BRB No. 99-0785 BLA

ROMULADO GRECO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GREAT EASTERN COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
INSERVCO INSURANCE SERVICES, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

George Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (98-BLA-1233) of Administrative Law Judge Ralph A. Romano denying benefits on a claim and a request for modification 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).[1] On September 30, 1998,

[1] Claimant filed his claim for benefits on April 12, 1982, Director's Exhibit 1. In a Decision and Order issued on November 23, 1986, Administrative Law Judge John C. Holmes denied benefits. Judge Holmes found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) but failed to establish total disability pursuant to 20 C.F.R. §718.204(c). Claimant appealed the denial of benefits, but at the same time, filed a request for modification with the Office of Administrative Law Judges. The Board affirmed Judge Holmes's denial of benefits, but held that claimant's modification request should have been initiated before the district director, and accordingly remanded the claim to the district director. *Greco v. Great Eastern Coal Co.*, BRB Nos. 87-2336 BLA and 88-2310 BLA (Mar. 27, 1992)(unpub.). The district director denied modification and, subsequently, Administrative Law Judge Ralph A. Romano issued a Decision and Order denying modification and benefits. Claimant appealed and the Board affirmed in part and vacated in part the administrative law judge's Decision and Order and remanded the case for further consideration pursuant to Section 718.204(c)(4). *Greco v. Great Eastern Coal Co.*, BRB No.

the administrative law judge issued an "Order and Briefing Schedule" denying claimant's request for a hearing on his request for modification and thereafter issued the Decision and Order now on appeal. The administrative law judge found that the instant claim constituted a request for modification pursuant to 20 C.F.R. §725.310 and was thus governed by the holding of the United States Court of Appeals, within whose jurisdiction this case arises, in *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). Decision and Order at 3-4. The administrative law judge further found that claimant failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) and thus found that claimant failed to establish a change in conditions or a mistake in the determination of fact pursuant to Section 725.310. Decision and Order at 4-8. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge applied the wrong legal standard in evaluating the request for modification and further erred in failing to find claimant totally disabled pursuant to Section 718.204(c). Employer responds and urges affirmance of the denial 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,

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94-2352 BLA (Aug 30, 1995)(unpub.). On remand, the administrative law judge found that the evidence failed to establish total disability pursuant to Section 718.204(c)(4) and that claimant thus failed to establish modification. Accordingly, benefits were denied. Subsequent to an appeal by claimant, the Board affirmed the denial of benefits. *Greco v. Great Eastern Coal Co.*, BRB No. 97-0183 BLA (Sept. 25, 1997)(unpub.). Claimant filed the instant request for modification on June 8, 1998. After denial by the district director, the administrative law judge issued an order finding no good cause existed to conduct a hearing and, on April 19, 1999, the administrative law judge issued the Decision and Order denying modification and benefits from which claimant now appeals.

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

Section 22 of the Longshore and Harbor Workers' Compensation Act [LHWCA] specifies that modification requests are to be reviewed "in accordance with the procedure prescribed in respect of claims in section [19 of the LHWCA, 33 U.S.C. §919]," 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a); *accord* 20 C.F.R. §725.310(b) ("modification proceedings shall be conducted in accordance with the provisions of [20 C.F.R. Part 725, setting forth the procedures for the adjudication of black lung claims] as appropriate"); *see Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998).

In addition to the statute, the regulations addressing black lung claims provide that "[i]n any claim for which a formal hearing is requested or ordered,..., the [district director] shall refer the claim to the Office of Administrative Law Judges for a hearing." 20 C.F.R. §725.421(a). The regulations also provide that "[a]ny party to a claim (*see* 20 C.F.R. §725.360) shall have the right to a hearing concerning any contested issue of fact or law unresolved by the [district director]. 20 C.F.R. §725.450.

Thus, as claimant contends, 30 U.S.C. §932(a), as implemented by 20 C.F.R. §§725.450, 725.451, 725.421(a), mandates that an administrative law judge must hold a hearing on any claim, including a request for modification, whenever a party requests such a hearing, unless such hearing is waived by the parties, *see* 20 C.F.R. §725.461(a), or a party requests summary judgement, *see* 20 C.F.R. §725.452(c); *see also* 20 C.F.R. §725.310(c); *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Robbins*, *supra*; *Cunningham*, *supra*; *Arnold v. Peabody Coal Co.*, 41 F.3d 1203, 1209, 19 BLR 2-22, 2-33 (7th Cir. 1994). Consequently, we vacate the administrative law judge's Decision and Order and remand the case to the administrative law judge to conduct a hearing *de novo* on claimant's request for modification pursuant to Section 725.310, *see Keating*, *supra*, and we decline to address claimant's other contentions regarding the administrative law judge's finding that claimant did not establish a basis for modification on the merits.[2]

[2] In its response brief, employer asserts that the administrative law judge has not erred in denying claimant a hearing pursuant to his request for modification. Employer asserts that the United States Court of Appeals for the Third Circuit has made no such pronouncement on the matter and further asserts that the instant case is distinguishable from case law arising within the jurisdiction of other circuits, *see e.g. Cunningham*, *supra*, inasmuch as the administrative law judge in the instant case previously had "ample opportunity to observe the demeanor and manner and make credibility determinations." Employer's Response Brief at 14. We reject this assertion and hold that the regulations do not contemplate the exception

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

that employer asserts. *See* 20 C.F.R. §725.461(a).