

BRB No. 98-1223 BLA

LEO BRADLEY)

Claimant-Petitioner)

v.)

DATE ISSUED:

COBRA COALS INCORPORATED)

and)

AMERICAN BUSINESS &)
MERCANTILE INSURANCE MUTUAL,)
INCORPORATED)

Employer/Carrier-)
Respondents)

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

Party-in-Interest)

DECISION AND ORDER

Appeal of the Decision and Order on Modification Denying Benefits of J.
Michael O'Neill, Administrative Law Judge, United States Department of
Labor.

Leo Bradley, Royalton, Kentucky, *pro se*.

Laura Metcoff Klaus and Richard Davis (Arter & Hadden LLP), Washington,
D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges and NELSON,
Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order on Modification Denying Benefits (96-BLA-0600) of Administrative Law Judge J. Michael O'Neill with respect to 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). The relevant procedural history of this case is as follows: Claimant filed an application for benefits on December 11, 1985. Director's Exhibit 1. In a Decision and Order issued on July 22, 1993, the administrative law judge determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that he was totally disabled pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 81. Accordingly, benefits were denied. *Id.* Claimant filed an appeal with the Board which, in a Decision and Order issued on March 29, 1995, affirmed the administrative law judge's findings under Section 718.204(c) and the denial of benefits. *Bradley v. Cobra Coals, Inc.*, BRB No. 93-2173 BLA (Mar. 29, 1995)(unpub.).

Claimant filed a request for modification of the denial of benefits on April 28, 1995 and submitted additional evidence. Director's Exhibit 94. The district director determined that modification was not warranted, as claimant did not establish either a change in conditions or a mistake in a determination of fact under 20 C.F.R. §725.310. Director's Exhibit 97. In a letter dated October 13, 1995, claimant's requested that the case be transferred to the Office of Administrative Law Judges (OALJ) for a hearing. Director's Exhibit 99. On October 28, 1995, claimant executed a Notice of Representation form in which he designated Marcus Mann as his attorney. Director's Exhibit 100. On two occasions - March 20, 1996 and May 8, 1996 - the administrative law judge issued an Order to Show Cause why a formal hearing should be held with respect to claimant's request for modification. Both employer and the Director, Office of Workers' Compensation Programs (the Director), responded and indicated that the case could be decided based upon a review of the record. Claimant did not respond.

The administrative law judge then issued an Order to Show Cause why the claim should not be dismissed on the grounds of abandonment. Claimant, through a letter written by his wife, responded and asked the administrative law judge not to dismiss his claim. Claimant indicated that his attorney had assured him that the matters pertaining to administrative law judge's Orders to Show Cause were being addressed. Claimant further suggested that his attorney did not have the correct address for the administrative law judge. The administrative law judge reinstated claimant's request for modification and indicated that no formal hearing would be scheduled.

In a Decision and Order dated May 13, 1998, the administrative law judge considered the newly submitted evidence and determined that it was insufficient to establish a change in conditions under Section 725.310. The administrative law judge also found that his prior Decision and Order contained no mistake in a determination of fact pursuant to Section 725.310. Accordingly, benefits were denied. Claimant's appeal

followed. Employer has responded and urges affirmance of the denial of benefits. The Director has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

It is apparent from the record that claimant asked for a formal hearing upon receipt of the district director's Proposed Decision and Order denying modification and in his subsequent correspondence, claimant never explicitly withdrew his request. Director's Exhibit 99. Following the issuance of the Decision and Order that is the subject of this appeal, the United States Court of Appeals for the Sixth Circuit held in a published opinion that a party asking for a hearing on modification is entitled to one. See *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998); see also *Robbins v. Cypress Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998). In light of this holding, we hereby vacate the administrative law judge's Decision and Order on Modification Denying Benefits and remand the case to the administrative law judge to hold a hearing with respect to claimant's request for modification.

Accordingly, the administrative law judge's Decision and Order on Modification Denying Benefits is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge