

BRB No. 97-1462 BLA

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| DORA IVEY |) | |
| (Widow of EARL IVEY) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | DATE ISSUED: |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Richard C. Rookard (Lay Representative), Clinton, Tennessee, for claimant.

Rita Roppolo (Marvin Krislov, Deputy Solicitor for National Operations; 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (85-BLA-3201) of Administrative Law Judge Clement J. Kichuk 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

¹ Claimant is Earl Ivey, the miner, who filed a claim for Black Lung benefits in 1973 and died in 1989. Director's Exhibit 1; Claimant's Exhibit 14. The miner's widow, Dora G. Ivey, is pursuing the claim on the miner's behalf and is represented by Richard C. Rookard, a lay representative.

amended, 30 U.S.C. §901 *et seq.* (the Act). This case has been before the Board previously.² While the case was pending before the Office of Administrative Law Judges on remand, claimant submitted new evidence and requested a formal hearing. The administrative law judge, however, did not conduct a formal hearing. In his Decision and Order on Remand, the administrative law judge considered the evidence, accorded greatest weight to the opinions and conclusions of Dr. Naeye and found that rebuttal of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(b)(3) was established. Decision and Order on Remand at 10; Director's Exhibit 57. Accordingly, benefits were denied. In the instant appeal, claimant initially requests remand for a *de novo* formal hearing and also challenges the administrative law judge's weighing of the evidence. The Director, Office of Worker's Compensation Programs (the Director), has filed a Motion to Remand this case to the district director.³

The Board's scope of review is defined by statute. We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 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).

Modification proceedings are properly initiated before the district director. *See* 20 C.F.R. §725.310; *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987). On remand, claimant submitted new evidence and requested a formal hearing. On

² In its most recent decision, the Board vacated the finding by Administrative Law Judge E. Earl Thomas that rebuttal of the interim presumption of total disability due to pneumoconiosis was established pursuant to 20 C.F.R. §727.203(b)(3) and remanded the case for further consideration. *Ivey v. Director, OWCP*, BRB No. 94-0666 BLA (May 31, 1996)(unpublished).

³ The Director has filed a Motion to Remand in this case to which claimant has responded urging denial of the motion. The Board accepts the Director's Motion to Remand as part of the record and herein decides the case on its merits.

appeal herein, claimant asserts that the administrative law judge should have granted a hearing on remand or, alternatively, treat her request as a request for modification. In its motion, the Director agrees that the case should be remanded to the district director and further asserts that the issue of invocation of the interim presumption should also be reviewed on modification. The administrative law judge decided the case on the record and did not transfer the case to the district director to consider claimant's request for modification as he was required to do. *See Ashworth v. Blue Diamond Coal Co.*, 11 BLR 1-167 (1988); *Hoskins v. Director, OWCP*, 11 BLR 1-144 (1988). This failure by the administrative law judge denied claimant procedural due process regarding requests for modification. 20 C.F.R. §§725.421(a) and 725.450. The United States Court of Appeals for the Sixth Circuit, which has jurisdiction in this case, has recently held that a party who has requested a hearing in a modification proceeding is entitled to one and that it is error for an administrative law judge to ignore such a request. *See Cunningham v. Island Creek Coal Co.*, F.3d , No. 97-3506 (6th Cir., May 5, 1998). In this case, claimant was not afforded a hearing before the administrative law judge, even though she requested one at the time she submitted the new evidence. In light of the Sixth Circuit's holding in *Cunningham, supra*, we vacate the administrative law judge's denial of benefits and remand the case to the district director to consider claimant's request for modification. As there is an outstanding request for modification in this case, we decline to address claimant's arguments with respect to the merits in her appeal to the Board.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated and the case is remanded to the district director to initiate modification proceedings pursuant to 20 C.F.R. §725.310.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY

Administrative Appeals Judge