BRB No. 97-1572 BLA

CAUDLE E. DEEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Modification and the Order Denying Motion for Reconsideration of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Daniel Sachs (U.M.W.A., Legal Department), Castlewood, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denying Modification and the Order Denying Reconsideration (97-BLA-0926) of Administrative Law Judge Frederick D. Neusner denying 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). This case has a lengthy procedural history. In her initial Decision and Order issued on December 11, 1981, Administrative Law Judge Anastasia T. Dunau credited claimant with thirty-nine years of qualifying coal mine employment, and adjudicated this claim, filed on March 27, 1978, pursuant to the provisions at 20

C.F.R. Part 727. The administrative law judge found that the evidence was insufficient to establish either invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a) or entitlement pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied.

Claimant filed a second claim for benefits on January 7, 1982, which was properly treated as a request for modification pursuant to 20 C.F.R. §725.310. In a Decision and Order issued on September 21, 1987, Administrative Law Judge Stuart A. Levin found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), but that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(3), and that the evidence was insufficient to support entitlement under 20 C.F.R. Part 410 or 20 C.F.R. Part 718. Consequently, the administrative law judge denied benefits.

Claimant appealed to the Board, but subsequently filed a request for modification with the district director. By Order dated January 22, 1990, the Board dismissed claimant's appeal, subject to reinstatement following modification procedures. A full evidentiary hearing was held, and on August 31, 1994, Administrative Law Judge Frederick D. Neusner issued a Decision and Order - Modification Denied, finding that the evidence was insufficient to establish a material change in claimant's condition.

On appeal, the Board reinstated claimant's appeal of Administrative Law Judge Levin's Decision and Order, vacated Judge Levin's finding of invocation at Section 727.203(a)(1), and remanded this case for reconsideration of the x-ray evidence in light of the principles enunciated by the United States Court of Appeals for the Fourth Circuit, wherein jurisdiction of this case arises, in *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). If, on remand, invocation at subsection (a)(1) was not established, the administrative law judge was instructed to determine whether the evidence was sufficient to establish invocation at subsections (a)(2)-(4). Because the administrative law judge did not address the opinions of Drs. Modi, Buchanan and Kanwal, the Board also vacated the administrative law judge's finding of rebuttal pursuant to Section 727.203(b)(3), and instructed the administrative law judge on remand to reweigh all evidence relevant to rebuttal thereunder in light of the holdings in *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Turner v. Director, OWCP*, 927 F.2d 778, 15 BLR 2-6 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). Lastly, the Board vacated Administrative Law Judge Neusner's findings pursuant to Section 725.310 for him to determine on remand whether modification was appropriate in light of the standard enunciated in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), and to consider all relevant evidence at Section

727.203(a)(1)-(4), and at Section 727.203(b) if reached. *Deel v. Clinchfield Coal Co.*, BRB Nos. 94-3968 BLA and 87-2935 BLA (Aug. 24, 1995)(unpublished).

In his Decision and Order Following Remand issued on March 29, 1996, the administrative law judge found that the weight of the evidence submitted prior to Administrative Law Judge Levin's denial of benefits was insufficient to establish invocation pursuant to Section 727.203(a)(1)-(4), and that new evidence submitted in support of modification was insufficient to establish either a change in conditions or a mistake in a determination of fact pursuant to Section 725.310. Accordingly, benefits were denied.

On February 4, 1997, claimant again requested modification and submitted new evidence in support thereof. Following the district director's denial of modification, claimant requested a formal hearing on March 14, 1997, and the case was referred to the Office of Administrative Law Judges on March 21, 1997. On July 1, 1997, the administrative law judge issued an Order Denying Modification, finding the new evidence insufficient to establish invocation at Section 727.203(a)(1)-(4), and finding no mistake in a determination of fact or change in conditions at Section 725.310.

On July 23, 1997, claimant filed a motion for reconsideration, arguing that he was not accorded procedural due process. The administrative law judge denied the relief requested in an Order Denying Motion for Reconsideration issued on July 31, 1997.

In the present appeal, claimant argues that his due process rights have been violated. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant asserts that he received no communication regarding his case between the time it was forwarded to the Office of Administrative Law Judges for hearing and the issuance of the administrative law judge's Order Denying Modification. Claimant maintains that he was not accorded procedural due process because he received no notice of hearing pursuant to 20 C.F.R. §725.453 or notice

that a full evidentiary hearing was not necessary, and documentary evidence was not introduced in accordance with 20 C.F.R. §725.456. Claimant also argues that receipt of a briefing schedule and notification of when the evidentiary record would be closed were necessary for claimant to timely submit evidence and written statements in support of modification. Claimant's arguments have merit. In his Order Denying Motion for Reconsideration, the administrative law judge found that the regulations do not require the Office of Administrative Law Judges to conduct a formal hearing following a remand from the Benefits Review Board, or to alter the record which was before the Board on appeal. The issue before the administrative law judge, however, was whether modification pursuant to Section 725.310 was appropriate based on evidence submitted subsequent to the administrative law judge's Decision and Order Following Remand, and claimant's request for reconsideration of the administrative law judge's Order Denying Modification was predicated on a lack of notice and the opportunity to be heard rather than on the lack of a formal hearing. While it is within the administrative law judge's discretion to determine whether a full evidentiary hearing is necessary in a modification proceeding, *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989), due process requires notification to the parties of when or whether a hearing will be held and the timeframe within which additional evidence or argument may be submitted to the administrative law judge prior to the closing of the record. Consequently, we vacate the administrative law judge's Order Denying Modification and Order Denying Motion for Reconsideration, and remand this case for the administrative law judge to accord appropriate notice and opportunity to the parties.

Accordingly, the administrative law judge's Order Denying Modification and Order Denying Motion for Modification are vacated, and this case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge