

BRB No. 87-3861 BLA

EUGENE DINARDO)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: _____)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order of Victor J. Chao, Administrative Law Judge, United States Department of Labor.

John R. Sexson (United Mine Workers of America), Taylorville, Illinois, for claimant.

Karen N. Blank (Marshall J. Breger, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: BROWN and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, with the assistance of a lay representative, the Decision and Order (86-BLA-3287) of Administrative Law Judge Victor J. Chao 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant filed a Part B claim on March 16, 1972, which was denied on April 26, 1973, and re-examined and denied again on March 18, 1974. Claimant requested a hearing, and Administrative Law Judge Francis J. Eyeran subsequently issued a Decision and Order denying benefits. Claimant filed a Part C claim on June 6, 1974, which was denied by the deputy commissioner on November 11, 1980. Claimant requested a hearing and Administrative Law Judge Aaron Silverman denied benefits on May 31, 1983. Claimant, through a lay representative, sought to initiate modification proceedings on September 13, 1983. The deputy commissioner denied claimant's modification request as untimely and claimant filed a new claim on October 15, 1985. Administrative Law Judge Victor J. Chao first determined that claimant established more than 10 years of coal mine employment. The administrative law judge then considered the claim pursuant to 20 C.F.R. §725.309(c) and found that claimant failed to establish a material change in conditions. Accordingly, benefits were denied. The Director, Office of Workers' Compensation Programs (the Director), responds urging that the case be remanded as the denial of claimant's request for modification as untimely was in error and because Administrative Law Judge Silverman failed to fully consider the medical opinion evidence of record in his Decision and Order of May 31, 1983.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. Stark v. Director, OWCP, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Upon considering claimant's petition for modification, the deputy commissioner stated that it was untimely filed as the petition was filed more than one year after the deputy commissioner's denial of claimant's first Part C claim on November 21, 1980. See Director's Exhibit 27. However, the deputy commissioner's denial of the petition is erroneous as Administrative Law Judge Silverman finally denied the first Part C claim on May 31, 1983 and claimant filed the petition for modification on September 13, 1983, clearly within the time constraint set forth in 20 C.F.R. §725.310. See Director's Exhibits 23, 25, 26; 20 C.F.R. §725.310(a). As a result, the administrative law judge's Decision and Order of November 30, 1987 is vacated and the case is remanded to the deputy commissioner for consideration of claimant's petition for modification of the May 31, 1983 Decision and Order denying benefits. See Motichak v. BethEnergy Mines, Inc., BLR , BRB No. 88-2805 (Oct. 2, 1992); Kott v. Director, OWCP, BLR , BRB No. 91-0561 (Oct. 2, 1992).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge