

BRB No. 11-0721 BLA

OPEL B. GRIFFEY)
(Widow of WILLIAM C. GRIFFEY))

Claimant-Petitioner)

v.)

CALAHAN ELKHORN COAL COMPANY,)
INCORPORATED)

and)

OLD REPUBLIC INSURANCE COMPANY)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 06/28/2012

DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Request for Summary Judgment of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: DOLDER, Chief Administrative Law Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Granting Employer's Request for Summary Judgment (10-BLA-5862) of Administrative Law Judge Linda S. Chapman rendered on 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). This case involves claimant's request for modification of the denial of a survivor's claim filed on September 7, 2004. Director's Exhibit 2. The relevant procedural history is as follows: Initially, on July 12, 2005, the district director awarded benefits. At employer's request, the case was forwarded to the Office of Administrative Law Judges (OALJ) for a hearing. Following the hearing, in a decision dated November 8, 2006, Administrative Law Judge Daniel F. Solomon denied benefits on the ground that claimant did not establish that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(c). Director's Exhibit 39.

By letter dated July 9, 2007, claimant requested modification of Judge Solomon's denial of benefits.² Director's Exhibits 40, 42. On September 25, 2008, the district director issued a Proposed Decision and Order denying modification. Director's Exhibit 44. Subsequently, without any action by claimant, the district director transferred the case to the OALJ for a hearing, which was held on May 20, 2009, before Administrative Law Judge Linda S. Chapman (the administrative law judge). Director's Exhibit 45. In a decision dated September 9, 2009, the administrative law judge determined that because claimant had not requested a formal hearing of the district director's September 25, 2008 denial, that decision became final, pursuant to 20 C.F.R. §725.419, and, therefore, claimant had waived all rights to further proceedings. Thus, the administrative law judge concluded that she lacked jurisdiction to consider claimant's request for modification. The administrative law judge further found, however, that assuming claimant had timely requested a hearing, she had not established a mistake in Judge Solomon's determination that the evidence failed to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 57.

By letter dated March 29, 2010, claimant again requested modification. Director's Exhibit 58. On July 20, 2010, the district director notified claimant that because she did not submit any additional evidence in support of her modification request, her request was interpreted as a contention that the previous decision from the OALJ was based on a mistake in a determination of fact, and, therefore, her case would be forwarded to the

¹ Claimant is the miner's widow. Director's Exhibit 7. She filed her claim for survivor's benefits on September 7, 2004. Director's Exhibit 2.

² In support of her request, claimant submitted two Affidavits of Deceased Miner's Condition, attesting to the miner's symptoms prior to his death. Director's Exhibit 40.

OALJ for a hearing. Director's Exhibit 59. Prior to the scheduled hearing, however, employer filed a Request for Summary Decision, arguing that claimant's March 29, 2010 request for modification was untimely, since it was filed more than one year after the district director's September 25, 2008 Proposed Decision and Order. Claimant responded, arguing that claimant's March 29, 2010 request for modification was timely, as it was filed within one year of the administrative law judge's September 9, 2009 Decision and Order.

In a Decision and Order Granting Employer's Request for Summary Judgment, the administrative law judge denied claimant's request for modification, finding, as she had previously, that she lacked jurisdiction to adjudicate the claim because, by failing to request a formal hearing of the district director's September 25, 2008 denial, claimant had allowed that decision to become final, and had waived all rights to further proceedings. Decision and Order at 3. The administrative law judge further found that claimant's request for modification "must fail for reasons set out in my previous decision," and that granting claimant's request for modification would not render justice under the Act. Decision and Order at 3-4. Therefore, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding that she lacked jurisdiction to adjudicate claimant's modification request. Employer/carrier (employer) responds, urging the Board to reject claimant's assertions. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

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.³ 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, but on or before January 1, 2005, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

A party may request modification of an award or denial of benefits within one year of the prior decision. 20 C.F.R. §725.310(a). The sole basis available for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." See *O'Keefe v. Aerojet- General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994).

In this case, prior to determining whether claimant established a mistake in a determination of fact regarding Judge Solomon's denial of survivor's benefits, pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered whether the case was properly before her for adjudication. The administrative law judge correctly noted that the regulation at 20 C.F.R. §725.419 allows any party to request a hearing within thirty days after the date of issuance of a district director's proposed decision and order. 20 C.F.R. §725.419(a); Decision and Order at 2-3. The regulation further provides that if no response to a proposed decision and order is sent to the district director within the period described, the proposed decision and order shall become final, and all rights to further proceedings with respect to the claim shall be considered waived, except as provided in §725.310. 20 C.F.R. §725.419(d); Decision and Order at 3. Based on the regulation at 20 C.F.R. §725.419, the administrative law judge concluded that claimant's failure to timely request a hearing following the district director's proposed decision rendered that decision final, and precluded all further proceedings. Thus, the administrative law judge determined that she lacked jurisdiction to adjudicate claimant's request for modification.

Contrary to the administrative law judge's conclusion, the regulations provide that the district director may forward the claim to the OALJ for a hearing, on his or her own initiative.⁴ See 20 C.F.R. §725.451. The record reflects that, by letter dated July 9, 2007,

⁴ The regulation at 20 C.F.R. §725.451 provides:

After the completion of proceedings before the district director . . . A district director may on his or her own initiative refer a case for hearing.

claimant initiated modification proceedings with the district director, alleging a mistake in a determination of fact in Judge Solomon's denial of survivor's benefits. When claimant took no further action following the district director's denial, the district director forwarded the case to the OALJ for a hearing, as was within his discretion, pursuant to 20 C.F.R. §725.451. Director's Exhibit 45. Moreover, as the United States Court of Appeals for the Sixth Circuit has held, and as the administrative law judge explained during the May 20, 2009 hearing proceedings, because the district director may not modify an administrative law judge's decision based on a mistake in fact, such requests for modification are routinely forwarded to the OALJ for adjudication, as it appears happened here. *See Youghioghney and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 950, 22 BLR 2-46, 2-58 (6th Cir. 1999)(holding that while modification must be initiated with the district director, the district director lacks the authority to modify awards based on a mistake in a determination of fact when the mistake was made by an administrative law judge); Hearing Tr. at 6. Therefore, as the district director permissibly forwarded claimant's modification request to the OALJ for a hearing and further adjudication, and as claimant subsequently took all necessary action to pursue her claim,⁵ under the facts of this case, claimant's modification request was properly before the administrative law judge at the time of both her September 9, 2009 and June 14, 2011 decisions.

However, in her June 14, 2011 decision, the administrative law judge reiterated that, in her prior decision, in addition to concluding that she lacked jurisdiction to consider the claim, she also fully considered all of the medical evidence of record and found that, even if claimant had made a timely request for a hearing, claimant had not established a mistake in Judge Solomon's denial of benefits. Decision and Order at 2. The administrative law judge then determined that claimant's second request for modification "must fail for reasons set out in my previous decision." Decision and Order at 3.

An administrative law judge has the authority to reconsider all of the evidence for any mistake of fact or change in conditions, *Worrell*, 27 F.3d at 230, 18 BLR at 2-296, but the exercise of that authority is discretionary. *Milliken*, 200 F.3d at 956, 22 BLR at 2-69. The Board reviews an administrative law judge's findings in this regard under the abuse of discretion standard. *See Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68, 73 (1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc). Claimant's first and second requests for modification were, necessarily, based upon a mistake in a determination of fact, namely, Judge Solomon's determination that claimant

⁵ As claimant asserts, and the administrative law judge acknowledged, following the administrative law judge's September 9, 2009 decision, claimant timely requested modification by letter dated March 29, 2010. Decision and Order at 3; Director's Exhibit 58.

failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Wojtowicz*, 12 BLR at 1-164. Additionally, both the issues and the relevant evidence before the administrative law judge in her most recent, June 14, 2011 decision, were identical to those she previously considered in her September 9, 2009 decision, which was issued following a hearing and full consideration of the evidence and the parties' arguments. Moreover, claimant's most recent modification request presented no new arguments for the administrative law judge's consideration.⁶ Decision and Order at 3. Given these facts, we hold that claimant has not established that the administrative law judge abused her discretion in determining that claimant's second modification request "must fail" for the reasons set forth in her prior decision. *See Kinlaw*, 33 BRBS at 73; *Clark*, 12 BLR at 1-153; Decision and Order at 3. Therefore, we affirm the administrative law judge's denial of claimant's modification request, and the denial of benefits, on the grounds that claimant failed to establish a mistake in a determination of fact with regard to Judge Solomon's finding that claimant failed to establish that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(c). 20 C.F.R. §725.310; Decision and Order at 3.

⁶ Claimant's March 29, 2010 letter stated: "This letter is to request modification of the denial of benefits issued by Judge Linda [S.] Chapman 09/09/09 and 90 days to provide evidence in support of this request." By letter dated June 3, 2011, claimant's counsel informed the administrative law judge that claimant had no new evidence to submit. In claimant's June 10, 2011 response to employer's request for a summary decision, her final communication to the administrative law judge, claimant asserted that her March 29, 2010 modification request was properly before the administrative law judge for adjudication; claimant presented no arguments regarding the merits of entitlement.

Accordingly, the administrative law judge's Decision and Order Granting Employer's Request for Summary Judgment is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge