

BRB No. 01-0859 BLA

LORAIN McCOWN)
(Widow of LLOYD D. McCOWN))
))
Claimant-Petitioner)
))
v.)
))
ODYSSEY COAL SALES,)
INCORPORATED)
))
and)
))
BITUMINOUS CASUALTY)
CORPORATION)
))
Employer/Carrier-)
Respondents)
))
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
))
Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order on Remand-Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Loraine McCown, Shelbiana, Kentucky, *pro se*.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand-Denial of Benefits (1997-BLA-1930) of Administrative Law Judge Robert L. Hillyard rendered on a survivor's 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 This case is before the Board for the second time. In the previous appeal, the Board affirmed the administrative law judge's denial of benefits on the survivor's claim. *McCown v. Odyssey Coal Sales, Inc.*, BRB No 99-0826 BLA (May 4, 2000)(unpub.). The sole issue remaining in this case is whether claimant requested modification of the denial of her deceased husband's lifetime claim for benefits.

The miner's claim for benefits filed on September 5, 1990 was denied by the administrative law judge on March 30, 1994, and the Board affirmed the denial on February 28, 1995. Director's Exhibit 49 at 4, 37, 290. The miner died on March 12, 1995, and his widow, without the assistance of counsel, timely requested reconsideration of the Board's decision affirming the denial of his claim. Director's Exhibit 49 at 3.

While the miner's claim was pending on reconsideration, the widow filed her survivor's claim on June 29, 1995. Director's Exhibit 1. The district director denied benefits on December 1, 1995. Director's Exhibit 26. On January 7, 1996, claimant, without the assistance of counsel, sent a letter to the district director stating: "In reference to your recent denial on my widows [*sic*] claim, I do not agree with this decision." Director's Exhibit 29. Claimant requested and was granted 90 days in which to submit new medical evidence. Director's Exhibits 29, 33. Claimant submitted additional evidence, and on April 17, 1996, the district director again denied survivor's benefits. Director's Exhibits 27, 45-57. On August 13, 1996, the Board denied reconsideration of its decision affirming the denial of the miner's claim. Director's Exhibit 49 at 1.

On February 28, 1997, claimant, without the assistance of counsel, sent a letter to the district director stating as follows:

I am writing concerning my husband's black lung. My husband, Lloyd Douglas McCown, died March 12, 1995. I am requesting a modification of decision [*sic*] that was made concerning his black lung in April 1996.

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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Director's Exhibit 30. The district director treated this letter as a request for modification of the April 17, 1996 denial of the survivor's claim only. Director's Exhibits 28, 34.

In the previous appeal, filed by claimant without the assistance of counsel, the Board noted that claimant's February 28, 1997 letter referring to "my husband's black lung" came within one year of the final denial of the miner's claim, and contrasted with claimant's January 7, 1996 letter concerning "my widows claim." Director's Exhibits 29, 30. Accordingly, the Board referred the administrative law judge to both of these letters and instructed him to "review the record and determine if claimant requested modification of the miner's claim." *McCown*, Slip op. at 5; see 33 U.S.C. §922, implemented by 20 C.F.R. §725.310(2000)(providing for modification within one year of a denial of benefits).

On remand, the administrative law judge reviewed the January 7, 1996 letter and found that it was not a request for modification of the miner's claim because the letter referred only to the survivor's claim. The administrative law judge reviewed the February 28, 1997 letter and found that it was not a request for modification of the miner's claim for two reasons. First, although claimant referred to her husband's "black lung," she "did not refer to his *claim* for black lung benefits." Decision and Order on Remand at 4 (emphasis in original). Second, claimant specifically requested modification of an April 1996 decision, which was the district director's April 17, 1996 decision denying the survivor's claim. Consequently, the administrative law judge found that neither letter requested modification of the miner's claim, and concluded further that "[t]here is nothing in the record from either the Claimant or her attorney² stating that the Claimant requested modification of her deceased husband's claim." *Id.*

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge misinterpreted claimant's letters and requests remand to the district director for modification proceedings on the miner's claim.

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, 1-177 (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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman &*

² Although claimant was *pro se* during most of the processing of her claim, she was represented by counsel at the hearing.

Grylls Associates, Inc., 380 U.S. 359 (1965).

“[T]he standard for what constitutes a request for modification is very low.” *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 953, 22 BLR 2-46, 2-64 (6th Cir. 2000). “A request for modification ‘need not meet formal criteria.’” *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 181, 21 BLR 2-545, 2-555 (4th Cir. 1999), quoting *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 526 (4th Cir. 1996). “Almost any sort of correspondence from the claimant” will suffice, *Betty B. Coal Co. v. Director, OWCP* [Stanley], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999), so long as it is timely and evinces an intent to pursue the claim. See *Fireman’s Fund Ins. Co. v. Bergeron*, 493 F.2d 545, 547 (5th Cir. 1974); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-163 n.2. (1988).

Our review of the record has revealed a letter not previously discussed in any proceeding. In this letter addressed to the district director, dated April 23, 1997, within one year of the Board’s final denial of the miner’s claim, claimant stated:

I have attained an attorney through Wolfe & Farmer, attorneys at law, to represent me in my deceased husband’s claim. (Lloyd Douglas McCown, SS# . . .) The attorney’s phone number is 1-800-446-0167. Please send all information to my attorney at Wolfe & Farmer, attorneys at law, Norton, Va.

Director’s Exhibit 32 (emphasis supplied). This letter was timely and evinces claimant’s intent to pursue her deceased husband’s claim. See *Bergeron, supra*; *Searls, supra*. No more is required to meet the “very low” standard for a modification request. *Milliken*, 200 F.3d at 953, 22 BLR at 2-64; see also *Stanley, supra*; *Borda, supra*; *Plesh v. Director, OWCP*, 71 F.3d 103, 110, 20 BLR 2-30, 2-43 (3d Cir. 1995). Because we hold as a matter of law that claimant’s April 23, 1997 letter was a request for modification of the miner’s claim, we vacate the administrative law judge’s Decision and Order on Remand and remand this case to the district director for the initiation of modification proceedings on the miner’s claim.³

³ We reject employer’s argument that a remand is unnecessary because a denial of benefits on the miner’s claim is “foreordained.” Employer’s Brief at 9. Having invoked the modification procedure, claimant may ask the fact-finder to simply rethink the prior factual findings, see *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994), and claimant will also have the opportunity to submit additional evidence if she so chooses. See 20 C.F.R. §725.310(b)(2000).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge