BRB No. 05-0682 BLA

MARY M. GRAY (o/b/o EDWARD K. GRAY, Deceased)	)	
Claimant-Respondent	)	
v.	)	
BENJAMIN COAL COMPANY	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 09/08/2005
Employer/Carrier- 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 Remand to District Director of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Blair v. Pawlowski (Pawlowski, Bilonic & Long), Ebensburg, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer and carrier.

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 Order Denying Motion for Remand to District Director (01-BLA-0787) of Administrative Law Judge Gerald M. Tierney 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 is before the Board for the second time. In *Gray v. Benjamin Coal Company, Inc.*, BRB No. 03-0574 BLA (June 29, 2004)(unpub.), the Board affirmed in part and vacated in part, the administrative law judge's decision and order awarding benefits in the miner's claim, and remanded the case for further evaluation of the evidence.

Subsequent to the Board's remand of the case, on April 22, 2005 employer filed a motion with the administrative law judge to remand the case to the district director for consideration of employer's request for modification, filed with the district director on January 19, 2005, pursuant to 20 C.F.R. §725.310 (2000). On May 4, 2005, the administrative law judge issued an Order Denying Motion for Remand to District Director. The administrative law judge determined that employer's request for modification was premature because, pursuant to 20 C.F.R. §725.310(a) (2000), modification was available only after a final decision had been issued following the Board's Decision and Order vacating in part and affirming in part the administrative law judge's prior Decision and Order and remanding the case.

On appeal, employer argues that the administrative law judge erred by not remanding the case to the district director for consideration of employer's request for modification. Claimant responds, urging affirmance of the administrative law judge's Order. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief agreeing with employer's position that the administrative law judge erred by not remanding the case to the district director for consideration of employer's Petition for Modification.

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

[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.

may not be disturbed. 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).

Initially, while we note that interlocutory orders are generally not appealable, *see Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), the Board has previously recognized an exception to the general rule against entertaining interlocutory orders when undue hardship and inconvenience can be avoided. *See Collins v. J & L Steel*, 21 BLR 1-182, 186 (1999). Thus, we hold that under the facts of this case, review of employer's appeal is warranted despite its interlocutory nature.

Upon consideration of the facts of this case and the briefs filed on appeal, we agree with employer and the Director that the administrative law judge erred in not remanding the case to the district director for consideration of employer's Petition for Modification. Section 22 of the Longshore and Harbor Workers' Compensation Act, as incorporated into the Act by 30 U.S.C. §932(a), provides:

> Upon his own initiative, or upon the application of any party in interest..., on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner,[2] the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case... and... issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. §922. In turn, the implementing regulation at 20 C.F.R. §725.310(a) (2000)[3] provides:

> Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

---

[2] The district director was formerly referred to as the deputy commissioner.

[3] The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. 20 C.F.R. §725.2.

20 C.F.R. §725.310(a) (2000). These provisions make clear that a final decision is not a prerequisite to reconsideration of a case pursuant to a request for modification. We thus vacate the administrative law judge's contrary determination.[4]

Based on the statutory and regulatory provisions set forth above, we also vacate the administrative law judge's determination that he was not required to remand this case to the district director for consideration of employer's Petition for Modification which was filed with the district director on January 19, 2005. 33 U.S.C. §922; 20 C.F.R. §725.310. Because the administrative law judge lacked jurisdiction to consider the claim once employer filed his Petition for Modification, we vacate the administrative law judge's Order Denying Motion for Remand to District Director.

[4] While 20 C.F.R. §725.480 (2000) does reference a "final" decision, providing that any party dissatisfied with a decision and order which has become *final* may request modification of the decision and order under 20 C.F.R. §725.310 (2000), the regulation does not provide that only at that point in time may a request for modification be made.

Accordingly, the administrative law judge's Order Denying Motion for Remand to District Director is vacated and the case is remanded to the district director for consideration of employer's Petition for Modification.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge