

BRB No. 99-0985 BLA

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

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

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

Barry H. Joyner (Henry L. Solano, 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0092) of Administrative Law Judge Ralph A. Romano 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). This claim is before the Board for the third time.¹ The administrative law judge issued an Order to Show Cause on

¹ Claimant filed a claim on October 1, 1993, Director's Exhibit 1. In a Decision and Order issued on December 19, 1994, the administrative law judge denied benefits, Director's Exhibit 32. Claimant appealed and the Board vacated the denial of benefits and remanded the case for reconsideration, Director's Exhibit 35. *Macknis v. Director, OWCP*, 95-0906 BLA (Sep. 27, 1996)(unpub.). On remand, the

November 30, 1998, on why a hearing should be held on claimant's request for modification. By letter dated December 12, 1998, claimant responded, requesting a hearing before the administrative law judge. On December 17, 1998, the administrative law judge issued an order stating that no hearing would be held on claimant's request for modification. Subsequently, the administrative law judge issued his Decision and Order denying benefits. On appeal, claimant contends that the administrative law judge erred in not providing claimant a hearing on his request for modification, as claimant had requested. Alternatively, claimant contends that the administrative law judge erred in denying claimant's request to submit evidence in response to evidence submitted by the Director, Office of Workers' Compensation Programs (the Director), and in finding that claimant did not establish a basis for modification pursuant to 20 C.F.R. §725.310. In response, the Director has filed a Motion to Remand, agreeing with claimant's contention that the administrative law judge erred in denying claimant a hearing on his request for modification and, therefore, the Director requests that the case be remanded to the administrative law judge for a hearing.²

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 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.*,

administrative law judge again denied benefits in a decision issued on June 3, 1997, Director's Exhibit 36. Claimant appealed, but the Board dismissed claimant's appeal, Director's Exhibit 37. *Macknis v. Director, OWCP*, 97-1331 BLA (Oct. 24, 1997)(unpub. order). Subsequently, claimant filed a request for modification on June 23, 1998, Director's Exhibit 38, and claimant ultimately requested a hearing before the Office of Administrative Law Judges, Director's Exhibits 44-45.

² We accept the Director's Motion to Remand as his response brief, and herein decide the case.

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 §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 both claimant and the Director contend, 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 claim for modification filed with the district director, 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, BLR (4th Cir., Oct. 21, 1999); *Robbins, supra*; *Cunningham, supra*; *Arnold v. Peabody Coal Co.*, 41 F.3d 1203, 1209, 19 BLR 2-22, 2-33 (7th Cir. 1994); *Worrell v. Consolidation Coal Co.*, 8 BLR 1-158 (1985). 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 v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), 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.³

³ Claimant's contention that the administrative law judge erred in prohibiting claimant from submitting evidence in response to evidence submitted by the Director

is moot because the parties will have an opportunity to submit evidence prior to the hearing on remand, see 20 C.F.R. §725.456.

Accordingly, the administrative law judge's Decision and Order denying modification 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