

BRB No. 07-0334 BLA

H. A.)
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 Claimant-Petitioner)
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 v.)
)
 CLINCHFIELD COAL COMPANY) DATE ISSUED: 12/21/2007
)
 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 – Denying Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2005-BLA-00072) of Administrative Law Judge Stephen L. Purcell 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). On March 17, 2005, the district director had issued a Proposed Decision and Order denying the claim by reason of abandonment after claimant failed to satisfy the district director's Order to Show Cause, issued on January 6, 2005, by not sending employer a signed medical release and history. The district director subsequently denied claimant's motion for reconsideration, by letter dated March 31, 2005. Following claimant's timely request for a hearing pursuant to 20 C.F.R. §725.409(b) (2000)¹, this case was assigned to the administrative law judge, who concluded that the district director properly denied the claim.

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

On appeal, claimant contends that the administrative law judge erred in upholding the district director's denial of the claim by reason of abandonment. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a response at this time.

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, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The pertinent regulation provides that a claim may be denied at any time by the deputy commissioner³ by reason of abandonment where the claimant fails: (1) To undergo a required medical examination without good cause; or, (2) To submit evidence sufficient to make a determination of the claim; or, (3) To pursue the claim with reasonable diligence. 20 C.F.R. §725.409(a)(2000). The regulation further provides that:

If the deputy commissioner determines that a denial by reason of abandonment is appropriate, he or she shall notify the claimant of the reasons for such denial and of the action which must be taken to avoid a denial by reason of abandonment. ...

20 C.F.R. §725.409(b)(2000).

The district director's actions are consistent with subsection (a) and the above-referenced portion of subsection (b) of the regulation, as the January 6, 2005 Order to Show Cause instructed claimant to show cause within 30 days, "why the claim should not be dismissed by reason of abandonment, pursuant to Section 725.408 and 725.409 of the regulations, for failure of the claimant to submit evidence sufficient to make a

effective on January 19, 2001, and are codified at 20 C.F.R. Parts 718, 722, 725, and 726. However, as the revisions to the regulation at 20 C.F.R. §725.409 apply only to claims filed after January 19, 2001, they are not applicable to this claim filed on August 16, 1978. 20 C.F.R. §725.2.

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 (1989) (*en banc*).

³ The deputy commissioner is now referred to as the district director, as reflected in the amendments to the regulations.

determination of the claim and for failure to pursue the claim with reasonable diligence.” Director’s Exhibit 210. The Order to Show Cause further instructed that claimant “may satisfy this Order by executing the [medical history form and medical authorization forms], sending the documents to the responsible operator, and certifying these actions to the District Director.” *Id.*

Although the administrative law judge found that denial of the claim by reason of abandonment was appropriate because claimant “was properly informed that his claim would be denied as abandoned ... [but] did not comply with the action requested and was fully capable of doing so prior to the issuance of the March 17, 2005 order denying the claim,” Decision and Order at 6, the administrative law judge failed to apply the latter requirements of Section 725.409(b)(2000). This regulation continues:

If there is no response to the notice within 30 days after such notice is sent, the claim shall be considered denied by reason of abandonment. If the claimant responds in a timely fashion, indicating a desire to pursue the claim, by requesting a hearing or indicating the intent to submit additional evidence, the deputy commissioner *shall*, if a hearing is requested, proceed in accordance with §725.412 or *allow a reasonable time of not less than 60 days* for the claimant to take the specified remedial action. If the claimant completes the action requested within the time allowed, the claim shall be developed, processed and adjudicated as specified in this part. *If the claimant does not fully comply with the action requested by the deputy commissioner, the deputy commissioner shall so notify the claimant.* If the claimant does not request a hearing or fully comply with the action requested by the deputy commissioner within 30 days of such notification, the claim shall be considered denied by reason of abandonment, except that a new claim may be filed at any time and new evidence submitted where the requirements of §725.310 are not met.

20 C.F.R. §725.409(b)(2000) (italics added).

Claimant’s counsel responded to the Order to Show Cause in a timely manner, definitively indicating an intent not to abandon the claim;⁴ thus, the district director was

⁴ On January 12, 2005, claimant’s counsel represented in his response letter that he would send employer’s counsel the authorized release; that claimant intended to submit medical examination evidence but was unable to undergo an examination at the time due to illness; and, that claimant was too ill to fill out paperwork. Director’s Exhibit 212.

obligated to allow claimant a reasonable time of not less than sixty days to produce the requested documents, and if claimant failed to fully comply within the time allowed, to issue a final notification requesting full compliance within an additional 30 days. Although the claims examiner acknowledged claimant's counsel's response on January 15, 2005 and indicated that claimant had not yet satisfied the Order to Show Cause, Director's Exhibit 213, the district director failed to give claimant the final notice required under Section 725.409(b)(2000). Thus, contrary to the administrative law judge's finding, the district director's actions do not comport with the mandates of the regulation.

The extreme sanction of dismissal is warranted only where the record exhibits a clear pattern of delay or contumacious conduct. *Howell v. Director, OWCP*, 7 BLR 1-259 (1985); see *Kephart v. Director, OWCP*, 701 F.2d 22, 5 BLR 2-58 (3d Cir. 1983); *Reizakis v. Loy*, 490 F.2d 1132 (4th Cir. 1974); *Flaska v. Little River Marine Construction Co.*, 398 F.2d 885 (5th Cir. 1968). A review of the record indicates that, rather than a clear pattern of delay or contumacious conduct, claimant pursued his claim since 1978; his counsel timely responded to the Order to Show Cause, explaining that claimant intended to pursue the claim but was too ill to undergo a medical examination and complete paperwork; the district director issued the Proposed Decision and Order denying the claim by reason of abandonment on March 17, 2005, without complying with the requirements of Section 725.409(b)(2000); and on March 24, 2007, claimant's counsel requested reconsideration explaining that claimant's episodes of dementia and inability to use his hands caused him to need more time than normal to make his responses. Director's Exhibits 212, 217. Thus, in light of this record, we hold that the administrative law judge's finding that the claim was properly denied by reason of abandonment is not supported by substantial evidence.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is vacated, and this case is remanded to the district director to apply Section 725.409(b)(2000) in its entirety, consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge