

BRB No. 99-0790 BLA

DOROTHY E. KUNTZ)
(Widow of NICHOLAS KUNTZ, JR.))
)
Claimant-Petitioner)
)
v.)
)
BELTRAMI ENTERPRISES,)
INCORPORATED)
)
and)
)
TRAVELERS INSURANCE COMPANY)
C/O CONSTITUTION STATE SERVICES)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

John A. Bednarz, Jr. (Bednarz Law Offices), Wilkes-Barre, Pennsylvania, for claimant.

James E. Pocius (Marshall, Dennehey, Warner, Coleman and Goggin), Scranton, Pennsylvania, for employer.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (1997-BLA-01966) of Administrative Law Judge Robert D. Kaplan denying benefits on a survivor's 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 administrative law judge, based upon a stipulation by the parties, credited the miner with twenty-eight years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Although he reserved ruling on the issue at the hearing, in his Decision and Order the administrative law judge concluded that he lacked jurisdiction to review the district director's determination that employer had shown good cause for its failure to timely controvert this claim. The administrative law judge thus rejected claimant's argument that employer's failure to file a timely controversion of the district director's Notice of Initial Finding precluded it from contesting either claimant's entitlement to benefits or its liability for payment of benefits. The administrative law judge then found that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in rejecting his procedural arguments. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a Motion to Remand wherein he argues that the case should be remanded to the administrative law judge for a *de novo* review of the timely controversion issue.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits pursuant to 20 C.F.R. §718.205(c), claimant must prove that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(a). For survivor's claims filed after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

The relevant procedural history of this case is as follows: The miner filed his most recent claim for black lung benefits on April 10, 1980, which was finally denied on August

20, 1981. The miner died on March 30, 1993. On January 3, 1997, the miner's widow, claimant herein, filed a survivor's claim. Decision and Order at 3; Director's Exhibits 1, 30. On February 10, 1997, the district director notified employer and Lackawanna Casualty Company (Lackawanna) c/o of Travelers Insurance Company (Travelers) of the claim, to which a representative of Constitution State Service Company (Constitution) responded on February 26, 1997, conceding that employer was the responsible operator. Decision and Order at 4-5; Director's Exhibits 16-17. On June 6, 1997, the district director issued a "Notice of Initial Finding" stating that the evidence indicated that claimant may be entitled to benefits, addressed to Lackawanna, and informing employer as the responsible operator that, pursuant to 20 C.F.R §725.413,¹ it had thirty days from the date of the notice to file a controversion and that if employer failed to respond within thirty days, it would be deemed to have accepted the initial finding and the failure to respond would be considered a waiver of employer's right to contest the claim absent a showing of good cause. Decision and Order at 5; Director's Exhibit 18. According to a handwritten memorandum, a claims examiner for the district director contacted a representative of Constitution, who indicated that the notice had not been received. Decision and Order at 5; Director's Exhibit 19. Soon thereafter, the representative sent Constitution's "Operator Controversion" to the district director, via telefacsimile, controverting all issues of liability and eligibility. Decision and Order at 5; Director's Exhibit 20. Later that same day, the claims examiner sent a letter to Travelers in which he acknowledged receipt of the controversion, unaccompanied by any statement of good cause for accepting the late filing. Decision and Order at 5; Director's Exhibit 21. Subsequently, the district director forwarded the case to the Office of Administrative Law Judges for a formal hearing. Decision and Order at 6; Director's Exhibit 31.

The hearing was held on July 6, 1998. Claimant appeared with counsel and an appearance was made on behalf of employer/carrier. Claimant initially raised the issue of employer's untimely controversion and sought to have the administrative law judge hold that

¹ 20 C.F.R §725.413 provides in part that a notified operator must indicate its intent to accept or contest liability within 30 days of receipt of notification, unless the district director extends the response period for good cause or in the interest of justice. 20 C.F.R. §725.413(a). Failure to respond timely is considered both an acceptance by the operator of the initial finding and a waiver of its right to contest the claim, unless good cause is shown. 20 C.F.R. §725.413(b)(3).

employer was precluded from contesting the issue of entitlement as well as liability for the payment of benefits, but the administrative law judge deferred ruling on the issue until after the hearing. Hearing Transcript at 7-23. Evidence was then admitted concerning the untimely controversion issue as well as the merits of entitlement and claimant testified regarding the miner's history of coal mine employment and smoking and his physical condition.

In his Decision and Order, the administrative law judge, after discussing the procedural history, surmised that, based on the actions taken by the district director, the district director had excused the carrier's failure to file the controversion within 30 days because it had not received notice of it. The administrative law judge thus rejected claimant's argument that employer's failure to file a timely controversion of the district director's Notice of Initial Finding precluded it from contesting either its liability for payments or claimant's entitlement to benefits. In so finding, the administrative law judge determined that he lacked jurisdiction to review the determination of the district director.² We disagree. In *Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992)(*en banc*)(Brown, J., concurring; Smith, J., dissenting), the Board adopted the holding of the United States Court of Appeals for the Sixth Circuit in *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989), that any party dissatisfied with the determination of the district director on the issue of the timeliness of controversion is entitled to have the issue decided by the Office of the Administrative Law Judges.³ In reaching its decision, the Board reasoned that because the administrative law judge resolves questions of fact and the issue of adequacy of notice involves a factual determination, the parties have a right to a hearing under 20 C.F.R. §725.450.⁴ In the instant case, the issue of whether employer has shown good cause for his failure to file a timely controversion also involves questions of fact that need to be resolved by the administrative law judge. We, therefore, reverse the

² The administrative law judge stated "this determination - right or wrong - comes within the jurisdiction of the District Director, and is not reviewable by an administrative law judge." Decision and Order at 7. In a footnote, the administrative law judge stated "[i]n my view, this finding by the District Director is probably incorrect." Decision and Order at 7 n.3.

³ Judge Smith, who dissented in *Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992)(*en banc*)(Brown, J., concurring; Smith, J., dissenting), has reconsidered his view on this issue and now concurs with the holding of the majority in the case.

⁴ The Board's decision in *Krizner, supra*, overruled its prior holding in *Whary v. Bush Coal Co.*, 11 BLR 1-150 (1988)(*en banc*)(McGranery, J., concurring), that the district director's determination on a showing of good cause is a purely discretionary act appealable only to the Board.

administrative law judge's finding that he lacked jurisdiction to consider the issue of employer's untimely controversion and remand this case to the administrative law judge to determine, pursuant to Section 725.413(b)(3), whether good cause existed to excuse employer's untimely response to the Notice of Initial Finding.⁵ If, on remand, the administrative law judge determines that the evidence is incomplete or inconclusive on this issue, he may, within his discretion, reopen the record and receive additional evidence on this issue or remand the case to the district director to develop relevant evidence. 20 C.F.R. §725.456(e); *Krizner, supra*; *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1999), 13 BLR 1-57 (1989)(*aff'd on recon. en banc*)(McGranery, J., concurring).

Accordingly, the administrative law judge's holding that he lacked jurisdiction to resolve the untimely controversion issue is reversed and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

⁵ The administrative law judge's finding that the evidence was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c) is unchallenged on appeal and is supported by substantial evidence. Consequently, if the administrative law judge finds, on remand, that good cause is shown for employer's untimely controversion, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).