

BRB No. 04-0314 BLA

SANDRA L. FERGUSON)	
(Widow of RICHARD D. FERGUSON))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CENTRAL OHIO COAL COMPANY)	
)	DATE ISSUED: 11/23/2004
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 - Denying Request for Modification of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Sandra L. Ferguson, South Zanesville, Ohio, *pro se*.

Jeffrey S. Goldberg (Howard M. Radzely, 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order - Denying Request for Modification (02-BLA-0172, 00-BLA-0791) of Administrative Law Judge Thomas F. Phalen, Jr. rendered 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 is currently pursuing the deceased miner's claim filed on August 19, 1997.² Director's Exhibit 1.

Upon review of claimant's request for modification, the administrative law judge found that he had previously granted withdrawal of the miner's claim pursuant to 20 C.F.R. §725.306(a) (2000), and that as a result, he had to consider the miner's claim as a claim which had never been filed. Consequently, the administrative law judge found that there was no decision on a claim, awarding or denying benefits, for him to reconsider pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's request for modification.

On appeal, claimant generally challenges the denial of her request for modification. Employer has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of claimant's request for modification.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The relevant facts are as follows: The record indicates that the miner's claim was previously before the administrative law judge for a hearing on a request to modify the district director's denial of benefits in the miner's claim. Director's Exhibits 13A, 35A-39A. That modification request was filed by Timothy F. Cogan, claimant's attorney of record at that time, Director's Exhibit 10A, acting on behalf of claimant's daughter, Cathy Stackhouse, who was the executor of the miner's estate. Director's Exhibit 44A. Prior to the scheduled hearing, claimant's attorney, Mr. Cogan, filed a letter with the

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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Claimant's survivor's claim, filed on June 28, 1999, is not before the Board on appeal. Employer conceded claimant's entitlement to survivor's benefits and an award was entered on her survivor's claim. Director's Exhibits 1A, 13A, 28A, 30A, 32A.

administrative law judge. Therein, Mr. Cogan stated that, “Cathy Stackhouse, who is the Executor of the miner’s Estate and therefore has authority over the miner’s claim, has instructed me, against my advice, to withdraw this appeal. Accordingly, I don’t believe there is any need either for the hearing or the briefs.” Cogan Letter, May 17, 2001. A “cc:” at the bottom of this letter listed, *inter alia*, claimant, “Ms. Sandra Ferguson.” *Id.* The administrative law judge construed the letter as “a request on behalf of the claimant to withdraw the claim without prejudice.” Order Approving Withdrawal of Claim, May 23, 2001. Finding withdrawal to be in claimant’s best interest, the administrative law judge granted withdrawal pursuant to 20 C.F.R. §725.306 (2000). A service sheet attached to the administrative law judge’s order granting withdrawal reflects that the order was served on claimant. The administrative law judge’s order was filed in the Office of Workers’ Compensation Programs on May 29, 2001. Sixty-eight days later, on August 5, 2001, claimant, unrepresented by counsel, wrote to the district director inquiring as to the status of the miner’s claim. Director's Exhibit 47A. The district director responded that the claim was “dismissed,” Director's Exhibit 48A, and claimant thereafter requested modification of the administrative law judge’s order granting withdrawal. Director's Exhibit 49A.

Upon review of the administrative law judge’s findings, the issues on appeal, and the evidence of record, we hold that the administrative law judge’s Decision and Order - Denying Request for Modification is supported by substantial evidence and is in accordance with law. The record reflects that claimant was notified of the request to withdraw filed by her attorney at that time and that she was also served with the administrative law judge’s order granting withdrawal of the miner’s claim. Claimant did not request reconsideration of the administrative law judge’s order granting withdrawal or file an appeal with the Board during the thirty days after the order became effective by virtue of its filing in the Office of Workers’ Compensation Programs. *See* 20 C.F.R. §725.479(a); *Wooten v. Eastern Associated Coal Corp.*, 20 BLR 1-20, 1-23 (1996). The law is clear that miners and their survivors must follow the procedural requirements of the Act and regulations. *Jordan v. Director, OWCP*, 892 F.2d 482, 486, 13 BLR 2-184, 2-191 (6th Cir. 1989). Because claimant neither requested reconsideration of the administrative law judge’s order granting withdrawal of the miner’s claim nor filed an appeal, the order became final. 20 C.F.R. §725.479(a).

Consequently, the administrative law judge on modification correctly considered the miner’s withdrawn claim as “not to have been filed.” 20 C.F.R. §725.306(b) (2000); *see Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-188 (2002)(*en banc*). The modification provision authorizes an administrative law judge to “reconsider the terms of an award or denial of benefits.” 20 C.F.R. §725.310(a). Because the miner’s claim in this case must be considered as if it had never been filed, the administrative law judge properly found that there was no award or denial of benefits before him to reconsider pursuant to 20 C.F.R. §725.310(a). *See* 20 C.F.R. §725.306(b) (2000). Therefore, the

administrative law judge properly denied claimant's request for modification and we thus affirm his decision.

Accordingly, the administrative law judge's Decision and Order - Denying Request for Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge