BRB No. 00-0123 BLA

WILLIAM SOHOSKY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
READING ANTHRACITE COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order-Denial of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen Koschoff, Wilburton, Pennsylvania, for claimant.

John D. Maddox (Arter & Hadden LLP), Washington, D.C., for employer.

Barry H. Joyner (Henry L. Solano, 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: SMITH and McGRANERY, Administrative Appeals Judges and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (99-BLA-0597) of Administrative Law Judge Ralph A. Romano with respect to 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). The relevant procedural history of this case is as follows: Claimant filed an application for benefits on April 12, 1995. Director's Exhibit 1. In a Decision and Order dated January 7, 1997, Administrative Law Judge Robert D. Kaplan accepted the parties' stipulation that claimant had forty-five years of coal mine employment and considered the claim pursuant to the regulations set forth in 20 C.F.R. Part 718. Judge Kaplan determined that the evidence of record was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. Director's Exhibit 104. Claimant filed an appeal with the Board which, in a Decision and Order issued on December 22, 1997, affirmed the denial of benefits. *Sohosky v. Reading Anthracite Co.*, BRB No. 97-0607 BLA (Dec. 22, 1997)(unpub.).

Claimant filed a timely request for modification on March 30, 1998. 20 C.F.R. §725.310(a); Director's Exhibit 117. The district director initially determined that claimant failed to establish either a change in conditions or a mistake in a determination of fact. Director's Exhibit 126. Claimant contested the district director's findings and requested a hearing. Director's Exhibit 132. The case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Ralph A. Romano (the administrative law judge). The administrative law judge issued a Notice of Hearing scheduling the case for June 2, 1999. Claimant's counsel moved for a continuance and employer did not object. The administrative law judge responded with an Order to Show Cause asking the parties to set forth their positions as to whether a hearing was necessary with respect to claimant's request for modification. Both claimant and employer indicated in writing that they wanted a hearing to be conducted. The administrative law judge subsequently issued an Order in which he stated that no hearing would be held in this case. The administrative law judge then proceeded to issue the Decision and Order that is the subject of the present appeal.

The administrative law judge determined that claimant failed to establish either a change in conditions or a mistake in a determination of fact pursuant to Section 725.310. Accordingly, benefits were denied. Claimant argues on appeal that the administrative law judge erred in failing to conduct a hearing. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has responded and

maintains that this case should be remanded to the administrative law judge for a hearing in accordance with claimant's request.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable 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).

Employer asserts that the administrative law judge did not err in declining to hold a hearing in this case inasmuch as the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §554, *et seq*., as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), allow for the adjudication of a claim based solely upon consideration of the documentary evidence. *See* 5 U.S.C. §556(d). Employer also argues that the United States Court of Appeals for the Sixth Circuit's holdings on this issue are fact-specific do not apply in the present case.

Although this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, both claimant and employer focus upon the decisions of the United States Court of Appeals for the Sixth Circuit.[1] Contrary to employer's assertions, the Sixth Circuit has clearly held that under the Act and the implementing regulations, a party asking for a hearing on modification is entitled to one. *See Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998); *see also Robbins v. Cypress Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998). The court did not determine that the provisions of the APA are controlling nor did it limit its holding to cases in which a claimant acting without the assistance of counsel requests a hearing. In addition, the Director notes correctly that although the APA permits the Secretary of Labor (the Secretary) to create procedures whereby an oral hearing is not required, the Secretary has exercised this discretion by adopting regulations which specify that an oral hearing is not required only when the parties waive their right to a hearing or when a party's motion for summary judgment is deemed meritorious. 20 C.F.R. §§725.450, 725.461. No other circumstances are identified which fall outside the broad scope of 20 C.F.R. §725.450, which provides that "[a]ny party

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[1]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's qualifying coal mine employment occurred in the Commonwealth of Pennsylvania. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

to a claim shall have a right to a hearing concerning any contested issue of fact or law[.]" Finally, the Sixth Circuit rejected the notion, advanced by employer in this case, that the promotion of judicial efficiency justifies denying a hearing on modification when it is not apparent that anything of probative value will be adduced at the hearing. *See Robbins*, *supra*.

More germane to the present case, in *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000), the Board adopted the holdings of the Fourth and Sixth Circuits and held that in all cases, regardless of the United States Court of Appeals in which jurisdiction arises, a party is entitled to a hearing with respect to a petition for modification if one is requested. *Pukas*, *supra*, 22 BLR at 1-72, *citing* 20 C.F.R. §§725.421(a), 725.450, 725.451; *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Robbins*, *supra*; *Cunningham*, *supra*. Thus, we hereby vacate the administrative law judge's Decision and Order-Denial of Benefits and remand the case to the administrative law judge to hold a hearing concerning claimant's request for modification.[2]

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[2]Inasmuch as the omission of a hearing voided the administrative law judge's Decision and Order-Denial of Benefits, there is no merit in employer's contention that the administrative law judge's substantive findings under 20 C.F.R. §725.310 should be affirmed as unchallenged on appeal.

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge