's Exhibits 22, 23. Claimant then requested a hearing on her modification request before the Office of Administrative Law Judges. Director's Exhibit 25.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in Virginia. Director's Exhibits 2, 7; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Director asserts that the one-year period referenced in Section 725.310 began to run the day after the "effective date" of the district director's proposed decision, which in this case, was thirty days after June 26, 2003. Director's Brief at 3, citing 20 C.F.R. §725.502(a)(2); Director's Exhibit 19. The Director also maintains that pursuant to 20 C.F.R. §725.311(c), the district director's proposed decision did not become effective until Monday, July 28, 2003, because the thirtieth day after the issuance of the decision was July 26, 2003, a Saturday. The Director therefore contends that claimant had one year from July 28, 2003 to seek modification. *See* 20 C.F.R. §725.311(c); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-15 (2003); Director's Brief at 3-4. Employer responds that Section 725.311(c) applies only to the computation of time periods involving communications between the parties and to deadlines for filing documents. Employer's Brief in Response to the Director's Motion to Remand at 1-3.

As an initial matter, we reject employer's argument that Section 725.311(c) applies only to compute time periods in which a party must file a document or take some action, and we agree with the Director that Section 725.311(c) applies to the identification of the effective date of a district director's proposed decision and order. The Director's reading of the regulation is reasonable and is supported by the text of the regulation. *See BethEnergy Mines, Inc. v. Pauley*, 501 U.S. 680, 15 BLR 2-155 (1991); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Adkins v. Director, OWCP*, 878 F.3d 622, 21 BLR 2-313 (4th Cir. 1989). We are persuaded by the plain meaning of the language used in Section 725.311(c), which provides in relevant part that:

> In computing *any* period of time described in this *part*, [or] by any applicable statute . . . [t]he last day of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period extends until the next day which is not a Saturday, Sunday, or legal holiday.

20 C.F.R. §725.311(c) (emphasis supplied). Based upon the phrases "any period of time" and "in this part," it is rational to conclude that Section 725.311(c) applies to the computation of any time periods referenced in 20 C.F.R. Part 725.[3]

[3] The Board has recognized that "[t]he time computation rule of 20 C.F.R. §725.311(c) is virtually identical to the time computation rule followed by the federal courts." *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-16 n.9 (2003), citing Fed. R. Civ. P. 6(a); Fed. R. App. P. 26(a). Rule 6(a) has been applied broadly, *see Union Nat'l Bank v. Lamb*, 337 U.S. 38, 41 (1949), and has been held applicable to computing any period of time regardless of whether or not the time period at issue is one in which a party must file a paper or take some action. *Am. Canoe Ass'n, Inc. v. City of Attalla*, 363 F.3d 1085,

Part 725 sets forth two time periods which are relevant to the present case. Section 725.310(a) states that a request for modification must be filed "before one year after the denial of a claim . . . ." 20 C.F.R. §725.310(a). The Board has construed the phrase "denial of a claim" to mean the "effective" denial of a claim. *Wooten v. Eastern Associated Coal Corp.*, 20 BLR 1-20, 1-25 (1996). Under 20 C.F.R. §725.502(a)(2), "[a] proposed order issued by a district director pursuant to §725.418 becomes effective at the expiration of the thirtieth day thereafter if no party timely requests revision of the decision and order or a hearing (see §725.419)." 20 C.F.R. §§725.502(a)(2);[4] *see also* 20 C.F.R. §725.419(d). Both Section 725.502 and Section 725.419 are silent as to how the thirty-day period is to be calculated. Part 725 provides, therefore, that absent a response or a request for a hearing, a proposed decision and order of a district director becomes effective thirty days after it is issued, and the time within which to seek modification is one year from the date that the proposed decision and order becomes effective. *See* 20 C.F.R. §§725.310, 725.502(a)(2); *Wooten*, 20 BLR at 1-25.

In this case, the administrative law judge did not consider the effect of Section 725.311(c). Decision and Order at 1-2. Pursuant to this regulation, the district director's proposed decision and order did not become effective until Monday, July 28, 2003, as the thirtieth day after its issuance--July 26, 2003--was a Saturday. 20 C.F.R. §725.311(c); *see Gross*, 23 BLR at 1-15; Director's Exhibits 19, 22. Thus, claimant had until at least July 28, 2004 to file a request for modification under Section 725.310(a). We must vacate, therefore, the administrative law judge's finding that claimant's modification request was untimely and remand the case to the administrative law judge.

On remand, the administrative law judge must first make a finding as to when claimant's modification request was filed with the district director and then must determine whether it was timely. In making the latter determination, the administrative law judge should also consider whether employer's July 18, 2003 response to the district director's proposed decision and order, in which employer disagreed with the district director's finding that coal workers' pneumoconiosis was established, tolled the time period within which claimant could seek modification. *See* 20 C.F.R. §§725.419(c), (d), 725.502(a)(2); Director's Exhibits 19, 21. If claimant's request for modification was

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1086-87 (11th Cir. 2004)(holding that Rule 6(a) "is not limited to time periods during which an act must be taken").

[4] This provision of Section 725.502(a)(2) contrasts with other provisions of that subsection which state, *inter alia*, that an administrative law judge's order becomes effective when it is filed in the office of the district director and an order of the Benefits Review Board becomes effective when it is issued. 20 C.F.R. §725.502(a)(2).

timely filed, then the administrative law judge must conduct a hearing and adjudicate the claim pursuant to Section 725.310 and determine whether claimant has established a change in conditions or a mistake in a determination of fact.[5] 20 C.F.R. §725.310(a); *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[5] The administrative law judge erred in determining that, because claimant did not timely file her modification request, her filing constituted a subsequent claim under C.F.R. §725.309(d). *See Stacey v. Cheyenne Coal Co.*, 21 BLR 1-111, 1-114-15 (1999)(holding that an untimely modification request is not a new claim unless the claim is perfected by timely filing a claim form).