BRB No. 99-0293 BLA

JOHN M. PIERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MIDLAND COAL COMPANY	)	DATE ISSUED:
	)	
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 on Modification of John C. Holmes, Administrative Law Judge, United States Department of Labor.

John D. Maddox (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Modification (97-BLA-1001) of Administrative Law Judge John C. Holmes awarding benefits 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). The decedent filed a miner's claim for benefits on March 17, 1978. Director's Exhibit 1. In his initial Decision and Order dated January 4, 1984, the administrative law judge credited the decedent with twenty-nine years of coal mine employment, and found the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) and (a)(4). Further, the administrative law judge found the evidence insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, the administrative law judge awarded benefits on the miner's claim. In response to employer's appeal, the Board vacated the administrative law judge's findings at 20 C.F.R. §727.203(a)(2) and (a)(4), and

remanded the case for further consideration thereunder. Further, although the Board affirmed the administrative law judge's findings at 20 C.F.R. §727.203(b)(1) and (b)(2), the Board vacated the administrative law judge's findings at 20 C.F.R. §727.203(b)(3) and (b)(4). The Board instructed the administrative law judge to consider the relevant evidence under 20 C.F.R. §727.203(b)(3) and (b)(4), if he found invocation of the interim presumption established. Additionally, the Board instructed the administrative law judge to consider whether the evidence is sufficient to establish entitlement to benefits under 20 C.F.R. Part 718, if he found the evidence insufficient to establish entitlement to benefits under 20 C.F.R. Part 727. *Pierson v. Midland Coal Co.*, BRB No. 84-0333 BLA (Apr. 29, 1988)(unpub.)

On the first remand, the administrative law judge found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(2). Further, the administrative law judge found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) and (b)(4). Accordingly, the administrative law judge reinstated the 1984 Decision and Order awarding benefits. In disposing of employer's appeal, the Board affirmed the administrative law judge's finding at 20 C.F.R. §727.203(a)(2). However, based on the administrative law judge's mischaracterization of Dr. Morgan's opinion, the Board vacated the administrative law judge's findings at 20 C.F.R. §727.203(b)(3) and (b)(4), and remanded the case for further consideration. The Board instructed the administrative law judge to consider whether the evidence is sufficient to establish entitlement to benefits under 20 C.F.R. Part 718, if he found the evidence insufficient to establish entitlement to benefits under 20 C.F.R. Part 727. *Pierson v. Midland Coal Co.*, BRB No. 88-2153 BLA (Apr. 16, 1992)(unpub.). While the case was pending before the Board on employer's request for reconsideration, the miner died. Director's Exhibits 40, 42. Claimant[1] filed a survivor's claim for benefits on February 14, 1995. Director's Exhibit 40. In a subsequent Order, the Board denied employer's request for reconsideration. *Pierson v. Midland Coal Co.*, BRB No. 88-2153 BLA (Order)(Mar. 22, 1996)(unpub.).

[1]Claimant is the widow of the miner, John M. Pierson, who died on June 21, 1992. Director's Exhibits 40, 42.

On the second remand, the administrative law judge stated, "I do not see a need to further analyze Dr. Morgan's report or to reevaluate a determination I made after thorough and conscientious review of all the evidence." [1996] Decision and Order on Remand at 2. The administrative law judge, therefore, adopted his "prior decisions, particularly that on remand." *Id*. Accordingly, the administrative law judge reinstated the 1984 Decision and Order awarding benefits. On October 10, 1996, employer filed an appeal of the administrative law judge's award of benefits with the Board. Director's Exhibit 58. Employer also filed a request for modification on November 25, 1996. Director's Exhibit 64. Hence, by Order dated December 31, 1996, the Board granted employer's request to dismiss the appeal and remanded the case to the district director to consider employer's request for modification. *Pierson v. Midland Coal Co.*, BRB No. 97-0136 BLA (Order)(Dec. 31, 1996)(unpub.). On January 17, 1997,[2] the district director issued a proposed decision with respect to employer's request for modification. Director's Exhibit 65. Although the caption of the district director's proposed decision indicates that employer's request for modification was denied,[3] the context of the decision indicates that employer's request for modification was granted. *Id*. In his proposed decision, the district director stated that the file would be sent to an administrative law judge for a hearing

[2]The district director's proposed decision was issued on January 17, 1997. Although the district director's proposed decision was dated January 17, 1996, it is clear from a review of the record that this was a typographical error. Director's Exhibit 65. Employer filed a request for modification in November 1996. Director's Exhibit 64. Further, the district director's proposed decision, which refers to employer's request for modification, indicates that "[t]he Administrative folder arrived in Columbus on January 14, 1997." Director's Exhibit 65.

[3]The caption of the district director's January 17, 1997 proposed decision states, "PROPOSED Decision and Order DENYING REQUEST FOR MODIFICATION." Director's Exhibit 65.

at the end of thirty days. *Id*. In a letter dated January 30, 1997, claimant indicated that she felt that she was entitled to black lung benefits. Director's Exhibit 66. On February 13, 1997, employer indicated that it disagreed with the district director's proposed decision, but stated that it agreed that this matter should be forwarded to the Office of Administrative Law Judges (OALJs) for a formal hearing. Director's Exhibit 67. The district director informed claimant that the miner's claim and the survivor's claim were being referred to the OALJs for a formal hearing. Director's Exhibit 68.

In a Decision and Order dated August 21, 1997, the administrative law judge, based on the parties' stipulation and without a formal hearing, found that the decedent was a miner under the Act. In addition to noting that employer did not contest his prior finding that the evidence is sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(2), the administrative law judge also found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). Further, the administrative law judge found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) and (b)(4). Accordingly, the administrative law judge found the evidence insufficient to establish a change in conditions or a mistake in a determination of fact at 20 C.F.R. §725.310, and thus, he awarded benefits in the miner's claim. Moreover, the administrative law judge awarded benefits in the survivor's claim. On September 24, 1997, employer filed an appeal of the administrative law judge's award of benefits with the Board, which was assigned docket number BRB No. 97-1825 BLA. Employer also filed a motion to remand in BRB No. 97-0136 BLA on October 27, 1997, contending that the administrative law judge failed to provide employer with an opportunity to develop the evidentiary record prior to his ruling on the decision on modification. Hence, by Order dated December 19, 1997, the Board granted employer's motion to remand. *Pierson v. Midland Coal Co.*, BRB Nos. 97-0136 BLA and 97-1825 BLA (Order)(Dec. 19, 1997)(unpub.). Consequently, on remand, the administrative law judge issued an Order to Reopen the Record dated January 26, 1998.

In a Decision and Order on Modification dated November 6, 1998, the administrative law judge found that the decedent was a miner under the Act. The administrative law judge also found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) and (a)(2). Further, the administrative law judge found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) and (b)(4). Consequently, the administrative law judge found the evidence insufficient to establish modification at 20 C.F.R. §725.310. Accordingly, the administrative law judge reinstated the 1984 Decision and Order awarding benefits.

On appeal, employer currently contends that the administrative law judge erred in failing to conduct a proper modification proceeding under 20 C.F.R. §725.310. Employer also contends that the administrative law judge erred in finding that the decedent was a miner under the Act. Further, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) and (a)(2). Additionally, employer contends that the administrative law judge erred in finding the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) and (b)(4). Lastly, employer contends that the case should be transferred to a new administrative law judge on remand because of the administrative law judge's bias against it.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Employer contends that the administrative law judge erred in failing to conduct a proper modification proceeding under 20 C.F.R. §725.310. Specifically, employer asserts that the administrative law judge erred in failing to grant its request for a hearing on modification. As previously noted, employer requested a hearing on modification. Director's Exhibit 67. Although the administrative law judge reopened the record to provide the parties with an opportunity to submit new evidence,[4] he did not hold a hearing on modification. To the contrary, the administrative law judge relied on the transcript of the hearing held on November 4, 1983. The pertinent regulations mandate that an administrative law judge hold a hearing on any claim, including a request for modification filed with the district director, whenever a party requests such a hearing, unless such hearing is waived by the parties, 20 C.F.R. §725.461(a), or a party requests summary judgment, 20 C.F.R. §725.452(c). *S*ee 30 U.S.C. §932(a), as implemented by 20 C.F.R. §§725.421(a), 725.450 and 725.451; *Arnold v. Peabody Coal Co.*, 41 F.3d 1203, 19 BLR 2-22 (7th Cir. 1994); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000). Thus, we vacate the administrative

[4]In an Order dated January 26, 1998, the administrative law judge reopened the record for sixty (60) days from the issuance of his Order for further development of the evidence on modification. In his decision, the administrative law judge stated, "I have received into evidence all the reports submitted by Employer, including those submitted after the sixty day period." [1998] Decision and Order on Modification at 1.

law judge's Decision and Order on Modification awarding benefits, and remand the case to the administrative law judge to conduct a hearing *de novo* on employer's request for modification at 20 C.F.R. §725.310.[5]

Further, since there is no evidence of record to support employer's assertion of bias by the administrative law judge, we reject employer's contention that the case should be transferred to a new administrative law judge on remand. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). Charges of bias must be supported by concrete evidence.[6] *See Zamora v. C. F. & I. Steel Corp.*, 7 BLR 1-

[5]Employer asserts that the administrative law judge erred in finding that the decedent was a miner under the Act, and in weighing the conflicting evidence on the merits. Inasmuch as we vacate the administrative law judge's Decision and Order on Modification awarding benefits and remand the case to the administrative law judge to conduct a hearing *de novo* on employer's request for modification, we decline to address these assertions.

[6]Employer asserts that the administrative law judge's bias against it is revealed by a statement that the administrative law judge made in his most recent decision. The administrative law judge stated, "[w]hile I would be the first to agree with employer that the right, perhaps duty in some cases, to obtain the benefits of modification petitions under the Act is surely as available for Employers as it is for Claimants, the ability to marshall [sic] evidence and propose 'advanced' legal arguments is considerably more prevalent for Employers, which unevenness must

568 (1984).

Accordingly, the administrative law judge's Decision and Order on Modification awarding 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

REGINA C. McGRANERY
Administrative Appeals Judge

---

be taken into account when weighing evidence." [1998] Decision and Order on Modification at 2. We are not persuaded by employer's assertion that this statement indicates that the administrative law judge is biased against it. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).