

BRB No. 95-0966 BLA

DALLAS D. WOOTEN)
)
 Claimant-Petitioner)
)
 v.)
)
 EASTERN ASSOCIATED COAL)
 CORPORATION)
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Order Granting Motion for Summary Judgment of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

H. John Taylor, Rand, West Virginia, for claimant.

Paul E. Frampton (Bowles, Rice, McDavid, Graff & Love), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Motion for Summary Judgment (94-BLA-0007) of Administrative Law Judge Robert L. Hillyard dismissing a petition for modification of 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). Claimant's first application for benefits, filed on November 23, 1987, was granted in a Decision and Order issued on September 26, 1989. Director's Exhibits 1, 3.

Employer appealed, and the Board vacated the award and remanded the case for reconsideration of the evidence pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204. *Wooten v. Eastern Associated Coal Corp.*, BRB No. 89-3468 BLA (Mar. 28, 1991)(unpub.).

On remand, the administrative law judge denied benefits in a Decision and Order issued on June 23, 1992 and filed in the office of the district director on July 1, 1992. Director's Exhibit 6. On June 23, 1993, claimant filed a petition for modification with

the district director, who dismissed the petition as untimely. Director's Exhibit 8. Thereafter, claimant requested a hearing and employer moved for summary judgment, requesting dismissal of claimant's petition for modification as untimely filed. Director's Exhibit 18; Employer's Motion for Summary Judgment.

The administrative law judge granted summary judgment. Citing 20 C.F.R. §725.310, the administrative law judge noted that modification is available "before one year after the denial of a claim," and found that because "claimant filed his request for modification exactly one year after [the denial of] benefits . . . it was not filed before one year after the denial of benefits." Order Granting Motion for Summary Judgment at 1 (emphasis in original). The administrative law judge concluded that claimant's petition was filed "one day late" and therefore dismissed the petition as untimely filed.

On appeal, claimant contends that the administrative law judge erred in dismissing the petition for modification as untimely. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, asserting that claimant's petition for modification was timely filed and requesting remand for adjudication of the claim on the merits.

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).

Claimant argues that his petition for modification was timely filed because (1) Section 725.311(c) permits an additional seven days for responding to a "statement" that must be in writing and served by mail, and (2) modification must be filed before one year expires and a year is 365 calendar days, which in this case ended at midnight on June 23, 1993. Claimant's Brief at 3-4. The Director argues that because the Decision and Order denying benefits was not filed in the office of the district director until July 1, 1992, claimant's petition for modification was timely filed. Director's Motion at 3. Employer contends that claimant's petition for modification was dated one year and one day later, thus rendering his request untimely pursuant to Section 725.310, which requires the petition to be filed "before one year" after the denial of the claim. Employer's Brief at 2.

Section 22¹ of the Longshore and Harbor Workers' Compensation Act (the

¹ Section 22 provides for modification as follows:

Longshore Act) provides that modification is available "at any time prior to one year

Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact . . . the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim, review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 919 of this title

33 U.S.C. §922, as incorporated into the Act by Section 422(a), 30 U.S.C. §932(a).

after the rejection of the claim." 33 U.S.C. §922, as incorporated into the Act by Section 422(a), 30 U.S.C. §932(a). In addition, Section 21(a)² of the Longshore Act provides that a decision and order "shall become effective when filed in the office of the deputy commissioner as provided in section 919³ of this title." 33 U.S.C.

² Section 21(a), in its entirety, provides that:

A compensation order shall become effective when filed in the office of the deputy commissioner as provided in Section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

33 U.S.C. §921(a), as incorporated into the Act by 30 U.S.C. §932(a).

³ Section 919(e) provides that:

The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known

§921(a), as incorporated into the Act by 30 U.S.C. §932(a).

The Act's implementing regulation for Section 21(a) states:

(a) A decision and order shall become effective when filed in the office of the deputy commissioner (see §725.478), and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30th day after such filing (see §725.481).

20 C.F.R. §725.479(a). Section 725.480(a) further provides that:

(a) A party who is dissatisfied with a decision and order which has become final in accordance with §725.479 may request a modification of the decision and order if the conditions set forth in §725.310 are met.

20 C.F.R. §725.480(a).

The condition set forth in Section 725.310 which we must address in this case is the requirement that a request for modification be filed "before one year after the denial of a claim;" neither Section 22 of the Longshore Act nor Section 725.310 specifies whether the one-year modification period runs from the date of issuance of a Decision and Order denying benefits, or from the date the Decision and Order denying benefits becomes effective. See 20 C.F.R. §725.310.

address of each.

33 U.S.C. §919(e), as incorporated into the Act by 30 U.S.C. §932(a).

In *Daugherty v. Director, OWCP*, 897 F.2d 740, 13 BLR 2-393 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, rejected the Director's contention that the 30-day period for appeal to the Board begins to run from the issuance of a Decision and Order denying benefits. Citing Section 21 of the Longshore Act, the Court held that the intent of Congress was clear "that the 30-day period for appeal of an [administrative law judge's] order and decision does not begin to run until the documents are 'filed in the office of the deputy commissioner,'" and that the regulations governing the filing of a notice of appeal must be construed to conform with the statute. *Daugherty*, 897 F.2d at 742, 13 BLR at 2-399.

The court held that the Director's interpretation of the regulations⁴ shortened the period of time "within which a claimant may appeal an [administrative law judge's] decision, and thus deprive[d] claimants of a right that Congress enacted." *Id.* The court concluded that the 30-day appeal period begins to run from the date that the decision and order becomes effective through filing in the deputy commissioner's office, and not from its issuance date. *Id.*

In *Harris v. NACCO Mining Co.*, 12 BLR 1-115, 1-116 (1989), the Board held that the 30-day period for filing an appeal from an administrative law judge's decision commences on the date the decision is actually filed in the office of the deputy commissioner.⁵ The Board indicated that "fairness and judicial efficiency" require a uniform nationwide rule for fixing appeal deadlines. *Id.*

While nothing in Section 22 of the Longshore Act or the regulations implementing the Act specifies the exact date from which the one-year period for modification should run, Section 21(a) of the Longshore Act and Section 725.479(a) provide that a decision and order becomes effective only when it is filed in the office of the district director. 33 U.S.C. §921(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.479(a). Inasmuch as the decision and order is not effective

⁴ The Director contended in *Daugherty* that 20 C.F.R. §725.478, which identified where the record must be sent and provided for service of the decision and order, also prescribed when an administrative law judge's decision and order was considered filed for purposes of calculating the deadline for appeal. *Daugherty*, 897 F.2d at 742-43, 13 BLR at 2-397-99.

⁵ The deputy commissioner is now referred to as the district director. 20 C.F.R. §725.101(a)(11); 55 Fed. Reg. 28604 (July 12, 1990).

until it is filed with the district director, the disposition of a claim--whether denial or award--should not trigger any jurisdictional time limits until at least the date of filing. *Compare Butcher v. Big Mountain Coal Co.*, 802 F.2d 1506, 9 BLR 2-121 (4th Cir. 1986)(Section 421(c), 33 U.S.C. 921(c), governing appeals to circuit courts, is jurisdictional and ministerial failures cannot overcome its meaning) with *Director, OWCP v. Hileman*, 897 F.2d 1277, 13 BLR 2-382 (4th Cir. 1990)(30-day period for filing motion for reconsideration is not jurisdictional and may be waived); see *Dailey v. Director, OWCP*, 936 F.2d 241, 15 BLR 2-129 (6th Cir. 1991).

We therefore construe the phrase, "denial of a claim" in Section 725.310 to mean the "effective" denial of a claim pursuant to Section 21(a) of the Longshore Act and Section 725.479(a). Because a decision and order becomes effective only when filed in the office of the district director, we agree with the Director that the time within which to seek modification is one year from the date on which the decision and order is filed, not from its issuance date.

Accordingly, we hold that claimant's petition for modification was timely filed. The Decision and Order on Remand was filed in the office of the district director on July 1, 1992⁶ and claimant's petition for modification was filed on June 23, 1993. Because claimant's modification request was filed within one year of the date upon which the Decision and Order on Remand denying benefits became effective, it was filed "prior to one year after the rejection of the claim" and therefore constitutes a timely request for modification. 33 U.S.C. §922; 20 C.F.R. §725.310; see *Daugherty, supra*; see also *Amax Coal Co. v. Director, OWCP* [Oxendine], 892 F.2d 578, 14 BLR 2-12 (7th Cir. 1989); *Trent Coal, Inc. v. Day*, 739 F.2d 116, 6 BLR 2-77 (3d Cir. 1984); *Mecca v. Kemmerer Coal Co.*, 14 BLR 1-101 (1990). Therefore, we reverse the administrative law judge's finding that claimant's petition for modification was untimely⁷ and instruct him on remand to consider claimant's request for modification pursuant to Section 725.310 and in accord with *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), and *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Accordingly, the administrative law judge's Order Granting Summary Judgment is reversed, and the case is remanded for further consideration consistent with this opinion.

⁶ The first page of the decision bears the date stamp of the Division of Coal Mine Workers' Compensation. Director's Exhibit 6.

⁷ In view of our disposition of this case, we decline to address claimant's argument regarding the applicability of Section 725.311(c).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

_____NANCY S.
DOLDER
Administrative Appeals Judge

Desk Book Section: PART III.G

The Board held that because Section 21(a) of the Longshore Act and 20 C.F.R. §725.479(a) provide that a decision and order becomes effective only when it is filed in the office of the district director, the time within which to seek modification pursuant to 33 U.S.C. §922 is one year measured from the date on which the decision and order is filed, not from its issuance date. Thus, the Board concluded that claimant's modification request, filed within one year of the date upon which the Decision and Order on Remand denying benefits became effective, was filed before one year after the denial of the claim and therefore constituted a timely request for modification pursuant to 33 U.S.C. §922 and 20 C.F.R. §725.310. ***Wooten v. Eastern Associated Coal Corp.***, 20 BLR 1-20 (1996).