BRB No. 01-0957 BLA

JAMES H. DUELLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Motion for Modification of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (Eugene Scalia, 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 Order Denying Motion for Modification (01-BLA-0088) of Administrative Law Judge Gerald M. Tierney on employer's petition for modification of a claim in which benefits had been awarded 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] This case is before the Board for the third time.[2] Originally, in a Decision and Order

[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.

[2] Claimant originally filed a living miner's claim on May 4,1982, which was denied by the Department of Labor on July 9, 1982, Director's Exhibit 117. Claimant took no further action on this claim and, therefore, it was administratively closed, *id*. Claimant filed a second, duplicate claim in October, 1984, and in a Decision and Order issued on August 31, 1987, Administrative Law Judge Joel R. Williams denied benefits under 20 C.F.R. Part 718 and reaffirmed his denial of benefits in a Decision and Order On Motion for Reconsideration issued on October 28, 1987. Director's Exhibit 118. Claimant took no further action on this claim. Claimant filed the instant, duplicate claim on September 22, 1989, Director's Exhibit 1.

On March 7, 1990, the Department of Labor issued a Notice of Initial Finding that claimant is entitled to benefits, Director's Exhibit 26, and informed employer that:

> If you fail to respond within 30 days, you will be deemed to have accepted the initial finding, and this failure shall be considered a waiver of your right to contest this claim unless good cause is shown to excuse such failure (CFR 725.413).

Employer mailed its controversion of the instant claim on April 19, 1990, Director's Exhibit 29.

The district director issued a Proposed Decision and Order on May 8, 1990, awarding benefits, informing employer that since it failed to respond to the Notice of Initial Finding within the time specified, employer was deemed to have accepted the finding. The district director further stated that employer's failure to timely respond was considered a waiver of employer's right to contest the claim unless it is excused for good cause shown. Director's Exhibit 31. On May 15, 1990 employer responded, stating that although its controversion was not filed within thirty days of the date of the Notice of Initial Finding, good cause for the late filing of controversion existed because of the unusual administrative burdens under which it was working. Director's Exhibit 32.

On May 29, 1990, the Department of Labor informed employer that it had not shown good cause for the delay in filing the controversion. Director's Exhibit 33. The case was

issued on February 20, 1992, Administrative Law Judge Edward Terhune Miller denied benefits under 20 C.F.R. Part 718, but did not address whether employer had timely filed its controversion or established good cause for the untimely filing of its controversion. Claimant appealed, and the Board held that Judge Miller erred by not first making a finding as to whether good cause existed for employer's untimely controversion prior to reaching the merits of the claim in accordance with 20 C.F.R. §725.413(b)(3)(2000)[3] and the Board's

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referred to the Office of Administrative Law Judges for a hearing and among the contested issues was whether employer had filed a timely controversion, which was contested by both employer and the Director, Office of Workers' Compensation Programs, Director's Exhibit 36.

[3] Section 725.413 states in pertinent part:

> (a) Within 30 days after receipt of notification issued under §725.412, unless such period is extended by the deputy commissioner for good cause shown, or in the interest of justice, a notified operator shall indicate an intent to accept or contest liability. If notice is given to the operator after initial findings have been made, the operator shall indicate its agreement or disagreement with each such finding. If notice is given to the operator before initial findings have been made, the operator shall indicate agreement or disagreement with the operator's identification as a potentially liable coal mine operator. An operator's response to notification shall be in writing and shall be sent to the deputy commissioner, the claimant, and all other parties to the claim.
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> (b)(3) If the operator fails to respond within the specified period, such operator shall be deemed to have accepted the initial findings of the deputy commissioner when made and shall not, except as provided in §725.463, be permitted to raise issues or present evidence with respect to issues inconsistent with the initial findings in any further proceeding conducted with respect to the claim. In 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, and the deputy commissioner may proceed to issue a proposed decision and order pursuant to §725.418, undertake further development, hold a conference, or refer the claim for a hearing.

holding in *Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992). The Board rejected employer's contention that claimant waived his right to challenge the timeliness of the controversion. Thus, the Board vacated Judge Miller's Decision and Order denying benefits and remanded the case for reconsideration of whether there was good cause for employer's untimely controversion. The Board further instructed Judge Miller that, if he did not find good cause on remand, he did not have jurisdiction to reconsider the district director's finding of entitlement and must award benefits on the claim. *Duelley v. Eastern Associated Coal Corp.*, BRB No. 92-1203 BLA (Apr. 28, 1995)(unpub.).

In a Decision and Order on Remand issued on October 5, 1995, Judge Miller rejected employer's contention that it had established good cause for the late filing of its controversion because of inadvertent administrative error inasmuch as employer was a self-insurer and, therefore, a large, stable entity which should be expected to have well-established procedures in place for the handling and processing of claims. In addition, Judge Miller found that because employer had received actual notice of its potential liability, employer, itself, and not its attorney or other agent, was at fault. Thus, Judge Miller found that employer failed to establish good cause for its untimely controversion and awarded benefits on the claim.

Employer appealed, and the Board again rejected employer's contention that claimant waived his right to challenge the timeliness of employer's controversion. The Board also rejected employer's contention that it had timely filed its controversion since employer had previously conceded, and the Board had previously held, that employer's controversion was untimely. In addition, the Board held that Judge Miller permissibly found that employer had not established good cause for its untimely controversion and, therefore affirmed Judge Miller's Decision and Order on Remand awarding benefits. *Duelley v. Eastern Associated Coal Corp.*, BRB No. 96-0282 BLA (Apr. 21, 1997)(unpub.). The Board subsequently denied employer's motion for reconsideration. *Duelley v. Eastern Associated Coal Corp.*, BRB No. 96-0282 BLA (Dec. 16, 1997)(unpub. order on recon.).

Employer appealed the Board's Decision and Order on Remand and the Order Denying Reconsideration to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. The Fourth Circuit rejected employer's contention that its controversion was timely inasmuch as employer had previously conceded that its controversion was untimely. The Fourth Circuit also held that claimant waived his right to

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20 C.F.R. §725.413(a), (b)(3)(2000).

challenge the timeliness of employer's controversion. *Eastern Associated Coal Corp. v. Director, OWCP [Duelley]*, No. 98-1214 (4th Cir., Sep. 22, 1998)(unpub.). Additionally, the Fourth Circuit held that Judge Miller did not abuse his discretion in determining that employer failed to demonstrate good cause for its late controversion because employer "fail[ed] to show some reasonable basis for noncompliance" and "[h]eavy workload or inattention to office chores do not constitute good cause." *Duelley*, No. 98-1214 at 6. Finally, the Fourth Circuit rejected employer's contention that "the bar to contesting the merits of [the] claim" as a consequence of "its failure to show good cause for its late filing is too severe a penalty," *id*. The Fourth Circuit held that "[o]nce the administrative law judge determined that [employer] failed to show good cause, it was not within his discretion to fashion a remedy," as "[t]he regulations compelled the administrative law judge to bar [employer's] challenge to the merits," *id*. The Fourth Circuit concluded that employer "was obligated to file a timely response to notice of the adverse decision" and "[t]he failure to do so was entirely due to [employer's] inattention to its own obligations (as employer "could have, but did not, request a longer time to respond"), *Duelley*, No. 98-1214 at 7. Thus, the Fourth Circuit affirmed the Board's Decision and Order on Remand and Order Denying Reconsideration affirming Judge Miller's Decision and Order on Remand awarding benefits.

On June 23, 1999, employer filed a Petition for Modification alleging a mistake in a determination of fact in the district director's findings that claimant had pneumoconiosis arising out of coal mine employment, was totally disabled, and was totally disabled due to pneumoconiosis. Employer further noted its intent to have claimant examined. Director's Exhibit 101.[4] The case was referred to the Office of Administrative Law Judges and the

[4] Claimant refused employer's requests to be examined and to answer interrogatories, Director's Exhibit 108, and so employer motioned that claimant be compelled to be examined by employer, Director's Exhibit 113. The district director denied employer's motion to compel and its petition for modification based on the lack of any relevant evidence on modification, Director's Exhibit 114. In response, employer requested on February 10, 2000, that the case be referred to the Office of Administrative Law Judges, reiterating that employer was seeking to modify the default finding that claimant was "medically eligible for benefits," Director's Exhibit 115. Although employer noted that its filing of its controversion in this case was "late," employer contended that the untimeliness was due to "significant internal changes," in its office, which "should have been excused," *id.* Employer further contends that the issue of controversion is "irrelevant to the merits of [employer's] petition for modification," *id*. Similarly, on September 19, 2000, employer reiterated that the issue on modification was whether the award of benefits in this case was erroneous because of a mistake in fact in determining that claimant was totally disabled due to pneumoconiosis and that it was employer's intent to prove that claimant did not have pneumoconiosis and was not totally disabled due to pneumoconiosis, Director's Exhibit 116.

contested issue, identified by the district director on Form CM-1025, to be considered at the hearing was whether employer established good cause for its untimely controversion. Director's Exhibit 119. Employer responded on November 20, 2000, that pneumoconiosis, pneumoconiosis arising out of coal mine employment, total disability, total disability due to pneumoconiosis, and 20 C.F.R. §§725.310 (2000) and 725.309 (2000) were issues contested by employer on modification and that the "issues listed by the District Director are incomplete, or not being contested."[5] In the Order Denying Motion for Modification,

[5] On February 7, 2001, employer again motioned that claimant be compelled to be examined by employer, noting that it alleged a mistake in the determination that claimant was totally disabled due to pneumoconiosis or had established a material change in conditions and that employer intended to prove that claimant did not have pneumoconiosis and was not totally disabled due to pneumoconiosis. In its March 12, 2001 brief regarding the impact of the new regulations in this case, employer reiterated that it alleged a mistake in fact in the determinations that pneumoconiosis, pneumoconiosis arising out of coal mine employment, total disability, total disability due to pneumoconiosis, and a material change in conditions were established and that employer intended to prove that claimant did not have pneumoconiosis and was not totally disabled due to pneumoconiosis.

Administrative Law Judge Gerald M. Tierney (administrative law judge) found that employer failed to establish a basis for modification of the prior finding, that employer failed to establish good cause for its untimely controversion, and, therefore, found that claimant was entitled to benefits.

On appeal, employer contends that the administrative law judge erred in failing to consider the merits of entitlement on modification. Specifically, employer contends that because the Act intended to award benefits only to claimants who actually established that they were totally disabled due to pneumoconiosis on the merits, the administrative law judge's refusal to allow employer to establish, on modification, that claimant was not totally disabled due to pneumoconiosis provided a windfall to claimant that is unfair and unjust. Employer further contends that modification of a prior award which was based on default

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At the hearing on April 3, 2001, the administrative law judge denied employer's motion to compel claimant to be examined by employer, even though employer had again alleged a mistake in fact in the administrative law judge's determination that claimant was totally disabled due to pneumoconiosis, because the administrative law judge noted that the issue in this case concerned employer's untimely controversion, Hearing Transcript at 4, 5-6.

Finally, in employer's May 3, 2001 post-hearing brief, employer again admitted that its controversion was late, but contended that no new evidence was required to support its petition for modification, as the evidence of record previously admitted was insufficient to support a finding of total disability, total disability due to pneumoconiosis or a material change in conditions, and, therefore, supported employer's contention that there was a mistake in a determination of fact.

pursuant to Section 725.413(b)(3) (2000) is not precluded or barred since modification allows for consideration of a claimant's ultimate entitlement to benefits. Employer contends that its petition for modification, filed after the Fourth Circuit's affirmance of Judge Miller's finding that employer failed to establish good cause for its untimely controversion, requires consideration of the claim on the merits. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging that the administrative law judge's Order Denying Motion for Modification be affirmed. The Director agrees that modification of a prior award which was based on default pursuant to Section 725.413(b)(3) (2000) is not precluded or barred, but rather that the basis for the modification must relate to the prior underlying decision, *i.e.*, whether employer failed to establish good cause for its untimely controversion pursuant to Section 725.413(b)(3)(2000).

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).

The administrative law judge noted that an employer who fails to file a timely controversion shall be deemed to have accepted the initial findings of the district director and shall not be permitted to raise issues or present evidence inconsistent with the initial findings in any further proceeding conducted with respect to the claim pursuant to 20 C.F.R. §725.413(b)(3)(2000). The administrative law judge stated that while good cause may excuse employer's failure to submit a timely response, *see* 20 C.F.R. §725.413(b)(3)(2000), "in the instant claim this has not been shown." Decision and Order Denying Modification. The administrative law judge therefore, held that employer's failure to timely controvert "bars" employer's request for modification on the merits. *Id.* Thus, the administrative law judge denied employer's request for modification.

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact.[6] Moreover, the Fourth Circuit has held that if a party merely alleges that the ultimate

[6] This case involves a motion for modification filed pursuant to 20 C.F.R. §725.310 (2000), but not pursuant to the revised regulation at 20 C.F.R. §725.310, which is only applicable to claims filed after January 19, 2000, *see* 20 C.F.R. §725.2(c). In addition, a relevant issue in this case is whether employer established good cause for its untimely controversion pursuant to 20 C.F.R. §725.413 (2000), but not pursuant to the revised regulation at 20 C.F.R. §725.412, which is only applicable to claims filed after January 19,

fact was wrongly decided, the administrative law judge may accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"). *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The party opposing entitlement may petition for modification based on a mistake in a determination of fact in order to reopen an award of benefits. *See Jessee*, *supra*; *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996).

2000, *see* 20 C.F.R. §725.2(c).

As both employer and the Director contend, an employer may file a motion for modification of an administrative law judge's finding that good cause for an untimely controversion has not been established pursuant to Section 725.413(b)(3)(2000). If an employer does not establish good cause for its untimely controversion, however, an administrative law judge does not have the authority to consider the case on the merits, *see* 20 C.F.R. §725.413(b)(3)(2000). Thus, we reject employer's contention that a motion for modification of a finding that good cause has not been established entitles employer to seek modification on the merits. To accept employer's contention would render any finding as to whether employer had good cause for its untimely controversion irrelevant, unnecessary or moot and render the regulatory consequence of employer's failure to establish good cause for an untimely controversion meaningless. The consequence for an employer's failure to establish good cause for an untimely controversion is that claimant is entitled to benefits because employer is deemed to have waived its right to raise or contest any other issue. 20 C.F.R. §725.413(b)(3)(2000). Thus, a finding that good cause has not been established for employer's untimely controversion is dispositive on the merits of the claim.[7] Moreover, modification was not intended to protect litigants from their litigation mistakes. *See Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68, 74 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000). Otherwise, employer would avoid the consequences of its untimely controversion if, as employer suggests, the merits of entitlement could be addressed merely by employer's filing of a petition for modification.

[7] Employer correctly contends that Section 725.413(b)(3)(2000) does not prohibit modification of an administrative law judge's finding that good cause for an untimely controversion was established and has not challenged the language at Section 725.413(b)(2000), which provides that an employer's failure to establish good cause for an untimely controversion is dispositive of the claim, as claimant is entitled to benefits and employer is deemed to have waived its right to raise or contest any other issue. 20 C.F.R. §725.413(b)(3)(2000).

In promulgating the regulatory procedures regarding the initial adjudication of claims by the district director and the time periods for response to such initial adjudication, the Department of Labor sought to "expedite the processing of claims" and provide a "consequence" for an "operator's unexcused failure to respond to notice of a claim" and "impose severe consequences," *see* 20 C.F.R. §725.413; 43 Fed. Reg. at 36792, 36793, 36798.[8] Thus, the only issue to be addressed in this case was whether the administrative law judge made a mistake in finding that good cause was not established for employer's untimely controversion.[9] Although employer properly contends that a party may seek modification by merely alleging that "the ultimate fact" was wrongly decided, *see Jessee, supra*, the ultimate fact found in this case is that employer failed to demonstrate good cause for its untimely controversion. *See* 20 C.F.R. §725.413(b)(3)(2000). Contrary to employer's contention that employer is "stuck with the award forever"or is precluded from developing evidence on modification or contesting the award of benefits on modification, Brief for Employer at 5, employer could establish a basis for modification by establishing, with or without new evidence, *see Jessee*, *supra*, that the administrative law judge's determination on controversion was based on a mistake in a determination of fact. As the administrative law judge found, and as both claimant and the Director contend, however, employer did not show a mistake in a determination of fact or allege a basis for modification of Judge Miller's determination on controversion.[10] Employer conceded on modification that its controversion

[8] Employer contends that it could not entirely escape the consequences of its untimely controversion if the claim were denied on the merits because employer is precluded, under the Act, from recouping benefits that have already been paid to claimant prior to the date that the award is modified. As employer contends, a modification finding would not affect the award of any benefits paid to claimant for the period prior to the filing of employer's petition for modification. *See* 33 U.S.C. §922; 20 C.F.R. §725.310(d)(2000). Employer's contention is specious, however, as the benefits that claimant has already received were paid by the Black Lung Disability Trust Fund because of employer's refusal to pay benefits pending resolution of this case. Thus, there are no benefits that employer has paid which it could not recoup.

[9] Because the administrative law judge's finding that employer failed to show good cause for its untimely controversion is dispositive of the claim, we reject employer's contention that the administrative law judge erred in treating employer's default as a concession to entitlement.

[10] Employer contends that the Director's position in this case, that employer must pay benefits even if the medical evidence establishes that claimant is not entitled to benefits on the merits, is inconsistent with the Director's position in *Ramey v. Triple R Coal Co.*, BRB Nos. 01-0817 BLA/A/B (Apr. 17, 2002)(unpub.). In *Ramey*, however, the Director contended that settlement agreements should not be permitted under the Act, as a matter of policy, because such agreements would result in benefits being paid to claimants who might

was "late," but only reiterated that it "should have been excused" because its untimeliness had occurred when employer was "undergoing significant internal changes," in the administration of its office. *See* Director's Exhibit 115. Employer argues that an award of

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not be entitled to benefits on the merits, rendering employers unable to assume liability for benefits in meritorious claims and thereby forcing the Black Lung Disability Trust Fund to assume liability in those claims.

The Board affirmed the administrative law judge's finding in *Ramey* that the proposed settlement agreement reached by the parties in that case was prohibited as neither the Act nor the regulations promulgated thereunder provided authority for the settlement of a claim. *See Ramey*, *supra*. Regarding the Director's policy argument as to why settlement agreements should not be permitted in claims arising under the Act and whether the exclusion of the settlement provisions of the Longshore and Harbor Workers' Compensation Act from incorporation into the Act by Congress, *see* 33 U.S.C. §908(i)(1), was by design or oversight, the Board stated that the Director's argument must be addressed to Congress which has the authority to amend the statute, rather than to the Board, *see generally Lee v. Boeing Co., Inc.*, 123 F.3d 801 (4th Cir. 1997); *Cades v. H&R Block, Inc.*, 43 F.3d 869, 874 (4th Cir. 1994). Similarly, in this case, the Fourth Circuit noted that the bar to employer's challenge of the merits of the claim was not based on deference to the Director's position on Section 725.413(b)(3)(2000), but was "compelled" by the regulation itself. *See* 20 C.F.R. §725.413(b)(3)(2000).

benefits to claimant based on "technicalities"provides a windfall to claimant and is "unfair and unjust."

The Fourth Circuit, however, previously rejected this contention. *See Duelley*, No. 98-1214 at 7. The Fourth Circuit held that "[o]nce the administrative law judge determined that [employer] failed to show good cause, it was not within his discretion to fashion a remedy," as "[t]he regulations compelled the administrative law judge to bar [employer's] challenge to the merits," *id*. The Fourth Circuit concluded that employer "was obligated to file a timely response to notice of the adverse decision" and "[t]he failure to do so was entirely due to [employer's] inattention to its own obligations, as employer "could have, but did not, request a longer time to respond,"*id*.[11]

[11] Employer also contends that the United States Court of Appeals for the Third Circuit has found that an untimely controversion can be excused or constitute a request for modification in *National Mines Corp. v. Carroll*, 64 F.3d 135, 19 BLR 2-329 (3d Cir. 1995). Contrary to employer's characterization, the Third Circuit's holding in *Carroll* is distinguishable from this case. In *Carroll*, an insurance carrier who filed an untimely controversion had never received notice of the initial finding of entitlement and, therefore, by inference, had good cause for its untimely controversion, whereas employer did receive notice in this case and did not establish good cause for its untimely controversion either before Judge Miller or before the administrative law judge on modification. In addition, the insurance carrier's untimely controversion in *Carroll* was filed as a response to a proposed Decision and Order issued by the district director subsequent to a Notice of Initial Finding, as regulated by 20 C.F.R. §725.419(d)(2000).

Section 725.419(d)(2000) provides that once a proposed Decision and Order issued by the district director becomes final, "all rights to further proceedings with respect to the claim shall be considered waived, except as provided in §725.310 (2000)," *see* 20 C.F.R. §725.419(d)(2000). Thus, because Section 725.419(d)(2000) specifically allows for the filing of a request for modification on the merits in response to a final proposed Decision and Order issued by the district director, the Third Circuit held that the insurance carrier's untimely controversion in *Carroll* was sufficient to constitute a request for modification. Employer's untimely controversion in this case, however, was filed in response to a Notice of Initial Finding specifically regulated, not by Section 725.419(d)(2000), but by Section 725.413 (2000).

Employer contends that there is no reason to treat an untimely response to a Notice of Initial Finding under Section 725.413(b)(3)(2000) more harshly than an untimely response to a final proposed Decision and Order under Section 725.419(d)(2000), which specifically allows for the filing of a request for modification on the merits pursuant to Section 725.310 (2000). Contrary to employer's contention, employer is not precluded from also seeking

modification of an award of benefits made pursuant to Section 725.413(b)(3)(2000). Because the consequence for an employer's failure to establish good cause for an untimely controversion to a Notice of Initial Finding, however, is that employer is deemed to have waived its right to raise or contest any issue inconsistent with the initial findings, *see* 20 C.F.R. §725.413(b)(3)(2000), the only issue to be addressed in conjunction with a request for modification of a good cause finding is whether there was a mistake in the determination of fact by the administrative law judge as to whether good cause was established for employer's untimely controversion.

Moreover, Section 725.419(d)(2000) relates to the response to a proposed Decision and Order "which is intended to serve as the document which concludes the adjudication of an uncontested approved case," *see* 43 Fed. Reg. 36795, whereas Section 725.413(b)(3)(2000) relates to the response to a Notice of Initial Finding at the initial stage of the adjudication of a claim. In promulgating the regulatory procedures regarding the initial adjudication of claims by the district director and the time periods for response to such notices of adjudication, the Department of Labor sought to "expedite the processing of claims" and to provide a "consequence" for an "operator's unexcused failure to respond to notice of a claim" and "impose severe consequences." 20 C.F.R. §725.413; 43 Fed. Reg. at 36792, 36793, 36798.

Consequently, inasmuch as employer merely reiterated on modification those arguments which Judge Miller previously rejected and Judge Miller's ruling was upheld by the Fourth Circuit, we affirm the administrative law judge's finding that employer did not establish a basis for modification in this case.[12]

[12] Finally, employer contends that it has a right to obtain a medical examination of claimant on modification and that the administrative law judge erred in precluding it from developing medical evidence on modification. An employer does not, however, have an absolute right to compel a claimant to submit to a medical examination or other requests for evidence on modification unless employer demonstrates that the request for examination or other evidence is reasonable and that claimant's refusal to be examined is unreasonable, *i.e.*, a new examination would be in the interest of justice because employer has raised a credible issue pertaining to the validity of the original adjudication. *See Stiltner v. Wellmore Coal Corp.*, 22 BLR 1-37 (2000)(on recon. *en banc*); *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173 (1999). In any event, as the only issue to be addressed in conjunction with a request for modification of a good cause finding is whether there was a mistake in the good cause finding and as the administrative law judge, in this case, found that employer did not establish good cause for its untimely controversion on modification, the administrative law judge did not have the authority to consider the case on the merits, *see* 20 C.F.R. §725.413(b)(3)(2000). Thus, employer's contention that it has a right to obtain a medical examination of claimant on modification is moot in this case.

Accordingly, the administrative law judge's Order Denying Motion for Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge