

BRB No. 00-0125 BLA

EUGENE KLOUSER )

Claimant-Petitioner )

v. )

HEGINS MINING COMPANY )

Employer- )

Respondent )

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT OF  
LABOR )

DATE ISSUED:

DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order - Denial of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen Koschoff, Wilburton, Pennsylvania, for claimant.

George Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for employer.

Edward Waldman (Henry L. Solano, 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, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order - Denial of Benefits (99-BLA-0814) of Administrative Law Judge Ralph A. Romano 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). This case has a long and detailed procedural history as outlined in the Board's previous decisions, *see Klouser v. Hegins Mining Co.*, BRB No. 93-1640 BLA (Apr. 20, 1995)(unpub.); *Klouser v. Hegins Mining Co.*, BRB No. 90-1474 BLA (Nov. 19, 1992)(unpub.); Director's Exhibits 141, 152. The procedural history relevant to the issue in the instant appeal is as follows:

Claimant filed his second request for modification on August 27, 1996.<sup>2</sup> Director's Exhibit 164. The district director denied claimant's request for modification. Director's Exhibits 168, 170. Claimant contested the district director's findings and requested a hearing. Director's Exhibit 171. The case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Ainsworth H. Brown. On January 24, 1997, Judge Brown issued an Order to Show Cause asking the parties to set forth their positions as to whether a hearing was necessary with respect to claimant's

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<sup>1</sup> Claimant is the miner, Eugene Klouser, who filed his initial application for benefits on June 6, 1978. Director's Exhibit 1.

<sup>2</sup> During the pendency of claimant's appeal of the denial of his previous claim, docketed as BRB No. 96-0137 BLA, claimant, in a Motion to Remand, requested that his appeal be dismissed and the case remanded to the district director in order to allow him the opportunity to file a petition for modification. Director's Exhibit 160. The Board granted this motion by Order dated June 10, 1996. *Klouser v. Hegins Mining Co.*, BRB No. 96-0137 BLA (June 10, 1996)(Order)(unpub.); Director's Exhibit 162.

request for modification. Director's Exhibit 186. Claimant indicated in writing that he waived his right to a hearing and, in a supplemental letter dated February 19, 1997, stated that after consultation with employer the parties were requesting an additional sixty days from the date of the ruling to complete the evidentiary record. Director's Exhibits 187, 188. Following the submission of additional evidence by both parties and also additional requests for extensions of time, Judge Brown issued an Order on August 3, 1998 in which he stated that "in view of the parties disinterest in trying to bring this matter to a result in this forum, the matter is **REMANDED** to the District Director for safe keeping while the parties consider whether they want to litigate this matter." Director's Exhibit 211.

Following the remand to the district director, the parties noted their intentions to proceed with the claim and agreed that the claim should be returned to the Office of Administrative Law Judges. Director's Exhibits 212-214. The case was thereafter transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Ralph A. Romano (the administrative law judge). On May 12, 1999, the administrative law judge issued an Order to Show Cause asking the parties to set forth, within fifteen days, their positions as to whether a hearing was necessary with respect to claimant's request for modification. Employer responded, indicating that it waived the right to a formal hearing. However, by letter dated May 27, 1999, claimant indicated in writing that he wanted a hearing to be conducted.<sup>3</sup> The administrative law judge subsequently issued an Order on May 28, 1999 in which he stated that no hearing would be held in this case and that the record would be closed on June 29, 1999 and closing arguments would be due July 30, 1999. In correspondence dated June 29, 1999, claimant stated that he maintains his Exception to the administrative law judge's May 28, 1999 ruling denying claimant's request for a formal hearing. The administrative law judge then proceeded to issue the Decision and Order that is the subject of the present appeal.

In a Decision and Order issued on September 27, 1999, the administrative law judge found that the evidence did not support a finding that there was a mistake in a determination of fact in the prior decision pursuant to 20 C.F.R. §725.310. In addition, the administrative law judge found that the newly submitted

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<sup>3</sup> Claimant's May 27, 1999 letter is not contained in the formal record. However, claimant included a copy of this letter, as Exhibit A, with his Petition for Review and Brief. Neither employer nor the Director dispute that claimant so filed this response to the administrative law judge's Order to Show Cause and requested a formal hearing.

evidence was insufficient to establish a change in conditions. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in denying his request for a hearing, arguing that he was denied his due process rights. In addition, claimant generally contends that the administrative law judge erred in finding the evidence insufficient to establish entitlement to benefits, but states that he is reserving additional argument concerning the administrative law judge's findings on the merits inasmuch as he believes he is entitled to a hearing on modification. In response, employer urges affirmance of the denial of benefits, arguing that the administrative law judge did not abuse his discretion in denying claimant a hearing on modification. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, which the Board accepts as his response brief, requesting that the Board remand the case to the administrative law judge with instructions that the administrative law judge conduct a hearing on claimant's request for modification. In his reply brief, claimant joins in the Director's Motion to Remand.<sup>4</sup>

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As the Director correctly contends, Section 22 of the Longshore and Harbor Workers' Compensation Act (LHWCA) specifies that modification requests are to be reviewed "in accordance with the procedure prescribed in respect of claims in section [19 of the LHWCA]." 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a); accord 20 C.F.R. §725.310(b) ["[modification proceedings shall be conducted in accordance with the provisions of [20 C.F.R. Part 725, setting forth the procedures for the adjudication of black lung claims] as appropriate"]. *Robbins v. Cypress Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998); see also *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1. Section 19 of the LHWCA, in turn, provides for a hearing to be held whenever a party so requests. 33 U.S.C. §919(c); *Stanley, supra*.

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<sup>4</sup> By letter dated June 13, 2000, the Director, Office of Workers' Compensation Programs (the Director), submitted a copy of *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000) as supplemental authority in this case.

Thus, as set forth in the holdings of the United States Court of Appeals for the Sixth Circuit in *Cunningham* and *Robbins*, as well as the holding of the United States Court of Appeals for the Fourth Circuit in *Stanley*, 30 U.S.C. §932(a), as implemented by 20 C.F.R. §§725.450, 725.451, 725.421(a), mandates that an administrative law judge hold a hearing on any claim, including a request for modification with the district director, whenever a party requests such a hearing, unless such hearing is waived by the parties, see 20 C.F.R. §725.461(a), or a party requests summary judgment, see 20 C.F.R. §725.452(c). *Stanley, supra; Robbins, supra; Cunningham, supra; see also Arnold v. Peabody Coal Co.*, 41 F.3d 1203, 19 BLR 2-22 (7th Cir. 1994).

More germane to the present case, in *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000), the Board adopted these holdings of the Fourth and Sixth Circuits and held that in all cases, regardless of the United States Court of Appeals in which jurisdiction arises, a party is entitled to a hearing with respect to a petition for modification if one is requested. *Pukas, supra*, 22 BLR at 1-72, citing 20 C.F.R. §§725.421(a), 725.450, 725.451; *Stanley, supra; Robbins, supra; Cunningham, supra*. Thus, we hereby vacate the administrative law judge's Decision and Order - Denial of Benefits and remand the case to the administrative law judge to hold a *de novo* hearing concerning claimant's request for modification. See *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge