BRB No. 99-1160 BLA

RALPH TOOLEY (deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
OLD BEN COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
	)	
	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

David Kelley, Boonville, Indiana, for claimant.

Laura Metcoff Klaus (Arter & Hadden LLC), Washington, D.C., for employer.

Jennifer U. Toth (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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (98-BLA-1030) of Administrative Law Judge Rudolf L. Jansen 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). In addressing the timeliness of claimant's petition for modification, the administrative law judge initially found that the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, dismissed claimant's appeal on July 3, 1996 and, therefore, claimant's petition for modification had to be filed within one year of that date pursuant to 20 C.F.R. §725.310. The administrative law judge found that the evidence of record established that the first written request for modification was dated August 17, 1997 and, therefore, was not timely filed. Additionally, the administrative law judge found that the telephone communications between claimant's daughter and the district director's office were insufficient to constitute a request for modification because they were not in writing, claimant's daughter had not been added as a party to this case and her testimony regarding these communications was uncertain as to the dates of these conversations. Consequently, the administrative law judge found that the evidence of record was insufficient to establish that the petition for modification was timely filed pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's petition for modification.

On appeal, claimant contends that the administrative law judge erred in finding that the petition for modification was untimely filed, arguing that the administrative law judge should have found good cause for claimant's failing to file the petition within one year of the last denial. Claimant also generally asserts that the one year time limitation should not be applied because this case was improperly administered during the pendency of the claim. In response, employer urges affirmance of the administrative law judge's denial of the petition for modification, arguing that there is no party-in-interest inasmuch as the miner is deceased, there is no surviving spouse and there is no evidence in the record that a party has been substituted for the miner. In addition, employer contends that the request for modification is barred under the holding of the Seventh Circuit in *Midland Coal Co. v. Director, OWCP*, [*Luman*], 149 F.3d 558, 21 BLR 2-451 (7th Cir. 1998) and, that even assuming the appropriateness of July 3, 1996 as the date from which the miner's one year time period began, the petition for modification was untimely as having been filed outside of the one year time period. Employer further urges rejection of claimant's request for a "good cause" exception to the time limitation. The Director, Office of Workers' Compensation Programs (the Director), also responds urging affirmance of the administrative law judge's denial

of the petition for modification. The Director, concurring with employer, argues that the one year time period began to run in 1995 following the Board's dismissal of claimant's appeal as abandoned inasmuch the Seventh Circuit did not have jurisdiction over the claim, citing *Luman*. The Director further urges the Board to reject claimant's contention that the claim had been improperly administered during the twenty-one years since the miner filed his claim.

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 applicable 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 procedural history of this case began when claimant filed an application for benefits on June 1, 1978. Director's Exhibit (I) 1.[1] The district director's office issued an Initial Notice of Finding awarding benefits on June 22, 1979, which was affirmed following an informal conference in a Memorandum of Conference dated December 20, 1979. Director's Exhibits (I) 16, 21. The case was thereafter transferred to the Office of Administrative Law Judges. Director's Exhibit (I) 24. The case was assigned to Administrative Law Judge Glenn Robert Lawrence, who held a formal hearing on October 20, 1980, and by Order dated November 5, 1980 remanded the case to the district director for consideration of new evidence submitted at the hearing. Director's Exhibit (I) 28. The district director considered

[1] The record contains two sets of exhibits marked "Director's Exhibits." The first set are marked Director's Exhibits 1-53 and reflect the evidence and procedural record up to the transfer of the claim to the Office of Administrative Law Judges on April 16, 1993 and, hereinafter, will be referred to as Director's Exhibits (I) 1-53. The second set of Director's Exhibits reflect the evidence and procedural record after the case was transferred to the Office of Administrative Law Judges on April 16, 1993 and, hereinafter, will be referred to as Director's Exhibits (II) 1-23.

the new evidence and again awarded benefits in a letter dated March 30, 1981. Director's Exhibit (I) 29. The case was transferred to the Office of Administrative Law Judges, but was remanded to the district director on October 15, 1985 pursuant to the parties' motion for the development and consideration of new evidence. Director's Exhibit (I) 32. By letter dated April 1, 1986, the district director denied benefits. Director's Exhibit (I) 33. Claimant requested a hearing and the case was transferred to the Office of Administrative Law Judges. Director's Exhibit (I) 34.

In a Decision and Order issued on June 28, 1988, Administrative Law Judge W. Ralph Musgrove denied benefits, finding the medical evidence of record insufficient to establish entitlement to benefits under 20 C.F.R. Part 727, 20 C.F.R. Part 410, Subpart D and 20 C.F.R. Part 718. Director's Exhibit (I) 35. Claimant filed a timely Notice of Appeal with the Board and subsequently filed a petition for modification, accompanied by new evidence, with the district director. Director's Exhibits (I) 36-37. By Order dated April 28, 1989, the Board dismissed claimant's appeal and remanded the case to the district director for modification proceedings, but noted claimant's right to reinstatement of this appeal. *Tooley v. Old Ben Coal Co.*, BRB No. 88-2493 BLA (Apr. 28, 1989) (Order)(unpub.); Director's Exhibit (I) 39. The district director denied claimant's modification on November 15, 1989. Director's Exhibit (I) 41. Pursuant to claimant's appeal, the Board held that the district director's letter denying claimant's modification was not a final order appealable to the Board and, thus, dismissed claimant's appeal, holding that the case must first go to the Office of Administrative Law Judges. *Tooley v. Old Ben Coal Co.*, BRB Nos. 88-2493 BLA and 89-4092 BLA (June 19, 1990)(Order) (unpub.); Director's Exhibit (I) 42.

Per claimant's request, the case was transferred to the Office of Administrative Law Judges on April 16, 1993 and assigned to Administrative Law Judge Bernard J. Gilday, Jr.. Director's Exhibit (II) 1. Noting that the parties waived their right to a hearing, Judge Gilday issued a Decision and Order on March 1, 1994 denying benefits. In his decision, Judge Gilday found that the new evidence was insufficient to establish entitlement under Part 727, Part 410, Subpart D and Part 718. Accordingly, he denied claimant's petition for modification and benefits. Director's Exhibit (II) 2. Claimant appealed the denial to the Board on March 31, 1994. Pursuant to employer's motion, the Board issued an Order directing claimant to show cause why his appeal should not be dismissed for failure to comply with the requirements of timely filing of a Petition for review and brief. *Tooley v. Old Ben Coal Co.*, BRB No. 94-2268 BLA (Aug. 22, 1994)(Order)(unpub.); Director's Exhibit (II) 4. Claimant filed two concurrent motions for extension of time which were granted by the Board on September 15,

1994, and October 31, 1994. *Tooley v. Old Ben Coal Co.*, BRB No. 94-2268 BLA (Sept. 15, 1994)(Order)(unpub.) and (Oct. 31 1994(Order)(unpub.); Director's Exhibits (II) 5-8. By Order dated February 21, 1995, the Board held that claimant had not filed a Petition for Review and brief and, therefore, the claim was dismissed as abandoned. *Tooley v. Old Ben Coal Co.*, BRB No. 94-2268 BLA (Feb. 21, 1995)(Order) (unpub.); Director's Exhibit (II) 9. In a Motion for Reconsideration dated March 28, 1995, claimant requested reconsideration of the Board's dismissal of his claim as abandoned and also submitted a Petition for Review and brief. Director's Exhibit (II) 10. By Order dated May 30, 1995, Board denied claimant's motion for reconsideration as untimely filed inasmuch as it was filed more than thirty (30) days after the Board's February 21, 1995 Order dismissing the claim. *Tooley v. Old Ben Coal Co.*, BRB No. 94-2268 BLA (May 30, 1995)(Order)(unpub.); Director's Exhibit (II) 11. Claimant filed a second motion for reconsideration contending that the first motion for reconsideration was timely filed. Director's Exhibit (II) 12. The Board denied claimant's second motion for reconsideration in an Order dated September 22, 1995. *Tooley v. Old Ben Coal Co.*, BRB No. 94-2268 BLA (Sept. 22, 1995)(Order)(unpub.); Director's Exhibit (II) 13. Claimant filed an appeal with the Seventh Circuit. Director's Exhibit (II) 14. By Order dated July 3, 1996, the court dismissed claimant's appeal for want of prosecution, stating that on May 14, 1996 a Show Cause Order was issued and no response was filed. *Tooley v. Director, OWCP*, No. 95-3738 (7th Cir. July 3, 1996)(unpub.); Director's Exhibit (II) 15. Claimant's counsel filed a formal petition for modification on September 9, 1997. Director's Exhibit (II)18. The district director denied claimant's petition for modification, finding that it was untimely filed pursuant to Section 725.310. Director's Exhibit (II) 20. Claimant requested a formal hearing and the case was thereafter transferred to the Office of Administrative Law Judges, wherein it was assigned to the administrative law judge. Director's Exhibit (II) 23.

Section 22 of the Longshore and Harbor Workers' Compensation Act (the Longshore Act) provides that modification is available "at any time prior to one year 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). The Act's implementing regulation for Section 22 of the Longshore Act, 20 C.F.R. §725.310, states that a request for modification be filed "before one year after the denial of a claim." 20 C.F.R. §725.310(a), implementing 33 U.S.C. §922, as incorporated into the Act by Section 422(a), 30 U.S.C. §932(a); *see Wooten v. Eastern Associated Coal Corporation*, 20 BLR 1-20 (1996); *see also Banks v. Chicago Trimmers Assoc.,* 390 U.S. 459, 88 S.Ct. 1140 (1968); *I.T.O. Corporation of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6 (CRT)(4th Cir.), *cert. denied*, 519 U.S. 807 (1996); *Fireman's Fund Insurance Co. v. Bergeron,* 493 F.2d 545 (5th Cir. 1974); *Searls v. Southern Ohio Coal Co.*, 11 BLR

1-161 (1988). In addition, an application need not be formal in nature, but rather, need only be sufficient to trigger review before the one-year limitation period expires. *Id*.

After consideration of the procedural history involved in this case, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that an effective petition for modification was timely filed pursuant to Section 725.310(a). The administrative law judge found that the record does not contain a written request for modification prior to a letter from claimant's counsel to the district director's office dated August 18, 1997, which included the statement that it was claimant's intent to reopen this claim.[2] Decision and Order at 4; Director's Exhibit (II) 18. However, the administrative law judge reasonably found that this letter was insufficient to be construed as an effective request for modification because it was filed more than one year after the July 3, 1997 deadline.[3] Decision and Order at 4; 20 C.F.R. §725.310; *Pettus, supra; Searls,*

[2] Claimant filed a formal petition for modification, accompanied by the miner's autopsy report, on September 9, 1997. Director's Exhibit (II) 18.

[3] Employer and the Director challenge the appropriateness of the administrative law judge's determination that the dismissal of claimant's appeal by the United States Court of Appeals for the Seventh Circuit dated July 3, 1996, constituted the date from which the one year time limitation ran, citing *Midland*

supra; see also Banks, supra; Bergeron, supra.

Moreover, we affirm the administrative law judge's finding that the communications between claimant's daughter and the district director's office were insufficient to establish an effective petition for modification. While informal communications, such as telephone conversations, may be sufficient to be considered a request for modification, the administrative law judge reasonably found that the record does not contain evidence that the telephone conversations were memorialized in writing and, therefore, do not constitute a petition for modification. Decision and Order at 4; *see Madrid v. Coast Marine Construction Co.,* 22 BRBS 148 (1989); *Cobb v. Schirmer Stevedoring Co.,* 2 BRBS 132 (1975), *aff'd,* 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978). Moreover, the administrative law judge reasonably found that the testimony of claimant's daughter was uncertain as to the dates the conversations occurred and, therefore, insufficient to establish that they occurred prior to July 3, 1997. Decision and Order at 4; *see Calfee v.*

Coal Co. v. Director, OWCP, [*Luman*], 149 F.3d 558, 21 BLR 2-451 (7th Cir. 1998), wherein the court addressed the effect of successive motions for reconsideration on the time period to file an appeal with the court. Employer and the Director contend that since claimant filed a second motion for reconsideration of the Board's February 1995 Order dismissing the claim, his appeal to the Seventh Circuit was not timely filed and, therefore, the court did not have jurisdiction over the appeal. Thus, the operative date from which claimant's one year time period in which to file for modification began in 1995, with the Board's decision. However, we decline to address the specifics of this argument in light of our affirmance of the administrative law judge's finding that claimant's petition for modification was untimely filed using July 3, 1996, the date most favorable to claimant.

Director, OWCP, 8 BLR 1-7 (1985); *see generally Elswick v. Eastern Associated Coal Corp.*, 2 BLR 1-1016 (1980). Lastly, the administrative law judge found that claimant's daughter had not been substituted as a party in interest. At the hearing, the administrative law judge noted that the deceased claimant was not a proper entity to pursue the claim, and found that no party had been formally substituted. The administrative law judge stated:

> I would think that if you get some authorization from the state court with a judge appointing somebody to pursue this so that I can change the caption of this case and do that on a formal basis, to add them, add their name to the caption...

Hearing Transcript at 7-8. A review of the record indicates that claimant's counsel did not submit any written documentation in satisfaction of the administrative law judge's instructions. Consequently, pursuant to 20 C.F.R. §725.360(a), (b), the record does not contain a valid party in interest on claimant's behalf. 20 C.F.R. §725.360; *see also* 20 C.F.R. §725.301(d). Inasmuch as the administrative law judge reasonably considered the relevant evidence, we affirm his finding that the communications between claimant's daughter and the district director's office were insufficient to constitute an effective petition for modification.

In addition, claimant contends that the one year limitation should "be excused under circumstances that make compliance impossible" inasmuch as the date the report from the pathologist was received was beyond claimant's control. Specifically, claimant states that since this report was not made available until after the one year limitation, claimant could not comply with the time limitation. This argument lacks merit. Contrary to claimant's contention, the regulations and case law do not require that all evidence be submitted with the request for modification or within the one year time period. Rather, all that is required is that a party in interest file written notice, within one year, evidencing an intent to make a request for modification. Such notice is sufficient to toll the one year period. *Searls, supra*; *see also Pettus, supra; Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998); *Bergeron, supra*. Moreover, this notice need not be formal in nature, merely written notice of the intent to seek review of the prior decision is sufficient. *Id*. Consequently, we reject claimant's contention that the unavailability of the autopsy report prior to the one year time limitation constitutes "good cause" for the petition for modification being filed after one year.

We also reject claimant's general allegation that the one year limitation should not apply because the claim was improperly administered during the

pendency of the claim. Contrary to claimant's contention, a review of the record and the procedural history indicates that the claim was consistently considered and the claim remained viable as a result of motions by the parties concerning the development and consideration of new evidence during the twenty-one years that the claim was pending. *See* discussion of procedural history, *supra*. Inasmuch as the record does not contain evidence of long and unexplained delays, which could have resulted in due process concerns, the case took a natural and proper, albeit long, progression to the present stage and, therefore, we reject claimant's contention that the one year limitation should not apply in this case because the case has been improperly handled.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge