

BRB No. 04-0860 BLA

VIRGINIA E. RICHARDS)	
(Widow of ARLIE RICHARDS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
UNION CARBIDE CORPORATION)	DATE ISSUED: 08/25/2005
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Dismissing Duplicate Claim and Order Denying Claimant's Motion for Reconsideration of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, lay representative.

Kathy L. Snyder, (Jackson Kelly PLLC), Charleston, West Virginia.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 Law Judges.

PER CURIAM:

Claimant,¹ by a lay representative, appeals the Decision and Order Dismissing Duplicate Claim and Order Denying Claimant's Motion for Reconsideration (04-BLA-5409) of Administrative Law Judge Janice K. Bullard (the administrative law judge) 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 survivor's claim is before the Board for a third time.

Claimant initially filed a timely claim for survivor's benefits on January 22, 1994, which was denied by Administrative Law Judge Charles P. Rippey in a Decision and Order issued on August 21, 1995. Director's Exhibit 2. On September 12, 1996, the Board issued a Decision and Order vacating the denial of benefits. The Board remanded the claim for a *de novo* hearing on procedural and substantive grounds, finding that claimant was improperly denied assistance of counsel and finding that all relevant evidence, in particular the miner's death certificate, listing pneumoconiosis as a significant condition contributing to the miner's death, was not considered. *Richards v. Union Carbide Corp.*, BRB No. 95-2206 BLA (Sep. 12, 1996) (unpub.).

Pursuant to the Board's remand of the case, Administrative Law Judge Clement J. Kennington issued a Decision and Order on July 9, 1998, denying benefits because claimant was unable to show that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205. Director's Exhibit 2. Subsequent to an appeal by claimant, the Board affirmed the denial of benefits. *Richards v. Union Carbide Corp.*, BRB No. 98-1447 BLA (Jul. 29, 1999) (unpub.).

Claimant filed another survivor's claim on June 4, 2002. Director's Exhibit 1. The administrative law judge found that because this second claim was filed more than one year after the prior survivor's claim was denied, the second survivor's claim constituted a duplicate survivor's claim pursuant to 20 C.F.R. §725.309 and thus dismissed the claim. Decision and Order Dismissing Duplicate Claim at 2. Claimant sought reconsideration of this dismissal. On July 14, 2004, the administrative law judge denied claimant's Motion for Reconsideration, and reaffirmed her previous finding that claimant's second survivor's claim was dismissed.

On appeal, claimant contends, that in light of correspondence sent to Judge Kennington and the President of the United States disputing the denial of benefits in her

¹ Claimant, Virginia E. Richards, is the surviving spouse of the miner, Arlie C. Richards, who died on January 22, 1994. Director's Exhibit 11. The death certificate lists the immediate cause of death as congestive heart failure due to myocardial infarctions, coronary artery disease and hyperlipidemia. Coal workers' pneumoconiosis is also listed as an "other significant condition contributing to the miner's death." *Id.*

first survivor's claim, which sufficed as either a motion for reconsideration or a petition for modification, claimant's initial survivor's claim was still pending. Employer responds, urging that the administrative law judge's dismissal be affirmed. In the alternative, employer argues that, if the Board determines that claimant's initial survivor's claim is still pending, liability, if any, should be transferred to the Black Lung Disability Trust Fund. The Director, Office of Workers' Compensation Programs, (the Director) urges the Board to vacate the administrative law judge's decisions and hold that claimant's initial survivor's claim is still pending before the Office of Administrative Law Judges as claimant filed a timely motion for reconsideration of the denial of that claim which has never been addressed. In addition, the Director contends that since employer has failed to demonstrate how its defense of this claim would be prejudiced, transfer to the Black Lung Disability Trust Fund is inappropriate.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

As noted above, pursuant to the Board's remand order, Judge Kennington issued a Decision and Order on July 9, 1998, denying benefits on the claimant's first survivor's claim. Review of the record demonstrates that subsequent to this Decision and Order, on July 26, 1998, claimant submitted a letter to Judge Kennington, in which she generally challenged the administrative law judge's denial of benefits. Along with her letter, claimant included an excerpt from the Decision and Order awarding benefits on the miner's claim, which noted medical evidence supportive of a finding of the existence of pneumoconiosis. Subsequently, on August 1, 1998, claimant submitted a second letter to Judge Kennington. The record does not demonstrate whether Judge Kennington took any action on these letters. At the same time, on August 1, 1998, the record demonstrates that claimant, without the assistance of counsel, submitted a letter to the Board seeking to appeal Judge Kennington's denial of benefits. The record does not reveal that Judge Kennington ever notified the Board of claimant's letters to him, or that the Board knew that claimant had filed such letters. Accordingly, the Board, on August 10, 1998, granted claimant's appeal, and, on July 29, 1999, issued its Decision and Order affirming Judge Kennington's denial of benefits.

After reviewing the relevant evidence of record, we conclude that claimant's July 26, 1998, letter to Judge Kennington constituted a motion for reconsideration of Judge Kennington's July 9, 1998 Decision and Order denying benefits. See 20 C.F.R. §802.206. Under Section 802.206, claimant is allowed thirty days from the date upon which the Decision and Order is served on all parties by the administrative law judge in which to file a motion for reconsideration of that Decision and Order. 20 C.F.R.

§802.206(b)(2)(a). Section 802.206 further provides that if a timely motion for reconsideration of the administrative law judge's Decision and Order is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed without prejudice as premature. 20 C.F.R. §802.206(f). Thus, although the Board had no notification that a motion for reconsideration of Judge Kennington's denial had been filed, the Board had no jurisdiction over the appeal sought by claimant on August 1, 1998, of that denial. 20 C.F.R. §802.206(f); *see Harmar Coal Co v. Director, OWCP [Rostis]*, 926 F.2d 302, 309, 14 BLR 2-182, 2-193 (3d Cir. 1991); *see also Jones v. Illinois Central Gulf Railroad*, 846 F.2d 1099, 11 BLR 2-150 (7th Cir. 1988). Accordingly, we vacate the Board's Order granting claimant's petition for review and the Board's Decision and Order of July 29, 1999, affirming Judge Kennington's denial of benefits. *Richards*, BRB No. 98-1447 BLA, and we remand this case to the Office of Administrative Law Judges for consideration of claimant's July 26, 1999 motion for reconsideration, as claimant's first claim is still pending. 20 C.F.R. §802.206(f).²

Furthermore, because claimant's second survivor's claim was filed on June 4, 2002, when claimant's motion for reconsideration was still pending before Judge Kennington, it merged with the earlier claim for all purposes pursuant to 20 C.F.R. §725.309(b). As a result, it was not a subsequent claim and the administrative law judge was without jurisdiction to issue a decision on the merits or on reconsideration. Hence, the Board also vacates these decisions and claimant's present appeal is dismissed without prejudice as premature.

Finally, we reject employer's assertion that, should the Board determine that claimant's initial survivor's claim is still pending, its due process rights would be violated and liability for benefits, if any, should be transferred to the Black Lung Disability Trust Fund as claimant never provided it with a copy of the July 26, 1998 letter she sent to Judge Kennington, citing *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000) and *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999). Employer's reliance upon these decisions is misplaced.

In *Holdman*, the Director lost the record file and ignored repeated attempts by the Board and the administrative law judge to reconstruct the record and resolve the issue of entitlement. The loss of the record file resulted in employer not having access to certain evidence. Accordingly, the United States Court of Appeals for the Sixth Circuit held that

² Insofar as claimant's letter to Judge Kennington constitutes a timely motion for reconsideration, *see* 20 C.F.R. §802.206, we have no occasion to address claimant's alternative assertion: that claimant's letters to the President of the United States filed subsequent to the Board's July 30, 1999 Decision and Order, constitute a timely petition for modification. 20 C.F.R. §725.310.

liability should be transferred to the Trust Fund because, as employer argued, it would be a violation of fundamental fairness to require the operator to defend a claim where the Director had lost the transcript and medical evidence and failed for fourteen years to resolve the issue.

In *Borda*, the Director failed to notify employer of claimant's request for modification and to schedule a hearing on claimant's claim. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, held that because the miner remained in coal mine employment until 1987, this delay in notification until 1988 prevented employer from mounting a defense to the claim pursuant to Section 727.203(b)(1) (rebuttal of the presumption of entitlement is established by evidence that claimant is, in fact, doing his usual coal mine work). The court further stated that it was "not the mere fact of the government's delay that violated due process but rather the prejudice resulting from such a delay," that caused the denial of due process. *Borda*, 171 F.3d at 182, 21 BLR at 2-560. In so holding, the court reaffirmed its holding in *Grigg v. Director, OWCP*, 28 F.2d 416, 18 BLR 2-99 (4th Cir. 1994), that the guarantee of due process was not violated, absent a showing of specific prejudice.

Employer's contention that its due process rights have been violated in the instant case is unpersuasive. Employer has failed to demonstrate, or even allege, any specific prejudice resulting from the delay in this case. On remand, employer will be able to present the same assertions and defenses available to it when the claim was initially filed. Employer was timely notified of the claim, developed evidence, and participated in every stage of the adjudication. Accordingly, we reject employer's assertion that liability for benefits, if any, should be transferred to the Black Lung Disability Trust Fund.

Accordingly, the administrative law judge's Decision and Order Dismissing Duplicate Claim and Order Denying Claimant's Motion for Reconsideration are vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge