BRB No. 00-1098 BLA

DOROTHY E. KUNTZ (Widow of NICHOLAS KUNTZ, JR.) Claimant-Petitioner v. BELTRAMI ENTERPRISES, INCORPORATED and TRAVELERS INSURANCE COMPANY C/O CONSTITUTION STATE SERVICES Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order (Upon Remand from the Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

John A. Bednarz, Jr. (Bednarz Law Offices), Wilkes-Barre, Pennsylvania, for claimant.

James E. Pocius (Marshall, Dennehey, Warner, Coleman and Goggin), Scranton, Pennsylvania, for employer.

Helen H. Cox (Howard M. Radzely, Acting 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: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow,[1] appeals the Decision and Order on Remand (1997-BLA-01966) of Administrative Law Judge Robert D. Kaplan denying benefits on a survivor's 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).[2] This case is before the Board for the second time. In the original decision, the administrative law judge credited the miner with twenty-eight years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge concluded that he lacked jurisdiction to review the district director's good cause determination for employer's failure to timely controvert this claim and rejected claimant's argument that employer's untimely controversion precluded it from contesting either claimant's entitlement to benefits or its liability for payment of benefits. The administrative law judge then found that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, benefits were denied.

[1] Claimant, Dorothy E. Kuntz, is the widow of Nicholas Kuntz, Jr., who died on March 30, 1993. Director's Exhibit 8.

[2] 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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

Claimant appealed the denial of benefits to the Board and in *Kuntz v. Beltrami Enterprises, Inc.*, BRB No. 99-0790 BLA (Apr. 28, 2000) (unpub.), the Board reversed the administrative law judge's finding that he lacked jurisdiction to consider the issue of employer's untimely controversion and remanded the case to the administrative law judge to determine, pursuant to 20 C.F.R. §725.413(b)(3) (2000), whether good cause existed to excuse employer's untimely response to the Notice of Initial Finding. The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c) (2000). The Board further held that, if on remand, the administrative law judge found that good cause was shown for employer's untimely controversion, the administrative law judge's denial of benefits is affirmed. *Kuntz*, *supra*, at 5 n.5.

On remand, the administrative law judge did not make a specific good cause determination regarding employer's untimely controversion as instructed by the Board, but instead found that employer's controversion was timely and viable for an alternative reason. The administrative law judge thus reaffirmed his determination that employer's medical evidence was admissible. The administrative law judge also concluded that the Board's affirmation of the prior denial on the merits thus remained in effect. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that employer's controversion was timely and further argues that she has been denied due process. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge erred in failing to make a specific good cause finding regarding the untimely controversion and urges remand for further consideration of this issue, but also argues that claimant has not been denied due process.

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 the 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).

The relevant procedural history of this case was set forth in our prior decision as well as in the administrative law judge's 1999 Decision and Order. On remand, the administrative law judge acknowledged the Board's instruction directing him to make a good cause finding regarding the untimely controversion issue. The administrative law judge then stated "I construe the Board to mean that if I find - for any valid reason - that Employer/Carrier's evidence is admissible, my denial of the claim is affirmed." Decision and Order on Remand

at 2. The administrative law judge next determined that whether employer's controversion, filed on July 15, 1997, was timely was dependent on whether the district director's June 6, 1997, Notice of Initial Finding was properly served on employer at that time. The administrative law judge noted that the facts surrounding the matter were confusing, but found "that there is no need to resolve the matters of whether there was proper service of the Notice of Initial Finding by the district director" since employer's controversion could be found timely and viable on another ground. Decision and Order on Remand at 2-3. The administrative law judge found that, even if the right to file a controversion had expired 30 days after the issuance of the June 6, 1997 Notice of Initial Finding, the district director's issuance of the Amended Notice of Initial Finding on September 17, 1997 revived employer's right to file a controversion. Decision and Order on Remand at 3 (citing *Campbell Industries, Inc. v. Offshore Logistics International, Inc.*, 816 F.2d 1401, 1402-04 (9th Cir. 1986)). Thus, the administrative law judge concluded that the controversion filed on July 15, 1997 automatically became viable by operation of the district director's issuance of the Amended Notice of Initial Finding on September 17, 1997. Consequently, the administrative law judge found employer's controversion timely and viable, and reaffirmed his previous determination that employer's medical evidence was admissible and again denied benefits.

Based on the facts in the instant case, we disagree with the administrative law judge's reliance on *Campbell Industries, Inc.*, to conclude that the district director's issuance of the Amended Notice of Initial Finding on September 17, 1997 revived employer's right to file a controversion. With this alternative resolution, the administrative law judge sought to avoid resolving the issue of whether or not employer established good cause for its untimely controversion of the district director's June 6, 1997 Notice of Initial Finding in accordance with the Board's order of remand. In *Campbell Industries, Inc.*, the district court filed and entered its initial judgment on May 9, 1985. 816 F.2d at 1402. Both parties filed timely motions pursuant to Fed.R.Civ.P. 52(b) to amend the findings and judgment. *Id.* On July 29, 1985, a hearing on the motions was held and the court indicated from the bench that certain findings had to be amended. *Id*. In order to avoid confusion, the court directed that a separate amended judgment be prepared to reflect the changes that was separate and complete in and of itself. 816 F.2d at 1403. On that same day the clerk entered a minute order in the docket which consisted of a short notation summarizing the court's ruling. *Id.* The district court subsequently filed its amended findings and judgment on September 25, 1985, which the clerk entered on October 3, 1985. *Id.* Campbell Industries, Inc., filed its notice of appeal on October 24, 1985, which was within thirty days of the October 3, 1985, entry of the amended findings and judgment. *Id.* Offshore Logistics International, Inc., subsequently filed a timely notice of cross-appeal, but asserted before the United States Court of Appeals for the Ninth Circuit, *inter alia,* that the thirty-day appeal period for filing an appeal was triggered and began to run upon the entry of the July 29, 1985, minute order rather than the October 3, 1985, entry of the amended findings and judgment. *Id.* In its

decision in *Campbell Industries, Inc.*, the Ninth Circuit initially addressed the issue of when the time for filing an appeal of a judgment begins to run. The Ninth Circuit acknowledged that the filing of certain motions, regardless of their substantive effect, tolled the appeal time, but that the appeal time was to run anew from the final disposition of the enumerated motions. *Id.* The Circuit Court noted that the district court's action on July 29, 1985, was not intended to be final, but instead that the amended findings and judgment entered on October 3, 1985, constituted the court's final act which started the appeal time running and, thus, that the appeal filed on October 24, 1985, was timely. 816 F.2d at 1404. In essence, the Ninth Circuit held that under Rule 4(a)(4) of the Federal Rules of Appellate Procedure, the time to file an appeal does not begin to run with the clerk's entry of a minute order in the docket indicating that motions to amend were denied in part and granted in part. Instead, the Ninth Circuit held that the time for filing an appeal does not begin to run until the judge acts in a manner which clearly indicates an intention that the act be final and a notation of that act has been entered on the docket. Thus, the time to file an appeal did not begin to run until the district court filed its amended finding and judgment.

The instant case can be distinguished from *Campbell Industries, Inc.*. In this case, the district director issued his Notice of Initial Finding on June 6, 1997. Director's Exhibit 18. None of the parties took any action within thirty days in response to the Notice of Initial Finding. Constitution subsequently filed its controversion on July 15, 1997, after the expiration of the thirty-day period provided in Section 725.413 (2000). In *Campbell Industries, Inc.*, however, after the district court entered the initial judgment in the case, both parties filed "timely motions to amend the court's finding and judgment." 816 F.2d at 1402. The filing of the district court's subsequent amended findings and judgment began the running of a new time period for filing motions only with respect to the amended findings and judgment, but did not revive the parties' rights to file motions with respect to the initial judgment. Thus, under the facts of this case, we disagree with the administrative law judge's alternative finding that the issuance of the Amended Notice of Initial Finding revived employer's right to file a controversion.

On remand, the administrative law judge acknowledged that "the facts surrounding [whether Employer/Carrier's controversion filed on July 15, 1997 was timely is dependent on whether the district director's June 6, 1997 Notice of Initial Finding was properly served on Employer/Carrier] are confusing." Decision and Order at 2. The administrative law judge further acknowledged that, in this case, "three different insurance carriers were involved, and there are questions regarding their interrelationship and correct addresses." *Id.* The administrative law judge's decision that "there is no need to resolve" the issue of proper service of the Notice of Initial Finding and, if so, whether there was good cause for the delayed filing of employer's controversion, does not comply with the Board's order of remand.

The regulations pursuant to Section 725.413 (2000) provide that within 30 days after an operator's receipt of a Notice of Initial Finding, unless such period is extended by the district director for good cause shown, or in the interest of justice, a notified operator shall indicate its agreement or disagreement with each such finding. 20 C.F.R. §725.413(a) (2000). Further, the regulations state that "[i]n a case where an operator has failed to respond to notification, such failure shall be considered a waiver of such operator's right to contest the claim, unless the operator's failure to respond to notice is excused for good cause shown. ..." 20 C.F.R. §725.413(b)(3) (2000). As a result of the administrative law judge's failure to follow the Board's instructions to make a finding regarding whether good cause existed to excuse employer's untimely response to the Notice of Initial Finding, this case must once again be remanded for further consideration.

The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). The administrative law judge's alternative finding which fails to provide findings and conclusions pursuant to the regulatory criteria, as instructed by the Board, does not satisfy the requirements of the APA. Moreover, we note that the United States judicial system relies on the most basic of principles, that a lower forum must not deviate from the orders of a superior forum, regardless of the lower forum's view of the instructions given it. *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *see Briggs v. Pennsylvania R.R.*, 334 U.S. 304 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993); 20 C.F.R. §802.405(a). As the administrative law judge has failed to make a specific finding, formally, and in compliance with the Board's instructions, as to whether employer demonstrated good cause for failing to timely controvert the claim, we must vacate the administrative law judge's alternative finding and again remand the case to the administrative law judge for a determination, pursuant to Section 725.413(b)(3) (2000). Inasmuch as we are remanding this case for further consideration, we need not address claimant's due process argument.

Accordingly, the Decision and Order (Upon Remand from the Benefits Review Board) is vacated and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge