

BRB No. 00-0220 BLA

DONALD CLEVINGER)
)
 Claimant-Petitioner)
)
 v.)
)
 MARY HELEN COAL COMPANY,) DATE ISSUED:
 INCORPORATED)
)
 and)
)
 AMERICAN BUSINESS & MERCANTILE)
 INSURANCE MUTUAL, INCORPORATED)
)
 Employer/Carrier)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order Dismissing Claim and Order Cancelling Hearing of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Donald Clevenger, Sidney, Kentucky, *pro se*.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Dismissing Claim and Order Cancelling Hearing (1999-BLA-888) of Administrative Law Judge Daniel J. Roketenetz 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). The administrative law judge found that claimant failed to respond to an Order to Show Cause within the requisite twenty-day period and that, pursuant to 20 C.F.R. §725.465(a)(2), claimant's request for modification was dismissed due to abandonment and failure to comply with an order of the administrative law judge. Employer, in response, urges that the dismissal of claimant's request for modification be affirmed. The Director, Office of Workers' Compensation Programs, as party-in-interest, has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant filed a claim for benefits on October 21, 1986, Director's Exhibit 1, which was denied by Administrative Law Judge Bernard J. Gilday, Jr. in a Decision and Order issued on March 9, 1989. Director's Exhibit 45. Judge Gilday found that the evidence of record failed to establish the presence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 45. Subsequent to an appeal by claimant, the Board affirmed the denial of benefits. *Clevenger v. Mary Helen Coal Company*, BRB No. 89-1133 BLA (Jun. 27, 1991)(unpub.). On October 22, 1991, claimant filed a request for modification, Director's Exhibit 52, which was denied by the Department of Labor, and subsequently, by Judge Gilday in a Decision and Order issued on November 5, 1992, Director's Exhibit 71. Subsequently, claimant submitted a new medical opinion which was treated by the Department of Labor as a request for modification, and denied because claimant was unable to establish a mistake in a determination of fact or a change in conditions, Director's Exhibits 72, 76. Subsequently, claimant again submitted another new medical opinion, Director's Exhibit 81, which was considered by the Department of Labor to be a second request for modification and denied on the same basis as the first such request, Director's Exhibit 86. Claimant requested a hearing, Director's Exhibit 87, and subsequent to the hearing of April 24, 1996, Director's Exhibit 102, Administrative Law Judge Michael P. Lesniak issued a Decision and Order denying modification, Director's Exhibit 165. Subsequent to an appeal by claimant, the Board affirmed the administrative law judge's Decision and Order denying modification. *Clevenger v. Mary Helen Coal Company*, BRB No. 97-0120 BLA (Sep. 25, 1997)(unpub.). The Board thereafter denied claimant's request for reconsideration. *Clevenger v. Mary Helen Coal Company*, BRB No. 97-0120 BLA (Order on Motion for Reconsideration)(Nov. 18, 1997)(unpub.). Claimant then filed a third request for modification with the Department of Labor, Director's Exhibit 114, the ultimate denial of which constitutes the basis for the instant appeal.

On October 15, 1998, claimant filed a request for modification with the Department of Labor, but submitted no new evidence in support of this request. Director's Exhibits 113, 114. Subsequently, claimant was informed that because no new evidence was submitted with his request for modification, the request would be evaluated on the basis of whether a mistake in a determination of fact was committed in the prior decision. Director's Exhibit 115a. After the case was set for hearing, Director's Exhibit 117, claimant, on September 4, 1999, indicated that he wished to dispense with the hearing and to have the modification request decided based upon the documentary record. Director's Exhibit 115. On September 13, 1999, employer submitted a motion requesting a summary decision on claimant's modification request. Pursuant to that motion, the administrative law judge, issued on September 15, 1999, an "Order to Show Cause Why Employer's Motion for Summary Decision Denying Benefits Should Not be Granted." Claimant was given twenty days to respond to this Order, but failed to do so. On October 21, 1999, the administrative law judge issued the Order Dismissing Claim and Order Cancelling Hearing.

In *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that a claimant is not required to plead a specific ground as the basis for a request for modification, that he need not submit new evidence with such a request, and the court cited with approval *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In *Jessee*, the Fourth Circuit concluded that any mistake of fact may be corrected, including the ultimate fact. *Jessee*, 5 F.3d at 725, 18 BLR at 2-29; see *The Youghioghny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 1999 WL 1260157 (6th Cir. 1999)(Wellford, J., dissenting). The administrative law judge has failed to consider claimant's current request for modification in a manner consistent with the holding of the Sixth Circuit in *Worrell*. Accordingly, we must vacate the administrative law judge's "Order Dismissing Claim and Order Cancelling Hearing" and remand the claim to the administrative law judge for consideration of claimant's request pursuant to the holding in *Worrell*.

Accordingly, the administrative law judge's Order Dismissing Claim and Order Cancelling Hearing is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

² Inasmuch as claimant has indicated that he wished to forego a hearing and to have his modification request decided based upon the evidence of record, claimant has waived his right to a hearing. See *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge