BRB Nos. 99-0615 BLA
and 96-1141 BLA

FRED HATFIELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH OF KENTUCKY, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification and Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor, and of the Supplemental Decision and Order on Remand of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglas and Nora J. Clark, Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Edward Waldman (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 Modification and Granting Benefits (97-BLA-1670) of Administrative Law Judge Pamela Lakes Wood 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). This case is before the Board for the third time. Employer also has timely requested reinstatement of its motion for reconsideration and suggestion for rehearing *en banc* of the Board's previous Decision and Order in this case, *see Hatfield v. Arch of Kentucky, Inc.*, BRB No. 96-1141 BLA (Feb. 13 1997)(unpub.), which was held in abeyance pending the outcome of a petition for modification which was subsequently filed by employer.

Claimant filed the instant, duplicate claim on June 17, 1993, Director's Exhibit 1,[1] and the district director issued a Notice of Initial Finding that claimant is entitled to benefits on December 1, 1993, Director's Exhibit 13.[2] Employer filed an untimely controversion on February 22, 1994, Director's Exhibit 15. Thus, because employer's controversion was untimely, the district director awarded benefits to claimant on March 8, 1994, as employer was deemed to have accepted the notice of initial finding, Director's Exhibit 14. Employer's counsel at that time replied on March 18, 1994, contending that good cause existed for

[1] Claimant originally filed a claim on January 5, 1988, Director's Exhibit 26. In a Decision and Order issued on October 12, 1990, Administrative Law Judge Clement J. Kichuk found twenty years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718. Judge Kichuk found the existence of pneumoconiosis established by the most recent x-ray evidence at that time pursuant to 20 C.F.R. §718.202(a)(1), pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.203(b) and total disability established pursuant to 20 C.F.R. § 718.204(c). Judge Kichuk further found, however, that total disability due to pneumoconiosis was not established pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied. Claimant took no further action on this claim.

[2] The Notice of Initial Finding, CM-971, Director's Exhibit 13, included an initial finding that claimant is entitled to benefits and informed employer that:

> If you wish to contest the initial finding, you must file a controversion (CM-970) with this office within thirty (30) days of the date of this notice.

In addition, the Department of Labor notice informed employer that:

> If you fail to respond within thirty (30) days, you will be deemed to have accepted the initial finding, and this failure shall be considered a waiver of your right to contest this claim unless good cause is shown to excuse such failure (CFR 725.413).

accepting its untimely controversion because of a clerical error in its office, Director's Exhibit 20, but on March 23, 1994, the district director found that employer failed to establish good cause for its untimely controversion and informed employer that it could request a formal hearing before the Office of Administrative Law Judges only on the issue of good cause, Director's Exhibit 21.

The case was referred to Administrative Law Judge Charles P. Rippey who, instead of holding a hearing on the contested issue of good cause, issued an Order to Show Cause on January 25, 1995, as to why claimant's duplicate claim should not be dismissed on the basis that a material change in conditions cannot be established under 20 C.F.R. §725.309(d) by a claimant whose prior claim was denied solely on the basis that claimant did not establish that the cause of his totally disabling condition was pneumoconiosis pursuant to 20 C.F.R. §718.204(b), Director's Exhibit 32. Ultimately, Judge Rippey issued an order on March 7, 1995, dismissing claimant's duplicate claim because claimant did not file a timely response to the Order to Show Cause, Director's Exhibits 34, 37, 39.

Claimant appealed and the Board reversed Judge Rippey's order of dismissal because he had erred in purporting to decide the uncontested issue of whether claimant established a material change in conditions under Section725.309(d) and ignored the only contested issue of whether employer established good cause for filing its untimely controversion, Director's Exhibit 48. *Hatfield v. Arch of Kentucky, Inc.*, BRB No. 95-1279 BLA (Sep. 29, 1995)(unpub.). The Board also held that the prior denial of claimant's original claim based on claimant's failure to establish total disability due to pneumoconiosis pursuant to Section 718.204(b) does not forever preclude claimant from subsequently establishing a material change in conditions pursuant to Section 725.309(d) by establishing causation pursuant to Section 718.204(b). Thus, the Board remanded the case for a decision solely on the issue of good cause, instructing Judge Rippey that if he found that good cause was not established, claimant is entitled to benefits under 20 C.F.R. §725.413(b)(3), because employer waived its right to contest any other issue.[3] The Board further instructed Judge Rippey that if he did find good cause established, he could re-open the record for further evidentiary development and, ultimately, should determine whether a material change in conditions is established pursuant to Section 725.309(d) on the merits in accordance with the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Without holding a hearing, Judge Rippey issued a Supplemental Decision and Order

[3] Because the good cause issue, if decided in claimant's favor, is dispositive on the merits of the claim, the Board also denied claimant's motion to remand the case for modification proceedings.

On Remand on May 3, 1996, Director's Exhibit 49. Judge Rippey held that negligence can never constitute good cause and, therefore, found that employer's clerical error failed to establish good cause for its untimely controversion. Accordingly, benefits were awarded. Employer appealed and the Board vacated Judge Rippey's finding that employer failed to establish good cause for its untimely controversion and remanded the case for a hearing solely on the issue of good cause, consistent with the holding of the Sixth Circuit in *Pyro Mining Co. v. Slaton,* 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989), Director's Exhibit 61. *Hatfield v. Arch of Kentucky, Inc.*, BRB No. 96-1141 BLA (Feb. 13, 1997)(unpub.); *see also Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992). The Board also reiterated its instructions from its previous Decision and Order regarding what action the administrative law judge should take depending on his ultimate good cause determination. Finally, the Board rejected employer's contention that its untimely controversion could nevertheless constitute a timely request for modification pursuant to 20 C.F.R. §725.310, holding that employer's intent was not to request modification but to contest the district director's initial finding of entitlement within the appellate process.

Employer filed a timely motion for reconsideration and suggestion for rehearing *en banc*, Director's Exhibit 62, and, therefore, the Board's Decision and Order vacating Judge Rippey's award of benefits did not become final, *see* 20 C.F.R. §802.406. On reconsideration, employer contends that the Board erred in holding that employer's untimely controversion did not constitute a petition for modification. Both claimant and the Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, responded, urging the Board to deny employer's motion.

Subsequently, employer filed a petition for modification of the award of benefits based on a mistake in fact on March 18, 1997, Director's Exhibits 64-65, within a year of Judge Rippey's May 3, 1996, Supplemental Decision and Order On Remand awarding benefits, Director's Exhibit 49. Consequently, on May 16, 1997, the Board issued an order remanding the case for consideration of employer's petition for modification and noting that employer could subsequently request that its motion for reconsideration be ultimately considered by the Board if its petition for modification were denied on remand, Director's Exhibit 69. *Hatfield v. Arch of Kentucky, Inc.*, BRB No. 96-1141 BLA (May 16, 1997) (unpub. order).

On remand, the district director initially denied employer's petition for modification, in part, because the district director noted that the only issue was good cause for employer's untimely controversion and that no benefits had been paid to claimant in the last year, Director's Exhibit 70. Ultimately, the case was referred for hearing to Judge Lake Woods [hereinafter, the administrative law judge], who issued the Decision and Order Denying Modification and Granting Benefits at issue herein. The administrative law judge held that

because employer was entitled to *de novo* review on modification of any issues of entitlement or factual determinations previously made, including causation, it was unnecessary for her to consider whether there was good cause for employer's untimely controversion. The administrative law judge further noted that employer indicated (as employer does again on appeal, herein) that the good cause issue is moot in light of employer's petition for modification and that employer's current counsel indicated that it would be impossible for employer to explain the reasons for employer's untimely controversion. In any event, the administrative law judge held that employer's untimely controversion could have been deemed a petition for modification and been considered at that time. The administrative law judge further held that employer's petition for modification would serve the interest of justice, for to otherwise find employer "eternally bound by its failure to respond in a timely manner" would invite "boilerplate controversions disputing every possible issue" which would not serve the interest of justice. Finally, the administrative law judge found claimant entitled to benefits pursuant to Sections 725.310, 725.309(d) and Part 718. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that a material change in conditions was established pursuant to Section 725.309(d), the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis established pursuant to Section 718.204(b). Claimant responds, urging that the administrative law judge's Decision and Order Denying Modification and Granting Benefits be affirmed. The Director, as a party-in-interest, also responds, urging the Board to affirm the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d).

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 this 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we reject the administrative law judge's and employer's characterization that consideration of whether there was good cause for employer's untimely controversion is moot in this case in light of employer's contention that it subsequently, and properly, filed a petition for modification. Even if we were to accept employer's contention that employer had properly filed a petition for modification, a modification finding does not affect the award of benefits to claimant for the period prior to the filing of employer's petition for modification, *see* 33 U.S.C. §922; 20 C.F.R. §725.310(d)("[a]n order issued following the conclusion of modification proceedings may terminate ... benefit payments,"but "[s]uch order shall not affect any benefits previously paid."). Thus, we initially address employer's reinstatement of its motion for reconsideration, and rehearing *en banc*, of the Board's prior

Decision and Order vacating Judge Rippey's award of benefits and remanding the case for a hearing solely on the issue of good cause for employer's untimely controversion, *see Hatfield*, BRB No. 96-1141, as it remains ripe for review regardless of the merits of employer's contention that employer had subsequently filed a petition for modification.[4]

[4] Although employer also contends in its most recent appeal that the Board erred in its original Decision and Order by reversing Judge Rippey's order of dismissal and denying claimant's motion to remand the case for modification proceedings, *see Hatfield*, BRB No. 95-1279, we reject employer's contentions as the Board's original Decision and Order stands as the law of the case and no exception to that doctrine has been demonstrated by employer herein, *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting). The law of the case doctrine is a discretionary rule of practice, based on the policy that when an issue is litigated and decided, that decision should be the end of the matter, such that it is the practice of courts generally to refuse to reopen in a later action what has been previously decided in the same case, *see Brinkley*, *supra*; *Williams*, *supra*.

In its motion for reconsideration, employer contends that the Board erred in previously rejecting employer's contention that employer's untimely controversion could have constituted a timely petition for modification.[5] The Board previously held that employer's intent was not to request modification but to contest the district director's initial finding of entitlement within the appellate process, *see Hatfield*, BRB No. 96-1141 BLA at 4. Employer contends that the Board has allowed informal modification requests by claimants and notes, along with the Director, that the United States Court of Appeals for the Third Circuit has found that an untimely controversion can constitute a request for modification in *National Mines Corp. v. Carroll*, 64 F.3d 135, 19 BLR 2-329 (3d Cir. 1995). Employer further contends that claimant would not be prejudiced by such a finding, because employer contends that modification proceedings would render moot any good cause finding and would ultimately conclude with the same result.

Contrary to employer's and the Director's characterization, the Third Circuit's holding in *Carroll* is distinguishable from this case. In *Carroll*, an insurance carrier who filed an untimely controversion had never received notice of the initial finding of entitlement, *see Carroll, supra*, whereas we note that employer did receive notice in this case. More importantly, the insurance carrier's untimely controversion in *Carroll* was filed as a response to a proposed Decision and Order issued by the district director which is specifically regulated by 20 C.F.R. §725.419(d). Section 725.419(d) provides that once a proposed Decision and Order issued by the district director becomes final, "all rights to further proceedings with respect to the claim shall be considered waived, except as provided in §725.310," *see* 20 C.F.R. §725.419(d). Thus, because Section 725.419(d) specifically allows for the filing of a request for modification pursuant to Section 725.310 in response to a final proposed Decision and Order issued by the district director, the Third Circuit held that the insurance carrier's untimely controversion in *Carroll* was sufficient to constitute a request for modification, *see Carroll*, *supra*.

However, employer's untimely controversion in the instant case was filed in response to a Notice of Initial Finding which is specifically regulated by 20 C.F.R. §725.413, as opposed to Section 725.419(d). Section 725.413(b)(3) provides that an employer who fails to timely file a controversion in response to a Notice of Initial Finding shall not be permitted to raise issues or present evidence with respect to issues inconsistent with the initial findings "in

[5] We reject employer's further contention on reconsideration that by contesting claimant's original claim, employer thereby contested the merits of claimant's duplicate claim because employer contends that claimant's duplicate claim merged with claimant's original claim. Inasmuch as claimant's original claim was finally denied, claimant's duplicate claim is a separate claim and does not merge with claimant's original claim, *see* 20 C.F.R. §725.309(d).

any further proceeding conducted with respect to the claim," *see* 20 C.F.R. §725.413(b)(3); *Pruitt v. USX Corp.*, 14 BLR 1-129, 1-134 (1990). Thus, an employer who files an untimely controversion to a Notice of Initial Finding and fails to establish good cause for its untimely filing is precluded pursuant to Section 725.413(b)(3) from raising issues or presenting evidence with respect to issues inconsistent with the initial findings "in any further proceeding conducted with respect to the claim," such as modification proceedings under Section 725.310. Although modification is available to an employer pursuant to Section 725.310 if a claimant is awarded benefits on the merits, if an employer does not establish good cause for its untimely controversion, an administrative law judge does not have the authority and/or jurisdiction to consider the case on the merits or, therefore, to modify a finding of entitlement to benefits by the district director and, therefore, must award benefits.

Thus, employer's untimely controversion of the Notice of Initial Finding cannot constitute a request for modification pursuant to Section 725.413(b)(3) and, therefore, the administrative law judge's holding that employer's untimely controversion could have been deemed a petition for modification is reversed.[6] Furthermore, employer's subsequent petition for modification filed after the Board's previous Decision and Order was also barred under Section 725.413(b)(3) since there has not been a finding as to whether employer established good cause for its untimely finding. The Board erred, therefore, in remanding the case for consideration of employer's petition for modification filed after the Board's previous Decision and Order.

[6] Moreover, because employer's untimely controversion cannot constitute a request for modification pursuant to Section 725.413(b)(3), any error by the Board in determining that employer's "intent" in filing its untimely controversion was not to request modification but to contest the initial finding of entitlement, as contended by the Director on reconsideration, is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Consequently, we grant employer's motion for reconsideration, but deny the relief requested, including employer's request for rehearing *en banc*. We also vacate the administrative law judge's Decision and Order Denying Modification and Granting Benefits addressing the merits of employer's petition for modification[7] and remand the case for a hearing solely on the issue of good cause, *see Slaton*, *supra*; *Krizner*, *supra*.[8] We note that, contrary to the administrative law judge's characterization and employer's contention, the Board previously held that if employer is unable to establish good cause for its untimely controversion,[9] such a finding is dispositive on the merits of the claim and claimant would be entitled to benefits under Section 725.413(b)(3) because employer waived its right to contest any other issue.[10] On the other hand, if the administrative law judge finds that good cause is

[7] We decline, therefore, to address the administrative law judge's findings and employer's contentions on the merits of claimant's duplicate claim based on evidence submitted previously on remand in conjunction with employer's invalid filing of a petition for modification.

[8] Contrary to employer's contention, claimant would be prejudiced if employer's untimely controversion were permitted not only by a loss of benefits, but also by having to potentially repay an overpayment of interim benefits already received, *see* 20 C.F.R. §§410.561-410.561h; 725.540-544. Even if claimant were not prejudiced by employer's late filing, employer is still required to establish good cause for its untimely controversion pursuant to Section 725.413(b)(3), *see Krizner*, *supra*. Moreover, contrary to the administrative law judge's determination, whether employer can or cannot contest entitlement because employer failed to file a "boilerplate controversion" contesting all the elements of entitlement is not at issue, but the timeliness of employer's controversion and whether employer had good cause for its untimely controversion.

[9] The Board previously declined to address employer's contention, reiterated on appeal herein, that the Notice of Initial Finding was not properly served on employer, which is for the administrative law judge to determine in deciding whether good cause was established, *see Hatfield*, BRB No. 96-1141 BLA at 4 n. 3. Moreover, the administrative law judge noted that employer's current counsel indicated that it would be impossible for it to explain the reasons for employer's untimely controversion, Decision and Order at 7 n. 10; *see also* Hearing Transcript at 10.

[10] Although employer contends that claimant's duplicate claim was untimely and that this was not addressed in the Department of Labor's Notice of Initial Finding or by the Board in its previous Decisions and Orders, the Board previously held that whether good cause was established for employer's untimely controversion is the only issue, because employer waived its right to raise and/or contest any other issue pursuant to Section 725.413(b)(3), *see Hatfield*, BRB Nos. 95-1279 BLA at 5; 96-1141 BLA at 4.

established for accepting employer's untimely controversion, he may either re-open the record or remand the claim to the district director for further development of the evidence. Should the case later reach the administrative law judge for a decision on the merits, the administrative law judge should apply the standard enunciated in *Ross* for determining whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d).[11]

[11] Contrary to employer's contention, the Board did not hold that the evidence of record established a material change in conditions pursuant to Section 725.309 in accordance with the standard enunciated in *Ross*, but merely instructed the administrative law judge that if he did find good cause established, he should determine whether a material change in conditions is established pursuant to Section 725.309 on the merits in accordance with the standard enunciated in *Ross*.

Accordingly, the administrative law judge's Decision and Order Denying Modification and Granting Benefits is vacated and employer's motion for reconsideration of the Board's previous Decision and Order, BRB No. 96-1141 BLA, is granted, but the relief requested by employer and employer's request for rehearing *en banc* is denied, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge