

BRB No. 10-0301 BLA

HUBERT H. CRABTREE, by	)	
DOROTHY TAYLOR and REGINA	)	
WALKER, Executors	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
QUEEN ANNE COAL COMPANY	)	DATE ISSUED: 01/31/2011
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Dismissing Request for Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Dismissing Request for Modification of Administrative Law Judge Daniel F. Solomon (06-BLA-5058) rendered with respect to a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).<sup>1</sup> The pertinent procedural history of this case is as follows: Employer filed a request to withdraw its controversion and to remand the case to the district director on February 7, 2006, while the case was pending before the administrative law judge. Director's Exhibit 70. On February 16, 2007, the administrative law judge issued an Order of Remand granting employer's unopposed motion to withdraw its controversion and to remand the case to the district director. Director's Exhibit 71. By letter dated May 7, 2007, claimant's counsel, Joseph E. Wolfe, filed a petition for attorney's fees for work performed before the administrative law judge. Director's Exhibit 73. On June 25, 2007, the administrative law judge issued a Supplemental Decision and Order awarding attorney's fees. Director's Exhibit 77. By letter dated July 16, 2007, employer appealed the award of attorney's fees. Director's Exhibits 78, 79. The Board affirmed in part, and modified in part, the administrative law judge's award of attorney's fees.<sup>2</sup> *H.C. [Crabtree] v. Queen Anne Coal Co.*, BRB No. 07-0882 BLA (July 17, 2008)(unpub.). Employer filed a request for modification of the attorney's fee award on September 2, 2008. Director's Exhibit 85. By Order dated January 15, 2010, the administrative law judge determined that decisions regarding attorney's fees are not subject to modification at 20 C.F.R. §725.310. Consequently, the administrative law judge concluded that he did not have jurisdiction to consider employer's request for modification of the award of attorney's fees.<sup>3</sup> Accordingly, the administrative law judge dismissed employer's request for modification.

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<sup>1</sup> As claimant, employer, and the Director, Office of Workers' Compensation Programs, correctly assert, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as it involves an award of attorney's fees and was filed before January 1, 2005. Director's Exhibit 1.

<sup>2</sup> The Board noted that the administrative law judge listed 4.5 hours of services by the legal assistant instead of the requested 4.75 hours. *H.C. [Crabtree] v. Queen Anne Coal Co.*, BRB No. 07-0882 BLA, slip op. at 4 (July 17, 2008)(unpub.). Thus, the Board modified the administrative law judge's award of attorney's fees to include 4.75 hours for the services by the legal assistant. *Id.* Consequently, the Board computed the award of attorney's fees to be \$7,708.75, rather than \$7,689.00, as computed by the administrative law judge. *Id.*

<sup>3</sup> The administrative law judge noted that employer requested that he sanction claimant's counsel for failing to file briefs, as the administrative law judge had ordered.

On appeal, employer challenges the administrative law judge's determination that he lacked jurisdiction to consider employer's request for modification of the administrative law judge's award of attorney's fees. Claimant responds, urging affirmance of the administrative law judge's dismissal of employer's request for modification. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with employer to the extent that it asserts that the administrative law judge erred in finding that he was without jurisdiction to reconsider the award of attorney's fees. Director's Response Letter at 2. Specifically, the Director asserts that the administrative law judge has the authority to consider a request for *reconsideration* of the award of attorney's fees. Nonetheless, the Director asserts that the Board may hold that the administrative law judge's misunderstanding of his jurisdiction in this case is harmless error, if the Board holds that the administrative law judge provided an adequate and affirmable explanation for his disposition of employer's request for *reconsideration*.<sup>4</sup>

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. 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).

Employer contends the administrative law judge erred in finding that he lacked jurisdiction to consider its request for modification of the award of attorney's fees. Specifically, employer argues that the administrative law judge was required to independently assess the record *de novo* to determine whether there was a mistake of fact in the hourly rate determination. Employer maintains that attorney's fee awards are benefits under the regulations and that "[t]here is simply no basis for holding that fee awards are excluded from the modification provisions of [the Act] or its implementing regulations." Employer's Brief at 8.

The administrative law judge stated, "[a]fter a review of the record, I find that supplemental decisions and orders on attorneys' (sic) fees standing alone are not subject to modification and I do not have jurisdiction to entertain the modification request." Order Dismissing Request for Modification at 2. The administrative law judge further stated, "[a]fter having been fully advised in these premises, I find that the Request for

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However, the administrative law judge found that he did not have the authority to issue sanctions to claimant's counsel regarding employer's request for modification of the administrative law judge's award of attorney's fees because he did not have jurisdiction to consider the request.

<sup>4</sup> Employer filed a brief in reply to claimant's response brief, reiterating its prior contentions.

Modification is denied, in that I do not have jurisdiction as the request does not attend the [c]laimant's physical condition." *Id.*

The Board has held that an award of attorney's fees is not subject to modification. *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41 (1997); *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993); *Fortier v. Bath Irons Works Corp.*, 15 BRBS 261 (1981).<sup>5</sup> In this case, employer could have moved for reconsideration of the Board's affirmance of the administrative law judge's June 25, 2007 Supplemental Decision and Order awarding attorney's fees after the Board issued its Decision and Order dated July 17, 2008, or it could have appealed the case to the appropriate United States Court of Appeals in order to address any errors therein. However, as discussed *supra*, by its own characterization, employer filed a request for *modification* of the administrative law judge's Supplemental Decision and Order awarding attorney's fees. The administrative law judge properly found that he did not have jurisdiction to consider this case because the award of attorney's fees is not subject to modification. *Greenhouse*, 31 BRBS at 43; *Parks*, 26 BRBS at 176; *Fortier*, 15 BRBS at 264-5. Consequently, we affirm the administrative law judge's dismissal of employer's request for modification.<sup>6</sup>

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<sup>5</sup> A Decision and Order granting a petition for attorney's fees does not concern "compensation" or "the terms of an award or denial of benefits" as required under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310. *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41 (1997).

<sup>6</sup> In view of our disposition of this case, we need not address employer's contention that the administrative law judge erred in finding that employer's request for modification is inappropriate because it does not address claimant's physical condition. Furthermore, in view of our disposition of this case, we need not address employer's contention that the administrative law judge erred in finding that modification of the award of attorney's fees was sought for the purpose of establishing a change in conditions, rather than the correction of a mistake of fact.

Accordingly, the administrative law judge's Order Dismissing Request for Modification is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge