

BRB No. 98-0670 BLA

RAYBURN STACY)
)
 Claimant-Petitioner)
)
 v.)
)
 CHEYENNE COAL COMPANY) DATE ISSUED:
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Richard T. Stansell-Gamm,
Administrative Law Judge, United States Department of Labor.

Rayburn Stacy, Wolford, Virginia, *pro se*.¹

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

PER CURIAM:

¹Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, representing himself, appeals the Decision and Order (97-BLA-1351) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits 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). The instant case involves a duplicate claim filed on February 12, 1990.² In the initial Decision and Order, Administrative Law Judge Robert J. Feldman found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Judge Feldman also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, Judge Feldman denied benefits. By Decision and Order dated February 28, 1994, the Board affirmed Judge Feldman's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Stacy v. Cheyenne Coal Co.*, BRB No. 92-2647 BLA (Feb. 28, 1994) (unpublished). The Board, therefore, affirmed Judge Feldman's denial of benefits. *Id.*

Claimant subsequently requested modification of his denied claim. Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) found that claimant's request for modification was untimely since it was not submitted within one year of the Board's February 28, 1994 denial of benefits. The administrative law judge, however, considered claimant's November 4, 1996 submission of new evidence to be a duplicate claim. The administrative law judge found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The

²The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on June 29, 1973. Director's Exhibit 56. The SSA denied the claim on October 11, 1973. *Id.* The Department of Labor denied the claim on June 8, 1981. *Id.* There is no evidence that claimant took any further action in regard to his 1973 claim.

Claimant filed a second claim on February 15, 1990. Director's Exhibit 1.

administrative law judge further found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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 administrative law judge initially considered whether claimant's request for modification was timely. By letter dated November 4, 1996, Tim White, a benefits counselor, informed the Department of Labor (DOL) that:

Pursuant to our telephone conversation today, I am resubmitting my December 1994 request for a modification in the above claim for Black Lung benefits. I requested a modification by letter dated December 14, 1994. Neither I nor the claimant received a response to this request. I am requesting that you reconsider this request as timely and respond to our modification request.

Director's Exhibit 79.³

The administrative law judge properly noted that a request for modification may be filed at any time within one year after the denial of a claim. See 20 C.F.R. §725.310. Because the Board denied claimant's 1990 duplicate claim on February 28, 1994, the administrative law judge noted that claimant's motion for modification had to be submitted by February 28, 1995. Decision and Order at 4. Although Mr. White submitted a copy of a December 14, 1994 modification request, the

³Mr. White enclosed a copy of a December 14, 1994 letter addressed to the DOL wherein he requested modification and submitted a new x-ray report. Director's Exhibit 79.

administrative law judge noted that the DOL had no record of the document until a copy was attached to Mr. White's November 4, 1996 correspondence. *Id.* Noting the absence of corroboration that the December 1994 request was actually mailed, the administrative law judge found that the DOL did not receive claimant's modification request until November 11, 1996.⁴ The administrative law judge, therefore, found that claimant's request for modification was untimely. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's request for modification was untimely filed.

Moreover, we are compelled to hold that the administrative law judge erred in determining that claimant's 1996 submission of new evidence constituted a duplicate claim. See Decision and Order at 5. Claimant has not submitted a new claim since the denial of his 1990 duplicate claim. The filing of an untimely motion for modification does not constitute a new claim. The regulations provide that the filing of a signed statement indicating an intention to claim benefits may be considered to be the filing of a claim under certain circumstances. 20 C.F.R. §725.305. Upon receiving such a written statement, the DOL is required to notify the signer, in writing, that to be considered, the claim must be executed by the claimant on a prescribed form and filed with the DOL within six months of the mailing of the notice. 20 C.F.R. §725.305(b). Although the DOL provided claimant with such notification, see Director's Exhibit 80, there is no indication that claimant filed the prescribed form. The regulations provide that claims based upon written statements indicating

⁴The administrative law judge further noted that:

As an aside, I note that the first time Mr. White apparently attempted to confirm whether DOL had received the modification request was November 1996, nearly two years after the date of the December 1994 request letter.

Decision and Order at 4 n.5.

an intention to claim benefits that are not perfected by filing the prescribed form “**shall not be processed.**” 20 C.F.R. §725.305(d) (emphasis added). We, therefore, hold that there was no claim before the administrative law judge to adjudicate. Consequently, we cannot address the administrative law judge’s findings pursuant to 20 C.F.R. §725.309 and 20 C.F.R. Part 718.

Claimant is notified that he may still file a duplicate claim at any of the various district offices of the Social Security Administration, or any of the various offices of the Department of Labor authorized to accept claims. See 20 C.F.R. §725.303.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and modified in part.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

Deskbook Section: Part III.F.2 - Merger of Claims/Duplicate Claims.

The Board held that the administrative law judge erred in determining that claimant's 1996 submission of new evidence constituted a duplicate claim. The Board further held that the filing of an untimely motion for modification does not constitute a new claim. The Board recognized that the regulations provide that the filing of a signed statement indicating an intention to claim benefits may be considered to be the filing of a claim under certain circumstances. 20 C.F.R. §725.305. Upon receiving such a written statement, the DOL is required to notify the signer, in writing, that to be considered, the claim must be executed by the claimant on a prescribed form and filed with the DOL within six months of the mailing of the notice. 20 C.F.R. §725.305(b). Although the DOL provided claimant with such notification, there was no indication that claimant filed the prescribed form. The regulations provide that claims based upon written statements indicating an intention to claim benefits that are not perfected by filing the prescribed form "shall not be processed." 20 C.F.R. §725.305(d). The Board, therefore, held that there was no claim before the administrative law judge to adjudicate. **Stacy v. Cheyenne Coal Co.**, BLR , BRB No. 98-0670 BLA (Feb. 10, 1999).