BRB No. 07-0789 BLA

D.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAMEY COAL COMPANY	)	DATE ISSUED: 06/25/2008
	)	
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 – Award of Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams and Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D. C., for employer.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (05-BLA-5629) of Administrative Law Judge Edward Terhune Miller rendered on a request for modification

of the award of benefits on a subsequent claim[1] 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 determined that the district director's award of benefits on this subsequent claim became final after employer failed to take any action within thirty days of the district director's issuance of a Proposed Decision and Order (PDO) on March 30, 2004. The administrative law judge found that employer was foreclosed from contesting the merits of claimant's entitlement to benefits pursuant to the modification provisions at 20 C.F.R. §725.310, based on employer's failure to respond to the district director's Schedule for the Submission of Additional Medical Evidence (SSAE) and to file a timely controversion of the PDO. The administrative law judge further found that employer had failed to demonstrate a mistake in a determination of fact in the district director's finding that employer waived its right to contest liability through its failure to take timely action with respect to the SSAE and PDO. Consequently, the administrative law judge denied employer's request for modification pursuant to 20 C.F.R. §725.310, and awarded benefits.

On appeal, employer contends that the administrative law judge erred in his application of Section 725.310 by failing to conduct a *de novo* hearing on employer's modification request, including consideration of the merits of claimant's entitlement. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), agrees with employer and urges that the administrative law judge's decision be vacated and the case be remanded for a hearing on the merits of employer's modification request.

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,

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[1] Claimant's original claim, filed on February 3, 1983, was denied by Administrative Law Judge George Fath, and his denial of benefits was finally affirmed by the United States Court of Appeals for the Fourth Circuit on January 31, 1996. Director's Exhibit 1.

More than one year later, claimant requested modification of the prior denial, and Administrative Law Judge Edward Murty, Jr., finding the request untimely, remanded the case to the district director for a new pulmonary evaluation in support of a new claim. Claimant was ruled to have filed a duplicate claim on July 29, 1999, and the claim was denied by Administrative Law Judge Alice M. Craft on December 13, 2001. Director's Exhibit 1. Claimant filed the present subsequent claim on July 3, 2003. Director's Exhibit 3. Based on the date of filing, this claim is governed by the revised regulations that became effective on January 19, 2001. *See* 20 C.F.R. §725.2(c).

and in accordance with applicable law.[2] 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).

Employer contends that the administrative law judge erred in his application of 20 C.F.R. §725.310, by failing to conduct a *de novo* hearing on employer's modification request and consider the medical evidence of record, old and new, in determining whether employer has established a mistake in a determination of fact or a change in conditions. Employer's Brief at 12. Employer also argues that the administrative law judge misapplied 20 C.F.R. §§725.412(b) and 725.419 to preclude modification of the district director's award of benefits. Employer's Brief at 13-14. We agree.

Claimant filed this subsequent claim on July 3, 2003. Director's Exhibit 3. A Department of Labor pulmonary evaluation was performed and admitted into evidence. Director's Exhibit 13. The district director issued an SSAE on December 5, 2003, making preliminary determinations that claimant was entitled to benefits and that employer is the responsible operator.[3] Director's Exhibit 24; 20 C.F.R. §725.410. Employer did not respond to the SSAE. On March 30, 2004, the district director issued a PDO, finding that claimant was entitled to benefits and that employer is the responsible operator. Director's Exhibit 26; 20 C.F.R. §725.418. Again, employer did not respond. On May 27, 2004, in response to correspondence from the district director regarding payment of benefits, employer informed the district director that it had misfiled the PDO, and requested that the district director rescind the PDO or, alternatively, treat employer's letter as a modification request. Director's Exhibit 30; 20 C.F.R. §725.310. The district director treated employer's letter as a modification request, but denied modification. Director's Exhibits 34, 37. Employer requested a hearing and submitted medical evidence. Prior to the hearing, claimant filed a motion to preclude employer from seeking modification based on employer's failure to respond to the PDO.

The administrative law judge, limiting the hearing to a discussion on the motion, denied modification, finding that employer was foreclosed from seeking modification of the district director's award of benefits based on employer's failure to timely respond to either the SSAE or the PDO. Decision and Order at 7. The administrative law judge, applying the holding in *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Duelley*], 104

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[2] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 1.

[3] Employer does not challenge its designation as the responsible operator. 20 C.F.R. §725.412(a)(2); Employer's Brief at 16, n. 5.

Fed. Appx. 912 (4th Cir. July 29, 2004), determined that employer failed to establish good cause for its untimely challenge to the district director's finding of entitlement. Decision and Order at 5-7.

The Director and employer initially point out that *Duelley* was decided under the prior regulatory scheme. Director's Brief at 2; Employer's Brief at 12. Under the current revised regulations, the designated responsible operator is not required to affirmatively challenge claimant's entitlement to benefits, as it was under 20 C.F.R. §725.413 (1999).[4] Section 725.412(b) provides, in part, "[i]f the [responsible] operator fails to file a statement accepting the claimant's entitlement to benefits within 30 days after the district director issues a schedule pursuant to §725.410 of this part, the operator shall be deemed to have contested the claimant's entitlement." 20 C.F.R. §725.412(b). Employer's failure to respond to the district director's SSAE, therefore, had no effect on claimant's burden to establish entitlement to benefits. Thus, the district director's PDO awarding benefits is properly the subject of employer's request for modification. Furthermore, when employer failed to respond to the PDO within thirty days, the PDO became final but was still subject to modification. 20 C.F.R. §725.419(d);[5] *see generally King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001). Employer is entitled to *de novo* consideration of its modification request by the administrative law judge, and new evidence may be admitted into the record, subject to evidentiary limitations. 20 C.F.R. §§725.414, 725.310(b); *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Rose v. Buffalo Mining Co.*, 23 BLR 1-221 (2007). The Director correctly notes that as the proponent of an order terminating an award of benefits, employer now bears the burden of disproving at least one element of entitlement. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121 (1997); *Branham v. BethEnergy Mines*, 20 BLR 1-27 (1996).

Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, in addition to assessing whether there has been a change in conditions or mistake in a determination of fact in a modification proceeding, the adjudicator must exercise the discretion granted under Section 725.310 by assessing other factors relevant to the rendering of justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007). The relevant factors include the

[4] Section 725.413 no longer exists.

[5] Section 725.419(d) provides, in part, that, "[o]nce a proposed decision and order or revised proposed decision and order becomes final and effective, all rights to further proceedings with respect to the claim shall be considered waived, *except as provided in §725.310*." 20 C.F.R. §725.419(d) (emphasis added).

need for accuracy; the diligence and motive of the party seeking modification; and the futility or mootness of a favorable ruling. *Id*. The Court also noted that finality interests may sometimes be relevant to a proper modification request ruling. *Id.* Consequently, we vacate the administrative law judge's decision and remand the case for a hearing on the merits of employer's modification request, and in light of *Sharpe*, instruct the administrative law judge to make an explicit determination on remand as to whether the granting of the modification request would render justice under the Act.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is vacated, and this case is remanded for a hearing and further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge