

BRB No. 94-0371 BLA

JOE WHITEHEAD)

Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Joe Whitehead, Stoney Fork, Kentucky, *pro se*.

Elizabeth Lopes (Thomas S. Williamson, Jr., 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, the United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (90-BLA-1797) of Administrative Law Judge Jeffrey Tureck denying benefits 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). At claimant's request, a formal hearing was scheduled on three occasions, but each time claimant was unable to attend due to illness. After claimant failed to attend the third scheduled hearing, the administrative law judge issued an order dated May 21, 1993, offering claimant the option of having the hearing rescheduled and held in claimant's home or having the case decided on the record. Administrative Law Judge's Third Order to Show Cause. The order specified that if claimant failed to respond by June 17, 1993, the administrative law judge would decide the case on the record. *Id.* Claimant failed to respond to the order, and the administrative law judge issued a Decision and Order on

September 14, 1993.¹

Claimant's wife responded to the Decision and Order in a letter dated October 4, 1993 and addressed to the administrative law judge. The letter stated that claimant was still too ill to attend a hearing and that claimant had been treated unfairly. Claimant's Letter. Also enclosed was a note from claimant's personal physician stating that claimant was being referred to a pulmonologist for an evaluation for pneumoconiosis. Attachment to Claimant's Letter. The administrative law judge, noting that claimant had not stated any bases for reconsideration, treated this letter as an appeal of the denial of benefits and forwarded it to the Board by order dated October 22, 1993. On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) responds, urging affirmance of the denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). 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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to 20 C.F.R. §725.450, any party to a claim has the right to a hearing before an administrative law judge. See *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989). A party may submit a written waiver of the right to appear pursuant to Section 725.461(a). See *Churpack v. Director, OWCP*, 9 BLR 1-71 (1986). A party's unexcused failure to attend the hearing constitutes a waiver pursuant to Section 725.461(b). See *Clevinger v. Regina Fuel Co.*, 8 BLR 1-1 (1985).

An administrative law judge may decide a case without holding a hearing only when all parties file a written waiver of their right to appear with the Chief Administrative Law Judge or the administrative law judge assigned to hear the case. 20 C.F.R. §725.461(a); *Churpack, supra*. In the instant case, claimant has not filed a written waiver. While the Director filed a Joint Motion to continue the second hearing stating that claimant intended to request a decision on the record if he survived his health crisis and was still unable to travel, there is no such written request by claimant to the administrative law judge in the

¹ In his Decision and Order, the administrative law judge credited claimant with one and one-half years of coal mine employment and, considering this duplicate claim under Part 718, found the newly submitted evidence insufficient to establish the existence of pneumoconiosis. Accordingly, he denied benefits.

record. Therefore, we hold that claimant has not properly waived his right to a formal hearing. See *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

Accordingly, we vacate the denial of benefits and remand this case to the administrative law judge for him to hold a hearing² or obtain a written waiver from both parties pursuant to Section 725.461(a).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

_____ REGINA C.
McGRANERY
Administrative Appeals Judge

² We note that the record indicates that the administrative law judge has offered to hold the hearing in claimant's home rather than in the Pineville or Harlan courthouse, reasonably concluding that this option may be the better alternative. Administrative Law Judge's Third Order to Show Cause.