BRB No. 06-0121 BLA

JAMES E. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 10/16/2006
TWIN PINES, INCORPORATED	)	
	)	
Employer	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH	)	
	)	
Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for carrier.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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:

Carrier appeals the Decision and Order on Remand (03-BLA-185) of Administrative Law Judge Daniel J. Roketenetz 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, the administrative law judge found that claimant established thirty-three and one-quarter years of coal mine employment[2] and invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Decision and Order dated January 19, 2001; Director's Exhibit 59. The administrative law judge found claimant to be entitled to benefits from April 1995, the month in which the existence of complicated pneumoconiosis was conclusively established. *Id*.

With respect to the responsible operator issue, the administrative law judge dismissed Altec Energy, Incorporated (Altec), because the April 1995 onset of claimant's complicated pneumoconiosis predated his employment with Altec. Decision and Order dated January 19, 2001; Director's Exhibit 59. The administrative law judge further noted that the record indicated that claimant was employed with Twin Pines, Incorporated (employer) in April 1995, but he dismissed employer as the responsible operator. Although the administrative law judge found that the existence of complicated pneumoconiosis was established as of April 1995, he noted that the record contained evidence suggesting that claimant's complicated pneumoconiosis may have been present as early as 1993. Since the operator that employed claimant in 1993, Meador Energy, Incorporated, was not named as a potential responsible operator, the administrative law judge found that the Black Lung Disability Trust Fund (Trust Fund) was responsible for the payment of benefits. Accordingly, the administrative law judge awarded benefits to be paid by the Trust Fund beginning April 1, 1995. The Director, Office of Workers' Compensation Programs (the Director), appealed to the Board.

Upon review of the Director's appeal, the Board affirmed the administrative law judge's finding that claimant was entitled to benefits. The Board further affirmed the administrative law judge's finding that the onset date of claimant's complicated pneumoconiosis was April 1995. The Board additionally affirmed the dismissal of Altec as the responsible operator, but reversed the administrative law judge's dismissal of

[1] Claimant filed his initial claim for benefits on June 30, 1993, which was withdrawn on July 20, 1993. Director's Exhibit 34. Claimant filed the instant claim on October 13, 1998. Director's Exhibit 1.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant was last employed in the coal mine industry in Kentucky. Director's Exhibit 2; Hearing Transcript at 27-29; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

employer, because the record indicated that employer employed claimant as of April 1995, the date upon which liability for benefits was established. Therefore, the Board reinstated employer as the operator responsible for the payment of benefits. *Smith v. Twin Pines, Inc.*, BRB No. 01-0453 BLA (Feb. 12, 2002)(unpub.); Director's Exhibit 77.

Employer, through its insurance carrier, American International South Insurance Company (carrier), requested reconsideration, arguing that it should be dismissed as the responsible operator, and that carrier should be dismissed as the responsible carrier, because carrier did not insure employer in April 1995. In support of its contention, employer submitted an affidavit from one of carrier's employees stating that carrier did not insure employer until January 1996. Employer contended that because the proper responsible carrier had not been identified by the Director, the Trust Fund should be responsible for payment.

The Board denied the request for reconsideration, stating that it could not consider the new evidence submitted by carrier, or consider an issue that was being raised for the first time on appeal. *Smith v. Twin Pines, Inc.*, BRB No. 01-0453 BLA (Aug. 2, 2002)(unpub.); Director's Exhibit 80. Employer and carrier requested modification on September 2, 2002, and the Board forwarded the case to the district director. Director's Exhibit 81, 84.

The district director denied modification on February 23, 2003, on the ground that he lacked the authority to modify the Board's decision. Director's Exhibit 86. Employer and carrier requested a hearing, but prior to the scheduled hearing, all parties, including the Director, requested a decision on the record.[3]

In a Decision and Order issued on September 26, 2005, the administrative law judge initially determined that the case was improperly referred to the district director for modification proceedings, and he therefore concluded that the district director lacked jurisdiction to decide the case. The administrative law judge stated that he would nevertheless consider this case as if it were before him "on remand from the Board." Decision and Order on Remand at 5. With respect to the responsible carrier issue, the administrative law judge concluded that "*res judicata* prevents me from addressing the proper insurance carrier." Decision and Order at 5-6. Accordingly, the administrative law judge ordered employer and carrier to pay benefits.

On appeal, carrier contends that it was error for the administrative law judge to find that the request for modification was improper and that the issue of the responsible

[3] On modification, carrier sought to admit into the record both the affidavit that it had previously submitted to the Board, and deposition testimony from the employee who executed the affidavit.

insurance carrier was waived. Claimant has not responded to carrier's appeal. The Director responds, asserting that a remand is required because the administrative law judge erred in failing to consider the modification request, but also arguing that the administrative law judge should find that carrier waived the responsible carrier issue.

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

Carrier and the Director argue that the administrative law judge erred in failing to consider carrier's modification request pursuant to 20 C.F.R. §725.310, because the administrative law judge did not apply the proper modification standard in making his findings. Carrier's Brief at 4-5; Director's Brief at 3-4. We agree.

Section 725.310 provides in relevant part that the administrative law judge "may, at any time before one year from the date of the last payment of benefits . . . reconsider the terms of an award," based on a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). Section 725.310 is "a broad reopening provision that is available to employers and employees alike." *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825, 22 BLR 2-305, 2-310 (6th Cir. 2001). Its "purpose . . . is to permit a[n] [administrative law judge] to modify an award where there has been 'a mistake in a determination of fact [which] makes such a modification desirable in order to render justice under the act.'" *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-108 (6th Cir. 1982), quoting *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 464 (1968); *see also Branham v. BethEnergy Mines, Inc.*, 21 BLR 1-79, 1-82-84 (1998)(McGranery, J., dissenting). The administrative law judge has the authority on modification "to reconsider all the evidence for any mistake of fact or change in conditions." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

In this case, the administrative law judge refused to consider the carrier's modification request, and would only "consider this a case on remand from the Board." Decision and Order on Remand at 5. This was error. The carrier had petitioned for modification on the responsible carrier issue; the case was not before the administrative law judge on remand. *See* 20 C.F.R. §725.310; *Worrell*, 27 F.3d at 230, 18 BLR at 2-296. Therefore, we must vacate the administrative law judge's decision and remand this case for him to address the issues raised in carrier's modification request, under the

applicable modification standard.[4] *See Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Blevins*, 683 F.2d at 142, 4 BLR at 2-108; *Branham*, 21 BLR at 1-82-84.

The Director requests that we also instruct the administrative law judge on remand that carrier must first prove that it did not waive the responsible carrier issue before the administrative law judge may consider the merits of carrier's modification request. We must decline this request. As noted, modification is a broad reopening provision. *King*, 246 F.3d at 825, 22 BLR at 2-310. Accordingly, a party's recourse to modification should not be denied solely because its modification request raises an issue or argument that could have been raised earlier in the proceedings. *See Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 954-55, 22 BLR 2-46, 2-67-68 (6th Cir. 1999); *accord Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002). Moreover, waiver is a flexible rule that is "prudential and not jurisdictional." *Milliken*, 200 F.3d at 955, 22 BLR at 2-68. As discussed, the onset date of claimant's complicated pneumoconiosis was found to be April 1995, whereas carrier alleges in its modification request that it did not insure the responsible operator until January 1996. In this situation, the Director does not explain why carrier should have believed that an onset finding before January 1996 was of any concern to carrier. We therefore decline to instruct the administrative law judge that carrier must first prove that it did not waive the responsible carrier issue. The sole issue for the administrative law judge to resolve on remand is whether the evidence shows that carrier was on the risk for employer as of April, 1995; if not, the administrative law judge should hold the Black Lung Disability Trust Fund liable for payment of benefits owed claimant.

[4] This case presents exceptional circumstances. The administrative law judge may find it necessary to reopen the record to resolve properly carrier's modification request. *See Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-148 (1989).

Accordingly, the administrative law judge's Decision and Order on Remand is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge