

BRB Nos. 98-0453 BLA  
and 94-0578 BLA

JAMES R. GUMP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
CONSOLIDATED COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Denying Modification and the Decision and Order Denying Request for Modification or Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

William S. Mattingly and Kathy L. Snyder (Jackson & Kelly), Morgantown, West Virginia, for employer.

Rodger Pitcairn (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, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Denying Modification and the Decision and Order Denying Request for Modification or Reconsideration (97-BLA-1827) of Administrative Law Judge Thomas M. Burke denying a request for modification of an award of 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). In his original Decision and

Order, the administrative law judge credited claimant with forty-seven years of coal mine employment and found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge further found total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204(b), (c)(2) and (c)(4) and awarded benefits as of November 1, 1985, the month in which the claim was filed. Employer appealed and in *Gump v. Consolidated Coal Co.*, BRB No. 89-3326 BLA (Apr. 8, 1993)(unpub.), the Board affirmed the administrative law judge's findings of total disability due to pneumoconiosis arising out of coal mine employment, but vacated the administrative law judge's onset date determination and remanded the case for reconsideration of this issue.

In his Decision and Order on Remand - Awarding Benefits issued September 23, 1993, the administrative law judge acknowledged that by letter dated July 6, 1993, employer had filed a Motion for Modification and Remand urging consideration of new evidence. Director's Exhibits 84, 88. The administrative law judge denied the motion on the basis that it was outside the scope of the Board's remand order and only reconsidered the evidence regarding the onset date of total disability. In his subsequent Decision and Order Denying Request for Modification or Reconsideration issued December 16, 1993, the administrative law judge acknowledged that by letter dated October 14, 1993, employer sought either modification or reconsideration of the September 23, 1993, Decision and Order on Remand - Awarding Benefits. The administrative law judge rejected employer's request for reconsideration since employer sought to have additional medical evidence considered. In addition, the administrative law judge denied employer's modification request, noting that such a request must be initiated before the district director. Director's Exhibit 90.

Employer appealed the administrative law judge's decision to the Board and the appeal was assigned docket number BRB No. 94-0578 BLA. By letter dated February 8, 1994, while the case was pending at the Board, employer filed a motion for modification and remand to the district director. By Order dated March 10, 1994, the Board dismissed employer's appeal and remanded the case to the district director for processing of the modification request. The district director obtained new evidence and also included the file from the denied survivor's claim in the record at Director's Exhibit 110.<sup>1</sup> Employer also submitted new evidence, Director's Exhibit 100, but the district director denied modification. Director's Exhibit 104. Employer then requested a formal hearing and the case was referred to the Office of Administrative Law Judges. Director's Exhibit 112. The administrative law judge decided this case on the record and found that the recently submitted evidence was insufficient to establish a change in conditions or mistake in a determination of fact that would warrant modification pursuant to 20 C.F.R. §725.310. Accordingly, modification of the award of benefits was denied.

---

<sup>1</sup> The miner died on May 25, 1992. Director's Exhibit 100.

On appeal herein, employer asserts the administrative law judge erred in failing to conduct a hearing prior to issuing his Order Denying Modification. Employer also alleges that the administrative law judge erred in his weighing of the medical opinion of Dr. Pinkerton against the contrary opinions of Drs. Kleinerman, Morgan and Lapp and that he also erred in failing to consider the medical opinions of Drs. Naeye, Fino and Renn. Employer also argues it was denied due process in the long delay in processing the claim at the district director level. Claimant did not file a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge improperly denied employer a hearing on its request for modification and agrees that employer should have been provided with a hearing, but also argues that employer was not prejudiced by the delay at the district director level.

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

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Initially, we consider employer's assertion concerning the administrative law judge's failure to hold a hearing on modification. Employer specifically contends that the administrative law judge erred in failing to afford it a formal hearing on its request for modification, asserting that the administrative law judge's failure to conduct such a hearing deprived it of due process of law and of its right to a fair hearing. Any party to a claim may request, in writing, an administrative hearing on contested issues of law or fact. 20 C.F.R. §725.451. The Board has held that an administrative law judge is not required to hold a hearing on modification, but rather has "the discretion to decide whether a modification hearing is necessary to render justice in a particular case." *See Napier v. Director, OWCP*, 17 BLR 1-111, 1-113 (1993). The administrative law judge stated that since there were no credibility determinations to be made and no party indicated that a hearing was necessary, the petition for modification would be decided on the record. Order Denying Modification at 2. Thus, employer was not afforded a hearing before the administrative law judge on modification, even though it requested one at the time it submitted the new evidence at the district director level. In view of the unique facts presented in this case, we believe that the

administrative law judge's determination to render a decision on the record does not render justice, and we agree with employer and the Director that based on the facts of this case, employer is entitled to a hearing as he has not waived his right to a hearing or requested a decision on the documentary evidence. *See* 20 C.F.R. §725.461(a). We, therefore, vacate the administrative law judge's denial of modification and remand the case to the administrative law judge to grant employer's request for a formal hearing on his modification request and to conduct a *de novo* hearing on the contested issues.

On remand, claimant must be allowed to respond to the evidence proffered by employer as well as the evidence prepared at the direction of the district director. Inasmuch as our decision returns the parties to their position prior to the denial of the request for modification, we need not address employer's other arguments on appeal since it would be premature to do so. Also, employer has failed to identify, with particularity, how he has been prejudiced by the district director's delay in processing its modification request and we decline to provide employer with its suggested remedy of transferring the liability for payment of benefits. Further, the administrative law judge did not discuss all of the new evidence of record submitted by employer in concluding that no mistake in a determination of fact was made in his prior decision. Therefore, on remand the administrative law judge must reconsider whether the previous findings of fact were in error in light of all of the evidence. *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

Moreover, as we are remanding this case to the administrative law judge to consider employer's modification request, the reinstated appeal of the administrative law judge's Decision and Order Denying Request for Modification or Reconsideration issued December 16, 1993, and assigned docket number BRB No. 94-0578 BLA, is again dismissed. Once a final decision on the petition for modification is issued by the administrative law judge, the case may be reinstated on the Board's docket if modification is denied. 20 C.F.R. §802.301(c). The case will be reinstated by the Board only if the petitioner requests reinstatement. The request for reinstatement must be filed with the Board within thirty (30) days of the date the Order on Modification is filed and must be identified by the Board's docket number, BRB No. 94-0578 BLA. If reinstatement is requested, the Board will consider only the issues raised in employer's appeal of the Decision and Order issued December 16, 1993. In the event the administrative law judge denies modification and employer wishes the Board to consider not only the original appeal, but also whether the denial of modification was erroneous, a Notice of Appeal must also be filed with the Board within thirty (30) days of the date the Order on Modification is filed. 20 C.F.R. §802.205. The appeal of the Order on Modification will be assigned a new docket number and will be consolidated with BRB No. 94-0578 BLA.

Accordingly, employer's appeal of the administrative law judge's Decision and Order

Denying Request for Modification or Reconsideration is dismissed and the Order Denying Modification of the administrative law judge is vacated and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

JAMES F. BROWN  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge