BRB Nos. 01-0918 BLA
and 01-0918 BLA-A

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

Appeal and Cross-Appeal of the Decision and Order--Benefits Granted of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor, and of the Decision and Order on Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order--Benefits Granted (1992-BLA-0115) of Administrative Law Judge Frederick D. Neusner and the Decision and Order on Reconsideration of Administrative Law Judge Thomas M. Burke rendered 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] Claimant filed his application for benefits on November 7, 1990. Director's Exhibit 1. His claim, now being considered pursuant to claimant's request for modification, is before the Board for the third time.

After a hearing, Administrative Law Judge Frederick D. Neusner awarded benefits in a Decision and Order issued on October 28, 1992. Director's Exhibit 35. Upon consideration of employer's appeal, the Board vacated in part Judge Neusner's Decision and Order and remanded the case for him to reconsider whether the x-ray and medical opinion evidence established the existence of pneumoconiosis, and to reweigh the blood gas studies and medical opinions on the issues of total disability and disability causation, if reached. *Mosley v. Eastern Associated Coal Corp*., BRB No. 93-0509 BLA (Jun. 28, 1994)(unpub.); Director's Exhibit 63.

On remand, Judge Neusner found that the weight of the chest x-ray and medical opinion evidence did not establish the existence of pneumoconiosis and denied benefits. Director's Exhibit 67. Upon consideration of claimant's appeal, the Board affirmed the denial of benefits. *Mosley v. Eastern Associated Coal Corp*., BRB No. 96-0662 BLA (Dec. 20, 1996)(unpub.); Director's Exhibit 79.

On January 14, 1997, claimant timely requested modification pursuant to 20 C.F.R. §725.310(2000), alleging that the denial was a mistake, and submitted additional medical evidence. Director's Exhibits 82, 89, 91. Based upon a review of claimant's new evidence, the District Director of the Office of Workers' Compensation Programs (the district director) found that claimant was entitled to benefits and issued an order proposing to modify the denial. Director's Exhibit 92. Employer objected to the proposed modification, requested a hearing, and stated that it intended to submit evidence. Director's Exhibit 93. On August 1, 1997, the district director forwarded the claim to the Office of Administrative Law Judges (the OALJ) for a formal hearing. Director's Exhibit 95. Thereafter, employer submitted the report and supporting documentation of its physician's examination of claimant. Director's Exhibit 96; Employer's Exhibit 5.

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

On September 16, 1997, Judge Neusner issued an order directing the parties to show cause why the modification petition should not be decided without a hearing, and closing the record as of September 30, 1997. Employer timely responded and requested a hearing. Employer explained that it was "continuing to develop evidence in this matter," and intended to "appear at the hearing, present evidence, and cross examine the Claimant about his current medical condition. . . ." Employer's Letter, Sep. 26, 1997.

On October 15, 1997, Judge Neusner issued his Decision and Order--Benefits Granted. Judge Neusner found that a hearing on modification was unnecessary and denied employer's request for a hearing. After admitting the parties' new evidence into the record, Judge Neusner found that the medical evidence established a change in conditions and entitlement to benefits. He awarded benefits as of January 1, 1997, based on Dr. D.L. Rasmussen's January 24, 1997 opinion that claimant was totally disabled due to pneumoconiosis.

On November 13, 1997, employer moved for reconsideration of Judge Neusner's decision not to hold the requested hearing on modification. Judge Neusner denied reconsideration, and employer timely appealed the decision awarding benefits and the order on reconsideration to the Board.

However, claimant had requested reconsideration of Judge Neusner's onset date finding, via an undated letter addressed to the OALJ and received by the Director, Office of Workers' Compensation Programs (the Director), on November 5, 1997. The Director forwarded claimant's letter to the Board and moved that employer's appeal be dismissed. On April 8, 1998, the Board dismissed employer's appeal as premature in light of claimant's motion for reconsideration and remanded the case to the OALJ.

Thereafter, the case file was apparently misplaced until 2001. Decision and Order on Reconsideration, Aug. 2, 2001 at 2. By then, Judge Neusner had retired and claimant's motion for reconsideration was assigned, without objection, to Administrative Law Judge Thomas M. Burke. Judge Burke granted reconsideration, but reaffirmed Judge Neusner's finding of a January 1, 1997 onset date. Employer's appeal and claimant's cross-appeal followed.

On appeal, employer contends that Judge Neusner erred in denying its request for a hearing on modification. Employer further asserts that Judge Neusner erred in his analysis of the medical evidence when he found that the existence of pneumoconiosis, and thus a change in conditions, was established. Additionally, employer argues that the Department of Labor's delay in processing this claim while claimant's motion for reconsideration was pending deprived employer of formerly available defenses, violating employer's due process rights. Claimant responds, urging affirmance. The Director responds, urging that the award be vacated and this

case remanded for a hearing. The Director argues further that the delay in processing this claim did not prejudice employer's defense of the claim and therefore did not violate employer's due process rights. Claimant cross-appeals, arguing that the administrative law judge erred in setting January 1, 1997 as the onset date. Employer has filed a combined reply brief and response to claimant's cross-appeal, in which employer reiterates the contentions raised in its appeal of the award of benefits and alternatively urges affirmance of the onset date finding.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

Subsequent to the issuance of Judge Neusner's Decision and Order--Benefits Awarded, the Board held that a hearing must be held on modification if one is requested, unless the parties waive their right to a hearing or a motion for summary judgment is properly granted. *Pukas v. Schuylkill Contracting Co*., 22 BLR 1-69, 1-72 (2000). Consequently, we vacate the administrative law judge's Decision and Order--Benefits Awarded and remand the case to the administrative law judge to conduct a hearing *de novo* on modification pursuant to Section 725.310[2] unless such hearing is waived by the parties or summary judgment is properly granted.

Employer further contends that Judge Neusner found the existence of pneumoconiosis established based solely on positive chest x-rays without discussing the medical opinion evidence. On remand, the administrative law judge assigned to this case must weigh together all relevant evidence developed pursuant to 20 C.F.R. §718.202(a) to determine whether the existence of pneumoconiosis is established by a preponderance of all the evidence in accordance with the standard set forth in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). As the administrative law judge must hold a hearing *de novo*, we do not address employer's remaining allegations of error in Judge Neusner's weighing of specific items of medical evidence.

[2] We reject claimant's argument that the failure to hold a hearing was a harmless error. Employer indicated its intent below to develop and introduce additional documentary evidence at the hearing, and the Director correctly notes that additional testimonial evidence could be introduced at the hearing. *See* 20 C.F.R. §§725.455(b), (d), 725.456, 725.457; *Robbins*, 146 F.3d at 429, 21 BLR at 2-505-06 (rejecting harmless error analysis where a requested modification hearing is not held).

Employer next argues that its due process rights were violated by the OALJ's delay in deciding claimant's motion for reconsideration. Employer contends that the delay was prejudicial because in the interim revised 20 C.F.R. §718.204(a) became effective, making disabling nonrespiratory and nonpulmonary impairments irrelevant to whether a claimant is totally disabled due to pneumoconiosis.[3] Employer argues that revised Section §718.204(a), if applied to this claim, deprives employer of the formerly available defense that claimant was totally disabled by a back injury before he ever developed a totally disabling respiratory impairment. Employer asserts that any liability for this claim must therefore be transferred to the Black Lung Disability Trust Fund.

Employer's argument is moot, as revised Section 718.204(a) is inapplicable to claims such as this one, which were pending on January 19, 2001. *See Nat'l Mining Ass'n v. Department of Labor*, --- F.3d ---, 2002 WL 1300007 *12 (D.C. Cir., June 14, 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The law on this issue remains "exactly as it was prior to the regulations' promulgation for cases that had already been filed when the regulations were promulgated." *Id*.; *see Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243, 19 BLR 2-1, 2-6 (4th Cir. 1994)(Nonrespiratory impairments "have no bearing on establishing total disability due to pneumoconiosis. . . ."); *Hobbs v. Clinchfield Coal Co*., 917 F.2d 790, 791 n.2, 15 BLR 2-225, 2-226 n.2 (4th Cir. 1990)(Other disabling conditions are irrelevant to the existence or causation of a total pulmonary disability).

Claimant contends that the record demonstrates he became totally disabled due to pneumoconiosis prior to January 1, 1997 and thus the administrative law judge erred in setting January 1, 1997 as the onset date for the commencement of benefits. Because we have vacated the Decision and Order--Benefits Granted and are remanding this case for a hearing to be held on claimant's modification petition, the administrative law judge must address the onset issue anew, if reached, pursuant to 20 C.F.R. §725.503(d).

[3] Revised Section 718.204(a) provides in part that a nonpulmonary condition that "causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a).

Accordingly, the Decision and Order--Benefits Granted and Decision and Order on Reconsideration are vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge