



BRB Nos. 17-0685 BLA
and 17-0685 BLA-A

CHARLES B. HALSEY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
AMFIRE/BROOKS RUN MINING)	
)	DATE ISSUED: 11/07/2018
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Cross-Petitioner)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order on Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith, Charleston, West Virginia, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision and Order on Modification (2017-BLA-5346) of Administrative Law Judge Daniel F. Solomon dismissing a claim filed on November 18, 2008 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

In a Decision and Order dated December 16, 2010, Administrative Law Judge Richard A. Morgan denied benefits because he found that the evidence did not establish that claimant suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Upon review of claimant's appeal, the Board affirmed Judge Morgan's denial of benefits. *Halsey v. Amfire LLC*, BRB No. 11-0269 BLA (Dec. 5, 2011) (unpub.).

Claimant timely requested modification on February 16, 2012. Director's Exhibit 58. In a Decision and Order dated August 12, 2015, Administrative Law Judge Adele Higgins Odegard found that the new evidence established the existence of complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. She therefore found that claimant established a change in conditions pursuant to 20 C.F.R. §725.310. Judge Odegard further found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and she awarded benefits accordingly. Judge Odegard found that the commencement date of benefits was February 2012, the month in which claimant filed his request for modification.

The Director timely moved for reconsideration of Judge Odegard's finding regarding the commencement date of benefits, arguing that claimant could be entitled to benefits "as early as November 2008." Director's Motion for Reconsideration at 8. One day after the Director filed her motion, employer filed an appeal with the Board. However, employer subsequently requested that its appeal be dismissed and the case remanded for the payment of benefits. By Order dated September 30, 2015, the Board granted employer's motion, dismissed its appeal, and remanded the case to the district director for

the payment of benefits.¹ *Halsey v. Amfire LLC*, BRB No. 15-0507 BLA (Sept. 30, 2015) (Order) (unpub.).

Claimant subsequently requested modification of Judge Odegard's award of benefits, challenging the determination of the benefits commencement date. The district director granted claimant's request for modification, ordering benefits to commence as of November 2008. Director's Exhibit 94. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

By Order dated May 24, 2017, Administrative Law Judge Daniel F. Solomon (the administrative law judge) set out a briefing schedule, noting that claimant waived an oral hearing and agreed to submit the case by stipulation. Additionally, he ordered the parties to exchange any prehearing submissions or evidence by August 10, 2017. The administrative law judge further ordered the parties to submit a report listing and summarizing all the documentary evidence, and directed that all documents be received by September 1, 2017. He further advised the parties that he would hold a telephone conference after all the evidence of record was received.

Because there was no response to the order, the administrative law judge issued another order on September 7, 2017, directing the parties to show good cause "why [the] claim should not be dismissed or remanded" for failure to comply with his orders. Each of the parties responded to the show cause order. Employer responded by indicating that no additional evidence was necessary since the issue in dispute was strictly a legal one involving the commencement date of benefits. Employer requested the opportunity to submit written briefs, noting that it had interpreted the order to mean that the parties' evidence had to be submitted by September 1, 2017 and that the briefing deadline would be established during the telephonic conference. Claimant responded, agreeing with employer's position, and requested an opportunity to submit a written brief. The Director responded by noting that it was likely that no party responded to the May 24, 2017 Order because the evidence relating to the benefits commencement date was already in the record. The Director asserted that the case should proceed to decision on the single issue in this case.

¹ By Order dated December 23, 2015, Administrative Law Judge Adele Higgins Odegard ruled that, because the Board remanded the case to the district director, she lacked jurisdiction to decide the motion for reconsideration filed by the Director, Office of Workers' Compensation Programs (the Director). She therefore dismissed the Director's motion. On February 12, 2016, Judge Odegard dismissed the Director's subsequent motion, requesting that she reconsider her December 23, 2015 Order.

In a Decision and Order on Modification dated September 19, 2017, the administrative law judge found that the parties failed to establish good cause for not providing him with evidence summaries. Accordingly, the administrative law judge dismissed the claim.

On appeal, claimant and the Director contend that the administrative law judge erred in dismissing the claim. Employer responds in support of the administrative law judge's dismissal of the claim. In a reply brief, claimant reiterates his previous contentions.

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. 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Claimant and the Director argue that the administrative law judge erred in dismissing the claim. In so doing, the administrative law judge stated:

The parties advise that they conferred by telephone and agree that this modification claim involves a pure[ly] legal issue and there is no need for any medical evidence beyond that which is already included in the record. Although I directed them to file medical summaries, they unilaterally determined that all that need be submitted is the parties' briefs. The parties were told that I would hold a telephone conference. Both Claimant and Employer/Carrier[']s counsel have had other cases with me. I set forth on the record in a telephone conference exactly what evidence I would have used to evaluate the case and would have asked the parties to argue their respective positions.

They request 30 days for the parties to submit their respective briefs.

However, I find that they have NOT provided good cause why they did not provide me with evidence summaries.

Decision and Order on Modification at 2-3. The administrative law judge therefore dismissed the claim. *Id.* at 3.

The regulations provide that an administrative law judge may, on his or her own motion, dismiss a claim based upon a claimant's failure to comply with a lawful order. *See* 20 C.F.R. §725.465(a)(2). However, an administrative law judge must first issue an Order to Show Cause why dismissal should not occur, and afford all the parties a reasonable

amount of time in which to respond to such order. 20 C.F.R. §725.465(c). After the time for response has expired, the administrative law judge “shall take such action as is appropriate to rule on the dismissal, which may include an order dismissing the claim, defense or party.” *Id.*

However, where the Black Lung Disability Trust Fund (Trust Fund) has paid interim benefits, the regulations provide that “[no] claim shall be dismissed in a case with respect to which payments prior to final adjudication have been made to the claimant . . . *except upon the motion or written agreement of the Director.*” 20 C.F.R. §725.465(d) (emphasis added). Thus, the Director’s consent must be obtained before a case in which the Trust Fund has paid interim benefits may be dismissed. As the Director accurately notes, the Trust Fund has paid interim benefits on this claim, and she has not agreed to the dismissal of the claim. Director’s Brief at 2. Thus, the administrative law judge exceeded his authority in dismissing the claim.² *See Boggs v. Falcon Coal Co.*, 17 BLR 1-62, 1-66 (1992).

Moreover, we agree with claimant and the Director that the administrative law judge’s remedy of dismissal was not appropriate under the circumstances of this case. First, as noted by the Director, the dismissal of the claim operates to the detriment of claimant and to the benefit of the employer, even though both parties failed to submit the requested evidence summaries. Director’s Brief at 2. Additionally, while this case involves a dispute regarding the commencement date of benefits, there is no dispute regarding claimant’s entitlement to benefits. *Id.* As a result, the dismissal of the claim is an unduly harsh action. Finally, the Director notes that the failure of the parties to submit evidence summaries was based on a “misunderstanding,” and “not meant as disrespect to the [administrative law judge].” *Id.* The administrative law judge’s dismissal of the claim, without considering “whether lesser sanctions would better serve the interests of justice,” was an extreme sanction and an abuse of discretion. *See French v. Cal. Stevedore & Ballast*, 27 BRBS 1, 6 (1993).

² In issuing his order of dismissal, the administrative law judge cited, as authority, portions of 29 C.F.R. §§18.12, 18.57, which relate to the termination and dismissal of proceedings. Decision and Order on Modification at 2. Consequently, it appears that the administrative law judge may have intended to dismiss the proceeding, not the claim. However, his order directed dismissal of the claim. The only claim in this case is the one filed by claimant on November 18, 2008.

Accordingly, the administrative law judge's Decision and Order on Modification dismissing the claim is vacated, and the case is remanded for further consideration of claimant's request for modification.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge