

BRB No. 13-0056 BLA

CLIFFORD L. AXELSEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN COAL COMPANY	)	DATE ISSUED: 09/27/2013
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS’	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Granting Summary Decision of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Matthew J. Black and James R. Black (James R. Black, P.C.), Salt Lake City, Utah, for claimant.

Richard H. Risse (White & Risse, L.L.P.), Arnold, Missouri, for employer.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Summary Decision (2012-BLA-6007) of Associate Chief Administrative Law Judge William S. Colwell (the administrative law judge), dismissing claimant’s request for modification of a denied subsequent claim filed

on May 16, 2007, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).<sup>1</sup> The only issue on appeal is whether claimant's request for modification of Administrative Law Judge Richard D. Malamphy's June 3, 2011 Order Denying Claimant's Motion for Reconsideration (Order) was timely filed. The administrative law judge found, pursuant to 20 C.F.R. §725.479(a), that Judge Malamphy's Order became effective on June 7, 2011, the date on which it was filed with the district director. The administrative law judge further found that, because claimant's request for modification was received by the district director on June 15, 2012, it was untimely under the requirement set forth in 20 C.F.R. §725.310, that a request for modification be filed within one year of the denial of the claim. Accordingly, the administrative law judge dismissed claimant's request for modification as untimely filed.

On appeal, claimant contends that the administrative law judge's dismissal of his request for modification as untimely filed was in error. Employer responds, urging affirmance.<sup>2</sup> The Director, Office of Workers' Compensation Programs, also responds and contends that the administrative law judge correctly interpreted and applied the controlling regulations.

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, rational, and in accordance with applicable law.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated into the

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<sup>1</sup> Claimant's first application for benefits, filed on August 26, 2002, was denied by the district director on July 8, 2003. Director's Exhibit 1. Claimant did not take any further action, and the denial became final. The district director issued a Proposed Decision and Order awarding benefits in claimant's subsequent claim on June 9, 2008. Director's Exhibit 33. At employer's request, the claim was forwarded to the Office of Administrative Law Judges for a hearing. Director's Exhibits 34, 39. Administrative Law Judge Richard D. Malamphy held a hearing on August 16, 2010, and issued a Decision and Order Denying Miner's Benefits dated March 22, 2011. Director's Exhibits 61, 68. Judge Malamphy subsequently denied claimant's request for reconsideration in an Order dated June 3, 2011. Director's Exhibit 71.

<sup>2</sup> Employer also alleges in its response that claimant's Petition for Review and Memorandum in Support were not timely filed pursuant to 20 C.F.R. §802.211, and requests that the Board reject them accordingly. We deny employer's request and hereby accept claimant's Petition for Review and Memorandum in Support as timely filed.

<sup>3</sup> The Board will apply the law of the United States Court of Appeals for the Tenth Circuit, as the miner's last coal mine employment was in Utah. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1, 5.

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

In considering whether claimant’s petition for modification was timely filed, the administrative law judge first determined, pursuant to 20 C.F.R. §725.479(a), that Judge Malamphy’s order denying benefits on reconsideration became “effective” on June 7, 2011, the date on which it was filed with the district director. Order Granting Summary Decision at 1. The administrative law judge then cited the requirement, set forth in 20 C.F.R. §725.310(a), that a petition for modification be filed “within one year after the denial of a claim.” 20 C.F.R. §725.310(a); Order Granting Summary Decision at 1. The administrative law judge concluded that, because claimant’s petition was not received by the district director until June 15, 2012, more than one year after the date on which Judge Malamphy’s Order was received by the district director, and became effective, the petition was untimely filed. Order Granting Summary Decision at 1. In so doing, the administrative law judge rejected claimant’s assertion that the district director’s statement, that the Proposed Decision and Order dated July 8, 2003 would become final if no action were taken within thirty days of the date of issuance, led claimant to reasonably believe that the same rule applied to Judge Malamphy’s Order. *Id.* at 2. The administrative law judge reasoned that 20 C.F.R. §§725.419(d) and 725.479(a) provide different rules for dispositions issued by a district director than those issued by an administrative law judge, and he was bound to apply 20 C.F.R. §725.479(a) to Judge Malamphy’s Order. *Id.*

On appeal, claimant argues that, in dismissing his petition for modification as untimely, the administrative law judge relied on “inconsistent provisions that create confusion regarding the commencement of the one year period for filing modification requests.” Petitioner’s Memorandum in Support of his Petition for Review at 2. Claimant asserts that the difference between “effective” and “final” dates under 20 C.F.R. §§725.419(d) and 725.479(a) creates confusion in determining the date from which the one year period for submitting a request for modification begins to run and that a close reading of 20 C.F.R. §§725.310, 725.419(d), 725.479(a), and 725.480 establishes that the date that Judge Malamphy’s Order became final, rather than the date that it became effective, began the running of the one-year period set forth in 20 C.F.R. §725.310(a). Claimant maintains that, pursuant to the district director’s statement in his Proposed Decision and Order, Judge Malamphy’s Order became final on July 3, 2011, giving claimant until July 3, 2012 to submit his request for modification. Claimant alleges, therefore, that his request for modification filed on June 15, 2012 was timely filed.

We reject claimant’s arguments. Contrary to claimant’s contention, the controlling regulations in this case are set forth in 20 C.F.R. §§725.310(a) and 725.479(a). As the administrative law judge indicated, the regulation at 20 C.F.R. §725.310(a) provides, in relevant part, that a party may seek to modify a denial of

benefits by filing a request “at any time before one year after the denial of a claim.” 20 C.F.R. §725.310(a); *see* Order Granting Summary Decision at 1. The regulation does not define the phrase “denial of a claim,” thereby leaving room for judicial interpretation. In *Wooten v. Eastern Associated Coal Corp.*, 20 BLR 1-20 (1996), a case involving a petition for modification of a denial of benefits issued by an administrative law judge, the Board held that it construed the phrase “to mean the ‘effective’ denial of a claim” under 20 C.F.R. §725.479(a), and the statutory provisions allowing for modification. *Wooten*, 20 BLR at 1-25. The Board further stated, “[b]ecause a decision and order becomes effective only when filed in the office of the district director . . . the time within which to seek modification is one year from the date on which the decision and order is filed[.]” *Id.*

We hold that, consistent with the Board’s reasoning in *Wooten*, the administrative law judge determined correctly that, under 20 C.F.R. §725.479(a), Judge Malamphy’s Order became effective on June 7, 2011, the date that it was filed in the district director’s office and that, under 20 C.F.R. §725.310(a), claimant had until June 7, 2012 to file his request for modification. We affirm, therefore, the administrative law judge’s finding that claimant’s request for modification, filed on June 15, 2012, was not timely filed, as it is in accordance with applicable law. 20 C.F.R. §§725.310(a), 725.479(a); *Wooten*, 20 BLR at 1-25.

Accordingly, the administrative law judge's Order Granting Summary Decision is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge