BRB No. 98-1216 BLA

HERBERT NUNLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
3N COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Geary P. Dillon, Whitwell, Tennessee, for claimant.

Phillip A. Fleissner, Chattanooga, Tennessee, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-0396) of Administrative Law Judge Joan Huddy Rosenzweig 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). The administrative law judge found that the instant claim constituted a duplicate claim pursuant to 20 C.F.R. §725.309,[1]

[1]Claimant initially filed a claim for benefits on May 8, 1980, which was denied by the district director on December 29, 1980.Director's Exhibit 23. No further action was taken by claimant until the filing of a second claim on May 24, 1994. Director's Exhibit 1. This second claim was denied by the district director on November 10, 1994, and again, by a "Proposed Decision and Order Memorandum of Conference," on April 11, 1995, wherein

Decision and Order at 2-3, and that the newly submitted x-ray evidence established a material change in conditions, Decision and Order at 11. The administrative law judge further found that claimant established a coal mine employment history of fifteen years, Decision and Order at 3-4. Turning to the merits of entitlement, the administrative law judge found that the entirety of the evidence supported a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), Decision and Order at 11, and that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), Decision and Order at 11-12. The administrative law judge finally concluded that, based on the pulmonary function study evidence of record, claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer contends that claimant's request for a hearing subsequent to the district director's Proposed Decision and Order Memorandum of Conference (Proposed Decision and Order) was not filed in a timely manner and that the administrative law judge erred in failing to address the issue. Employer further contends that the administrative law judge also erred in concluding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and erred in finding that claimant established a totally disabling respiratory impairment pursuant to Section 718.204(c). Claimant, in response, urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief 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

---

claimant was also advised that he had thirty days from the date of the Proposed Decision and Order to request a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 21. By letter dated August 24, 1995, claimant, through his new counsel, requested a hearing before the Office of Administrative Law Judges. Subsequent to a hearing held on April 23, 1996, the administrative law judge, on May 14, 1998, issued the Decision and Order awarding benefits from which employer now appeals.

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).

On April 11, 1995, the Proposed Decision and Order was issued by the district director. Director's Exhibit 21. In the Proposed Decision and Order the district director noted a statement made by claimant's then counsel that claimant no longer wished to pursue the claim, but agreed to accept a decision on the record. Proposed Decision and Order at 2. The district director proceeded to find that claimant was not entitled benefits, and indicated that "[i]n the absence of appeal within thirty (30) days, this Proposed Decision and Order will become final." Proposed Decision and Order at 8. The Proposed Decision and Order indicates that a copy was to be sent to his then counsel. Proposed Decision and Order at 9. Claimant took no action until, through new counsel, he submitted a letter dated August 24, 1995, requesting a hearing before the Office of Administrative Appeals Judges. Director's Exhibit 22. In this letter, claimant indicated that he had not received the Proposed Decision and Order. Director's Exhibit 22. On December 1, 1995, claimant's request for a hearing was granted and the case was forwarded to the Office of Administrative Law Judges. Director's Exhibit 24. On form CM-1025, both employer and the Director checked boxes indicating that they wished to contest the issue that the requirements for modification pursuant to 20 C.F.R. §725.310 were established. Director's Exhibit 24. The Director also indicated that he was contesting the issue of the timeliness of the filing of the appeal of the Memorandum of Conference. Director's Exhibit 24. At the hearing, claimant stated that at no point did he ever represent that he no longer wished to pursue the claim. *See* Hearing Transcript at 35. Claimant further indicated that he, at some point, had received notice that his claim was denied.[2] *See* Hearing Transcript at 36-37. In the Decision and Order issued subsequent to the hearing, the administrative law judge made no findings on these issues.

The regulations make clear that a party aggrieved by a Proposed Decision and Order has thirty (30) days to reply to the district director's determination. 20 C.F.R. §§725.417(d), 725.419(a). Failure to timely reply constitutes acceptance of the Proposed Decision and Order. 20 C.F.R. §§725.417(a), 725.419(d); *see Key v. Alabama By-Products Corp.*, 8 BLR 1-241 (1985). Moreover, a Proposed Decision and Order is considered a final adjudication of a claim if neither party requests a revision of the Proposed Decision and Order or requests a hearing within thirty (30)

[2]The determination of whether, in fact, claimant indicated that he no longer wished to pursue the claim or whether notice of the denial was received by claimant is outside our scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

days after the date of its issuance. 20 C.F.R. §§725.418(a), 725.419(a), 725.419(d); *see Key, supra*.

In the instant case, the administrative law judge concluded that claimant's request for a formal hearing before the Office of Administrative Law Judge's was timely. Decision and Order at 2. Contrary to the administrative law judge's determination, the record demonstrates that, while claimant appointed new counsel on April 18, 1995, a date within the thirty-day period allowed for in the Proposed Decision and Order, Director's Exhibit 12, claimant failed to request a hearing until August 24, 1995, a date outside the thirty day period. Director's Exhibit 22. Moreover, contrary to claimant's statement in his request for a hearing, a review of the hearing transcript and other evidence of record indicates that claimant, at some time prior to his request for a hearing, was aware of the Proposed Decision and Order denying benefits. *See* Hearing Transcript at 36-37; Employer's Exhibit 2. Accordingly, we vacate the administrative law judge's determination that claimant's request for a hearing was timely and remand the claim to the administrative law judge for further consideration of whether claimant's request for a hearing was timely.

If the administrative law judge determines that claimant's request for a formal hearing was outside the thirty-day period, but within one year of the Proposed Decision and Order, the request would thus constitute a request for modification pursuant to 20 C.F.R. §725.310. *See Garcia v. Director, OWCP*, 12 BLR 1-44 (1988). On remand, therefore, the administrative law judge must determine whether claimant's request for a hearing was timely and if he determines that it was not, he must then remand the claim to the district director for further consideration of the request for modification. *See Garcia, supra; see also Saginaw Mining Co. v. Mazzuli,* 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987)*; see generally Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).[3]

[3]We thus make no determinations regarding the administrative law judge's finding of entitlement.

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated and the case is remanded for further consideration 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