

BRB No. 97-1265 BLA

CARL MOSLEY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JOHNSON COAL COMPANY)	DATE ISSUED:
)	
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 on Remand and Order Denying Benefits on Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Phyllis Robinson, Hyden, Kentucky, for claimant.

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand and Order Denying Benefits on Reconsideration (94-BLA-1208) of Administrative Law Judge Thomas M. Burke 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). This case has been before the Board previously.¹ In his Decision and Order on Remand, the administrative

¹ In its most recent decision, the Board vacated the administrative law judge's finding that claimant was entitled to modification and that employer failed to establish rebuttal of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(b)(3). The Board noted that contrary to its holding in a previous decision in this case, the medical opinions of Drs. O'Neill, Penman, Anderson, Carey, and Powell may be

law judge considered the evidence and found that employer had rebutted the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(b)(3). Accordingly, benefits were denied. On April 22, 1997, claimant filed a notice of appeal and motion for modification. The administrative law judge considered the notice and motion to be a request for reconsideration for the sake of judicial efficiency. The administrative law judge considered the new evidence submitted by claimant and again found that employer had established rebuttal pursuant to Section 727.203(b)(3). Accordingly, the administrative law judge denied the request for reconsideration and benefits. In the instant appeal, claimant challenges the administrative law judge's weighing of the evidence. Employer responds, urging affirmance.² The Director, Office of Worker's Compensation Programs, has indicated that he will not respond to claimant's appeal.

The Board's scope of review is defined by statute. We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with 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).

sufficient to establish rebuttal at Section 727.203(b)(3) because they establish no pulmonary impairment and show that claimant's disability is due to obesity and back pain. The Board held that the administrative law judge erred in finding Dr. Branscomb's opinion equivocal and speculative and in confusing disease causation with disability causation. Lastly, the Board vacated the administrative law judge's finding regarding the onset date of claimant's total disability. *Mosley v. Johnson Coal Co.*, BRB No. 95-1855 BLA (June 26, 1996) (unpublished).

² In a footnote in its response brief, Employer questions the jurisdiction of the case as there is an outstanding request for modification, which the administrative law judge treated as a request for reconsideration. Employer's Response Brief at 1.

Modification proceedings are properly initiated before the district director. *See* 20 C.F.R. §725.310; *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987). In the instant case, claimant submitted new evidence and filed a request for modification with the administrative law judge twenty days after the administrative law judge's Decision and Order denying benefits. Because claimant's motion was filed within thirty days of the Decision and Order, the administrative law judge considered the motion to be a request for reconsideration and did not transfer the case to the district director to consider claimant's request for modification as he was required to do. *See Ashworth v. Blue Diamond Coal Co.*, 11 BLR 1-167 (1988); *Hoskins v. Director, OWCP*, 11 BLR 1-144 (1988). This error by the administrative law judge denied claimant the procedural due process regarding requests for modification. 20 C.F.R. §§725.421(a) and 725.450. The United States Court of Appeals for the Sixth Circuit, which has jurisdiction in this case, has recently held that a party who has requested a hearing in a modification proceeding is entitled to one and that it is error for an administrative law judge to ignore such a request. *See Cunningham v. Island Creek Coal Co.*, 199 F.3d 1000, 10 BLR 2-119 (6th Cir. 1998). In this case, claimant was not afforded an opportunity to request a hearing before the administrative law judge because he considered the newly submitted evidence as a motion for reconsideration. In light of the Sixth Circuit's holding in *Cunningham*, *supra*, we vacate the administrative law judge's denial of benefits and remand the case to the district director to consider claimant's request for modification. As there is an outstanding request for modification in this case, we decline to address claimant's arguments in its appeal to the Board.

Accordingly, the administrative law judge's Decision and Order on Remand and Order Denying Benefits on Reconsideration are vacated and the case is remanded to the district director for consideration of the evidence submitted by claimant on modification.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge