

BRB No. 00-0785 BLA

ANDREW T. SMARR	)		
	)		
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 - Denying Modification and Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Jennifer U. Toth (Judith E. Kramer, Acting Solicitor of Labor; 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Modification and Denying Benefits (99-BLA-0754) of Administrative Law Judge Ralph A. Romano on a duplicate 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).<sup>1</sup> Adjudicating claimant's petition

<sup>1</sup> The 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

for modification<sup>2</sup> pursuant to 20 C.F.R. Part 718 (2000), the administrative law judge found

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<sup>2</sup> Claimant is Andrew T. Smarr, the miner, who filed his first application for benefits on September 8, 1982, which was denied by Administrative Law Judge Ainsworth H. Brown in a Decision and Order dated January 28, 1988. Director's Exhibit 19. Claimant appealed the denial to the Board, but thereafter, pursuant to claimant's request, the Board withdrew claimant's appeal in an order issued on October 31, 1988. *Smarr v. Director, OWCP*, BRB No. 88-656 BLA (Oct. 31, 1988)(unpub. Order); Director's Exhibit 19. Subsequently, claimant filed a duplicate claim for benefits on September 29, 1993, Director's Exhibit 1, which was dismissed on January 4, 1995 per claimant's request, Director's Exhibit 22. On October 19, 1995, claimant filed a petition for modification and supporting evidence, Director's Exhibit 24, which Administrative Law Judge Paul H. Teitler construed as a third application for benefits because it was filed more than one year since the previous denial on June 21, 1994. Administrative Law Judge Teitler adjudicated this claim and, in a Decision and Order dated November 8, 1997, denied benefits. Director's Exhibit 59. Claimant filed an appeal to the Board, however, claimant later filed a Motion to Remand, indicating his desire to pursue modification proceedings and requesting that the Board remand the case to the district director. Director's Exhibit 67. By order dated September 30, 1998, the Board dismissed claimant's appeal and remanded the case to the district director. *Smarr v. Director, OWCP*, BRB No. 98-0373 BLA (Sep. 30, 1998)(unpub. Order); Director's Exhibit 68. Consequently, claimant filed a request for modification and supporting evidence.

that in prior proceedings, claimant had affirmatively established the existence of pneumoconiosis arising out of coal mine employment, but failed to demonstrate total disability due to pneumoconiosis. Subsequently, the administrative law judge addressed the relevant evidence and found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), and therefore, found that claimant failed to establish either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied modification and benefits.

On appeal, claimant argues that the administrative law judge erred in denying his request for a formal hearing on modification and an opportunity to submit rebuttal evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, requesting that the case be remanded to the administrative law judge for a formal hearing and arguing that both she and claimant be provided an opportunity to submit additional evidence. Therefore, the Director requests that the Board vacate the Decision and Order of the administrative law judge.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which the Director and claimant have responded.<sup>3</sup> Based on the responses submitted by claimant and the Director and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant contends that the administrative law judge improperly ignored Board precedent by erroneously denying claimant his due process right to a hearing on modification. The Director agrees with claimant inasmuch as claimant requested a hearing on modification in this proceeding and did not waive his right to such. These contentions have merit. A review of the record reveals that on December 22, 1998, claimant submitted his request for modification and supporting evidence with the district director. Director's Exhibit 70. The district director denied modification and claimant requested a formal hearing on January 28, 1999. Director's Exhibit 73. Consequently, the administrative law judge issued an Order to Show Cause giving any party who desired a formal hearing the opportunity to show cause why a formal hearing was necessary or whether the case could be decided based on the documentary evidence and documents which might be submitted

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<sup>3</sup>The Director's brief, dated March 29, 2001, asserts that the outcome of this case will not be affected by application of the revised regulations pursuant to 20 C.F.R. §§725.450, 725.451 because only technical changes have been made to these provisions and the revised 20 C.F.R. §725.310 applies only to claims filed on or after January 19, 2001. Claimant contends that the revised regulations will not affect the outcome of this case.

henceforth. Director's Exhibit 78. Claimant responded, stating that he was entitled to a hearing on his case because "the Black Lung regulations unequivocally guarantee a party the right, to a hearing before an Administrative Law Judge in cases involving a petition for modification." Director's Exhibit 79. The Director responded that she had no objection to a decision being based on the documentary record. Director's Exhibit 80. Upon consideration of the parties responses, the administrative law judge issued an order dated May 28, 1999, stating, "there will be no hearing in this matter," ordered the parties to submit any further documentary evidence and set the briefing schedule. Director's Exhibit 81.

The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in discussing claimant's right to a hearing on modification stated in *Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995), that under the regulations, *see* 20 C.F.R. §725.421(a)(2000), the Director must refer a claim to the Office of Administrative Law Judges if a party requests a formal hearing. 71 F.3d at 110, 20 BLR at 2-44. In addition, the Board has held that Sections 725.421(a), 725.450, and 725.451 (2000) "mandate that an administrative law judge hold a hearing on any claim, including a request for modification filed with the district director, whenever a party requests such a hearing, unless such hearing is waived by the parties, *see* 20 C.F.R. §725.461(a)[2000], or a party requests summary judgment, *see* 20 C.F.R. §725.452(c)[2000]." *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000); *see Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 498, 22 BLR 2-1, 2-12-13 (4th Cir. 1999); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998); *Arnold v. Peabody Coal Co.*, 41 F.3d 1203, 19 BLR 2-22 (7th Cir. 1994). Inasmuch as claimant did not waive his right to a hearing on modification nor did any party request summary judgment in the instant case, the administrative law judge impermissibly refused to conduct a hearing in this matter. *See Plesh, supra; Pukas, supra*. Accordingly, we vacate the administrative law judge's Decision and Order and remand the case to the administrative law judge to conduct a hearing *de novo* on claimant's request for modification pursuant to Section 725.310 (2000). *Plesh, supra; Pukas, supra; see Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). Furthermore, pursuant to Section 725.456(b)(2)(2000), "... any other documentary material, including medical reports, which was not submitted to the [district director], may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim." 20 C.F.R. §725.456(b)(1), (2), (3) (2000); *see North American Coal Co. v. Miller*, 870 F.2d 948, 951-952, 12 BLR 2-222, 2-227-228 (3d Cir. 1989)("due process, as incorporated in the Administrative Procedure Act requires an opportunity for rebuttal where it is necessary to the full presentation of a case"); *see also Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991).

Accordingly, the Decision and Order - Denying Modification and Denying Benefits of the administrative law judge is vacated, and this case is remanded for proceedings consistent with this opinion.<sup>4</sup>

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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<sup>4</sup> Our decision to vacate the administrative law judge's Decision and Order and remand the case for further proceedings obviates the need to address the administrative law judge's findings on the merits.