



BRB No. 16-0664 BLA
Case No. 2012-BLA-05598

TEVIS RAY HOWARD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ARCH ON THE NORTH FORK,)	DATE ISSUED: 01/15/2020
INCORPORATED)	
)	
and)	
)	
Self-insured by ARCH COAL,)	
INCORPORATED)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	ORDER on MOTION
Party-in-Interest)	for RECONSIDERATION

Claimant¹ filed a timely motion for reconsideration of the Board's Decision and Order in *Howard v. Arch on the North Fork, Inc.*, BRB No. 16-0664 BLA (Sept. 26, 2017) (unpub.), affirming the denial of benefits in this miner's claim. 33 U.S.C. §921(b)(5); 20

¹ Claimant was unrepresented in his initial appeal to the Board. Claimant is now represented by legal counsel in this motion for reconsideration.

C.F.R §802.407(a). Employer responds in support of the Board's decision. The Director, Office of Workers' Compensation Programs, has not responded.

Claimant contends he was an unrepresented litigant before the administrative law judge and, therefore, the administrative law judge erred in not performing a fuller inquiry into whether his decision to proceed without legal counsel and to waive the formal hearing was made knowingly and voluntarily. Claimant also contends the administrative law judge erred in not taking further steps to secure his testimony regarding whether his surface coal mining was substantially similar to underground coal mining.²

We reject claimant's contention that he was unrepresented during the proceedings before the administrative law judge. Claimant was represented by members of the Stone Mountain Health Services (Stone Mountain) in their capacity as formally appointed lay representatives. 20 C.F.R. §§725.362, 725.363(b); Director's Exhibit 24. Stone Mountain rendered the services a representative performs, e.g., submitting evidence, responding to correspondence, and was included in all correspondence circulating among the administrative law judge, employer and the miner.

With regard to conducting an oral hearing, the administrative law judge found claimant waived the oral hearing scheduled for the week of March 28, 2016. Section 725.461(a) provides that if all parties provide written waiver of their right to appear before the administrative law judge, it shall not be necessary for the administrative law judge to conduct an oral hearing.³ 20 C.F.R. §725.461(a). Claimant, through his lay representative, filed a motion with the administrative law judge requesting the oral hearing be waived due to his poor health and, thus, requested a decision on the record.⁴

² In this respect, the administrative law judge found that because claimant did not have fifteen years of underground or substantially similar coal mine employment, he was not entitled to the benefit of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). The Board affirmed this finding. *Howard*, slip op. at 3-6.

³ Section 725.461(a) further states that the administrative law judge may nonetheless schedule and hold a hearing if s/he determines the personal appearance or testimony of a party or parties would assist in ascertaining the facts in issue in the claim. 20 C.F.R. §725.461(a). However, the regulation also provides that if the parties have submitted a valid waiver and do not appear before the administrative law judge, the administrative law judge shall make a record of the relevant documentary evidence and any further written stipulations of the parties, and the decision shall be based upon such evidence. *Id.*

⁴ Additionally, even if claimant had been unrepresented below, the administrative law judge is not required to conduct any additional inquiry as to whether claimant is capable of representing himself. Section 725.362(b) states that an administrative law judge

Moreover, we reject claimant's reliance on *Hatfield v. Director, OWCP*, BRB No. 16-0511 BLA (Nov. 30, 2016) (Order) (unpub.), wherein the Board held the administrative law judge erred in canceling the oral hearing due to his non-compliance with the regulatory requirement to provide thirty days' notice to the parties when he believed an oral hearing was not necessary. 20 C.F.R. §725.452(d). In light of the failure to properly apply the regulation, the Board remanded the claim for the administrative law judge to conduct an oral hearing. In this case, the oral hearing was canceled on claimant's motion requesting waiver and not on the administrative law judge's sua sponte action. As claimant has not established error in the administrative law judge's acceptance of the motion to waive the oral hearing, we deny claimant's request that we reverse the Order of Waiver and remand for an oral hearing.

We further reject claimant's contention that the administrative law judge was required to assist him in the presentation of his case. Claimant argues the administrative law judge erred in not taking further steps to secure his testimony regarding whether his surface coal mining was substantially similar to underground coal mining. Motion for Reconsideration at 7. Contrary to claimant's contention, it is claimant's responsibility to present evidence on all elements of his claim and not the duty of the administrative law judge to assist claimant in obtaining evidence supportive of his case. The administrative law judge's role in Black Lung adjudications is that of an impartial arbiter of the evidence the opposing parties present and not that of an advocate. *Shapell v. Director, OWCP*, 7 BLR 1-304, 306-07 (1984). Consequently, we decline claimant's motion to remand the case for the presentation of additional testimony.⁵

need not inquire regarding a claimant's ability to proceed without representation in any adjudication taking place without a hearing. 20 C.F.R. §725.362(b).

⁵ At any time within one year after the final denial of this claim, claimant may file a request for modification with the district director alleging there was a mistake in a determination of fact or a change in his condition. 33 U.S.C. §922, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §§725.310, 725.480; see *Youghioghney & Ohio Coal Co. v. Milliken*, 200 F.3d 942 (6th Cir. 1999). An administrative law judge has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir.1994) (quoting *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971)).

Accordingly, we deny claimant's motion for reconsideration.⁶ 20 C.F.R. §§801.301(c), 802.409. The Board's decision is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

⁶ As Chief Administrative Appeals Judge Betty Jean Hall has retired and Administrative Appeals Judge Ryan Gilligan is no longer a member of the Board, Administrative Appeals Judges Jonathan Rolfe and Daniel T. Gresh are substituted on this panel. 20 C.F.R. §802.407(a).