BRB No. 01-0430 BLA

ELIZABETH ZENDROSKY (Widow of BENJAMIN ZENDROSKY) Claimant- Petitioner v. BLASCHAK COAL COMPANY and TRAVELERS INSURANCE Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: DECISION AND ORDER

Party-in-Interest

Appeal of the Order of Dismissal of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Elizabeth Zendrosky, Girardville, Pennsylvania, *pro se.*

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin), Bethlehem, Pennsylvania, for employer.

Timothy S. Williams (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Order of Dismissal (01-BLA-0019) of Administrative Law Judge Ainsworth H. Brown denying benefits on a survivor's 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 relevant procedural history of this case is as follows: Claimant filed her initial application for survivor's benefits on October 6, 1998. Director's Exhibit 1. In a Decision and Order dated February 29, 2000, the administrative law judge accepted the parties' stipulation that the miner had twenty-nine years of coal mine employment and considered the claim pursuant to the regulations set forth in 20 C.F.R. Part 718 (2000). The administrative law judge also accepted the parties stipulation that the miner suffered from coal worker's pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b) (2000). However, the administrative law judge found that the medical evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, the administrative law judge denied benefits in this survivor's claim. Director's Exhibit 31.

Claimant filed a timely request for modification on May 24, 2000. 20 C.F.R. §725.310(a); Director's Exhibit 32. In a Proposed Decision and Order Denying Request for Modification, the district director stated that claimant submitted no new evidence in support of her request for modification and, thus, it was considered to be based on a mistake in a determination of fact. The district director further stated that the case was, therefore, being forwarded to the administrative law judge for a hearing. Director's Exhibit 36. The case was then transferred to the Office of Administrative Law Judges and again assigned to Administrative Law Judge Ainsworth H. Brown (the administrative law judge). On November 15, 2000, the administrative law judge issued a Notice of Hearing scheduling the case for March 30, 2001. Employer's counsel submitted a letter

[1] Claimant is the widow of Benjamin Zendrosky, the miner, who died on September 14, 1997. Director's Exhibit 5.

dated November 16, 2000, noting their appearance in the case on behalf of employer and also stating that they were still contesting claimant's entitlement to benefits and requesting that the survivor's claim "...be once again denied and dismissed." On December 7, 2000, the administrative law judge responded with an Order to Show Cause setting forth the grounds available for claimant's modification request and also the guidelines for the submission of new evidence. In addition, the Order provided claimant fifteen days in which to show why her request for a hearing should not be denied and dismissed. Claimant did not respond to this Order to Show Cause. The administrative law judge proceeded to issue the Order of Dismissal dated January 7, 2001 that is the subject of the present appeal.

In response to claimant's appeal of the Order of Dismissal, the Director, Office of Workers' Compensation Programs (the Director), requests that the Board vacate the administrative law judge's Order of Dismissal and remand the case for further proceedings. In particular, the Director argues that claimant need not submit new evidence in conjunction with her modification petition nor does claimant need to allege a specific factual error other than her disagreement with the ultimate disposition of the claim. The Director also argues that claimant is entitled to a hearing on her modification petition unless the parties specifically waive the hearing. Employer responds urging affirmance of the administrative law judge's Order of Dismissal, arguing that claimant failed to submit any new evidence or allege a specific mistake of fact in the prior denial and also that claimant did not respond to the administrative law judge's Order to Show Cause and, therefore, the administrative law judge properly dismissed the case.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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). If the findings of fact and conclusions of law of the administrative law judge 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).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922 (the statute underlying 20 C.F.R. §725.310), provides in part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of

> fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim, review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation . . . .

Section 22 vests the administrative law judge with "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or **merely further reflection on the evidence initially submitted**." *O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971) [emphasis added]; *Branham v. BethEnergy Mines, Inc*., 21 BLR 1-79, 1-82 (1998)(McGranery, J., dissenting). In addition, the administrative law judge's authority to correct mistakes is not limited to any particular kind of factual mistake, but rather, extends to "any mistake of fact," including "the ultimate fact" of entitlement. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). Specifically, if claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"). *Keating, supra, quoting Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Additionally, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, states that "[a]t a minimum, the [ALJ] must review all evidence of record – any new evidence submitted in support of modification, as well as the evidence previously of record – and "further reflect" on whether any mistakes [of] fact were made in the previous adjudication of the case." *Keating*, 71 F.3d at 1123, 20 BLR at 2-57. However, the submission of new evidence is not required for this "further reflection" of the evidence of record. *O'Keeffe, supra*; *Keating, supra*; *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71(1992).

In the instant case, because the administrative law judge's Order to Show Cause required claimant to either submit new evidence or allege a specific factual error in the prior decision, which is not required by the statute or regulation, *see* 33 U.S.C. §922, Section 725.310 (2000), *O'Keeffe, supra*, we vacate the administrative law judge's Order of Dismissal and remand the case to the administrative law judge for further consideration of claimant's modification

petition. *See O'Keeffe, supra; Keating, supra*; *Kovac, supra;* 20 C.F.R. §725.310 (2000).

Moreover, as the Director correctly stated, and as the Board has previously held, claimant is entitled to a hearing on her survivor's claim, including this request for modification,[2] unless the hearing is specifically waived by the parties or a Motion for Summary Judgment is granted. *See Pukas v. Schuylkill Contracting Co.,* 22 BLR 1-69, 1-72 (2000), *citing* 20 C.F.R. §§725.421(a), 725.450, 725.451; *see also Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995).

Accordingly, the administrative law judge's Order of Dismissal is vacated and the case is remanded to the administrative law judge for further proceedings.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL

[2] Contrary to employer's contention, the district director properly forwarded the modification request to the administrative law judge inasmuch as the role of the district director, in considering modification requests, where the case has previously been before an administrative law judge is purely ministerial and administrative. *Ashworth v. Blue Diamond Coal Co.*, 11 BLR 1-167 (1988); *Hoskins v. Director, OWCP*, 11 BLR 1-144 (1988). The authority of the district director is limited to processing the request for modification and then forwarding the case to the Office of Administrative Law Judge for resolution of the issues. *Id*

Administrative Appeals Judge