U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 17-0644 BLA
and 17-0645 BLA

HELEN COTTON (Widow of CLIFFORD COTTON) Claimant-Petitioner v. STONEY RIDGE COAL COMPANY and AMERICAN MINING INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/11/2018 DECISION and ORDER

Appeal of the Order Granting Employer's Motion to Dismiss and Decision and Order on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Loring Justice, R. Chadwick Rickman, and Linn Guerrero (Loring Justice, PLLC), Knoxville, Tennessee, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Order Granting Employer's Motion to Dismiss and Decision and Order on Remand (2014-BLA-05232, 2014-BLA-05233) of Administrative Law Judge Daniel F. Solomon dismissing a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on August 22, 2005.[2]

On June 17, 2008, Administrative Law Judge Paul C. Johnson conducted a consolidated hearing on both a miner's subsequent claim filed on April 13, 2001[3] and claimant's 2005 survivor's claim. In a Decision and Order dated November 21, 2008, Judge Johnson adjudicated the miner's claim. He credited the miner with thirty-six years and eleven months of coal mine employment,[4] and found that the autopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Judge Johnson further found that the miner was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Judge Johnson

[1] Claimant is the surviving spouse of the miner, who died on March 30, 2005. Director's Exhibit 65.

[2] Claimant's appeal in the survivor's claim was assigned BRB No. 17-0645 BLA. Although the Board assigned BRB No. 17-0644 BLA to claimant's appeal in the miner's claim, a review of the file and the Board's docket system reveals that claimant did not file an appeal of the miner's claim. Thus, only the survivor's claim is before the Board on appeal.

[3] The miner initially filed a claim for benefits with the Social Security Administration (SSA) on October 19, 1970. Director's Exhibit 1. The SSA denied benefits on June 13, 1973, and the Department of Labor denied benefits on March 28, 1979. *Id.* The miner filed a second claim on October 7, 1991. *Id.* An administrative law judge denied benefits because she found that the evidence did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. *Id.* The Board affirmed her denial of benefits. *Cotton v. Stoney Ridge Coal Co.*, BRB No. 97-0248 BLA (Oct. 23, 1997) (unpub.).

[4] The miner's coal mine employment was in Tennessee. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

found that the evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), however, and denied benefits accordingly.

In a separate Decision and Order dated November 21, 2008, Judge Johnson denied benefits in the survivor's claim because he found that the evidence did not establish that the miner's death was due to pneumoconiosis. Pursuant to claimant's appeal, the Board affirmed Judge Johnson's denial of both claims. *Cotton v. Key Mining, Inc.*, BRB Nos. 09-0262 BLA and 09-0655 BLA (Nov. 16, 2009) (unpub.).

Claimant timely requested modification on November 5, 2010, challenging the denial of both the miner's claim and the survivor's claim. 20 C.F.R. §725.310; Director's Exhibit 115. On November 8, 2010, the district director notified claimant that because her survivor's claim was denied less than one year ago, her correspondence would be considered "a request for modification of the prior denial." Director's Exhibit 116. However, on April 11, 2011, the district director denied claimant's request for modification of the miner's claim only.[5] Director's Exhibit 117.

On April 2, 2012, claimant requested modification of "the most recent denial of benefits." Director's Exhibit 119. On July 9, 2012, the district director denied claimant's request for modification of the survivor's claim only.[6] Director's Exhibit 120.

Claimant filed a third request for modification on July 8, 2013. Director's Exhibit 121. The district director denied claimant's request for modification of the survivor's claim on October 8, 2013. Director's Exhibit 124.

By letter dated November 4, 2013, claimant requested a formal hearing. Director's Exhibit 125. The district director forwarded both the miner's claim and the survivor's claim to the Office of Administrative Law Judges for a formal hearing.[7] Director's Exhibits 126, 128.

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[5] The district director did not address the survivor's claim. Director's Exhibit 17.

[6] The district director mistakenly indicated that the survivor's claim had been denied on April 11, 2011, when in fact the miner's claim had been denied. Director's Exhibit 120.

[7] On November 3, 2014, claimant requested modification of the October 8, 2013 denial of benefits. By letter dated November 4, 2014, the district director notified claimant that the miner's claim and survivor's claim had been forwarded to the Office of Administrative Law Judge for a formal hearing. The district director instructed claimant to inform the Office of

After Administrative Law Judge Daniel F. Solomon (the administrative law judge) scheduled a hearing for May 23, 2016, employer filed two pre-hearing motions. Employer first sought to clarify the status of the miner's claim. Employer also filed a motion to dismiss the survivor's claim, arguing that claimant could not establish a mistake in a determination of fact, and that granting modification would not render justice under the Act.

By Order dated May 4, 2016, the administrative law judge granted employer's motion to dismiss claimant's request for modification, finding that there was not a mistake in a determination of fact, and that reopening the case would not render justice under the Act. On June 3, 2016, claimant moved for reconsideration, arguing that the administrative law judge erred in not finding a mistake in a determination of fact. Claimant also requested that a hearing on her modification request be scheduled so that she could submit expert medical testimony in support of her claim. By Order dated June 8, 2016, the administrative law judge denied claimant's motion for reconsideration as untimely.

Pursuant to claimant's appeal, the Board held that claimant's motion for reconsideration was timely, having been filed with thirty days after the filing of the administrative law judge's decision. *Cotton v. Stoney Ridge Coal Co.*, BRB Nos. 16-0495 BLA, 16-0496 BLA (Sept. 26, 2016) (Order) (unpub.). The Board therefore remanded the case to the administrative law judge for consideration of claimant's motion for reconsideration.

On remand, the administrative law judge found that granting claimant's request for modification would not render justice under the Act. The administrative law judge also found that there was not a mistake in a determination of fact in the prior denial of benefits. Accordingly, he denied claimant's request for reconsideration.

On appeal, claimant contends that the administrative law judge erred in finding that there was not a mistake in a determination of fact in the denial of her survivor's claim. Claimant also challenges the administrative law judge's determination that granting her request for modification would not render justice under the Act. Employer responds in support of the administrative law judge's denial of claimant's request for modification. The Director, Office of Workers' Compensation Programs, has not filed a brief. In a reply brief, claimant reiterates her previous contentions of error.[8]

Administrative Law Judges if she wanted to file a request for modification of her claims. There is no indication in the record that claimant did so.

[8] Claimant argues that the manner in which Department of Labor administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II §2, cl. 2. Claimant's Reply Brief at 6-7. On July 12, 2018, employer filed a motion to hold 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. 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).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. 20 C.F.R. §725.310(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). However, when a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see King v. Jericol Mining, Inc.*, 246 F.3d 822, 825 (6th Cir. 2001); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Moreover, a party is not required to submit new evidence because an administrative law judge has the authority "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe*, 404 U.S. at 256; *see King*, 246 F.3d at 825.

In this case, we agree with claimant that the administrative law judge erred in not providing her with a hearing to address her petition for modification. Upon a party's request, an administrative law judge must hold a hearing to address any contested issue of fact or law. *See* 33 U.S.C. §919(c), (d), as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §§725.450, 725.451; *see Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 429 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 390 (6th Cir. 1998). A full evidentiary hearing need not be conducted, however, if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and

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in abeyance and for supplemental briefing to permit the Director, Office of Workers' Compensation Programs (the Director), to advise the Board and the parties of her position regarding the impact of *Lucia v. SEC*, 138 S.Ct. 2044 (2018), and then to allow the other parties to respond. The Director filed her response with the Board on July 30, 2018, asserting that claimant waived her Appointments Clause argument by failing to raise it in her opening brief. Director's Response at 4-5. We agree with the Director. Because claimant did not raise the Appointments Clause issue in her opening brief, she forfeited the issue. *See Lucia*, 138 S.Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after she has filed her brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). In light of our dismissal of claimant's argument, employer's motion for supplemental briefing is denied as moot.

the moving party is entitled to the relief requested as a matter of law.[9] *See* 20 C.F.R. §725.452(c). In this case, because the parties did not agree to a decision on the record, and no party filed a motion for summary judgment,[10] the administrative law judge was obligated to hold a hearing before issuing his decision. *See Robbins*,146 F.3d at 428-30. Consequently, on remand, the administrative law judge must hold the requested hearing unless one of the regulatory exceptions for doing so is found to be applicable.[11] *See* 20 C.F.R. §§725.461(a);

[9] Additionally, "[i]f the administrative law judge believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the judge shall notify the parties by written order and allow at least thirty days for the parties to respond," but if any party makes a timely request in response to the order, "the administrative law judge shall hold the oral hearing." 20 C.F.R. §725.452(d). While the parties may waive the right to a hearing before an administrative law judge, such waiver must be in writing and filed with the Chief Administrative Law Judge or the administrative law judge assigned to hear the case. *See* 20 C.F.R. §725.461(a). The procedures set forth in 725.452(d) were not employed in this case.

[10] Although employer filed a motion to dismiss claimant's request for modification, it did not file a motion for summary judgment. Further, contrary to employer's assertion, the administrative law judge did not issue a summary judgment. The administrative law judge also did not follow the necessary procedures for issuing such a judgment. Although the administrative law judge prefaced his May 4, 2016 Order and July 24, 2017 Decision and Order on Remand with citations of the regulatory provisions relating to summary judgment, and found that claimant did not contest the facts as submitted by employer, he did not provide notice that he was considering whether summary decision should be granted. See 29 C.F.R. §18.72. He also did not state that he was issuing a summary judgment. Rather, he found that there was not a mistake of fact and then dismissed the case. Order dated May 4, 2016 at 6.

[11] Although the administrative law judge acknowledged claimant's assertion that she intended to call an expert witness to testify at the hearing, the administrative law judge found that she had "not proffered any report or proffered what facts may be established from the witness." Decision and Order on Remand at 6. Contrary to the administrative law judge's characterization, claimant informed the administrative law judge, by letter dated May 6, 2016, as well as in her subsequent motion for reconsideration, that she intended to call Dr. Waldman as an expert witness. Claimant's Motion for Reconsideration at 3, Exhibit A. Claimant advised the administrative law judge that she anticipated that Dr. Waldman would testify at the hearing that the miner had a totally disabling respiratory impairment and that his death was caused, contributed to, or hastened, by the inhalation of coal mine dust or coal workers' pneumoconiosis. *Id.*

The administrative law judge ordered that the parties provide him, no later than twenty days prior to the May 23, 2016 scheduled hearing, with a list of witnesses that they intended

725.452(c), (d); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000) (holding that an administrative law judge must hold a hearing whenever a party requests one, unless the parties waive the hearing or a party requests summary judgment).

In view of the foregoing, we vacate the administrative law judge's finding that claimant failed to establish that the denial of her claim for survivor's benefits was based on a mistake in a determination of fact. 20 C.F.R. §725.310. On remand, the administrative law judge must reconsider this issue, setting forth his "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record," in accordance with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). If the administrative law judge finds that claimant has met her burden of demonstrating a mistake of fact, the administrative law judge should then re-consider whether granting claimant's modification request would render justice under the Act.[12] *See O'Keeffe*, 404 U.S. at 256; *Worrell*, 27 F.3d at 230.

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to call to testify. Order dated January 14, 2016 at 1-2. Claimant provided her notification after the expiration of the pre-hearing deadline, but more than ten days before the scheduled hearing date. *See* 20 C.F.R. §§725.456(c); 725.457(a).

[12] We note that the administrative law judge held that he was required to make a "threshold" determination of whether granting modification would render justice under the Act prior to considering the modification petition on the merits. Decision and Order on Remand at 5, *citing Sharpe v. Director, OWCP* [*Sharpe I*], 495 F.3d 125, 128 (4th Cir. 2007). This is not accurate. This is a Sixth Circuit case and that Circuit has not adopted *Sharpe*. Moreover, while *Sharpe I* held that an administrative law judge must consider the question before ultimately granting the relief requested in a modification petition, nothing in *Sharpe I* requires a threshold determination. While it might make sense to make a threshold determination in cases of obvious bad faith, for example, it does not follow that a threshold determination is appropriate in cases where there is no indication of an improper motive. In such a case, thus, the administrative law judge ordinarily should first consider the merits. If there is no basis to grant the relief requested in a modification petition, there is no reason to determine whether that relief would render justice under the Act. *See O'Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254, 255 (1971) (the plain purpose of modification is to vest an adjudicator "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.").

Accordingly, the administrative law judge's Order Granting Employer's Motion to Dismiss and Decision and Order on Remand are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.[13]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[13] The district director forwarded the denied miner's 2001 claim, along with the denied survivor's 2005 claim, to the Office of Administrative Law Judges for a formal hearing. However, the administrative law judge addressed only the survivor's claim. In its response brief, employer asserts that, if the Board remands the survivor's claim for further consideration, the Board should instruct the administrative law judge that "only the survivor's claim is pending for adjudication." Employer's Brief at 8. As employer did not file a cross-appeal, and as this argument is not offered in support of the decision below, we decline to address it. *See King v. Tenn. Consolidation Coal Co.*, 6 BLR 1-87, 1-91 (1983). However, because it goes to the jurisdiction of the administrative law judge, it should be addressed by the administrative law judge before he makes any determination concerning the miner's claim.