

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 17-0593 BLA

MARGARET M. HANCHERICK (widow of )  
ALEX HANCHERICK) )

Claimant-Petitioner )

v. )

HELVETIA COAL COMPANY )

DATE ISSUED: 09/27/2018

and )

ONE REPUBLIC GENERAL INSURANCE )  
CORPORATION )

Employer/Carrier- )  
Respondents )

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 of Drew A. Swank,  
Administrative Law Judge, United States Department of Labor.

Georgina M. Dino, Belsano, Pennsylvania, for claimant.

Norman A. Coliane (Thompson, Calkins & Sutter, LLC), Pittsburgh,  
Pennsylvania, for employer.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski,  
Acting Associate Solicitor; 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, BOGGS and ROLFE,  
Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Modification (2017-BLA-05373) of Administrative Law Judge Drew A. Swank, rendered on a survivor's claim filed on October 11, 2005, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The claim was initially awarded by the district director on June 5, 2006. Director's Exhibit 26. Employer requested a hearing, and the case was assigned to Administrative Law Judge Daniel L. Leland, who denied benefits in a Decision and Order issued on December 17, 2007. Director's Exhibit 41.

Claimant filed a request for modification on December 9, 2008. Director's Exhibit 42. In a Decision and Order issued on July 13, 2012, Administrative Law Judge Thomas M. Burke denied claimant's modification request, finding that claimant failed to establish a change in conditions or a mistake in a determination of fact. Claimant filed an appeal with the Board, and the denial of benefits was affirmed on August 14, 2013. *Hancherick v. Helvetta Coal Co.*, BRB No. 12-0597 BLA (Aug. 14, 2013) (unpub.). Claimant filed a motion for reconsideration with the Board that was denied on March 14, 2014. *Hancherick v. Helvetta Coal Co.*, BRB No. 12-0597 BLA (Mar. 14, 2014) (unpub. Order on Recon. ).<sup>2</sup>

Almost two years and two months later, claimant filed a request for modification with the district director on May 10, 2016. Director's Exhibit 62. Judge Swank (the administrative law judge) denied the modification request on the grounds that it was not timely filed pursuant to 20 C.F.R. §725.310.

On appeal, claimant asserts that her modification request was timely in view of a pending overpayment case against her that had not been resolved as of the date she filed

---

<sup>1</sup> Claimant is the widow of the miner, Alex Hancherick, who died on July 20, 1999. Georgina M. Dino filed a letter with the Board on behalf of claimant as her lay representative.

<sup>2</sup> After the Board affirmed the denial of benefits, the Director, Office of Workers' Compensation Programs instituted overpayment proceedings against claimant to recover interim benefits paid by the Black Lung Disability Trust Fund. Director's Letter Brief at 2. Claimant agreed to pay the overpayment in October 2016. *Id.*

her modification request.<sup>3</sup> Employer and the Director, Office of Workers' Compensation Programs (the Director) respond, urging affirmance of the administrative law judge's decision. The Director specifically asserts that claimant and her representative are "simply mistaken regarding the district office's alleged policy of allowing the time limit for modification to be stayed pending resolution of overpayment proceedings." Director's Letter Brief at [2] (unpaginated).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</sup> 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).

We conclude that the administrative law judge's denial of claimant's modification request was rational and in accordance with the law. The regulation at 20 C.F.R. §725.310(a) provides in relevant part:

Upon his own or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may, at any time before one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award of denial of benefits.

20 C.F.R. §725.310(a); *see also* 33 U.S.C. §922(a), as incorporated by 30 U.S.C. §932(a); *Youghiogeny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951 (6th Cir. 1999); *Stanley v.*

---

<sup>3</sup> Ms. Dino asserted before the administrative law judge and in this appeal that she was a claims examiner in the Johnstown, Pennsylvania black lung district office for the Office of the Regional Solicitor, Department of Labor, from 1982 to 2013. She maintains that it was the policy of that office to accept a request for modification after the one-year deadline of 20 C.F.R. §725.310, if there was an unresolved overpayment pending in the case. Thus, it is claimant's position on appeal that the pending overpayment case tolled the regulatory time-frame for filing her modification request. The administrative law judge found this argument "unpersuasive as it does not explain why [c]laimant could not have requested modification within one year of the final order pursuant to the time limit in 20 C.F.R. § 725.310." Decision and Order Denying Modification at 3.

<sup>4</sup> The record indicates that the miner's coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

*Betty B Coal Co.*, 13 BLR 1-72, 1-76 (1990) (a party has “one year from a final decision” to request modification). There is no regulatory or statutory provision for extending the one-year deadline for filing a modification request under 20 C.F.R. §725.310.<sup>5</sup>

In this case, the time period within which claimant had to file her request for modification commenced on March 14, 2014, the date the Board issued its order denying reconsideration.<sup>6</sup> See 20 C.F.R. §§802.403(b), 802.406; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-14 (2003) (The one-year time period for filing a modification request from a Board decision begins from the date upon which the decision is filed with the Clerk of the Board – the same date on which the decision is issued). Because claimant did not file her modification request within one year of the Board’s March 14, 2014 order denying reconsideration, we affirm the administrative law judge’s finding that the modification request was untimely filed pursuant to 20 C.F.R. §725.310.<sup>7</sup>

---

<sup>5</sup> An action with respect to overpayments is an action regarding recovery of payments already made, after a claimant has been determined not entitled to benefits. It is neither an award nor a denial of benefits.

<sup>6</sup> Claimant was advised that she had one year to file a request for modification. *Hancherick v. Helvetta Coal Co.*, BRB No. 12-0597 BLA (Mar. 14, 2014) (unpub. Order on Recon.).

<sup>7</sup> Because we affirm the administrative law judge’s finding that the modification request was not timely filed, it is not necessary that we address claimant’s additional arguments on appeal.

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge