

BRB No. 10-0658 BLA

LOIS CLARK)
(Widow of JAMES H. CLARK))
)
 Claimant-Respondent)
)
 v.)
)
 OLD BEN COAL COMPANY)
)
 and)
)
 SAFECO INSURANCE COMPANY OF) DATE ISSUED: 07/26/2011
 AMERICA)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order Awarding Benefits of William S. Colwell,
Administrative Law Judge, United States Department of Labor.

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

Paul L. Edenfield (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: SMITH, McGRANERY, and HALL, Administrative Appeals
Judges.

PER CURIAM:

Old Ben Coal Company (Old Ben or employer), and Safeco Insurance Company of America (Safeco or carrier) appeal the Order Awarding Benefits (2010-BLA-05051) of Administrative Law Judge William S. Colwell rendered on a survivor's 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). The administrative law judge found that Safeco failed to timely controvert the claim before the district director, and that Safeco was precluded from seeking modification of the award. Accordingly, the administrative law judge awarded benefits to claimant, payable by Safeco.

Safeco appeals, challenging the administrative law judge's determination that Safeco received the district director's notices associated with this claim, and asserting that due process requires that Safeco be dismissed, and that any benefits be paid by the Black Lung Disability Trust Fund (the Trust Fund). Safeco further asserts that, assuming it had proper notice of the claim, it should be excused from failing to timely respond to the district director's notices and Proposed Decision and Order under the doctrine of "excusable neglect." Safeco also contends that the administrative law judge failed to consider whether the dissolution in bankruptcy of Horizon Natural Resources Incorporated (Horizon), the successor company to Old Ben, requires the dismissal of both Old Ben and Safeco as parties to this claim.¹ Finally, Safeco asserts that, even if Safeco failed to timely controvert this claim, the administrative law judge erred in finding that Safeco was not entitled to contest the merits of entitlement through a petition for modification. Safeco asks that the Board vacate the award of benefits and permit Old Ben and Safeco to controvert entitlement, or, at a minimum, remand this case for the processing of Safeco's petition for modification. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's finding that Safeco received the district director's notices associated with this claim. The Director agrees with Safeco, however, that the administrative law judge erred in failing to consider whether Safeco established "excusable neglect" for its failure to timely respond to these notices, and erred in finding that Safeco was precluded from seeking modification of the merits of entitlement. Finally, the Director asserts that the Board need not address whether Old Ben is the properly designated responsible operator, as this issue must first be addressed by the administrative law judge. Safeco filed a reply brief reiterating its contentions on appeal.

¹ Employer explains that Old Ben Coal Company was purchased by Zeigler Coal Company, which assumed Old Ben's liabilities. Zeigler was later purchased by Horizon Natural Resources Incorporated, which assumed Zeigler's liabilities. Thus, employer asserts, at the time of its bankruptcy, Horizon was responsible for Old Ben's liabilities. Employer's Brief at 12.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The relevant procedural history of the case is as follows. Claimant³ filed her claim for benefits on April 9, 2008. Director's Exhibit 3. On July 3, 2008, the district director notified Old Ben and Safeco of the claim, pursuant to 20 C.F.R. §725.407.⁴ Director's Exhibit 16. The Notice of Claim identified Old Ben as "self insured." Director's Exhibit 16. The notice, and an accompanying letter from the district director, were sent by certified mail to Safeco Insurance Co. of America, Safeco Plaza, Seattle, Washington, 98124, and informed Safeco that Old Ben had secured its liability by obtaining an indemnity bond from Safeco. The district director explained that, due to Old Ben's pending liquidation in bankruptcy, Old Ben would likely default on any award of benefits insured against it in this case. Therefore, the district director added, Safeco had a potential interest in this matter, and a right to request to intervene as a party-in-interest. Director's Exhibit 16. The record contains a return receipt signed, "Paul Webster PX 149," dated July 8, 2008. Director's Exhibit 16. However, the district director received no reply from Safeco or Old Ben.

On October 23, 2008, the district director issued a Schedule for the Submission of Additional Evidence (the Schedule), pursuant to 20 C.F.R. §725.410. Director's Exhibit 17. The Schedule, which identified Safeco as the insurance carrier for Old Ben, was sent to Safeco by certified mail at Safeco Plaza, Seattle Washington, 98124. *Id.* The Schedule allowed thirty days for a response, pursuant to 20 C.F.R. §725.412. The Schedule stated that if no response was received, Old Ben would be deemed to accept its designation as the responsible operator, and to waive its right to contest its liability in any further proceedings, but would be considered to have contested claimant's entitlement to benefits. Director's Exhibit 17. The record contains a return receipt signed, "Paul Webster PX 149," dated October 28, 2008, but the district director received no reply from Safeco. Director's Exhibit 17.

² This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as the miner's coal mine employment was in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

³ Claimant is the widow of the miner, who died on December 1, 2007. Director's Exhibit 8.

⁴ The July 3, 2008 Notice amended an earlier, May 1, 2008, Notice of Claim. Director's Exhibit 15.

On January 27, 2009, the district director issued a Proposed Decision and Order, awarding benefits, pursuant to 20 C.F.R. §725.418. Director's Exhibit 18. The Proposed Decision and Order was sent by certified mail to Safeco, as insurer for Old Ben, at Safeco Plaza, Seattle Washington, 98124. Director's Exhibit 18. The Proposed Decision and Order allowed thirty days for any party to file a request for revision or a request for a formal hearing before the Office of Administrative Law Judges, pursuant to 20 C.F.R. §725.419. The Proposed Decision and Order stated that if no response was received within thirty days, the Order would become final and effective. Director's Exhibit 18. The record contains a return receipt dated February 22, 2009, again signed, "Paul Webster PX 149," but the district director received no reply from Safeco.

By letter dated March 24, 2009, the district director notified claimant that Safeco, as the insurance carrier for Old Ben, did not respond to the Proposed Decision and Order, and that, therefore, payment of benefits would commence.⁵ Director's Exhibit 19. A copy of the letter was sent to Safeco, by certified mail, at Safeco Plaza, Seattle Washington, 98124. *Id.* The record contains a return receipt, this time signed by Michael Durkovic, dated March 27, 2009. *Id.*

In a letter to the district director dated April 15, 2009, counsel for Old Ben and Safeco stated that Safeco had not received any notice of the claim, or other claim documents, and first learned of the claim's existence on March 31, 2009, when it received a copy of the district director's March 24, 2009 letter. Director's Exhibit 20. Counsel acknowledged that the claim documents were purportedly received by Paul Webster, at Safeco, in Seattle, Washington, but stated that there was no one in the Safeco company directory with that name. *Id.* Noting that the failure to serve Safeco with proper notice could result in Safeco being released from liability for the claim, counsel requested that the district director vacate the Proposed Decision and Order and allow Old Ben and Safeco time to receive and review the file and respond to the claim. Director's Exhibit 20.

In a response dated April 16, 2009, the district director provided counsel with copies of the certified mail receipt cards, signed by Mr. Webster and Mr. Durkovic, and reasserted his position that Safeco was properly notified of the claim. Director's Exhibit 21.

By letter dated May 1, 2009, Old Ben and Safeco, through counsel, again denied receiving notice of the claim, and requested that the Proposed Decision and Order be vacated, and that Old Ben and Safeco be allowed to defend the claim. Director's Exhibit

⁵ The district director explained that benefits would initially be paid by the Black Lung Disability Trust Fund, and that the government would seek reimbursement from Safeco. Director's Exhibit 19.

22. The district director interpreted this letter as a request for modification, which she denied on June 15, 2009. Director's Exhibit 23; *see* 20 C.F.R. §725.310.

In a response dated July 14, 2009, Old Ben and Safeco, through counsel, submitted an affidavit from Ann Hester, former Home Office Counsel for Safeco, who stated that Safeco did not receive any of the four mailings prior to the district director's March 24, 2009 letter, and that Paul Webster, who signed the certified mail receipts, was not an agent of Old Ben or Safeco "or any other entity receiving mail for Safeco." Director's Exhibit 24, Hester Affidavit at 2-3. Ms. Hester explained that, even if the Notice of Claim and other documents had been sent to the wrong person at Safeco, Safeco's internal mail handling system would have ensured receipt by the proper person. Director's Exhibit 24, Hester Affidavit at 3-4. Counsel asserted that Ms. Hester's declaration established that Safeco did not receive timely notice of the claim or the Proposed Decision and Order and, thus, was not at fault for failing to respond. Therefore, Safeco requested that it be relieved of the default award of benefits, and be allowed to defend the claim. Director's Exhibit 24.

On August 6, 2009, the district director provided copies of certified mail receipt cards from another claim, showing that Paul Webster had previously signed for documents sent to Safeco at the same Safeco Plaza address utilized in this claim. Noting that Safeco had received and timely acted upon those claim documents, and noting further that, in this claim, Safeco received the district director's March 24, 2009 letter, also sent to the Safeco Plaza address, the district director declined to reconsider or vacate the award of benefits. Director's Exhibit 25. In response, by letter dated August 28, 2009, Old Ben and Safeco requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 26.

On April 26, 2010, the administrative law judge ordered Old Ben and Safeco to show cause why an award of benefits should not be entered in this claim for failure to file a timely controversion. In response, counsel submitted a second affidavit, from Connie Fuqua, former project manager for Safeco, and now Project Leader for Liberty Mutual Agency Markets, which purchased Safeco in 2008. Ms. Fuqua stated, in pertinent part, that before 2007, Safeco's home office was located at the Safeco Plaza, Seattle, Washington, 98124 (Old Safeco Plaza), and that during 2006 and 2007 the company incrementally moved its headquarters and mailroom facilities to Safeco Plaza, 1001 Fourth Avenue, Seattle, Washington, 98101 (New Safeco Plaza). Fuqua Affidavit at 1-2. Ms. Fuqua stated that, in addition to requesting that the United States Postal Service (USPS) forward its mail from Old Safeco Plaza to New Safeco Plaza, Safeco employed a third-party courier service, Postal Express, "to courier mail from the new USPS term station in downtown Seattle to the New Safeco Plaza location," including "any mail forwarded from the Old Safeco Plaza location to the USPS term station." Fuqua Affidavit at 2. Ms. Fuqua stated that her investigation revealed that Paul Webster was an

employee of Postal Express,⁶ and that “[g]iven that he signed for the mail, he must have collected mail addressed to Old Safeco Plaza that was being held by the main USPS. He was responsible for bringing it to New Safeco Plaza.” Fuqua Affidavit at 3. After detailing Safeco’s mail handling procedures, Ms. Fuqua stated that she could not explain why Safeco could not locate any of the documents served in this case, and she indicated that she could only conclude that the documents were not received by Safeco. Fuqua Affidavit at 4-6.

Based on Ms. Fuqua’s declaration, Safeco again asserted that it did not receive notice of this claim, and should be dismissed as a party. Safeco further asserted that, assuming the proper receipt of the Proposed Decision and Order and other documents associated with this claim, the deadline for controversion should be tolled, as Safeco established “excusable neglect” for its failure to submit timely responses. Further, Safeco contended that, assuming Safeco received proper notice, Horizon’s recent dissolution in bankruptcy required that Safeco be dismissed as the responsible carrier. In the alternative, Safeco requested that its challenge to claimant’s entitlement be considered a request for modification, and that the parties be permitted to develop and submit evidence addressing the merits of the survivor’s claim.

In an Order Awarding Benefits dated August 5, 2010, the administrative law judge initially found that Safeco conceded that it did not provide the district director with its new mailing address until March 4, 2010. The administrative law judge therefore found that the district director properly sent the notices associated with this claim to the mailing address of record. The administrative law judge further found that Paul Webster, as an employee of Postal Express, the courier company hired by Safeco to deliver mail from Safeco’s old address to its new one, served as an agent of Safeco. Thus, the administrative law judge concluded that, as the record contained signed certified mail receipts from Mr. Webster for the notices sent by the district director to Safeco’s address of record, Safeco failed to show “good cause” for its failure to timely controvert this claim. Finally, the administrative law judge determined that Safeco was not entitled to seek modification of the merits of entitlement, and ordered Safeco to pay benefits.

On appeal, Safeco initially contends that it was never properly served with any of the notices associated with this claim. Safeco acknowledges that Paul Webster, an employee of its courier service, Postal Express, signed the certified mail return receipts for the Notice of Claim and other documents. Safeco’s Brief at 2. Safeco avers, however, that it never received any of those notices, and, therefore, had no actual knowledge of the claim. Safeco’s Brief at 5. Safeco further asserts that, as Mr. Webster was not authorized to receive service of documents on Safeco’s behalf, knowledge of the

⁶ Michael Durkovic is also an employee of Postal Express.

claim cannot be imputed to Safeco based on the receipt of mail by Mr. Webster. Safeco's Brief at 7. Therefore, Safeco asserts, as it had no notice of the pending claim, or opportunity to present its objections, due process requires that Safeco be dismissed as a party to this claim, and that liability for payment of benefits be transferred to the Trust Fund. Safeco's Brief at 5-6, *citing Tazco Inc. v. Director, OWCP [Osborne]*, 895 F.2d 949, 13 BLR 2-313 (4th Cir. 1990); *see Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005). We disagree.

Substantial evidence supports the administrative law judge's conclusion that the district director properly served Safeco with the Notices of Claim, Schedule for the Submission of Additional Evidence, and Proposed Decision and Order awarding benefits. As the Director contends, "a timely and accurate mailing raises a rebuttable presumption that the mailed material was received," *see Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 573; 21 BLR 2-464, 2-475 (6th Cir. 1998), *quoting Old Ben Coal Co. v. Luker*, 826 F.2d 688, 697, 10 BLR 2-249, 2-262 (7th Cir. 1987), *citing Hagner v. United States*, 285 U.S. 427 (1932); Director's Brief at 5. The record reflects that beginning with the May 1, 2008 Notice of Claim, the district director sent notices to Safeco at its mailing address at Old Safeco Plaza. Director's Exhibits 15-18. The record further reflects that, although Safeco had moved to New Safeco Plaza sometime in 2007, Safeco did not inform the district director of its new address until March 4, 2010. *See Safeco's July 16, 2010 "Response to Order to Show Cause" at 2 n.2.* Therefore, the administrative law judge rationally found that the district director properly mailed the notices to Safeco's official address of record, Old Safeco Plaza. Order Awarding Benefits at 2.

The record also supports the administrative law judge's conclusion that, contrary to Safeco's contention, Safeco received the district director's notices, through Paul Webster, an employee of Postal Express, the courier service engaged by Safeco to bring the mail addressed to Old Safeco Plaza to New Safeco Plaza. Safeco acknowledges that Mr. Webster signed the certified mail return receipts in his capacity as a courier for Postal Express. Safeco's Brief at 2. While Safeco asserts that Mr. Webster was not authorized to receive service of documents, we agree with the Director that the administrative law judge reasonably concluded that receipt may be imputed to Safeco, through Mr. Webster, as an agent of Safeco with implicit authority to receive certified mail on its behalf. *See In re Grand Jury Subpoenas*, 775 F.2d 43, 46 (2d Cir. 1985); *Capital City Excavating v. Donovan*, 679 F.2d 105, 108-109 (6th Cir. 1982). Director's Brief at 6. Notably, in the July 9, 2010 affidavit prepared by former Safeco employee Connie Fuqua, Ms. Fuqua conceded that Mr. Webster worked for a courier service hired by Safeco, and did not dispute Mr. Webster's authority to receive certified mail for Safeco. Rather, Ms. Fuqua stated that "[g]iven that he signed for the mail, he must have collected mail addressed to Old Safeco Plaza that was being held by the main USPS. He was responsible for bringing it to New Safeco Plaza." Fuqua Affidavit at 3. In addition, the record contains documents from another case in which Safeco was the insurer, where the certified mail

receipts were also signed by Mr. Webster, apparently without objection from Safeco. Director's Exhibit 25. Moreover, the record also establishes that Safeco received, and responded to, the district director's March 24, 2009 letter to claimant, which was similarly addressed to Old Safeco Plaza, and signed for by a Postal Express employee. Director's Exhibits 19, 20. Thus, as the Director asserts, Safeco was aware that employees of Postal Express were "acting under the guise of authority to receive documents," including those from the Department of Labor, and Safeco did not object to, or alter, this arrangement, or inform the Department of its new address. Director's Brief at 7. Therefore, the facts and circumstances of this case support the district director's reasonable inference that Mr. Webster had implicit authority to accept service of certified mail from the Department of Labor. *See In re Grand Jury Subpoenas*, 775 F.2d at 46; *Donovan*, 679 F.2d at 108-109. We, therefore, affirm the administrative law judge's determination that Safeco received the district director's Notices of Claim, Schedule for the Submission of Additional Evidence, and Proposed Decision and Order. Order Awarding Benefits at 2.

We next address Safeco's contention that the administrative law judge erred in finding that, assuming proper service, Safeco failed to establish "good cause" for failure to timely controvert the claim. Safeco's Brief at 6. Safeco specifically contends, and the Director agrees that, in finding no "good cause" established for Safeco's failure to act, the administrative law judge applied an incorrect legal standard. Safeco's Brief at 8-10; Director's Brief at 9. Safeco and the Director contend that the administrative law judge should have instead inquired into whether Safeco established "excusable neglect" for its failure to timely respond to the district director's notices. Safeco's Brief at 8-10; Director's Brief at 8-11. We agree.

In finding that Safeco did not establish "good cause" for its failure to timely controvert this claim, the administrative law judge appeared to apply a former regulation which required a showing of "good cause" in order to avoid the penalty of a procedural default that barred any further defenses to the claim if the operator did not file a timely controversion.⁷ Under the revised regulation, the default penalty no longer exists. *See Stiltner v. Ramey Coal Co.*, 24 BLR 1-33, 1-37 n.4 (2008). The revised regulations do not specify a standard for assessing whether a party should be excused for failing to file a

⁷ The administrative law judge appeared to have applied the provisions of the regulation at 20 C.F.R. §725.413 (2000), which have since been deleted, and their contents incorporated into 20 C.F.R. §725.412. *See* 20 C.F.R. §§725.412, 725.413. Section 725.413 (2000) provided that "[i]n a case where an operator has failed to respond to notification, such failure shall be considered a waiver of such operator's right to contest the claim, unless the operator's failure to respond to notice is excused for good cause shown" 20 C.F.R. §725.413 (2000).

timely response to the district director's Notices of Claim, Schedule for the Submission of Additional Evidence, or Proposed Decision and Order. 20 C.F.R. §§725.408(a)(1), (3); 725.410(b); 725.412; 725.419. Safeco and the Director assert that, in administrative proceedings where the procedural rules borrow from the Federal Rules of Civil Procedure, the courts have applied the "excusable neglect" standard set forth at Federal Rule of Civil Procedure 60(b), in determining whether a party's failure to respond to an administrative notice may be forgiven, or excused. See *George Harms Construction Co v. Chao*, 371 F.3d 156 (3d Cir. 2004). While we recognize that "good cause" and "excusable neglect" both refer to a fairness-based analysis of ascertaining whether default should be forgiven, and the terms are sometimes used interchangeably, see *Hatfield v. Arch of Kentucky, Inc.*, BRB No. 02-0510 BLA (Mar. 31, 2003)(unpub.), in this case the administrative law judge's "good cause" inquiry was too narrow to encompass the relevant inquiry under "excusable neglect." In determining if "excusable neglect" is established, an administrative law judge must consider the danger of prejudice to the non-movant and its potential impact on judicial proceedings, the reason for the neglect, including whether it was within the reasonable control of the party seeking to excuse the delay, and whether that party acted in good faith. See *Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 359 (7th Cir. 1997), citing *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380 (1993); *Western Snyder v. Barry Realty, Inc.*, 60 Fed.Appx. 613, 614 (7th Cir. 2003).

Safeco argued to the administrative law judge that it employed meticulous mail handling procedures, incorporating numerous safeguards designed to ensure that documents would be routed to the person responsible for responding to the document. Safeco's Response to Order to Show Cause at 5-12; Fuqua Affidavit at 4-6. Safeco described these mail handling procedures in detail, and asserted that it was "not aware of any other situation similar to this case where claim documents sent to the wrong address but allegedly forwarded and received by Safeco at its correct location were not timely addressed." Fuqua Affidavit at 6. Thus, Safeco asserted, and continues to assert, that it did "everything it should and could" to ensure that its mail was received, and responded to, and that, therefore, excusable neglect should operate to relieve Safeco of the consequences of its failure to respond to the district director's notices. As the administrative law judge did not address Safeco's assertion that its failure to timely respond to the district director's notices should be excused, we vacate the administrative law judge's award of benefits.⁸ On remand, the administrative law judge must consider

⁸ We decline to hold, as Safeco requests, that it established excusable neglect as a matter of law. Safeco's Brief at 10-12. As the Director asserts, the excusable neglect analysis in this case requires factual and credibility determinations that are within the province of the administrative law judge. *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); Director's Brief at 10. We further decline to hold, as a matter of law, that Old Ben is not the properly designated responsible operator in this claim. As the Director

Safeco's arguments and all relevant facts and circumstances, including Safeco's failure to promptly notify the district director of its new address, and must determine whether Safeco's lack of timely response to the Notice of Claim, the Schedule for the Submission of Additional Evidence, and the Proposed Decision and Order may be forgiven.⁹ See *Robb*, 122 F.3d at 359; *Western*, 60 Fed.Appx. at 614; *Burrell v. Henderson*, 434 F.3d 826, 832 (6th Cir. 2006).

Finally, if the administrative law judge finds, on remand, that Safeco did not establish excusable neglect, the administrative law judge must consider Safeco's petition for modification. As Safeco and the Director assert, in finding that Safeco is precluded from seeking modification of the merits of entitlement, the administrative law judge erred in applying case law interpreting the prior regulations.¹⁰ See *Stiltner*, 24 BLR at 1-37-38; Safeco's Brief at 14-15; Director's Brief at 11-12. Contrary to the administrative law

points out, having found that Safeco defaulted on this claim, the administrative law judge did not address Safeco's contention that Old Ben's dissolution in bankruptcy relieves both Old Ben, and Safeco, of liability for the payment of benefits, and the Board will not address this issue in the first instance. See *Burns*, 855 F.2d at 501.

⁹ We note that, under the facts of this case, if the administrative law judge finds excusable neglect established, Safeco would be excused from failing to respond to all relevant notices associated with this claim, prior to its receipt of the district director's March 24, 2009 letter, when counsel became aware of this claim. Thus, Old Ben and Safeco would be entitled to respond to each of the district director's findings, within the time limitations stated in the regulations, including, but not limited to, the district director's responsible operator and responsible carrier designations, as set forth in the Schedule for the Submission of Additional Evidence, and its ultimate finding of entitlement, as set forth in the Proposed Decision and Order. See 20 C.F.R. §§725.407, 725.408, 725.410, 725.412, 725.418, 725.419.

¹⁰ The prior regulation provided:

If the operator fails to respond within the specified period [30 days], such operator shall be deemed to have accepted the initial findings of the deputy commissioner when made and shall not, except as provided in §725.463, be permitted to raise issues or present evidence with respect to issues inconsistent with the initial findings *in any further proceeding conducted with respect to the claim.*

20 C.F.R. §725.413(b)(3) (2000) (emphasis added).

judge's finding, the revised regulation provides that, once the district director's proposed decision and order becomes final, "all rights to further proceedings with respect to the claim shall be considered waived, *except as provided in §725.310* [allowing for modification petitions]. 20 C.F.R. §725.419(d) (emphasis added); *Stiltner*, 24 BLR at 1-37-38.

Accordingly, the administrative law judge's Order Awarding Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge