BRB No. 01-0715 BLA

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| WINSTON GIBBS, JR. | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: |
| 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 on Remand-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 (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Denial of Request for Modification (1997-BLA-1447) of Administrative Law Judge Robert L. Hillyard rendered 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).

[1] This case, now involving employer's request for modification of an award of

benefits, is before the Board for the third time.

Claimant filed his application for benefits on February 22, 1993. Director's Exhibit 1. After a hearing, Administrative Law Judge Stuart A. Levin credited claimant with twenty and one-half years of coal mine employment and awarded benefits in a Decision and Order issued on September 20, 1995. Director's Exhibit 56. Judge Levin credited the medical opinion of Dr. William Anderson, as supported by those of Drs. Glen Baker and John Myers, to find the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.202(a)(4). Judge Levin deferred to Dr. Anderson's judgment based upon his medical credentials and found that his opinion was more persuasive and better reasoned than the contrary opinions of Drs. A. Dahhan and Gregory Fino. Because the physicians of record agreed that claimant was totally disabled by a respiratory or pulmonary impairment, Judge Levin turned to the issue of whether the disability was due to pneumoconiosis. On this question, Judge Levin accorded less weight to Dr. Dahhan's and Dr. Fino's opinions that claimant was totally disabled due to smoking, because he found that their opinions were rendered under the mistaken belief that claimant did not have pneumoconiosis. Doctor Anderson opined that although claimant had pneumoconiosis, his total disability was due to smoking because his pulmonary function impairment consisted solely of air trapping. Judge Levin accorded less weight to Dr. Anderson's analysis because Dr. Anderson did not consider pulmonary function data interpreted as reflecting both obstructive and restrictive elements to claimant's respiratory impairment. Therefore, the administrative law judge chose to accord greater weight to the opinions of Drs. Myers and Baker that claimant was totally disabled due to both smoking and pneumoconiosis. Accordingly, Judge Levin awarded benefits.

Employer appealed, challenging the findings that the existence of pneumoconiosis was established and that claimant's total disability was due to pneumoconiosis. On appeal, the Board affirmed the administrative law judge's findings as supported by substantial evidence and based upon reasonable credibility determinations. *Gibbs v. Arch of Kentucky, Inc*., BRB No. 96-0129 BLA (Jul. 24, 1996)(unpub.); Director's Exhibit 62. Consequently, the Board affirmed the award of benefits. Employer additionally challenged the finding that benefits should commence as of August 1, 1992. The Board agreed that the administrative law judge did not provide a rationale for awarding benefits as of August 1, 1992 and, accordingly, vacated his onset finding and remanded the case for him to reconsider the relevant evidence and make specific findings in accordance with 20 C.F.R. §725.503(b)(2000).

Thereafter, employer filed a timely motion for reconsideration of the Board's decision. Director's Exhibit 63. However, before the Board could act on

reconsideration, employer filed a petition for modification with the district director, alleging that the award of benefits was premised on two mistaken determinations of fact: first, that claimant suffered from pneumoconiosis, and second, that his totally disabling respiratory impairment was due to pneumoconiosis. Director's Exhibit 64; *see* 33 U.S.C. §922, implemented by 20 C.F.R. §725.310(2000)(providing for modification within one year of an award, based on a mistake of fact or change in conditions). By order dated November 29, 1996, the Board granted employer's motion for remand to the district director for modification proceedings, and dismissed employer's motion for reconsideration, subject to reinstatement. Director's Exhibit 66.

In support of employer's contention that a mistake occurred, employer submitted several new x-ray readings which were negative for pneumoconiosis, four examination reports with associated testing, a deposition of an examining physician, a consulting physician's report, a second consulting physician's deposition, and medical treatment records. Drs. Matt Vuskovich, Robert Powell, and Ballard Wright examined and tested claimant in June, September, and October 1995, respectively, in connection with his Kentucky workers' compensation claim. Director's Exhibits 64, 83. All three physicians concluded that claimant does not have pneumoconiosis but has a severe obstructive lung impairment due solely to smoking. *Id*. Dr. Bruce Broudy examined and tested claimant on August 27, 1997 and concluded that he does not have pneumoconiosis but has pulmonary emphysema and severe chronic obstructive airways disease due to smoking. Employer's Exhibit 1. Dr. Broudy expanded on his opinion in a deposition. Employer's Exhibit 2. On June 5, 1997 Dr. Ben Branscomb reviewed the medical evidence of record and concluded that claimant has neither clinical nor legal pneumoconiosis but suffers from chronic asthmatic bronchitis due to smoking. Director's Exhibit 83. Dr. Fino reviewed his original report plus Dr. Broudy's 1997 examination results and testified that claimant does not have pneumoconiosis but has a severe obstructive lung condition due to smoking. Employer's Exhibit 7. Two sets of medical treatment notes were submitted. The first set covered six hospitalizations from October 1988 through October 1995. The first five hospitalizations were for treatment of chronic obstructive pulmonary disease; the sixth was for the treatment of colitis. The second set of treatment notes covered six office visits by claimant to his treating physician, Dr. Kenneth Wier, between June 1995 and January 1997. Each of these brief notes relates a follow-up visit for emphysema, COPD, hypoxia, bronchospasm, and anxiety disorder. Some of these notes record prescription refills, including bronchodilators. Neither the hospital records nor Dr. Wier's notes contain a diagnosis of pneumoconiosis.

Claimant responded with two positive x-ray readings, Claimant's Exhibits 1, 2,

and with his own deposition of Dr. Broudy. Claimant's Exhibit 3.

In the initial decision on modification, Administrative Law Judge Robert L. Hillyard found that employer could not demonstrate a mistake of fact because employer did not submit evidence affirmatively discrediting the opinions of Drs. Anderson, Baker, and Myers. Accordingly, he denied employer's modification request. Additionally, the administrative law judge reconsidered the evidence of record, found that it did not establish when claimant became totally disabled due to pneumoconiosis, and ordered that benefits commence as of February 1, 1993, the month in which claimant filed his claim. *See* 20 C.F.R. §725.503(b)(2000).

Pursuant to employer's appeal, the Board vacated the administrative law judge's mistake of fact finding and remanded the case for him to review the record to determine whether employer established a mistake in a determination of fact. *Gibbs v. Arch of Kentucky, Inc*., BRB No. 99-0903 BLA (Sep. 27, 2000)(unpub.). The Board further instructed the administrative law judge that he retained the discretion to consider whether reopening the claim would render justice under the Act.

On remand, the administrative law judge found that employer's new evidence submitted on modification should have been developed and presented in the initial litigation. The administrative law judge therefore concluded that it would not render justice to consider whether the new evidence demonstrated a mistake of fact. The administrative law judge then reviewed Judge Levin's 1995 Decision and Order and the evidence initially submitted, adopted Judge Levin's findings and credibility determinations, and found that employer did not demonstrate that a mistake of fact had occurred. Accordingly, the administrative law judge denied modification.

On appeal, employer argues that the administrative law judge erred by not conducting a *de novo* review of the entire record on modification to determine whether the ultimate fact was correctly decided. Employer further asserts that even if the mistake of fact analysis could properly be confined to the original evidence, the administrative law judge did not rethink the prior findings of fact, and violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), by failing to provide reasons for the relative weight he accorded to the medical evidence. Claimant has not responded, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate 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 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922 (the statute underlying 20 C.F.R. §725.310), provides in part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim, review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation . . . .

"[B]y its plain language, 33 U.S.C. §922 is a broad reopening provision that is available to employers and employees alike." *King v. Jericol Mining, Inc*., 246 F.3d 822, 825, --- BLR --- (6th Cir. 2001). "The 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). The administrative law judge has the authority "to reconsider all the evidence for any mistake of fact or change in conditions," *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994), 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." *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). Nor is modification intended to protect litigants from their counsel's litigation mistakes. *Kinlaw*, 33 BRBS at 74. Consequently, the administrative law judge should 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. The Board reviews the administrative law judge's findings in this regard under the abuse of discretion standard. *Id*.

With the foregoing principles in mind, we turn to employer's contentions on appeal. Employer first contends that the administrative law judge abused his discretion in declining to consider the new evidence developed on modification. Employer maintains that its allegation of a mistake of fact automatically required the administrative law judge to weigh all evidence submitted. Contrary to employer's contention, exercise of the authority to review compensation cases is discretionary. *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 956, 22 BLR 2-46, 2-69 (6th Cir. 1999). This authority includes the discretion to consider, as the administrative law judge did here, that "an allegation of mistake should not be allowed to become a back door to retrying the case because one party thinks he can make a better showing on the second attempt." Decision and Order on Remand at 5, quoting *McCord v. Cephas*, 532 F.2d 1377, 1380 (D.C. Cir. 1976). We cannot say the administrative law judge abused his discretion by considering whether the new evidence was timely developed and submitted.

Employer asserts that, because the evidence submitted on modification was based in part on new physical examinations, the administrative law judge erred in refusing to weigh this evidence. The administrative law judge summarized all of the evidence in his two decisions, and he clearly recognized that employer submitted new examination reports. Decision and Order at 4-16; Decision and Order on Remand, Attachment A. However, he concluded that employer should have seen the need to develop and present additional evidence in its initial defense of the claim. In view of the discretionary nature of the administrative law judge's modification authority, *see Milliken, supra*, we cannot say that he abused his discretion in this regard. *See Kinlaw, supra*. Review of the record indicates that at the time of the initial litigation, the only physical examination report submitted by employer was that of Dr. Dahhan, and his conclusion that claimant did not have pneumoconiosis was countered by the opinions of three, well-credentialed, examining physicians who diagnosed pneumoconiosis. Two of those three physicians further attributed claimant's disability in part to pneumoconiosis. Under these circumstances, the administrative law judge permissibly considered that Section 22 is not intended to provide a back-door route to retrying a case, or to correct misjudgments of counsel. *See General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 26, 14 BRBS 636, 640 (1st Cir. 1982). Consequently, on the facts presented we affirm the administrative law judge's finding that a reopening of the record based on the newly developed evidence would not render justice, as it constitutes a rational exercise of his discretionary authority. *See Kinlaw, supra*.

Employer further contends that when the administrative law judge considered the mistake of fact issue based upon the evidence initially submitted, he did not rethink the prior findings or provide an explanation for the relative weight accorded to the evidence. The administrative law judge reviewed the findings made by Judge Levin in light of the original evidence, adopted Judge Levin's findings and credibility determinations, and found that no mistake of fact was demonstrated. Decision and Order on Remand at 5-6. Upon review, we hold that the administrative law judge adequately "reflect[ed] on the evidence initially submitted," *O'Keeffe v. Aerojet-General Shipyards*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972), and that by adopting the previous credibility determinations, the administrative law judge provided a sufficient rationale under the APA for his finding that employer did not demonstrate a mistake of fact. *See Caudill v. Arch of Kentucky, Inc.,* 22 BLR 1-97, 1-101 (2000)(*en banc*). Therefore, we affirm the administrative law judge's finding that no mistake of fact was established.

Accordingly, the administrative law judge's Decision and Order on Remand-Denial of Request for Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge