BRB No. 99-0303 BLA

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

Appeal of the Decision and Order - Denial of Request for Modification of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Ronald C. Cox (Johnnie L. Turner, P.S.C.), Harlan, Kentucky, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Denial of Request for Modification (97-BLA-1447) of Administrative Law Judge Robert L. Hillyard 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 administrative law judge determined the instant case to be a request for modification of the September 20, 1995 Decision and Order of Administrative Law Judge Stuart A. Levin awarding benefits. In his September 1990 Decision and Order, Judge Levin credited claimant with twenty and one-half years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's February 1993 filing date. In weighing the medical evidence, Judge Levin found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§718.202(a)(4), 718.203(b). Judge Levin further found the evidence sufficient to establish total respiratory disability, 20 C.F.R. §718.204(c), and that pneumoconiosis was a contributing cause of claimant's total respiratory disability, 20 C.F.R. §718.204(b). Accordingly, Judge Levin awarded benefits. Moreover, Judge Levin determined that the date from which benefits commence was August 1, 1992. Employer appealed this decision to the Board.

Pursuant to employer's appeal, the Board affirmed Judge Levin's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis and that pneumoconiosis was a contributing cause of claimant's total disability pursuant to Sections 718.202(a)(4) and 718.204(b).[1] *Gibbs v. Arch of Kentucky, Inc.*, BRB No. 96-0129 BLA, slip op. at 3-4 (July 24, 1996)(unpub.). However, the Board vacated Judge Levin's determination that August 1, 1992 was the date from which benefits commenced and remanded the case to Judge Levin for further consideration of this issue. *Id*., slip op. at 5. By motion dated August 20, 1996, employer sought reconsideration of the Board's affirmance of Judge Levin's findings on the merits of entitlement. However, prior to the Board's ruling on employer's motion, employer filed a petition for modification with the district director, accompanied by new medical evidence. Director's Exhibit 64. Consequently, the Board dismissed employer's motion for reconsideration and

[1] The Board affirmed Judge Levin's decision to credit claimant with twenty and one-half years of coal mine employment as well as his findings at 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b) and 718.204(c), as unchallenged by the parties on appeal. *Gibbs v. Arch of Kentucky, Inc.*, BRB No. 96-0129 BLA, slip op. at 2, n.1 (July 24, 1996)(unpub.).

remanded the case to the district director to address employer's petition for modification. *Gibbs v. Arch of Kentucky, Inc.*, BRB No. 96-0129 BLA (Nov. 20, 1996)(Order)(unpub.).

In the Decision and Order on modification, Administrative Law Judge Robert L. Hillyard (the administrative law judge) found that the newly submitted evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. In addition, he found that the evidence did not establish a mistake in a determination of fact, inasmuch as the evidence was insufficient to discredit the prior finding of the existence of pneumoconiosis and its part in causing claimant's total disability pursuant to Sections 718.202(a)(4) and 718.204(b). Accordingly, the administrative law judge denied employer's request for modification and affirmed the award of benefits. Additionally, the administrative law judge determined that the date from which benefits commence was August 1, 1993, the month in which claimant filed his application for benefits.

On appeal, employer contends that the administrative law judge erred in finding the evidence insufficient to establish a mistake in a determination of fact. Initially, employer contends that the administrative law judge utilized an erroneous standard in determining that the evidence was insufficient to establish a mistake in a determination of fact under Section 725.310 inasmuch as the administrative law judge failed to engage in a proper *de novo* review of the evidence. Employer also contends that the administrative law judge erred in his weighing of the medical evidence pursuant to Sections 718.202(a)(4) and 718.204(b) as he failed to adequately explain the bases for his findings. In response, claimant urges affirmance of the administrative law judge's award of benefits, as within a reasonable exercise of his discretion. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not respond in this appeal.

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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and implemented at 20 C.F.R. §725.310, a party may, within one year of a final order or the last payment of benefits, request modification of such order. Section 22 provides the only means for changing otherwise final decisions, with

modifications pursuant to this section being permitted based upon a mistake in a determination of fact in the initial decision or a change in the miner's condition. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *see also Metropolitan Stevedore Co. v. Rambo* [*Rambo II*], 515 U.S. 121, 31 BRBS 54 (CRT) (1997). Moreover, it is well-established that the party requesting modification bears the burden of persuasion. *Rambo, supra; Branham, supra.* The party seeking modification need not establish a glaring error within the prior decision or submit new evidence in support of its contention that there was a mistake in the prior decision. Rather, in determining whether a mistake in a determination of fact has been established, the administrative law judge is granted "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted" under the mistake in fact prong. *O'Keeffe, supra; Worrell, supra; Jessee, supra; Branham, supra*.

In the instant case, the administrative law judge correctly stated that employer, as the party requesting modification, bears the burden of proof in establishing a mistake of fact.[2] Decision and Order at 17; *see Rambo, supra*; *Branham, supra*. However, the administrative law judge erred in determining that in order to meet its burden, employer was required to submit evidence on modification which affirmatively discredited the opinions of Drs. Anderson, Baker and Myers, the prior evidence of record. *See O'Keeffe, supra; Worrell, supra; Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71(1992). Rather, in accordance with the principles set forth above, the administrative law judge should have assessed whether a mistake of fact exists based solely upon further reflection on the original evidence or a determination that either the wholly new evidence or cumulative evidence establishes that the previous disposition contains a factual error.[3] *Id*. If employer failed to

[2] Employer, in requesting modification did not allege a change in claimant's condition. *See* Director's Exhibit 64. Nevertheless, the administrative law judge reviewed the evidence and determined that it was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. Decision and Order at 17; *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Inasmuch as the parties do not challenge this finding, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] In determining whether there is a mistake in a determination of fact, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this

demonstrate a mistake of fact by any of these methods, the administrative law judge could have properly concluded that employer did not meet its burden under Section 725.310. We, therefore, vacate the administrative law judge's determination that the evidence is insufficient to support a finding of a mistake of fact and remand the case to the administrative law judge for a *de novo* review of the evidence of record to determine whether employer has established a mistake in a determination of fact pursuant to Section 725.310. *Worrell, supra; see also Rambo, supra; Branham, supra*.

If, on remand, the administrative law judge finds the evidence sufficient to establish a mistake in a determination of fact, he must also consider whether the re-opening of the case will render justice under the Act inasmuch as "[t]he purpose of this section is to permit a[n] [administrative law judge] to modify an award where there has been 'a mistake in a determination of fact [which] makes such a modification desirable in order to render justice under the act.'" *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-108 (6th Cir. 1982), quoting *Banks v. Chicago Grain Trimmers Association, Inc*., 390 U.S. 459, 464 (1968). Specifically, the administrative law judge has the authority "to reconsider all the evidence for any mistake of fact or change in conditions," *Worrell, supra*, but the "exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *See Kinlaw v. Stevens Shipping and Terminal Co*., 33 BRBS 68, 72 (1999). "An administrative law judge must not lightly consider reopening a case at the behest of a party who, right or wrong, could have presented its side of the case at the first hearing." *Branham v. Bethenergy Mines, Inc*., 21 BLR 1-79, 1-82 (1998)(McGranery, J., dissenting). Nor is modification intended to protect litigants from their counsel's litigation mistakes. *Kinlaw*, 33 BRBS at 74. Consequently, on remand, if the administrative law judge finds the evidence sufficient to establish a mistake in a determination of fact, he must also consider whether reopening will render justice, by balancing the interest in obtaining a "correct" result against the need for finality in decision making. *Id*., at 73.

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case arises, emphasized that "'[t]here is no need for a smoking gun error, changed conditions, or startling new evidence.'" *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994), quoting *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order - Denial of Request for Modification is affirmed in part, vacated in part and the case is remanded to the administrative law judge 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