BRB No. 13-0261 BLA

LOIS CLARK (Widow of JAMES H. CLARK) Claimant-Respondent v. OLD BEN COAL COMPANY and SAFECO INSURANCE COMPANY OF AMERICA Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/26/2014 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of William S. Colwell, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Safeco Insurance Company of America (Safeco) appeals the Decision and Order Awarding Benefits on Remand (2010-BLA-5051) of Administrative Law Judge William S. Colwell, rendered on a survivor's claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This claim, filed on April 21, 2008, is before the Board for the second time.[2] Director's Exhibit 3.

In his initial Order Awarding Benefits, issued on August 5, 2010, the administrative law judge found that Safeco failed to timely controvert the claim, and that Safeco did not establish "good cause" for its failure, because the district director's notices and Proposed Decision and Order awarding benefits were sent to Safeco's address of record, and were received by an agent of Safeco.[3] The administrative law judge also determined that Safeco's procedural default barred it from seeking modification pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge awarded benefits.

Upon review of Safeco's appeal, the Board affirmed the administrative law judge's findings that the district director properly served Safeco with the Notice of Claim, Schedule for the Submission of Additional Evidence, and Proposed Decision and Order awarding benefits at Safeco's mailing address of record, and that Safeco received them through its agent.[4] *Clark v. Old Ben Coal Co.*, BRB No. 10-0658 BLA, slip op. at 7-8

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[1] Claimant was the widow of the miner, who died on December 1, 2007. Director's Exhibit 8. In a letter dated June 18, 2013, the district director informed the Board that claimant died on May 15, 2013.

[2] The full procedural history of this case is set forth in the Board's prior decision. *Clark v. Old Ben Coal Co.*, BRB No. 10-0658 BLA, slip op. at 3-6 (July 26, 2011) (unpub.).

[3] Old Ben Coal Company, the responsible operator, was liquidated in 2004. Director's Exhibit 17; *Old Ben Coal Co. v. OWCP* [*Melvin*], 476 F.3d 418, 23 BLR 2-424 (7th Cir. 2007). Safeco's interest in this case is as the surety on bonds that Old Ben obtained as a self-insured operator. Director's Exhibit 17. The case was before the administrative law judge pursuant to Safeco's request for a hearing after the district director denied its request for modification. *Clark*, slip op. at 5; Director's Exhibit 26.

[4] As the Board summarized, when Safeco moved its Seattle headquarters, it had the United States Postal Service forward its mail and it employed a courier service, Postal Express, to pick up mail addressed to Safeco's former headquarters and deliver it to Safeco's new address. *Clark*, slip op. at 5-6. An employee of Postal Express signed certified mail receipts for the claim documents that the district director sent to Safeco's old address. *Clark*, slip op. at 3-5. Despite its mail handling procedures, Safeco could not locate the documents served in the case, and concluded that it must not have received

(July 26, 2011) (unpub.). The Board also held, however, that the administrative law judge erred in finding that Safeco failed to establish good cause for its failure to timely controvert the claim, because the proper inquiry was whether Safeco could establish "excusable neglect." *Id*. at 8-9. The Board therefore vacated the award of benefits and instructed the administrative law judge, on remand, to consider whether Safeco established excusable neglect for its failure to timely controvert the claim. *Id*. at 8-10. The Board further held that the administrative law judge erred in finding that Safeco was precluded from seeking modification, and thus instructed the administrative law judge to consider Safeco's petition for modification if he found that Safeco did not establish excusable neglect. *Id*. at 10-11.

On remand, the administrative law judge ordered the parties to file position statements on the issues of excusable neglect and modification. In its position statement, Safeco argued that the evidence of its mail handling and claim procedures established that its failure to timely controvert the claim resulted from an error beyond its control that should be excused. Safeco requested "oral argument" on the issue of excusable neglect, noting that there had not yet been a hearing, and requested permission to develop medical evidence in support of its request for modification. Old Ben/Safeco's Position Statement at 7. The Director, Office of Workers' Compensation Programs (the Director), argued that Safeco did not establish excusable neglect for failing to timely respond to the district director's claim notices and Proposed Decision and Order, but indicated that "the consequences of Safeco's failure are limited," because "Safeco is allowed to challenge the claimant's entitlement to benefits through modification."[5] Director's Position Statement at 2. Further, "to ensure that Safeco's due process rights [were] protected, the Director agree[d] that Safeco should [also] be allowed to challenge the district director's

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them. *Clark*, slip op. at 6. Safeco indicated that it became aware of the claim after the district director's Proposed Decision and Order awarding benefits became final. *Clark*, slip op. at 4.

[5] The Director stated that he did not believe that Safeco's failures before the district director should prevent it from seeking modification on the ground that modification would not render justice under the Act. In the Director's view, Safeco "acted diligently after discovering the existence of the claim," and had not "abused the adjudication process." Director's Position Statement at 6 n.2. Further, the Director noted that "'accuracy of determination is to be given great weight'" in the justice under the Act standard. *Id*., quoting *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 547, 22 BLR 2-429, 2-453 (7th Cir. 2002).

responsible operator finding on modification."[6] *Id*. The Director requested that the administrative law judge set a schedule for the parties' submission of evidence on modification. Director's Position Statement at 7-8.

Upon receipt of the parties' position statements, the administrative law judge issued an Order To Show Cause Why Summary Decision Awarding Benefits Should Not Be Issued. In his Order, the administrative law judge found that Safeco did not establish excusable neglect for its failure to timely respond to the district director's claim notices and Proposed Decision and Order awarding benefits. Further, he determined that it would not render justice under the Act to consider Safeco's modification request, because the request was filed for an improper motive and arose from a lack of diligence on Safeco's part. The administrative law judge granted the parties thirty days to show cause why a summary decision awarding benefits should not be entered.

In response, the Director argued that, because no party moved for a summary decision, the administrative law judge must hold a hearing if Safeco timely requested one in response to his Order. Director's Response To Order To Show Cause at 3-4, citing 20 C.F.R. §725.452(d). Safeco responded that the administrative law judge would err if he found no excusable neglect, and that there was no basis for a summary denial of its petition for modification. Old Ben/Safeco's Response To Order And Motion For Reconsideration at 2-6 (unpaginated). Safeco requested a "telephone conference call," contending that resolution of the issues on remand "would likely be made easier by the give and take of oral argument." *Id*. at 8 (unpaginated).

In a Decision and Order Awarding Benefits on Remand, issued on February 12, 2013, the administrative law judge determined that a hearing was unnecessary because "the material facts necessary to adjudicate this claim on modification are undisputed," and because case law authorized him to issue a summary decision sua sponte. Decision and Order on Remand at 2, citing *Smith v. Westmoreland Coal Co*., 12 BLR 1-39 (1988). The administrative law judge found that Safeco did not establish excusable neglect for its failure to timely controvert the claim. He also denied Safeco's petition for modification, finding that, because the petition was "not filed for a proper purpose," considering the

[6] The Director noted that, under the regulations, an operator's failure to respond to the district director's Notice of Claim and Schedule for Submission of Additional Evidence would preclude it from challenging its liability in any later proceedings. 20 C.F.R. §§725.408(a)(3); 725.412(a)(2). However, the Director explained that "owing to the unique circumstances present here," he was "willing to allow Safeco to challenge Old Ben Coal's responsible operator status on modification. . . ." Director's Position Statement at 7.

petition for modification would not render justice under the Act. Decision and Order on Remand at 8. Accordingly, the administrative law judge awarded benefits.

On appeal, Safeco argues that the administrative law judge erred by issuing a summary decision without holding a hearing, which Safeco had requested. Safeco also contends that the administrative law judge erred in finding that Safeco failed to establish excusable neglect, and in denying its petition for modification. The Director has filed a Motion to Remand, contending that the administrative law judge erred by disregarding Safeco's request for a hearing and issuing a summary decision. The Director therefore urges the Board to vacate the administrative law judge's decision and remand the case for a hearing, with the opportunity for the parties to submit evidence.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

Upon a party's request, an administrative law judge must hold a hearing to address any contested issues of fact or law. *See* 33 U.S.C. §919(c), (d), as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §§725.450, 725.451. The right to a hearing, if requested, extends to petitions for modification. *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 428-29, 21 BLR 2-495, 2-504 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 390, 21 BLR 2-384, 2-388-89 (6th Cir. 1998); *see Arnold v. Peabody Coal Co.*, 41 F.3d 1203, 1208-09, 19 BLR 2-22, 2-33 (7th Cir. 1994). The requested hearing must be held unless one of the following exceptions is applicable: (1) the parties waive their right to a hearing, in writing; (2) a party requests summary judgment, and the administrative law judge determines that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law; or (3) the administrative law judge notifies the parties in a written order of his or her belief that a hearing is unnecessary, allowing at least thirty days for the parties to respond, and no party timely requests a hearing in response. *See* 20 C.F.R. §§725.461(a); 725.452(c), (d); *Cunningham*, 144 F.3d at 390, 21 BLR at 2-388-89; *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000) (holding that an administrative law judge must hold a hearing whenever a party requests one, unless the parties waive the hearing or a party requests summary judgment).

[7] The miner's coal mine employment was in Illinois. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

The record reflects that neither of the first two exceptions was applicable, since employer did not file a written waiver of its right to the requested hearing and no party moved for summary judgment. With respect to the third exception to the duty to hold the requested hearing, in its response to the administrative law judge's show cause order, Safeco requested "oral argument," and the administrative law judge interpreted Safeco's response as a renewed request for a hearing, which he denied. Decision and Order on Remand at 2. Because Safeco requested a hearing, the administrative law judge erred in issuing a summary decision.[8] *See* 20 C.F.R. §725.452(d). Therefore, we must vacate the administrative law judge's decision, and remand this case for him to conduct the requested hearing unless one of the exceptions is found to be applicable. *See* 20 C.F.R. §§725.461(a); 725.452(c), (d); *Pukas*, 22 BLR at 1-72.

Finally, Safeco requests that we remand this case to a different administrative law judge because it believes the case requires a "fresh look" at the evidence. Safeco's Brief at 15. The record does not reflect recalcitrance by the administrative law judge, or that he has demonstrated bias against Safeco. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). Thus, we decline to order that this case be reassigned to another administrative law judge.

[8] The administrative law judge cited *Smith v. Westmoreland Coal Co.*, 12 BLR 1-39 (1988), as authority to issue a summary decision on his own motion if he determined that a hearing was unnecessary. Decision and Order on Remand at 2. The administrative law judge's reliance on *Smith* was misplaced, because *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000) overruled that portion of *Smith*. Further, as the Director notes, the regulations were revised in 2001 to specify that, where no party has moved for summary judgment, the administrative law judge may notify the parties that he or she believes an oral hearing is not necessary, and allow the parties at least thirty days to respond, but the administrative law judge "shall hold the oral hearing if any party makes a timely request in response to the order." 20 C.F.R. §725.452(d).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge