BRB No. 87-3370 BLA

HOMER RAKES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMCO, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order of Summary Judgment of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Belinda S. Morton, Fayetteville, West Virginia, for claimant.

George D. Blizzard, II (Shaffer & Shaffer), Madison, West Virginia, for employer.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Order of Summary Judgment (86-BLA-173) of Administrative Law Judge Charles P. Rippey denying 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). Claimant's original claim, filed on March 7,

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

1973, was denied by the deputy commissioner on June 9, 1980. Claimant filed a second claim on August 12, 1983, which was construed as a duplicate claim pursuant to 20 C.F.R. §725.309, and after denial by the deputy commissioner, this case was forwarded to the Office of Administrative Law Judges for formal hearing. On July 20, 1987, the administrative law judge issued a Notice of Hearing, which directed the parties to file and exchange copies of all exhibits within forty days of the hearing, scheduled for the week of November 2, 1987. On October 5, 1987, the administrative law judge issued an Order to Show Cause as to why summary judgment should not be granted based upon claimant's failure to establish a material change in conditions pursuant to Section 725.309.

On October 6, 1987, claimant submitted the medical report of Dr. Callinan dated September 13, 1984, and on October 14, 1987, claimant filed an Answer to the Order to Show Cause, asserting that claimant's original claim was still viable, and that the opinion of Dr. Rasmussen was sufficient to establish entitlement. On November 5, 1987, the administrative law judge issued a Decision and Order of

Summary Judgment, finding that claimant had failed to show any reason why such judgment should not be entered, and that Dr. Callinan's report was neither filed in a timely manner nor was good cause shown why it could not have been. Consequently, the administrative law judge cancelled the hearing and denied benefits. On appeal, claimant contends that summary judgment was not appropriate; that the evidence of record is sufficient to support entitlement; and that the administrative law judge erred in refusing to admit Dr. Callinan's report into the record. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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).

Claimant contends that summary judgment herein was not appropriate, as this case presents unresolved factual issues. See Montoya v. National King Coal Co., 10 BLR 1-59 (1986). We agree. The administrative law judge found that inasmuch as all of the objective tests of record were non-qualifying[1] and as none of the

[1] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that

medical opinions diagnosed a totally disabling pulmonary impairment, the evidence submitted subsequent to the denial of claimant's original claim remained insufficient to establish total disability pursuant to the regulations at 20 C.F.R. Part 718, and therefore claimant had not established a material change in conditions pursuant to Section 725.309.[2] Order to Show Cause at 1, 2. Claimant notes, however, that the opinion of Dr. Rasmussen stated that claimant is incapable of performing steady work beyond light work levels due to pulmonary insufficiency related to coal mine employment, and thus, if fully credited, could support a finding of total respiratory disability. Director's Exhibit 19. See Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986). Moreover, claimant maintains that his original claim remains viable, mandating review pursuant to the regulations at 20 C.F.R. Part 727, since claimant filed an Attorney Representation form on November 24, 1980, within one year of the

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exceed those values.

[2] The administrative law judge noted that new x-ray evidence submitted in support of the duplicate claim was sufficient, if fully credited, to establish the existence of pneumoconiosis, but that since this was also true of the x-ray evidence submitted prior to the denial of the original claim, claimant had failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Order to Show Cause at 1.

deputy commissioner's denial on June 9, 1980, and requested a copy of his file, which was not sent until September 16, 1981. See Director's Exhibit 19.

It is well settled that a request for modification need not be formal in nature, and any written notice by or on behalf of claimant within one year of an administrative denial evidencing an intention to make a request for modification may constitute a request for modification. See generally Fireman's Fund Ins. Co. v. Bergeron, 493 F.2d 545 (5th Cir. 1974); see also Kovac v. BCNR Mining Corp., 14 BLR 1-156 (1990), modified on recon., 16 BLR 1-71 (1992); Stanley v. Betty B Coal Co., 13 BLR 1-72 (1990); Garcia v. Director, OWCP, 12 BLR 1-24 (1988). As a review of the record reveals evidence which could support both entitlement and claimant's contention that his actions constituted a request for modification, we must vacate the administrative law judge's Order of Summary Judgment, and remand this case for the alj to hold a formal hearing concerning all contested issues of law and fact. See 20 C.F.R. §725.451; Montoya, supra.

On remand, the administrative law judge must determine whether modification pursuant to Section 725.310 is appropriate, see Kovac, supra, requiring adjudication on the merits pursuant to Part 727; or whether this is a duplicate claim situation, mandating review under Part 718 if the new evidence submitted subsequent to the denial of the original claim establishes a material change in conditions pursuant to Section 725.309. See Lukman v. Director, OWCP, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990); Rice v. Sahara Coal Co., Inc., 15 BLR 1-19 (1990)(en banc);

Dotson v. Director, OWCP, 14 BLR 1-110 (1990). The administrative law judge must also reconsider the admissibility of Dr. Callinan's report, which was submitted in compliance with the regulatory procedures set forth in 20 C.F.R. §§725.456, 725.457 and 725.458, in response to the administrative law judge's Order to Show Cause. See generally Smith v. Westmoreland Coal Co., 12 BLR 1-39 (1988). Additionally, inasmuch as the relevant inquiry concerning the merits is whether claimant is totally disabled due to pneumoconiosis arising out of coal mine employment on the date of the hearing, see generally Cooley v. Island Creek Coal Co., 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988), Coffey v. Director, OWCP, 5 BLR 1-404 (1982), the administrative law judge must further determine the extent of relevant and probative evidence admissible into the record on behalf of each party which due process requires.[3] See 20 C.F.R. §§725.452(b), 725.455(b), 725.456(e); see generally King v. Cannelton Industries, 8 BLR 1-146 (1985).

Accordingly, the administrative law judge's Order of Summary Judgment denying benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

[3] The record reflects that subsequent to the issuance of the administrative law judge's Order of Summary Judgment and claimant's appeal to the Board, claimant filed another claim for benefits on May 26, 1988, and submitted new evidence in support thereof. The deputy commissioner denied the claim on July 6, 1989, finding that the evidence did not establish a material change in conditions pursuant to Section 725.309, and the denial was appealed directly to the Board. On remand, the administrative law judge must also consider this evidence in light of his findings regarding the viability of claimant's original claim. See Kovac, supra; Lukman, supra.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

RENO E. BONFANTI
Administrative Law Judge