BRB No. 05-0336 BLA

ROGER D. HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LITTLE SIX CORPORATION	)	
	)	
Employer-Petitioner	)	
	)	
CONTRACTING ENTERPRISES	)	
	)	
and	)	
	)	
BIG SIX CORPORATION	)	DATE ISSUED: 09/26/2005
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employers/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Bobby Steve Belcher, Jr. (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer, Little Six Corporation.

Thomas H. Miller (Frankl, Miller & Webb, LLP), Roanoke, Virginia, for employer, Contracting Enterprises.

John C. Johnson (Frith, Anderson & Peake, PC), Roanoke, Virginia, for employer, Big Six Corporation.

Helen H. Cox (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer, Little Six Corporation (employer), appeals the Decision and Order Denying Modification (02-BLA-00267) of Administrative Law Judge Mollie W. Neal denying modification and 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).[1] This case has been before the Board previously. In the original decision, Administrative Law Judge Daniel F. Sutton found that employer was the proper responsible operator and that its failure to respond to the notice of initial finding was an acceptance of liability. Decision and Order dated July 24, 1998; Director's Exhibit 104. Administrative Law Judge Sutton further found that employer did not demonstrate good cause for its failure to respond to the notice of initial finding and, therefore, waived its right to contest the claim. Decision and Order dated July 24, 1998; Director's Exhibit 104. Finally, Administrative Law Judge Sutton dismissed Contracting Enterprises and Big Six Corporation as potential responsible operators. Decision and Order dated July 24, 1998; Director's Exhibit 104. Accordingly, benefits were awarded. Employer filed a Motion for Reconsideration which was subsequently denied. Director's Exhibits 106, 110.

On appeal, the Board rejected employer's assertions that Administrative Law Judge Sutton erred in failing to find good cause established for employer's untimely response to the initial finding of entitlement and in failing to consider the merits of the

[1] Claimant filed his claim for benefits with the Department of Labor on September 28, 1992. Director's Exhibit 1.

claim.[2] The Board also affirmed the dismissal of Contracting Enterprises and Big Six Corporation as potential responsible operators. *Hall v. Little Six Corp.*, BRB No. 99-0121 BLA (Oct. 28, 1999)(unpub.); Director's Exhibit 125. Employer simultaneously filed a Petition for Reconsideration with the Board and a Petition for Modification with the district director. Director's Exhibits 126, 127. The Board dismissed employer's reconsideration request as it no longer had jurisdiction in this case in light of the modification request. Director's Exhibit 131.

The district director denied modification on October 11, 2000. Director's Exhibit 147. Employer requested a hearing and on November 23, 2004, Administrative Law Judge Mollie W. Neal (the administrative law judge) found that employer failed to establish good cause for its untimely controversion and could not use the modification procedures to submit evidence inconsistent with the initial findings of entitlement. Decision and Order Denying Modification at 5. The administrative law judge further found that Contracting Enterprises and Big Six Corporation were properly dismissed as potential responsible operators. Decision and Order Denying Modification at 6. Finally, the administrative law judge concluded that employer's modification request pursuant to 20 C.F.R. §725.310 (2000)[3] was untimely. Decision and Order Denying Modification at 6-7. Accordingly, modification was denied.

In the instant appeal, employer contends that the administrative law judge erred in finding that the request for modification was untimely, in finding that good cause was not established for the failure to respond to the initial finding of entitlement, and in failing to address the relevant evidence with respect to the issues of entitlement. Claimant responds, urging affirmance of the Decision and Order Denying Modification of the administrative law judge as supported by substantial evidence. Employers, Contracting Enterprises and Big Six Corporation, respond asserting that they were properly dismissed as potential responsible operators. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge properly

[2] The relevant facts pertaining to employer's failure to respond to the notice of initial finding or to contest the award of benefits in this case have previously been set forth in detail in the Board's prior decision in *Hall v. Little Six Corp.*, BRB No. 99-0121 BLA (Oct. 28, 1999)(unpub.), which is incorporated herein by reference.

[3] 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). The amendments to the regulation governing consideration of requests for modification do not apply to claims, such as the present one, which were pending on January 19, 2001. 20 C.F.R. §§725.2, 725.310.

found that Little Six Corporation failed to establish good cause for the late controversion and therefore properly denied its modification request.[4]

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).

After consideration of the administrative law judge's Decision and Order Denying Modification, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[5] Initially, we reject employer's assertion that it was error for the administrative law judge not to consider the evidence with respect to entitlement in this case as a request for modification of the good cause finding would trigger reconsideration of the merits. Section 725.413(b)(3) (2000)[6] provides that an employer who fails to timely file a controversion in response to a Notice of Initial Finding shall not 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."[7] 20 C.F.R. §725.413(b)(3) (2000); *Pruitt v. USX Corp.*, 14 BLR 1-129, 1-134

[4] The administrative law judge's responsible operator determinations with respect to Contracting Enterprises and Big Six Corporation are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 9.

[6] The regulation at 20 C.F.R. §725.413 (2000) has been substantially revised. The Department of Labor deleted this section from the regulations and incorporated it into Section 725.412. *See* 20 C.F.R. §§725.412, 725.413. This revision does not impact the instant claim as this amendment does not apply to claims which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

[7] The regulation at 20 C.F.R.§725.413 (2000) provides, in relevant part, that:

> Within 30 days after receipt of notification issued under §725.412, unless such period is extended by the [district director] for good cause shown, or in the interest of justice, a notified operator shall indicate an intent to accept or contest liability....

(1990). Thus, an employer who files an untimely controversion to a Notice of Initial Finding and fails to establish good cause for its untimely filing is precluded, pursuant to Section 725.413(b)(3) (2000), from raising issues or presenting evidence with respect to issues inconsistent with the initial findings "in any further proceeding conducted with respect to the claim," such as modification proceedings under Section 725.310 (2000). Thus, contrary to employer's assertion, a petition for modification of a finding that good cause was not established does not entitle employer to a modification on the merits of the claim. To do so would defeat the regulatory scheme and procedures regarding the initial adjudication of claims by the district director and the time periods for response to notices, and would render 20 C.F.R. §725.413(b) (2000) meaningless. If employer does not establish good cause for its untimely controversion, 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 the administrative law judge properly refused to address any contentions with respect to the merits, as the only issue that was properly before the administrative law judge, on modification, was whether a mistake of fact was established with respect to the good cause finding.[8] *See Pruitt*, 14 BLR 1-129; Decision and Order Denying Modification at 5.

---

20 C.F.R. §725.413(a) (2000). The regulation further provides that:

> If the operator fails to respond within the specified period, such operator shall be deemed to have accepted the initial findings of the [district director] 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....

20 C.F.R. §725.413(b)(3) (2000).

[8] Although employer properly contends that a party may seek modification by merely alleging that "the ultimate fact" was wrongly decided, *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), 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).

We further reject employer's contention that the administrative law judge erred in failing to accept employer's untimely controversion as good cause has been established. Employer's Brief at 6-10. In finding that employer did not satisfy the good cause standard, the administrative law judge found no merit to employer's assertions that its failure to respond was excusable because of its reliance on its insurance carrier to defend against the claim, and that it was not informed by the Office of Workers' Compensation Programs that its insurance carrier was insolvent and was not defending the claim. Decision and Order Denying Modification at 5-6. The administrative law judge concluded that it was employer's responsibility to oversee its insurance carrier's viability and that employer's failure to comply with the regulatory time frames for response to notices issued by the Office of Workers' Compensation Programs at critical stages of the administrative process was due entirely to its inattention to its business. Decision and Order Denying Modification at 6.

We review the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). The administrative law judge acted within her discretion in declining to accept employer's untimely controversion as employer failed to show good cause for the untimely filing. *Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992); *Clark*, 12 BLR at 1-153; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985). As the burden of proof is on employer to establish good cause, the administrative law judge permissibly determined that employer did not meet this burden and was precluded from contesting the claim. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Director's Exhibits 27, 28, 33, 80, 107; Decision and Order Denying Modification at 5-6. Under the circumstances of this case, we discern no abuse of discretion in the administrative law judge's finding that good cause was not established, and therefore, we affirm this determination. *See Krizner*, 17 BLR 1-31; *Clark*, 12 BLR 1-149; *Shedlock*, 9 BLR 1-195; *Itell*, 8 BLR 1-356.

Finally, employer and the Director assert that the administrative law judge erred in finding that employer's modification request was untimely. Employer's Brief at 5-6; Director's Brief at 7. We agree. The administrative law judge found that employer's modification request was not filed within one year of the district director's award of benefits and therefore found that employer failed to preserve its right to contest the award of benefits. Decision and Order Denying Modification at 6. 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 "at any time prior to one year after the date of the last payment of compensation . . . ." 33 U.S.C. §922; *see also* 20 C.F.R. §725.310(a)(2000). Consequently, as claimant is receiving benefit payments, employer's modification request was timely. *See* 20 C.F.R. §725.310(a) (2000); *Jessee v. Director,*

OWCP, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); Director's Exhibit 33. We therefore reverse the administrative law judge's finding that employer's petition for modification is untimely.

A remand is not required, however, since any error is harmless, as the administrative law judge specifically found that employer did not establish good cause for its untimely controversion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order Denying Modification at 5-6. Although modification is available to employer pursuant to Section 725.310 (2000), since employer did not establish good cause for its untimely controversion, the administrative law judge does not have the authority and/or the jurisdiction to consider the case on the merits or to modify a finding of entitlement to benefits by the district director and, therefore, must award benefits. *See* 20 C.F.R. §725.413(b)(3) (2000). Consequently, we affirm the award of benefits as it is supported by substantial evidence and is in accordance with law. *See Krizner*, 17 BLR 1-31; *Pruitt*, 14 BLR 1-129; *Clark*, 12 BLR 1-149; *Shedlock*, 9 BLR 1-195; *Itell*, 8 BLR 1-356.

Accordingly, we affirm in part and reverse in part the administrative law judge's Decision and Order Denying Modification, and affirm the award of benefits.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge