



BRB No. 17-0651 BLA

JOYCE A. DURHAM	)	
(Widow of CHARLIE DURHAM)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELRO COAL COMPANY	)	DATE ISSUED: 09/12/2018
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	DECISION and ORDER
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	

Appeal of the Decision and Order Denying Benefits of William T. Barto, Administrative Law Judge, United States Department of Labor.

Joyce A. Durham, Koekee, Virginia.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2016-BLA-05361) of Administrative Law Judge William T. Barto, rendered on a request for modification of the denial of a survivor's claim, filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).<sup>2</sup> The administrative law judge concluded that the district director properly denied claimant's request for modification and denied benefits accordingly.

Claimant generally contests the denial of benefits. Employer responds and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds and maintains that the administrative law judge mistakenly addressed whether claimant complied with a show cause order issued by the district director. The Director urges therefore that the denial of modification be vacated and that the case be remanded for the administrative law judge to address the correct issue. Employer filed a Motion to Strike the Director's response. The Director responds, urging denial of the Motion.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the administrative law judge's findings are rational,

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<sup>1</sup> Claimant is the widow of the miner, who died on April 21, 2014. Director's Exhibit 10. She filed a survivor's claim on December 26, 2014. Director's Exhibit 1. There is no indication in the record that the miner filed a federal black lung claim during his lifetime. Therefore, Section 422(l) of the Act, which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, is not applicable in this case. 30 U.S.C. §932(l) (2012).

<sup>2</sup> Robin Napier, a lay representative with Stone Mountain Health Services of St. Charles, Virginia, filed a letter requesting that the Board review the administrative law judge's decision, but she is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

supported by substantial evidence, and in accordance with applicable law. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they meet these criteria.<sup>3</sup> 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).

## **I. Motion to Strike**

Initially, we address employer’s Motion to Strike the Director’s Brief. 20 C.F.R. §802.219(h). Citing 20 C.F.R. §802.212(b), employer alleges that the Director’s Response Brief must be stricken, as it is “not authorized and not responsive.”<sup>4</sup> Employer’s Motion to Strike at 3. In the present appeal, claimant challenges the administrative law judge’s denial of her modification request. The Director’s brief responds to claimant’s general allegations of error on that issue and asserts that the administrative law judge did not properly apply the modification provision at 20 C.F.R. §725.310, which is consistent with the Director’s responsibility to safeguard the proper administration of the Act. *See Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317 (4th Cir. 2012); *Reed v. Director, OWCP*, 10 BLR 1-67 (1987); *Mansfield v. Director, OWCP*, 8 BLR 1-445 (1986). Because the Director’s Response Brief does not violate 20 C.F.R. §802.212, we will address the arguments made therein. Accordingly, employer’s Motion to Strike is denied. 20 C.F.R. §802.219(h).

## **II. Modification**

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 of benefits, as there cannot be a change in the deceased miner’s condition. 20 C.F.R. §725.310; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In reviewing the record on modification, an administrative law judge is authorized “to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.” *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256

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<sup>3</sup> The record indicates that the miner’s coal mine employment was in Virginia. Director’s Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>4</sup> Pursuant to 20 C.F.R. §802.212(b), arguments in response briefs “shall be limited to those that respond to issues raised in petitioner’s brief or those in support of the decision below.”

(1971). The administrative law judge may correct “any mistake . . . including the ultimate issue of benefits eligibility.” *Betty B Coal Co. v. Director, OWCP* [Stanley], 194 F.3d 491, 497 (4th Cir. 1999); see *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

The procedural history of this case is as follows. Claimant filed her survivor’s claim on December 26, 2014. Director’s Exhibit 2. Claimant authorized and appointed Ron Carson, Sharon McDevitt, and Robin Napier of Stone Mountain Health Services of St. Charles, Virginia (Stone Mountain), to act as her lay representatives before the Office of Workers’ Compensation Programs. Director’s Exhibit 13. By letter dated February 13, 2015, the district director requested that claimant review the miner’s Social Security Administration (SSA) earnings record, and provide additional information on his work for each employer, the dates of employment, and the extent of his coal mine dust exposure. Director’s Exhibit 22. The request was sent to claimant at the address listed on her application for benefits, and a copy was also sent to Stone Mountain. *Id.* The request concluded with the instruction to “[p]lease respond within the next 30 days.” *Id.* There is no indication in the record that claimant or a representative of Stone Mountain responded to the district director’s request.

On May 22, 2015, the district director issued an Order to Show Cause Abandonment of Claim/Denial, advising claimant that he had not received the information requested in the February 13, 2015 correspondence. Director’s Exhibit 26. The district director ordered claimant to show cause within thirty days why the claim should not be dismissed by reason of abandonment due to claimant’s failure to provide the information requested. *Id.* The district director included a copy of the February 13, 2015, letter and a copy of the SSA earnings record. *Id.* There is no indication in the record that claimant or a representative of Stone Mountain responded to the district director’s Order to Show Cause.

On June 30, 2015, the district director issued a Proposed Decision and Order Abandonment of Claim, denying the claim as abandoned and granting the parties thirty days to challenge the determination. Director’s Exhibit 31. On July 23, 2015, Stone Mountain sent a letter to the district director with medical treatment records “in support of claimant’s request for Modification.” Director’s Exhibit 36; see 20 C.F.R. §725.310.

In a letter dated August 17, 2015, the district director acknowledged receipt of the letter from Stone Mountain. Director’s Exhibit 37. The district director advised claimant that the thirty-day time period allowed for a response to the Proposed Decision and Order denying the claim had expired and that, in light of claimant’s failure to provide the miner’s employment information within the time limit, the June 30, 2015 Proposed Decision and

Order was final.<sup>5</sup> *Id.* The district director further advised claimant that her July 23, 2015, correspondence would be considered a request for modification. *Id.* The district director also informed claimant that the record would be held open for sixty days “to allow all parties to submit additional evidence.” *Id.*

Thereafter, in a letter from employer to the district director, dated August 31, 2015, employer requested a copy of the modification request and any medical evidence submitted. Director’s Exhibit 38. Employer also filed a Response to Request for Modification, urging denial. *Id.* Finally, employer stated that claimant had not responded to its Interrogatories and Requests for Production of Documents, which employer sent to claimant on June 9, 2015. *Id.* Employer requested that the district director issue an order requiring claimant to respond. *Id.*

On October 5, 2015, the district director issued an Order to Show Cause Abandonment of Claim/Denial to claimant, as requested by employer, because she did not respond to employer’s Interrogatories and Requests for Production of Documents. Director’s Exhibit 40. The district director ordered claimant to show cause within thirty days why the claim should not be denied by reason of abandonment and, further, that claimant could satisfy the order by complying with employer’s requests and certifying her actions with the district director. *Id.* On October 12, 2015, Stone Mountain advised the district director that claimant had complied with employer’s request for a document giving employer permission to access the miner’s medical records. Director’s Exhibit 23. In correspondence dated October 28, 2015 and January 11, 2016, employer notified the district director that claimant complied with its requests. Director’s Exhibits 23, 24, 25.

On December 14, 2015, the district director issued a Proposed Decision and Order Denying Request for Modification. Director’s Exhibit 45. He found that a mistake in a determination of fact had not been made when the claim was denied by reason of abandonment on June 30, 2015. *Id.* Claimant requested a hearing and the case was referred

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<sup>5</sup> Contrary to the district director’s finding, claimant filed her July 23, 2015 letter within the thirty-day time limit for challenging the Proposed Decision and Order issued on June 30, 2015. As the Director, Office of Workers’ Compensation (the Director), maintains, because claimant timely responded to the Proposed Decision and Order, the district director could have treated her letter as a request for revision under 20 C.F.R. §725.419(a), rather than as a request for modification under 20 C.F.R. §725.310. We agree with the Director that this error is harmless, as the only issue for decision would have been the same regardless of the form of the request, i.e., whether the claim was properly denied by reason of abandonment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director’s Response Brief at 3 n.1.

to the Office of Administrative Law Judges. Director's Exhibits 51, 52. The administrative law judge subsequently held a telephonic hearing in which claimant, her lay representative and employer's counsel were present. In his Decision and Order, the administrative law judge set forth the following "Conclusions of Law" relevant to this appeal:

1. Claimant's failure to comply with the District Director's Order of October 5, 2015, constituted a failure to "submit evidence sufficient to make a determination of the claim." *See* 20 C.F.R. § 725.409(a)(2).
2. Claimant had sufficient notice and an opportunity to be heard concerning the Order of October 5, 2015, because both she and her lay representative received timely notice of the Order and the consequences of non-compliance therewith.
3. There is no statutory or regulatory basis for a defense to abandonment based upon a claimant's detrimental reliance upon a lay representative or other agent.
4. There is no evidence of a mistake as to a determination of fact made in connection with the denial of Claimant's modification request.

Decision and Order at 6-7 (footnotes omitted). Based on these determinations, the administrative law judge denied claimant's request for modification.

The Director maintains that the administrative law judge's decision is "problematic," stating:

The [administrative law judge] denied claimant's claim as abandoned primarily because he believed she failed to comply with the district director's October 5, 2015 Order to Show Cause. The [administrative law judge's] finding is incorrect. A close inspection of the district director's December 14, 2015 [Proposed Decision and Order] shows that the October 2015 order to show cause did not factor into the decision to deny the claim as abandoned. Presumably, this is because [claimant] had complied with the directives in the October 2015 show cause order. Instead, the December 2015 [Proposed Decision and Order Denying Request for Modification] was based on [claimant's] failure to show that the June 30, 2015 [Proposed Decision and Order] denying her claim as abandoned should be modified as based on a mistake of fact.

Director's Response Brief at 2-3 (citations omitted).

We agree with the Director that the administrative law judge's inquiry into the existence of a mistake in a determination of fact in the district director's June 30, 2015 Proposed Decision and Order was flawed. The Board has held that an administrative law judge is not constrained by any rigid procedural process in adjudicating claims in which modification of a district director's decision is sought. *See Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-14, 1-19 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992). The administrative law judge was therefore not required to assess whether the district director properly denied claimant's request for modification or whether he made a mistake in a determination of fact in his Proposed Decision and Order Abandonment of Claim. Rather, the administrative law judge should have considered, *de novo*, whether the survivor's claim must be denied by reason of abandonment, based on the events occurring between the filing of the claim for survivor's benefits on December 26, 2014 and the June 30, 2015 issuance of the Proposed Decision and Order Abandonment of Claim. 20 C.F.R. §725.455(a).

In addition, as the Director observes, the administrative law judge focused erroneously on claimant's alleged noncompliance with the district director's October 12, 2015 Order to Show Cause, rather than determining whether claimant met the criteria in 20 C.F.R. §725.409(a)(1)-(4) for denial of a claim by reason of abandonment when the district director issued the June 30, 2015 Proposed Decision and Order.<sup>6</sup> *See* Director's Response Brief at 3. Because the administrative law judge did not resolve the issue before him, he did not comply with the Administrative Procedure Act (APA), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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<sup>6</sup> Pursuant to 20 C.F.R. §725.409(a):

A claim may be denied at any time by the district director by reason of abandonment where the claimant fails:

- (1) To undergo a required medical examination without good cause; or,
- (2) To submit evidence sufficient to make a determination of the claim; or,
- (3) To pursue the claim with reasonable diligence; or,
- (4) To attend an informal conference without good cause.

20 C.F.R. §725.409(a)(1)-(4).

We therefore vacate his finding that the district director did not err in determining that claimant abandoned her survivor's claim, and remand the case to him. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). On remand, the administrative law judge is required to make a *de novo* determination of whether claimant's survivor's claim must be denied by reason of abandonment, pursuant to 20 C.F.R. §725.409, based on the events transpiring between the filing of the survivor's claim on December 26, 2014 and the issuance of the Proposed Decision and Order Abandonment of Claim on June 30, 2015. *See Motichak*, 17 BLR at 1-19; *Kott*, 17 BLR at 1-13.

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge