

BRB No. 02-0559 BLA

DELPHIA PRATT)
)
Claimant-Petitioner)
)
v.) DATE ISSUED:
)
DIAMOND MAY COAL COMPANY)
)
and)
)
KENTUCKY COAL WORKERS' SELF-)
INSURANCE FUND)
)
Employer/Carrier-)
Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Dismissing Claim and Order Canceling Hearing
of Daniel J. Roketenetz, Administrative Law Judge, United States
Department of Labor.

Delphia Pratt, Viper, Kentucky, *pro se*.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard,
Kentucky, for employer/carrier.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S.
Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Dismissing Claim and Order Canceling Hearing (01-BLA-0098 and 01-BLA-0099) of Administrative Law Judge Daniel J. Roketenetz on two claims 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).² The administrative law judge found that the instant claim constituted a request for modification pursuant to 20 C.F.R. §725.310(2000).³ The administrative law judge proceeded to find that no evidence was

¹Claimant, Delphia Pratt, is the surviving spouse of the miner, Pearl Pratt, who died on October 30, 1994. Director's Exhibit 14.

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The amendments to the regulation at 20 C.F.R. §725.310, however, do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

³The miner initially filed a claim for benefits on July 24, 1980. Director's Exhibit 114. Subsequently, the claim was denied by the district director on the basis of claimant having failed to show that his pneumoconiosis arose out of coal mine employment or that he was totally disabled thereby. Director's Exhibit 114. The miner filed a second claim on November 9, 1992, Director's Exhibit 1. After the claim was denied by the district director, the miner sought modification. While the miner's request for modification was pending, the miner died. Director's Exhibit 14. Claimant then filed a separate survivor's claim on November 4, 1994. Director's Exhibit 2. Both the survivor's claim and miner's request for modification were eventually denied by the district director. Director's Exhibit 111. After a hearing, Administrative Law Judge Thomas F. Phelan denied benefits in both claims in a Decision and Order issued on March 17, 1998. Director's Exhibit 118. Claimant appealed and the Board affirmed the denial of survivor's benefits, but remanded the case for further consideration of the miner's claim. *Pratt v. Diamond May Coal Co.*, BRB No. 98-0986 BLA and 98-0986 BLA-A (Aug. 18, 1999). On remand, Judge Phelan found that claimant failed to establish entitlement to survivor's benefits. Director's Exhibit 134. Subsequently, claimant filed a letter requesting modification. Director's Exhibit 135. The request was denied by the district director. Director's Exhibit 141. Claimant disagreed with the denial and requested a hearing before an administrative law judge. Director's Exhibit 143. A hearing was set before the administrative law judge for April 11, 2001. On January 10, 2001, employer filed a Motion to Dismiss, noting that no additional evidence had been submitted with

submitted by claimant in her request for modification on both claims and further found that claimant made no allegation of a change in conditions or a mistake in a prior determination of fact on both claims. Decision and Order at 3. The administrative law judge thus concluded that there was no need for a hearing in the instant case, and that because there were no issues presented before him, claimant's request for modification was dismissed. Decision and Order on 3.

Employer, in response to claimant's *pro se* appeal, urges that the administrative law judge's Decision and Order be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, urges the Board to remand the claim for consideration of claimant's request for modification and to afford claimant the hearing which she requested.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal 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).

In dismissing claimant's request for modification, the administrative law judge held that since claimant submitted no new evidence and failed to allege either a change in condition or a mistake in a determination of fact there were no issues to be resolved. Decision and Order at 3. Thus, the administrative law judge concluded, dismissal was appropriate because claimant was unable to establish modification.

claimant's request for modification. Subsequently, on March 14, 2002, the administrative law judge issued the Decision and Order Dismissing Claim and Order Canceling Hearing" from which claimant now appeals.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in fact inasmuch as the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). We thus conclude that the administrative law judge's dismissal of claimant's request for modification on the basis that claimant has failed to submit evidence or allege a mistake in a determination of fact or change in conditions constitutes clear error. *See Worrell, supra*. Accordingly, we vacate the administrative law judge's order dismissing claimant's request for modification.

The administrative law judge further held that in view of his determination that claimant neither produced new evidence nor alleged grounds for modification, "the conduct of a hearing in this case would serve no useful purpose," notwithstanding claimant's request for a hearing. The Sixth Circuit has held that, once requested, a claimant should have the opportunity to present witnesses, to introduce additional evidence and to present his argument before an administrative law judge. *Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998); *see Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998). Accordingly, on remand, the administrative law judge must provide a hearing as requested by claimant. *Robbins, supra*.

Accordingly, the administrative law judge's Decision and Order Dismissing Claim and Order Canceling Hearing is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

McGRANERY

REGINA C.
Administrative Appeals Judge