

BRB No. 98-1082 BLA

JIM JUDE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PETER CAVE COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT OF	)	
LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Request for Modification of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Jim Jude, Pilgrim, Kentucky, *pro se*.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Request for Modification (97-BLA-1314) of Administrative Law Judge Daniel J. Roketenetz 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). This claim was originally filed in September 1974. Director's Exhibit 1. In May 1990, the administrative law judge issued a Decision and Order - Denial of Benefits. The administrative law judge found that claimant established a maximum of eight years of coal mine employment. Next, the administrative law judge found that the evidence was sufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §410.490, inasmuch as claimant established the existence of simple pneumoconiosis pursuant to Section 410.490(b)(1)(i) by x-ray evidence, and claimant established some degree of respiratory impairment which arose, in part, from his coal mine employment under Section 410.490(b)(2). The administrative law judge found that rebuttal was not

established pursuant to 20 C.F.R. §727.203(b)(1)-(2). However, the administrative law judge found that employer rebutted the interim presumption pursuant to Section 727.203(b)(3). Moreover, the administrative law judge found that claimant was not entitled to benefits under the “more stringent” standards contained in 20 C.F.R. Parts 410, Subpart D, and 718. 1990 Decision and Order at 10. Accordingly, benefits were denied. Director’s Exhibit 88.

Claimant appealed, and the Board issued a Decision and Order affirming the administrative law judge’s finding of eight years of coal mine employment. Further, the Board held that the administrative law judge properly found that rebuttal could be established by any one of the rebuttal methods contained under Section 727.203(b). However, the Board vacated the administrative law judge’s finding that rebuttal was established pursuant to Section 727.203(b)(3), and remanded for the administrative law judge to reconsider subsection (b)(3) rebuttal under the standard of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, that employer must establish that claimant’s coal mine employment played no part in causing the miner’s disability. In addition, the Board instructed the administrative law judge, if he found entitlement not established pursuant to 20 C.F.R. Part 727, to consider entitlement at 20 C.F.R. Part 718. *Jude v. Peter Cave Coal Co.*, BRB No. 90-1745 BLA (Feb. 26, 1993)(unpublished); Director’s Exhibit 94. Employer filed a Motion for Reconsideration, and the Board vacated the administrative law judge’s finding at Section 410.490(b)(1)(i) in light of the United States Supreme Court’s decision in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) abolishing the “true doubt” doctrine. The Board also vacated the administrative law judge’s finding that rebuttal was not established pursuant to Section 727.203(b)(2), and remanded the case for the administrative law judge to consider rebuttal under the Sixth Circuit’s standard of *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989), *reh’g denied* 877 F.2d 495, 12 BLR 2-303 (6th Cir.). Accordingly, the Board remanded the case for further consideration. *Jude v. Peter Cave Coal Co.*, BRB No. 90-1745 BLA (Dec. 9, 1994)(unpub. Decision and Order on Recon.); Director’s Exhibit 97.

In February 1996, the administrative law judge issued a Decision and Order on Remand - Denial of Benefits. Because of the Supreme Court’s decision in *Ondecko*, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis under Section 410.490, thus making consideration of rebuttal at Section 727.203(b) unnecessary. Moreover, the administrative law judge found that claimant was not entitled to benefits pursuant to Part 718. Accordingly, benefits were denied. Director’s Exhibit 98. Claimant filed an appeal, and subsequently filed a motion for modification with the Board. The Board, therefore, dismissed claimant’s appeal and remanded the case to the district director to consider modification. *Jude v. Peter Cave Coal Co.*, BRB No. 96-0782 BLA (Sept. 17, 1996)(unpub. Order); Director’s Exhibit 107. On remand, the district director denied claimant’s request for modification on February 7, 1997. Director’s Exhibit 113. On February 26, 1997, claimant indicated that he disagreed with the district director’s finding and requested that his claim be scheduled for a formal hearing with the Office of Administrative Law Judges. Director’s Exhibit 114. On June 25, 1997, the administrative law judge issued an Order requiring each party to state whether it requested an oral hearing on the modification request. The administrative law judge stated that if any party failed to respond timely to the Order, it would be deemed that the party did not request a hearing. Employer responded,

requesting that a decision be rendered on the record. There is no indication in the record that claimant, who was not represented by counsel, filed a response. In his Order Denying Oral Hearing on Modification and Requesting Briefs, the administrative law judge found that a hearing was not necessary. Subsequently, in April 1998, the administrative law judge issued a Decision and Order - Denying Request for Modification. The administrative law judge determined that claimant failed to establish a change in conditions or a mistake in a determination of fact with respect to his years of coal mine employment or pursuant to 20 C.F.R. §§410.490, 718.202(a), and 718.204. Accordingly, benefits were denied.

Claimant appeals, without the assistance of counsel, contending generally that the administrative law judge erred in denying benefits. Employer has submitted a response brief advocating affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not respond to the instant appeal unless specifically requested to do so by the Board.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

Subsequent to the administrative law judge's April 1998 Decision and Order, the United States Court of Appeals for the Sixth Circuit held that a party requesting a hearing on modification is entitled to one. *See Robbins v. Cypress Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998). In the instant case, the administrative law judge denied claimant's request for an oral hearing on modification.<sup>1</sup> Director's Exhibit 114. In light of the holdings in *Robbins* and *Cunningham*, we vacate the administrative law judge's 1998 Decision and Order - Denying Request for Modification and remand for a hearing with respect to claimant's request for modification. *See Robbins, supra; Cunningham, supra*. Since we remand the case for a hearing, we decline to address the merits of the case at this time.

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<sup>1</sup> The administrative law judge stated that considering the response to the Order to Show Cause, the medical evidence, and the issues on modification, it did not appear that any individual's testimony would be crucial in assessing the modification request. The administrative law judge also stated that any other issues regarding the miner's social and work histories or job duties were addressed in the miner's testimony at the original hearing.

Accordingly, we vacate the administrative law judge's 1998 Decision and Order - Denying Request for Modification and remand the case to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge