BRB Nos. 00-0562 BLA
and 00-0562 BLA-A

SHERIDAN OSBORNE	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in Interest	)	DECISION and ORDER

Appeal of the Order Denying Summary Judgment of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor, the Order Denying Employer's Motion for Reconsideration of Order Denying Summary Judgment and the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd and Lloyd, PLLC), Washington, D.C., for employer.

Helen H. Cox (Judith E. Kramer, Acting 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Order Denying Summary Judgment of Administrative Law Judge Thomas F. Phalen, Jr., and the Order Denying Employer's Motion for Reconsideration of Order Denying Summary Judgment, and the Decision and Order (99-BLA-0499) of Administrative Law Judge Daniel J. Roketenetz 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).[1] Claimant initially filed an application for benefits on February 24, 1988, which claim was denied by the district director on August 1, 1988. Directors's Exhibit 23. Claimant filed a duplicate claim on April 22, 1994, which was denied by Administrative Law Judge Daniel L. Leland in a Decision and Order issued on February 14, 1996, due to claimant's failure to establish any required element of entitlement. Director's Exhibits 1, 30. The administrative law judge's Decision and Order was subsequently affirmed by the Board in response to claimant's appeal. *Osborne v. Leeco, Inc.*, BRB No. 96-0664 BLA (Jan. 28, 1997)(unpub.). Claimant filed the present request for modification on March 10, 1998. Director's Exhibit 44. Employer thereafter filed a motion for summary judgment on March 2, 1999, contending that claimant's modification request was untimely. In response, Administrative Law Judge Phalen issued an order on April 15, 1999, finding that claimant's request for modification was timely and denying employer's motion to dismiss the instant claim. Employer requested reconsideration of this finding, and on May 12, 1999, Administrative Law Judge Roketenetz (the administrative law judge) issued an order denying employer's request. In a Decision and Order issued on February 14, 2000, the administrative law judge noted the parties' stipulation that claimant established fourteen years of coal mine employment, and considered the claim pursuant to the provisions of 20 C.F.R. Part 718 (2000). The administrative law judge found that the evidence of record was insufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000), or total disability pursuant to 20 C.F.R.

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the regulations.

§718.204(c) (2000), and thus failed to demonstrate a change in condition or a mistake of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence was insufficient to establish the presence of pneumoconiosis at 20 C.F.R. §718.202(a)(1),(4) (2000), and total disability pursuant to 20 C.F.R.§718.204(c)(4) (2000). Employer responds urging affirmance of the denial of benefits, and in its cross-appeal, asserts that claimant's request for modification was untimely and therefore this claim is not within the administrative law judge's jurisdiction. The Director, Office of Workers' Compensation Programs (the Director), responds that employer correctly contends that claimant's modification request was untimely, and therefore that the administrative law judge lacked jurisdiction over the instant case, but that this error is harmless, since the administrative law judge properly denied the claim on the merits.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao,* No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which only employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case.[2] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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 applicable 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).

[2]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

We will first consider whether claimant's request for modification was timely. The record indicates that the Board affirmed Judge Leland's denial of benefits on January 28, 1997, and on March 10, 1998, claimant's attorney submitted new evidence to the district director, and specifically requested modification of the denial of benefits. Director's Exhibits 42, 44. On March 27, 1998, the district director responded that claimant's request would be considered as a petition for modification. Director's Exhibit 45. On April 6, 1998, employer responded to the district director by asserting that claimant's modification was untimely as it was not filed within one year of the Board's January 28, 1997 Decision and Order. Director's Exhibit 46. On May 1, 1998, the district director issued a Proposed Decision and Order finding that claimant's modification request was timely, but denying benefits. Director's Exhibit 49. Claimant requested a formal hearing on May 7, 1998, and on May 29, 1998, employer again submitted a statement disagreeing with the finding that claimant's modification request was timely and requesting dismissal of claimant's request for a hearing. Director's Exhibits 50, 52. The district director denied employer's request to dismiss the claim on June 1, 1998, and forwarded the claim to the Office of the Administrative Law Judges. Director's Exhibit 53.

Pursuant to the provisions of Section 725.310 (2000), a request for modification may be filed at any time within one year after the denial of a claim. *See* 33 U.S.C. §922; 20 C.F.R. §725.310 (2000). In response to employer's March 2, 1999, request for summary judgment, Judge Phalen found, based on the Board's holding in *Wooten v. Eastern Associated Coal Corp.*, 20 BLR 1-20 (1996), that the timeliness of a modification request is determined by the date on which the most recent decision and order in the case is filed in the office of the district director. As the Board's Decision and Order in the present case was not filed in the office of the district director until May 20, 1997, Judge Phalen found that the Board's Decision and Order was not effective until that date. Thus, Judge Phalen found that claimant's modification request was timely as it was filed within one year from May 20, 1997. ALJ Phalen's Order at 1-2. Employer subsequently requested reconsideration of Judge Phalen's decision, and on May 12, 1999, Judge Roketenetz issued an order concurring in Judge Phalen's determination that claimant's modification request was timely, and again denying employer's request for summary judgment. ALJ Roketenetz's Order at 1.

Employer and the Director contend that the administrative law judge erred in treating claimant's March 10, 1998, petition for modification as timely. We agree. The Board issued its Decision and Order affirming the previous denial of benefits on January 28, 1997. No party filed a motion for reconsideration or an appeal to the United States Court of Appeals for the Sixth Circuit. which would have prevented the Board's decision from taking effect on the date it was issued. *See* 20 C.F.R. §§802.403, 802.406, 802.407(a), 802.410(a); *Pittston Coal Group v. Sebben,* 488 U.S. 105, 12 BLR 2-89 (1988); *Peabody Coal Co. v. Abner,* 118

F.3d 1106, 21 BLR 2-154(6th Cir. 1997);[3] *Bolling v. Director, OWCP*, 823 F.2d 165, 10 BLR 2-169 (6th Cir. 1987); *see also Pifer v. Florence Mining Co.*, 8 BLR 1-498 (1986). Only decisions of an administrative law judge, not those of the Board, take effect on the date that they are filed in the office of the district director. *See* 20 C.F.R. §§725.479(a), 802.406 (2000); *Director, OWCP v. Seals*, 942 F.2d 986, 15 BLR 2-193 (6th Cir. 1991); *Wooten, supra.* Accordingly, claimant had until January 28, 1998, to file a timely request for modification. As claimant's modification request was filed more than one year after the Board's Decision and Order affirming the denial of benefits, it was untimely filed and was not within the jurisdiction of the administrative law judge. *See* 20 C.F.R. §§725.310, 802.406 (2000). Moreover, as claimant has not submitted a new claim since the Board's denial of his previous duplicate claim, claimant's request for modification and submission of new evidence cannot be considered a duplicate claim. *Stacy v. Cheyenne Coal Company*, 21 BLR 1-112 (1999). We, therefore, hold that there was no claim before the administrative law judge to adjudicate. Consequently, we cannot address the administrative law judge's findings pursuant to Part 718.

[3]The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, inasmuch as claimant's coal mine employment occurred in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc)*; Director's Exhibit 2.

Accordingly, the Order of Judge Phalen, the Order Denying Employer's Motion for Reconsideration of Order Denying Summary Judgment of Judge Roketenetz, and the Decision and Order of the administrative law judge denying benefits is vacated.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge