

BRB Nos. 11-0547 BLA
and 11-0748 BLA

SARAH C. VANDYKE)
(o/b/o and Widow of ELMER C.)
VANDYKE))
)
Claimant-Petitioner)
)
v.)
)
L & R MINING COMPANY,)
INCORPORATED)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 05/29/2012
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Denial of Request for Modification of Alan L. Bergstrom, 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 Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denial of Request for Modification (2008-BLA-05642 and 2008-BLA-05643) of Administrative Law Judge Alan L. Bergstrom denying benefits on a miner's claim and a survivor's 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).² This case has a lengthy procedural history, and is before the Board for the fifth time.³ In the last appeal, the Board affirmed Administrative Law Judge Clement J. Kichuk's finding that modification of the prior denial of benefits in the miner's claim was not appropriate pursuant to 20 C.F.R. §725.310 (2000), as the evidence was insufficient to establish that pneumoconiosis was a necessary cause of the

¹ Claimant is the widow of the miner, who died on August 13, 1993. Director's Exhibit 160. In addition to her claim for survivor's benefits, claimant is pursuing the miner's claim on behalf of his estate. Director's Exhibit 154.

² Because both claims were filed before January 1, 2005, recent amendments to the Act do not affect this case. *See* Public Law No. 111-148, §1556(c), 124 Stat. 119 (2010).

³ The miner filed his application for benefits on October 7, 1986, which was ultimately denied, after remand from the Board, in a Decision and Order issued by Administrative Law Judge G. Marvin Bober on October 7, 1991. *Vandyke v. L&R Mining Co.*, BRB No. 88-2793 BLA (June 13, 1990)(unpub.); Director's Exhibits 46, 56, 61. The miner subsequently filed a request for modification with the district director on January 23, 1992, which was denied on April 1, 1992. Upon request for a hearing, the case was assigned to Administrative Law Judge Paul H. Teitler. The miner died on August 18, 1993, while his claim was pending. Judge Teitler denied benefits on December 19, 1994, and claimant filed an appeal with the Board on January 5, 1995. Director's Exhibit 127. Claimant filed her survivor's claim on February 8, 1994. While her claim was pending before the Office of Administrative Law Judges, claimant filed a motion to dismiss her appeal of the miner's claim, requesting that the Board remand the case to the district director for modification proceedings and for consolidation purposes. By Order issued on July 17, 1995, the Board granted claimant's motion. *Vandyke v. L&R Mining Co.*, BRB No. 95-0867 BLA (July 17, 1995)(Order)(unpub.); Director's Exhibits 141, 199. Claimant contemporaneously filed a motion with the Office of Administrative Law Judges to remand her survivor's claim to the district director for consolidation with the miner's claim, which was granted. Both claims were ultimately denied by Administrative Law Judge Clement J. Kichuk, and the Board affirmed the denial of benefits. *Vandyke v. L&R Mining, Inc.*, BRB No. 01-0433 BLA (Mar. 28, 2002)(unpub.); Director's Exhibit 233.

miner's totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) (2000).⁴ The Board also affirmed Judge Kichuk'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) (2000), and affirmed his denial of benefits in the survivor's claim. *Vandyke v. L&R Mining, Inc.*, BRB No. 01-0433 BLA (Mar. 28, 2002)(unpub.). Claimant did not appeal the Board's decision.

By letter dated October 1, 2002, claimant's counsel submitted an Overpayment Recovery Questionnaire to the district director, along with a handwritten letter from claimant, seeking waiver of recovery of the overpayment of interim benefits made by the Black Lung Disability Trust Fund (Trust Fund). On December 3, 2002, the district director notified claimant that "the circumstances of your case warrant the termination of the recovery of the overpayment," adding that "since you have inferred that you are requesting modification of the denial of your claim, the overpayment may be reopened if you are once again found entitled to benefits." Director's Exhibit 237. Claimant subsequently submitted a May 8, 2004 pathology report from Dr. Perper in support of modification, and employer contested entitlement in both claims, arguing that claimant failed to timely request modification. The case was assigned to Administrative Law Judge Alan L. Bergstrom (the administrative law judge), who found that claimant failed to request modification within one year of the Board's Decision and Order of March 28, 2002. The administrative law judge further determined that claimant could not establish a change in the deceased miner's condition; that claimant failed to demonstrate a mistake in a prior determination of fact in either claim; and that reopening the claims would not render justice under the Act.⁵ Thus, the administrative law judge concluded that modification pursuant to 20 C.F.R. §725.310 (2000) was not appropriate, and denied benefits in both the miner's claim and the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding that the correspondence forwarded to the Department of Labor (DOL) on October 1, 2002

⁴ In 2001, the Department of Labor amended the regulations implementing the Act. As the claims in this case were filed prior to January 19, 2001, the former version of the regulations remains applicable. 20 C.F.R. §725.2.

⁵ Modification of an award or denial of benefits in a miner's claim may be made on the grounds of either a change in conditions or a mistake in a determination of fact. *See* 20 C.F.R. §725.310 (2000). Because the miner died prior to the Board's 2002 decision, there could be no finding that his physical condition had changed since the Board's decision. For the same reason, claimant cannot establish a basis for modification in her survivor's claim by showing a change in the miner's condition. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989).

did not constitute a timely request for modification of the consolidated claims. Claimant also contends that the administrative law judge erred in finding that reopening the claims would not render justice under the Act. Employer/carrier (employer) responds in support of the denial of modification, and asserts that due process requires its dismissal as a party and a transfer of liability to the Trust Fund. The Director, Office of Workers' Compensation Programs, has declined to file a response in this case.

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.⁶ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a), the fact-finder may, on the ground of a change in conditions or because of a mistake in a determination of fact, reconsider the terms of an award or denial of benefits. The implementing regulation provides, in relevant part, that a request for modification may be filed "at any time before one year after the denial of a claim." See 20 C.F.R. §725.310(a) (2000); *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Claimant contends that the administrative law judge erred in finding that her handwritten letter and her counsel's October 1, 2002 letter to DOL did not constitute a timely modification request. Claimant argues that a request for modification need not be formal in nature or contain the word "modification," and notes that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that almost any sort of correspondence from a claimant can constitute a request for modification, as long as it is timely filed and expresses dissatisfaction with a purportedly erroneous denial. Claimant's Brief at 11, citing *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999). Claimant asserts that her handwritten letter, sent to the district director within one year of the Board's Decision and Order, clearly expresses her dissatisfaction with the Board's decision and her intent to have the outstanding repayment obligation excused and the case reconsidered. Claimant also maintains that the district director has the discretion to grant modification and that he acknowledged claimant's letter as a modification request. Claimant's Brief at 8-13. Claimant's arguments lack merit.

⁶ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

The record reflects that on March 28, 2002, the Board issued its Decision and Order affirming Judge Kichuk's denial of benefits. By letter to the district director, dated October 1, 2002, claimant's counsel stated that:

Enclosed is the completed OWCP-20 form⁷ along with a handwritten letter from [claimant] explaining the enclosed documents she has supplied in support of the request for waiver [of recovery of overpayment].⁸ After reviewing these documents, if you need clarification, have questions, or need additional information, please advise.

Director's Exhibit 236. Counsel enclosed a two-page handwritten letter from claimant, addressed "To Whom It May Concern," that began: "In reference to the overpayment of benefits I [received] from my deceased husband and why I feel I am entitled to these benefits is as follows." Director's Exhibit 234. Claimant averred that, when the benefits were awarded, she used them in good faith for her livelihood, without thinking that she might have to pay them back, and that she believed the miner's medical evidence constituted valid proof of entitlement. *Id.* After explaining her difficulty in repaying the overpayment of approximately \$34,000.00, claimant concluded: "For these reasons I would hope you would reconsider and excuse the debt you are saying I owe." *Id.* By letter dated December 3, 2002, the district director informed claimant that she was absolved of any indebtedness, but noted that "since you have inferred that you are requesting modification of the denial of your claim, the overpayment may be reopened if you are once again found entitled to benefits." Director's Exhibit 237. In a letter to the district director, dated April 26, 2003, claimant's counsel stated, in relevant part:

Request for modification regarding the above captioned case was to be requested with reference to the denial of benefits dated March 28, 2003 [sic]. My office had requested a medical analysis be done by Dr. Joshua Perper. At this time, we are waiting for the report to be concluded by Dr. Perper. I anticipate receiving the report no later than May 15, 2003.

Director's Exhibit 238. Counsel asked that he be notified of "any other parties to this case," and handwrote "I request more time" after his signature. *Id.*

⁷ Form OWCP-20 is entitled "Overpayment Recovery Questionnaire."

⁸ Claimant received interim benefits on the miner's claim from the Black Lung Disability Trust Fund, resulting in an overpayment when benefits were ultimately denied. *See* 20 C.F.R. §725.540.

In his Decision and Order - Denial of Request for Modification, the administrative law judge rejected claimant's assertion that her handwritten letter was a request for reconsideration of the Board's decision affirming the denial of benefits. After reviewing relevant case law and noting that a valid request for modification must set forth some basis for a reasonable person to conclude that a modification request has been made, the administrative law judge found that claimant's letter was merely a request for waiver of recovery of an overpayment of benefits, as it did not contain new evidence or reference a mistake in a determination of fact, but rather, expressed dissatisfaction with the requirement that she repay the overpayment of benefits. Decision and Order at 6, *citing Stanley*, 194 F.3d at 496, 22 BLR at 2-11; *I.T.O. Corp. v. Pettus*, 73 F.3d 523, 527 (4th Cir. 1996), *cert. denied*, 519 U.S. 807. The administrative law judge further found that counsel's letter dated April 26, 2003 was a request for modification of the prior denial, but that it was not timely filed within one year of the Board's decision issued on March 28, 2002, and that the record contained no other correspondence that could constitute a timely request for modification. Decision and Order at 7, 11-12.

After reviewing the administrative law judge's findings and claimant's arguments on appeal, we conclude that claimant has not demonstrated an abuse of discretion by the administrative law judge. The record supports the administrative law judge's determination that claimant's October 1, 2002 correspondence to DOL constituted a request for waiver of recovery of the overpayment, not a request for modification pursuant to Section 725.310 (2000). *See Pettus*, 73 F.3d at 527; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc). While counsel's letter of April 26, 2003 expressed claimant's intent to reopen the claims and submit new evidence, the administrative law judge properly found that this letter constituted an untimely request for modification, as it was filed more than one year after issuance of the Board's March 28, 2002 decision. 20 C.F.R. §725.310 (2000); Decision and Order at 11; Director's Exhibit 238. Consequently, we affirm the administrative law judge's finding that the record does not contain a timely request for modification pursuant to Section 725.310 (2000) in the miner's claim or the survivor's claim.

Assuming, *arguendo*, that claimant timely requested modification, however, we also reject claimant's argument that the administrative law judge erred in denying modification of the consolidated claims. The administrative law judge properly found that claimant could not establish a change in the deceased miner's condition, and reviewed the record for a mistake of fact in Judge Kichuk's prior determination that the evidence was insufficient to establish disability causation at Section 718.204(b) (2000) and death due to pneumoconiosis at Section 718.205(c) (2000). The administrative law judge determined that the new evidence submitted on modification consisted of Dr. Perper's pathology report, diagnosing complicated pneumoconiosis that substantially contributed to the miner's disability and death, and Dr. Crouch's contrary pathology report, diagnosing simple pneumoconiosis that was insufficient in extent and severity to

have caused a significant degree of impairment or to have contributed to the miner's death. Director's Exhibits 240, 255; Decision and Order at 9-10. The administrative law judge further determined that, while Dr. Perper's findings of pneumoconiosis and total respiratory disability were consistent with the evidence of record and the prior judicial decisions, the physician's opinion, that a 1.0 centimeter nodule observed at autopsy is sufficient to represent complicated pneumoconiosis under the regulatory requirements, was inconsistent with applicable case law and the preamble to the revised regulations. Decision and Order at 9; *see* 65 Fed. Reg. 79,936 (Dec. 20, 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999). Noting that the record contains a large volume of x-rays, ventilation studies, blood gas studies, treatment records and autopsy and/or pathology reports that the prior tribunals evaluated in detail, the administrative law judge found that Dr. Perper's opinion adds to the evidence of record regarding the extent of the miner's pneumoconiosis and its possible contribution to his disability and death. However, the administrative law judge acted within his discretion in concluding that claimant failed to establish that the prior final decision was incorrect, finding that Dr. Perper's opinion "does not undermine the analysis and accuracy of the prior decisions," or "result in a different determination" as to the role pneumoconiosis played in the miner's disability or death. Decision and Order at 10-11. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his denial of modification of the consolidated claims.

Accordingly, the administrative law judge's Decision and Order – Denial of Request for Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge