

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0456 BLA

WYMAN JOHNSON, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CHEVRON MINING, INCORPORATED)	
)	DATE ISSUED: 11/12/2019
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 Dismissing Modification as Untimely of
Larry W. Price, Administrative Law Judge, United States Department of
Labor.

Wyman Johnson, Berry, Alabama.

Kathleen H. Kim (Kate S. O’Scannlain, Solicitor of Labor; Barry H. Joyner,
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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and
GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Dismissing Modification as Untimely (2017-BLA-06223) of Administrative Law Judge Larry W. Price¹ rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case has a somewhat complicated procedural history.

Claimant filed his fourth claim for benefits on September 14, 2011. On March 30, 2016, Administrative Law Judge Adele H. Odegard issued a Decision and Order denying benefits. Director's Exhibit 39. Her decision became effective April 5, 2016, when it was filed with the district director. 20 C.F.R. §725.479(a). On June 3, 2016, claimant appealed the decision to the Board without counsel. On July 29, 2016, the Board dismissed that appeal as untimely. *Johnson v. Chevron Mining, Inc.*, BRB No. 16-0498 BLA, slip op. at 2 (July 29, 2016) (Order) (unpub.); Director's Exhibit 44. On August 6, 2016, claimant filed a second appeal of Judge Odegard's decision with the Board. This time, he submitted new evidence with his appeal request. The Board also dismissed that appeal as untimely, but noted that claimant could seek modification. *Johnson v. Chevron Mining Inc.*, BRB No. 16-0609 BLA, slip op. at 2 (Jan. 9, 2017) (Order) (unpub.); see 20 C.F.R. §725.310. Claimant then sent a letter to the Board, dated February 13, 2017, stating he was appealing his case, and enclosing medical progress notes.² On May 4, 2017, the Clerk of the Board responded on behalf of the Board, noting that the Board had previously addressed his request for an appeal and that the appeal had been dismissed because it was not timely filed. He advised claimant, however, "[t]he Board will construe this correspondence as a request for modification. Your correspondence and attached information is being forwarded to the Office of the District Director for further appropriate action."

In the meantime, claimant submitted a separate letter to the district director, postmarked April 20, 2017. The district director issued a Proposed Decision and Order denying modification, noting that claimant "filed a timely request for modification on April 28, 2017." Director's Exhibit 48 at 1. At claimant's request, the claim was transferred to

¹ On July 25, 2019, the Board sent a letter to claimant giving him the opportunity to have his case reviewed to determine whether it should be remanded for a new hearing before a new administrative law judge. See *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018). Claimant was directed to make his request for *Lucia* review by August, 4, 2019. Having not received a reply from claimant to the Board's letter, we will review only the merits of his appeal.

² A copy of this letter in the Board's records bears the handwritten notation "rec'd 3/22/17." The docket for claimant's second appeal notes receipt of correspondence from claimant on March 22, 2017.

the Office of Administrative Law Judges for a hearing. Administrative Law Judge Larry W. Price dismissed claimant's modification request, finding it untimely because April 28, 2017 was more than one year after April 5, 2016, the effective date of Judge Odegard's decision. Judge Price's decision did not, however, reference the Board's May 4, 2017 Order referring claimant's earlier modification request (that the Board received on March 22, 2017) to the district director for consideration.

On appeal, claimant generally challenges Judge Price's dismissal, stating that his condition has worsened.³ Employer has not responded to claimant's appeal. The Director, Office of Workers' Compensation Programs (the Director), responds urging the Board to vacate the decision below and remand the case for the administrative law judge to consider whether claimant's previous submissions of new evidence to the Board constitute timely requests for modification.⁴

In an appeal a claimant files without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's decision if it is rational, supported by substantial evidence, and in accordance with applicable law.⁵ 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 review, we conclude that Judge Price's dismissal was not in accord with the law, and therefore vacate his decision and remand this case to the district director to consider claimant's timely request for modification.

At any time within one year of the denial of benefits, a claimant may request modification of the denial of benefits in a miner's claim based on a change in conditions

³ Enclosed with his letter of appeal to the Board are progress notes from his treating physician electronically signed on May 14, 2018.

⁴ Alternatively, the Director urges that if the administrative law judge determines that claimant did not timely seek modification, he should "return the case to the District Director with instructions to initiate [a new claim for benefits as of April 2017]." Director's Brief at 3.

⁵ The record reflects claimant's last coal mine employment was in Alabama. Director's Exhibit 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

or a mistake in a determination of fact.⁶ 20 C.F.R. §725.310(a). The one-year period for seeking modification of an administrative law judge's Decision and Order runs from the date on which the Decision and Order is filed in the office of the district director. *Wooten v. E. Associated Coal Corp.*, 20 BLR 1-20, 1-25 (1996).

A request for modification need not be formal in nature. "Almost any sort of correspondence from the claimant can constitute a request for modification of a denial, so long as it is timely and expresses dissatisfaction with a purportedly erroneous denial." *Betty B Coal Company v. Director, OWCP [Stanley]*, 194 F.3d 491, 497 (4th Cir. 1999); *Searls v. S. Ohio Coal Co.*, 11 BLR 1-161, 1-163 n.2 (1988) (noting the request need only be sufficient to trigger review before the one-year limitation period expires).

In light of the foregoing authority, the Board construed claimant's letter, which the Board received on March 22, 2017, as a modification request because it came within one year of the April 5, 2016 effective date of the decision denying benefits and included additional medical evidence claimant wished to have considered. The administrative law judge only considered claimant's April 28, 2017 modification request filed with the district director. Decision and Order at 2. He does not appear to have considered the letter that the Board construed as a request for modification nor does it appear the district director acted on it. Because March 22, 2017 is within one year of April 5, 2016, the effective date of the denial of benefits, claimant's March 22, 2017 modification request was timely and his supplementary April 28 request consequently also was timely. Further, we construe claimant's letter to the Board appealing Judge Price's dismissal and enclosing new evidence as supplementary to his request for modification.

We therefore vacate the administrative law judge's finding that claimant's modification request is untimely and remand this case to the district director for consideration of claimant's timely modification request of March 22, 2017 in conjunction with his supplementary requests. 20 C.F.R. §725.310. The Board will forward the new medical evidence it received from claimant to the district director. *See* 20 C.F.R. §§725.310, 725.480; *Stanley*, 194 F.3d at 497; *I.T.O. Corp. of Va. v. Pettus*, 73 F.3d 523, 527 (4th Cir. 1996).

⁶ In a modification proceeding the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See USX Corp. v. Director, OWCP [Bridges]*, 978 F.2d 656, 658 (11th Cir. 1992); *see also Jessee v. Director, OWCP*, 5 F.3d 723, 725-26 (4th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order Dismissing Modification as Untimely is vacated and the case is remanded to the district director for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge