

BRB No. 02-0254 BLA

JOHN PIERSON (deceased))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:
MIDLAND COAL COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order-Granting Motion to Dismiss and the Order Denying Reconsideration of John C. Holmes, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Timothy S. Williams (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order-Granting Motion to Dismiss and the Order Denying Reconsideration (1997-BLA-1001) of Administrative Law Judge John C. Holmes rendered on 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).

¹ The miner filed this claim on March 21, 1978. Director's Exhibit 1. Employer was notified of and contested the claim. Director's Exhibits 20, 21. Thereafter, the Black Lung Disability Trust Fund (the Trust Fund) began payment of interim benefits pursuant to the district director's award.

The administrative law judge held a hearing on February 9, 1983, but for reasons that are not reflected by the record, was unable to obtain the hearing transcript. Director's Exhibit 33 at 1 n.1. The administrative law judge held a rehearing on November 4, 1983. At the second hearing, the parties agreed that the miner need not retestify concerning his coal mine employment. Instead, the parties stipulated to claimant's testimony as recorded in the administrative law judge's notes of the first hearing, which, by agreement of the parties, the administrative law judge read into the record. Tr. at 5.

The pertinent facts stipulated were that the miner worked in the strip mines for over twenty-five years as a welder. He generally worked in an on-site repair shop located "as far as three to six miles from the pit. However, he was exposed to substantial amounts of coal dust in addition to welding fumes." *Id.* Additionally, employer's counsel at the rehearing withdrew controversion of all issues except the medical issues checked on Form CM-1025. Tr. at 8. Thus, employer did not contest that claimant was a miner or that employer was the responsible operator. See Director's Exhibit 30.

In the ensuing Decision and Order-Granting Benefits, the administrative law judge credited the miner with twenty-nine years of coal mine employment, found invocation of the interim presumption of total disability due to pneumoconiosis established pursuant to 20 C.F.R. §727.203(a)(2),(4), and found that rebuttal of the presumption was not established pursuant to 20 C.F.R. §727.203(b). Director's Exhibit 33. Accordingly, he awarded benefits. Upon consideration of employer's appeal, the Board vacated both the invocation and rebuttal findings and remanded the case for further consideration. *Pierson v. Midland Coal Co.*, BRB No. 84-0333 BLA (Apr. 29, 1988)(unpub.); Director's Exhibit 36.

The administrative law judge again awarded benefits on remand. Director's Exhibit 37. On appeal, employer argued, *inter alia*, that the then-recent

¹ 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

decision in *Director, OWCP v. Zeigler Coal Co.* [Wheeler], 853 F.2d 529 (7th Cir. 1988), established that claimant was not a miner under the Act.

The Board held that employer was precluded from raising this issue because “employer stipulated to a finding that claimant was a miner and conceded the issue of responsible operator.” *Pierson v. Midland Coal Co.*, BRB No. 88-2153 BLA at 2 (Apr. 16, 1992)(unpub.); Director's Exhibit 38 at 2. The Board affirmed the administrative law judge’s finding that invocation was established pursuant to 20 C.F.R. §727.203(a)(2), but vacated the administrative law judge’s finding that rebuttal was not established and remanded the case for further consideration. [1992] *Pierson*, slip op. at 3; Director's Exhibit 38 at 3.

Employer timely moved for reconsideration. The miner died on June 21, 1992 while the motion for reconsideration was pending. Director's Exhibit 40. The miner’s widow had an autopsy performed, and filed a survivor’s claim on February 17, 1995. *Id.* Because the district director found the widow to have derivative entitlement, the Trust Fund began paying her interim benefits. Director's Exhibit 49. The Board summarily denied employer’s motion for reconsideration on March 22, 1996. Director's Exhibit 56.

On remand, the administrative law judge again found that employer did not establish rebuttal of the presumption, and awarded benefits. Director's Exhibit 57. Employer appealed, but subsequently moved for dismissal because it had filed a request for modification with the district director pursuant to 20 C.F.R. §725.310. Director's Exhibit 62. Accordingly, the Board dismissed employer’s appeal and remanded the case to the district director for modification proceedings. Director's Exhibit 63.

In its petition for modification, employer contended that the administrative law judge made a mistake when he found that Mr. Pierson was a miner. Employer also argued that the autopsy evidence demonstrated mistakes in the previous findings that employer did not establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3),(4). Director's Exhibit 64. The administrative law judge denied modification. He found employer bound by its stipulation that Mr. Pierson was a miner, and alternatively

² The record indicates that the miner’s most recent coal mine employment occurred in Illinois. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ Section 422(l) of the Act, 30 U.S.C. §932(l), relieves survivors of the burden of filing a claim and proving their own entitlement to benefits in cases involving awards to deceased miners on claims filed prior to January 1, 1982. *Smith v. Camco Mining, Inc.*, 13 BLR 1-17, 1-19 (1989).

found that the evidence established that he was a miner. The administrative law judge further found that the medical evidence did not establish a mistake of fact.

Employer appealed, but then moved for remand on the ground that the administrative law judge deprived employer of the opportunity to develop evidence on modification. By order issued December 12, 1997, the Board dismissed employer's appeal and remanded the case to the administrative law judge for further proceedings.

On remand, the administrative law judge reopened the record and received employer's additional evidence. The administrative law judge again found that Mr. Pierson was a miner, concluded that the medical evidence did not establish a mistake of fact, and denied modification. Employer appealed, and the miner's widow died on July 27, 1999, while the appeal was pending. Upon review of employer's appeal, the Board held that the administrative law judge erred by failing to hold the requested hearing on modification. *Pierson v. Midland Coal Co.*, BRB No. 99-0293 BLA (Sep. 21, 2000)(unpub.); Consequently, the Board vacated the administrative law judge Decision and Order and remanded for a *de novo* hearing on employer's modification request.

On remand, employer moved to dismiss the claim on the ground that no party in interest remained. Employer's Motions, March 3 and May 1, 2001. In the alternative, employer moved that the hearing be canceled and a decision be made on the record. The Director opposed employer's motion to dismiss, stating that "the Director has paid interim benefits to the miner and subsequently to the widow. The Director, therefore, seeks the opportunity to hear the case on the record and brief the matter in order to defend entitlement of benefits to the parties." Director's Letter, May 14, 2001.

In a Decision and Order-Granting Motion to Dismiss that is the subject of this appeal, the administrative law judge dismissed the claim. The administrative law judge explained that he granted employer's motion because "it is impossible . . . to conduct a hearing on the merits of the case as *specifically directed* by the Board without the participation of the Claimants" Decision and Order-Granting Motion to Dismiss at 1 (emphasis in original). The administrative law judge "reject[ed] the Director's contention that this matter is now a dispute between Employer and the Director, Party-In-Interest as to who is liable for benefits already paid," because "Employer's ability to pursue its petition for modification on the issues it contests, i.e., that Mr. Pierson, was, in fact, a miner and that he and the widow are entitled to benefits . . . is curtailed by the inability of Employer to call on the miner or the widow survivor." Decision and Order-Granting Motion to Dismiss at 2. The Director requested reconsideration, which the administrative law judge summarily denied on

November 19, 2001.

On appeal, the Director contends that the administrative law judge violated 20 C.F.R. §725.456(d) by dismissing the claim without the Director's consent. Employer responds, urging affirmance of the dismissal. Employer contends that alleged violations of employer's due process rights by the Department of Labor mandated dismissal of the claim, and argues further that 20 C.F.R. §725.456(d) is an invalid regulation. Additionally, employer contends that the Board must dismiss the claim because the record establishes as a matter of law that Mr. Pierson was not a miner. The Director has filed a reply brief reiterating his 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 supported by substantial evidence, is rational, and is in accordance with 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).

The Director contends that the administrative law judge erred by dismissing this claim over the Director's objection that the Trust Fund seeks recovery of interim benefits paid. If employer is held liable for benefits in this case, the Act permits the Director to recoup any interim benefits paid to the miner and his widow. See 30 U.S.C. §934(b). Thus, although the claimants are deceased, "the real parties in interest are the Department of Labor and [employer]." *Midland Coal Co. v. Director, OWCP*, [Luman], 149 F.3d 558, 560 n.1, 21 BLR 2-451, 2-455 n.1 (7th Cir. 1998). In turn, Section 725.465(d) provides that "[n]o claim shall be dismissed in a case with respect to which payments prior to final adjudication have been made . . . except upon the motion or written agreement of the Director." 20 C.F.R. §725.456(d). In this case, the Trust Fund paid interim benefits and the Director objected to dismissal. Therefore, the administrative law judge erred by dismissing the claim. See 20 C.F.R. §725.456(d); *Boggs v. Falcon Coal Co.*, 17 BLR 1-62, 1-64 (1992); *Sizemore v. Shamrock Coal Co.*, 16 BLR 1-1, 1-2 (1991). Consequently, we must reverse the administrative law judge's Decision and Order-Granting Motion to Dismiss and Order Denying Reconsideration and remand this case to the administrative law judge for a decision on the merits of employer's request for modification.

⁴ The Director states that the Trust Fund paid \$54,821.00 to the Piersons in interim benefits. Directors Brief at 8 n.4.

⁵ The Director argues that he and employer have already waived their right to a modification hearing, and asserts, alternatively, that a hearing can go forward on remand without the claimants. Director's Brief at 12 and n.11. On remand, the Director and employer may indicate whether they desire a hearing. See *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000).

Employer's arguments do not alter the analysis. Employer contends that Section 725.456(d) is invalid because it subjects the administrative law judge to the supervision of the Director, in violation of 5 U.S.C. §554(d). Employer's Brief at 12 and n.8. The Board has previously rejected the identical argument. *Boggs*, 17 BLR at 1-64-66. Employer, however, argues that *Boggs* is no longer good law in light of *Director, OWCP v. Newport News Shipbldg. & Dry Dock Co.* [Harcum], 514 U.S. 122, 29 BRBS 87 (1995)(CRT), which, employer argues, stands for the proposition that the Director cannot be both a party to the litigation and make the decisions in the case. Employer's Brief at 12.

Harcum had no effect on *Boggs*. In *Harcum*, the United States Supreme Court held that under Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §921(c), the Director lacks standing to appeal a Board decision denying a disability claim. *Harcum*, 514 U.S. at 132-36, 29 BRBS at 90-93. *Harcum* did not involve §554(d) of the Administrative Procedure Act or any claim that the Director exercised influence over an administrative law judge's decision. Thus, *Harcum* is inapposite.

Employer's reliance on *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), *Lane Hollow Coal Co. v. Director, OWCP* [Lockhart], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1999), and *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), for the proposition that dismissal was required on due process grounds is similarly misplaced. *Borda* and *Lockhart* were cases in which the court ordered transfer of liability to the Trust Fund because the Department of Labor's delay in notifying the employer of the claim prevented employer from mounting a meaningful defense, thereby violating employer's due process rights. *Borda*, 171 F.3d at 182-84, 21 BLR at 2-558-62; *Lockhart*, 137 F.3d at 805-08, 21 BLR at 2-316-22. Here, by contrast, employer was promptly notified, developed evidence, and has participated in the claim at all stages.

Additionally, *Holdman* does not mandate dismissal of this claim. In *Holdman*, the court upheld an administrative law judge's transfer of liability to the Trust Fund on due process grounds where the Office of Workers' Compensation Programs (OWCP) lost the record and the parties were unable to fully reconstruct it. *Holdman*, 202 F.3d at 883-84, 22 BLR at 2-43-45. As a result of OWCP's loss of the record and its delays in processing the claim, evidence that the administrative law judge found critical to the employer's defense--including a hearing transcript--was missing and could not be recreated because the claimant had died. Here, by contrast, the

⁶ Section 554(d) of the Administrative Procedure Act provides, in pertinent part, that the hearing officer shall not be "subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency." 5 U.S.C. §554(d)(2).

record was not lost, and the administrative law judge made no finding that the Department of Labor lost the transcript of the first hearing. Director's Exhibit 33 at 1 n.1. Moreover, at the 1983 rehearing held to remedy the missing transcript situation, employer chose not to have the miner testify to the specifics of his coal mine employment but instead stipulated to having the administrative law judge's notes of the miner's original testimony read into the record. November 4, 1983 Tr. at 5. Additionally, since 1988 employer has argued that the existing evidence of record is sufficient to demonstrate that Mr. Pierson was not a miner. Finally, the

administrative law judge here found only that employer's ability to pursue its modification request was "curtailed" by its inability to call the claimants as witnesses at a modification hearing, not that the alleged loss of the original hearing transcript was the fault of the Department of Labor and violated employer's due process rights. Decision and Order-Granting Motion to Dismiss at 2. Consequently, employer's reliance on *Holdman* as a basis for affirming the dismissal of this claim is misplaced.

Employer next contends that the Board must dismiss the claim because under *Wheeler*, the record demonstrates as a matter of law that Mr. Pierson was not a miner. In the previous appeal, the Board declined to address this issue because it was a matter for the administrative law judge to resolve in deciding employer's modification request. [2000] *Pierson*, slip op. at 5 n.5. In *Wheeler* itself, the Seventh Circuit court warned that it was not setting a rigid situs rule based solely on the employee's distance from the mine, but was instead prescribing a case-by-case, "intensively fact dependent" approach. *Wheeler*, 854 F.2d at 535. Because the inquiry as to whether Mr. Pierson was a miner is fact dependent, we decline to address the issue.

Accordingly, the administrative law judge's Decision and Order-Granting Motion to Dismiss and the Order Denying Reconsideration are reversed and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge