BRB No. 04-0218 BLA

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| HOWARD B. DICKSON, JR. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| NORTH AMERICAN COAL CORPORATION | ) | |
| | ) | |
| | ) | DATE ISSUED: 10/29/2004 |
| Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Marianne L. Hohman (Sidley, Austin, Brown & Wood L.L.P.), Chicago, Illinois, for claimant.

David J. Millstone and Cheryl A. Hipp (Squire, Sanders & Dempsey L.L.P.), Cleveland, Ohio.

Sarah M. Hurley (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (02-BLA-0204) of Administrative Law Judge Gerald M. Tierney 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 filed this application for benefits on June 11, 1980. Director's Exhibit 1. This claim, which is currently pending on claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000), is before the Board for the third time. The Board's prior decision in *Dickson v. North Am. Coal Corp.*, BRB No. 99-1296 BLA (Sep. 20, 2000)(unpub.), contains a full procedural history of the case. *Dickson*, slip op. at 1-3. We now address the procedural aspects relevant to the administrative law judge's decision to grant claimant's request for modification and award benefits.

In a Decision and Order - Denial of Request for Modification issued on August 20, 1999, Administrative Law Judge Robert L. Hillyard found that although claimant was entitled to the benefit of the rebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.305, the presumption was rebutted because the record did not establish the existence of pneumoconiosis or that claimant's respiratory impairment arose out of coal mine employment. Director's Exhibit 98 at 7-10. Judge Hillyard therefore found that no change in conditions or mistake in a determination of fact was established pursuant to 20 C.F.R. §725.310 (2000), and denied benefits. Upon review of claimant's appeal, the Board affirmed the denial of benefits as supported by substantial evidence and in accordance with law. *Dickson*, slip op. at 3-5. The Board denied claimant's motion for reconsideration on December 20, 2000. Director's Exhibit 100.

Seven months later, on July 31, 2001, claimant filed a letter with the district director requesting "an appeal on denial of the decision for Bla[ck] Lung Benefits," alleging that there had been a change in his condition. Director's Exhibit 101. The district director treated claimant's letter as a request for modification. Director's Exhibit 102. The district director denied modification and referred the claim to the Office of Administrative Law Judges for a hearing. Director's Exhibit 108.

Prior to the scheduled hearing before Administrative Law Judge Gerald M. Tierney, the parties waived their right to a hearing and requested a decision on the record. 20 C.F.R. §725.461(a); *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 429, 21

[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.

BLR 2-495, 2-504 (6th Cir. 1998); *Pukas v. Schuylkill Contracting Co*., 22 BLR 1-69, 1-72 (2000). Accordingly, the administrative law judge cancelled the hearing and determined this case on the record.

In the Decision and Order - Awarding Benefits, the administrative law judge found, pursuant to 20 C.F.R. §718.305, that claimant was employed for fifteen or more years in underground coal mine employment, that there was no chest x-ray evidence of complicated pneumoconiosis, and that there was other evidence demonstrating the existence of a totally disabling respiratory or pulmonary impairment. Specifically, based on Dr. Saludes's 2002 report submitted by claimant on modification, the administrative law judge found that claimant established that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that claimant was entitled to the rebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.305. The administrative law judge also concluded that employer did not meet its burden to rebut the presumption. Although employer submitted Dr. Rosenberg's report stating that claimant does not have pneumoconiosis or any impairment arising out of coal mine employment, the administrative law judge found that Dr. Rosenberg did not address Dr. Saludes's 2002 test results or his diagnosis of an impairment due partly to coal dust exposure. The administrative law judge found the most recent evidence from Dr. Saludes to be the most probative of record. Since employer did not rebut the presumption at 20 C.F.R. §718.305, the administrative law judge found that claimant established a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge further determined that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge lacked jurisdiction over this claim because claimant did not request modification. Alternatively, employer asserts that the administrative law judge lacked jurisdiction because claimant did not request a hearing after the district director denied claimant's request for modification. Employer contends further that the administrative law judge's award of benefits must be vacated because employer was not served with Dr. Saludes's report and thus employer had no opportunity to respond to it. Additionally, employer asserts that Dr. Saludes's opinion does not support a finding of a change in conditions. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge had jurisdiction over a request for modification, but urges that the award of benefits be vacated and the record reopened by the administrative law judge so that employer may respond to Dr. Saludes's opinion. Employer has filed a reply brief reiterating its contentions.

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. 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).

Employer contends that claimant did not request modification of the December 20, 2000 denial of his claim because in his July 31, 2001 letter filed with the district director's office claimant stated that he sought to appeal the decision. Consequently, employer asserts, neither the district director nor the administrative law judge had jurisdiction over the claim. We disagree.

The district director and the administrative law judge properly treated claimant's July 31, 2001 letter as a request for modification of the prior denial of benefits. The "standard for what constitutes a modification request is very low." *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 953, 22 BLR 2-46, 2-64 (6th Cir. 1999). In claimant's July 31, 2001 letter to the district director, he requested "an appeal on denial of the decision," and alleged that "[t]here has been a definite change in [claimant's] condition," in that he was "[n]ow on oxygen" and breathing medications "since the appeal of decision." Director's Exhibit 101. Claimant attached a home oxygen supply form along with a request that the district director obtain evidence from his treating physicians. Director's Exhibit 101 at 2-4. Claimant's letter was timely and met the modification standard. Contrary to employer's contention, the fact that claimant used the word "appeal" in his letter is not dispositive of whether the letter was a request for modification. *See Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465 n.8 (1968)(explaining that it was "irrelevant" that the claimant labeled her filing a new claim, so long as the filing came within the scope of the modification provision). Consequently, we reject employer's contention that neither the district director nor the administrative law judge had jurisdiction over the claim, and we hold that claimant's letter was properly treated as a request for modification.

Employer also contends that the administrative law judge lacked jurisdiction over the claim because claimant did not request a hearing after the district director denied claimant's request for modification. The district director informed claimant that the new evidence he reviewed did not "justify modification," but explained that "since the last decision on your claim was rendered at a higher level, I will be . . . forwarding your claim up to" the administrative law judge for "another formal hearing." Director's Exhibit 108. The district director's action was proper. All modification requests must begin with the district director's office, *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987), yet the district director may not modify an administrative law judge's decision. *See Milliken*, 200 F.3d at 950, 22 BLR at 2-58; *Hoskins v. Director, OWCP*, 11 BLR 1-144, 1-145 (1988). Additionally, the applicable regulation authorizes the district

director to "forward the claim for a hearing" at "the conclusion of modification proceedings . . . ."[2] 20 C.F.R. §725.310 (2000). Accordingly, we reject employer's contention that the administrative law judge lacked jurisdiction over the claim because claimant did not request a hearing.

Employer contends that it was not served with Dr. Saludes's report and thus was not afforded the opportunity to respond to it. The facts relevant to this issue are as follows: By letter to the administrative law judge dated October 11, 2002, claimant, without counsel, requested a decision on the record and indicated he would be submitting the results of September 2002 testing from the "Black Lung Clinic Martin's Ferry Hospital." Claimant's Letter, Oct. 11, 2002 at 1. Claimant served employer with a copy of this letter. On October 17, 2002, claimant, without counsel, submitted to the administrative law judge Dr. Saludes's August 26, 2002 report and testing conducted at East Ohio Regional Hospital, Martins Ferry, Ohio. Claimant's Exhibit 1. The record does not reflect whether claimant served employer with a copy of this report.

On October 31, 2002, employer indicated that it had no objection to a decision on the record, and on the same day, the administrative law judge granted claimant's request for a decision on the record and gave the parties forty-five days to submit evidence and argument. Thereafter, the administrative law judge granted employer two extensions. The second extension gave the parties until January 13, 2003 to submit evidence and closing arguments. On January 13, 2003, employer submitted Dr. Rosenberg's record review report, Employer's Exhibit 7, and employer's brief, neither of which addressed Dr. Saludes's report or testing.

On July 17, 2003, the administrative law judge issued a show cause order stating that "[w]hen the file was . . . reviewed, it became apparent that Claimant . . . did not provide Employer a copy of his East Ohio Regional Hospital report, dated August 26, 2002, that was filed in our office on October 17, 2002. Employer was contacted and he confirmed such." Order, Jul. 17, 2003. The administrative law judge ordered claimant to show cause within fifteen days why employer should not have until September 2, 2003, to submit rebuttal evidence to claimant's August 26, 2002 report. The record indicates that the administrative law judge served the order on employer, but does not reflect whether the administrative law judge sent employer a copy of the August 26, 2002 report.

On July 22, 2003, claimant, without counsel, responded that he had sent the August 26, 2002 report to employer by regular mail, but would send another copy by

[2] The former version of 20 C.F.R. §725.310 applies to this claim because it was pending on January 19, 2001. *See* 20 C.F.R. §725.2(c). Consequently, employer's reliance on the revised modification regulation as authority for its argument is misplaced.

certified mail if the administrative law judge wanted him to do so. The record does not reflect a response or further action by the administrative law judge.

The next record entry is on October 14, 2003, when the administrative law judge issued his Decision and Order - Awarding Benefits. In the Decision and Order, the administrative law judge stated that employer "was given the opportunity to review Dr. Saludes' report; Employer declined to submit any evidence in response to that report." Decision and Order at 4.

Contrary to the administrative law judge's statement, we agree with the Director that it is not clear that employer was afforded an opportunity to respond to Dr. Saludes's report. Procedural due process requires that parties have the opportunity to rebut evidence relied upon by an agency in an ajudicatory proceeeding. *Richardson v. Perales*, 402 U.S. 389, 405 (1971); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1048-50, 14 BLR 2-1, 2-9-12 (6th Cir. 1990). As the administrative law judge found in his July 17, 2003 order, it appears employer was not served with Dr. Saludes's report. But the administrative law judge's order merely directed claimant to show cause within fifteen days why employer should not be permitted to respond to claimant's medical report; the order did not authorize employer to respond, nor did it indicate that the administrative law judge made the report available to employer. Further, after claimant responded to the administrative law judge that he had mailed a copy of the report to employer previously, but was willing to send another if the administrative law judge wanted him to do so, the administrative law judge did not issue an order resolving the matter. Considering both the lack of clarity in the administrative law judge's handling of the issue, and the prejudice alleged by employer,[3] we agree with the Director that "[i]n the end . . . we cannot say for certain that employer had an adequate opportunity to defend its interests here . . . ." Director's Brief at 6. Consequently, we must vacate the administrative law judge's award of benefits and remand this case for him to reopen the record to afford employer the opportunity to respond to Dr. Saludes's opinion. *See Lemar*, 904 F.2d at 1049, 14 BLR at 2-10. In light of our remand of the case, we need not address employer's arguments challenging the administrative law judge's weighing of the medical evidence.

[3] As employer notes, the administrative law judge found that employer did not rebut the presumption at 20 C.F.R. §718.305 because employer submitted no evidence to refute Dr. Saludes's opinion. Decision and Order at 5.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part and vacated in part, and the case is remanded 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