

BRB No. 94-0149 BLA

L. C. BRANHAM)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BETHENERGY MINES, 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 on Motion for Modification of David Di Nardi, Administrative Law Judge, United States Department of Labor.

Roland Case, Pikeville, Kentucky, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Jennifer U. Toth (J. Davitt McAteer, Acting 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 and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Motion for Modification (92-BLA-1669) of Administrative Law Judge David Di Nardi denying its petition to modify an award of benefits based 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 BLBA).

Employer sought modification based upon a mistake in a determination of fact, *i.e.* that claimant never was totally disabled. In support of its motion employer proffered five medical reports, two from doctors who recanted their prior opinions.

The administrative law judge determined that modification under Section 22 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §922, as incorporated into the BLBA by 30 U.S.C. §932(a) and implemented for black lung benefits claims by 20 C.F.R. §725.310, was not available to employer. The administrative law judge, therefore, denied the Motion for Modification. Decision and Order on Motion for Modification at 17. This appeal followed. By Order dated May 3, 1995, the Board scheduled oral argument in this case. Oral argument was held on June 6, 1995 in Cincinnati, Ohio. See 20 C.F.R. §§802.304(a), 802.305(a).

On appeal, employer contends, and the Director, Office of Workers' Compensation Programs (the Director), agrees, that the administrative law judge erred by effectively concluding that modification of an award by the party opposing entitlement was foreclosed as a matter of law. Employer alleges that the administrative law judge thus erred in failing to consider the evidence submitted by employer in support of its motion for modification. Employer's Brief at 5, 12; Director's Brief at 4. Claimant¹ did not file a response brief, but appeared at oral argument through counsel.

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 BLBA by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹Claimant is L.C. Branham, the miner, who filed a claim for benefits on April 19, 1985. Director's Exhibit 1.

In concluding that modification is not available to employer, the administrative law judge considered the language of Section 22² as well as the regulations of the Secretary of Labor (the Secretary) set forth at 20 C.F.R. §§702.373 and 725.310,³ which implement

²Section 22 provides in relevant part that:

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 deputy commissioner, the deputy commissioner 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 ...

33 U.S.C. §922, as incorporated into the BLBA by 30 U.S.C. §932(a).

³Section 725.310 provides that

(a) Upon his 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 deputy commissioner may, at any time before one year from 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 or denial of benefits.

(b) Modification proceedings shall be conducted in accordance with the provisions of this part as appropriate. Additional evidence may be submitted by any party or requested by the deputy commissioner. Modification proceedings shall not be initiated before an administrative law judge or the Benefits Review Board.

(c) At the conclusion of modification proceedings the deputy commissioner may issue a proposed decision and order (§725.418), forward the claim for a hearing (§725.421) or, if appropriate, deny the claim by reason of abandonment (§725.409).

(d) An order issued following the conclusion of modification proceedings may terminate, continue, reinstate, increase or decrease benefit payments or award benefits. Such order shall not affect any benefits previously paid, except that an order increasing or decreasing the amount of benefits payable may be made effective on the date from which benefits were determined payable by the terms of an earlier award. In the case of an award which is decreased, any payment made in excess of the decreased rate shall be subject to collection or offset under subpart G of this part.

20 C.F.R. §725.310.

Section 22 for claims under the LHWCA and the BLBA respectively. Decision and Order on Motion for Modification at 6-10, 14. The administrative law judge noted the progressive and irreversible nature of pneumoconiosis, the remedial nature of the BLBA and distinctions between pertinent language of the longshore and black lung regulations to support his rationale that modification of a black lung benefits award on behalf of the party opposing entitlement would be precluded. *Id.* at 12, 15.

In so ruling, the administrative law judge held that modification of an award in this instance "is both inconsistent with the purposes of the BLBA as well as an attempt to bypass, render meaningless and, in effect relitigate the Claimant's entitlement status, a status which is now binding by virtue of *res judicata* and collateral estoppel." Decision and Order on Motion for Modification at 16-17. He thus concluded that employer's sole avenue for relief from an award of benefits would be by way of appeal.⁴ *Id.* at 17; see 33 U.S.C. §921(b).

For the reasons that follow, we hold that a party opposing entitlement may also rely on the modification procedures provided at Section 22, as implemented by Section 725.310, for claims arising under the BLBA. Because the administrative law judge was in error in concluding otherwise, we vacate the Decision and Order on Motion for Modification, and remand this case to the administrative law judge for *de novo* consideration of the administrative record as a whole, including employer's proffered evidence, to determine whether employer has proven a mistake in a determination of fact, as alleged.⁵

II

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the BLBA by 30 U.S.C. §932(a)⁶ and as implemented at Section

⁴The administrative law judge also noted that "[i]n the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner. . . ." Decision and Order on Motion for Modification at 15. Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Supreme Court held that the true doubt rule is inapplicable to the adjudication of claims under the Federal Coal Mine Health and Safety Act (the BLBA). *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994).

⁵Because employer sought modification based upon a mistake in a determination of fact, we have no occasion to address the possible alternate ground for modification, a change in conditions.

⁶Section 422(a) of the BLBA, 30 U.S.C. §932, incorporates provisions of the Longshore and Harbor Workers' Compensation Act as amended, including any future provisions unless specifically excluded. See 20 C.F.R. §725.1(j); *Director, OWCP v. Eastern Coal Co.*, 561 F.2d 632 (6th Cir. 1977).

725.310, provides that upon his own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to 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 or denial of benefits. See 20 C.F.R. §725.310.⁷

Judicial authority supports a broad reading of Section 22. As the United States Supreme Court noted in *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), neither the wording of the statute nor its legislative history supports a "narrowly technical and impractical construction." 404 U.S. at 255; see *Metropolitan Stevedoring Co. v. Rambo*, 115 S.Ct. 2144, 2147 (1995); see also *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982). Furthermore, the petitioner need not allege any specific ground for relief. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); see *Rambo*, 115 S.Ct. at 2147; *Fireman's Fund Insurance Co. v. Bergeron*, 493 F.2d 545, 547 (5th Cir. 1974); cf. *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 527 (4th Cir. 1996)(bare demands for entitlement failed to constitute valid requests for modification).

Thus, Section 22 vests the fact-finder with "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe*, 404 U.S. at 257; *Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987); accord *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174, 175-76 (1988); see also *Rambo*, 115 S.Ct. at 2148; *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 461-465 (1968).

III

At the outset, we conclude that the administrative law judge's invocation of the doctrine of *res judicata* as a reason to foreclose modification in this instance was incorrect. Contrary to the administrative law judge's ruling, see Decision and Order on Motion for Modification at 16-17, Section 22 was implemented by Congress to displace traditional notions of *res judicata* and collateral estoppel. See *Williams v. Jones*, 11 F.3d 247, 257, 27 BRBS 142, 159 (CRT)(1st Cir. 1993); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8, 15 (1993); *Wojtowicz*; see generally *Banks*; cf. *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-79

⁷Demonstrating a mistake in a determination of fact does not require submission of new evidence. See generally *Eifler v. Director, OWCP*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991).

(1993)(duplicate claim under 20 C.F.R. §725.309). Accordingly, the finality embodied in the doctrine of *res judicata* cannot serve to foreclose employer's opportunity to seek modification of an award.

IV

We likewise disagree with the administrative law judge's reliance on distinctions between awards under the LHWCA and the BLBA to hold that the reopening of a black lung award is precluded. The administrative law judge reasoned that there are crucial factors which distinguish black lung awards from awards ordered under the LHWCA. Among these factors are progressive and irreversible nature of pneumoconiosis, the remedial purposes of the BLBA, and the entitlement language of the BLBA, phrased in terms of "total disability." By contrast, he stated that "[t]he LHWCA provides for quantifiable disability findings [pursuant to a disability schedule, and for permanent, total, temporary, and partial disability], as well as for the settlement of claims, as found in 33 U.S.C. §§908-910, 933." Decision and Order on Motion for Modification at 16. These differences convinced the administrative law judge that only LHWCA awards were subject to reopening in favor of the party opposing entitlement. *Id.*

The statutory and regulatory provisions at issue expressly permit modification "upon the request of any party." 33 U.S.C. §922; 20 C.F.R. §725.310(a). An order issued on modification may "terminate, continue, reinstate, increase or decrease" benefits payments or award benefits. 20 C.F.R. §725.310(d). Under the administrative law judge's holding, however, the language in both Section 22 and its implementing regulations, which authorize the termination of an award, would be rendered meaningless.⁸ This interpretation violates a fundamental principle of statutory construction which the Supreme Court recently applied when construing another provision of Section 22: "When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Rambo*, 115 S.Ct. at 2147 (*quoting Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)).

⁸We also disagree with the administrative law judge's reliance on the phrase "as appropriate," which was included in Section 725.310(b) but not in the corresponding LHWCA regulation, 20 C.F.R. §702.373, to buttress his conclusion that modification on behalf of employer is "inappropriate" in black lung claims. Decision and Order on Motion for Modification at 15. The interpretation that the use of the phrase "as appropriate" demonstrates an intent to preclude the reopening of claims by a party-respondent renders meaningless those provisions in the remainder of Section 725.310, as well as Section 22, which dictate, *inter alia*, that modification may "terminate" benefits. It is unlikely that the Secretary would have intended such an incongruous result. We agree instead with the Director that the phrase "as appropriate" is not a grant of discretion to the administrative law judge on an issue of substance, but rather pertains to issues of procedure addressed by the Part 725 regulations. The Director's interpretation of the Secretary's regulation is reasonable. See *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414 (1945).

Thus, in this instance the party opposing entitlement may seek to reopen a black lung award pursuant to Section 22 on the basis of a mistake in a determination of fact. Moreover, the trier-of-fact may conclude that the ultimate determination of claimant's entitlement was mistaken after consideration of "wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted," which calls into question the correctness of the initial award. See *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Worrell*; see generally *Banks*. The record reveals that in this case several examining physicians reviewed their records at employer's request. Drs. T.L. Wright, Director's Exhibit 19; Employer's Exhibit 41, and Dr. Ballard Wright, Director's Exhibits 24, 61, 89; Employer's Exhibit 32, recanted their prior opinions that claimant was disabled due to pneumoconiosis, and subsequently opined that claimant retained the respiratory capacity for coal mine work.

Because the administrative law judge's holding, that employer's petition for modification is precluded, contravenes the express language of Section 22 and applicable regulatory provisions, the Decision and Order on Motion for Modification does not accord with applicable law.⁹

We, therefore, vacate the administrative law judge's holding that modification proceedings are unavailable to employer and remand the case to the administrative law judge to consider the merits of employer's petition for modification.

V

On remand, the administrative law judge must specifically address employer's assertion that a mistake in a determination of fact was demonstrated. See Employer's Brief at 9-11. We note that employer has submitted evidence to buttress this claim, see Director's Exhibits 84, 89; Employer's Exhibits 13, 15, 20, 22-24, 27, 32, 35, 37, 39-41, 44. Employer, in this case, bears the burden of persuasion on modification. See 20 C.F.R.

⁹In view of the clear and unambiguous language of both Section 22 and its effectuating regulation, the administrative law judge's reliance on legislative history as support for the preclusion of modification in this instance is misplaced. "[A]ny argument based on legislative history is of minimal, if any, relevance to the issue of whether Congress or the Secretary of Labor intended to permit the party opposing entitlement to seek modification of a claim in order to terminate entitlement." *Metropolitan Stevedoring Co. v. Rambo*, 115 S.Ct. 2144, 2149 (1995).

§718.403; *Burley Welding Works v. Lawson*, 141 F.2d 964 (5th Cir. 1944); 3 A. Larson, WORKMEN'S COMPENSATION LAW §81.33(c); cf. *Plesh v. Director, OWCP*, 71 F.3d at 109 (question of whether party opposing entitlement on modification bears burden of persuasion or production noted but not addressed).

In the final analysis, the administrative law judge must then determine whether reopening the claim in this instance will "render justice under the Act." *O'Keeffe*, 404 U.S. at 255; *Worrell*; *National Mines Corp. v. Carroll*, 64 F.3d 135, 139 (3d Cir. 1995); *General Dynamics Corp.*, 673 F.2d at 25, 14 BRBS at 639; *McCord v. Cephas*, 174 U.S.App. D.C. 302, 306, 532 F.2d 1377, 1381 (1976). We emphasize that an administrative law judge may not invoke the remedial nature of the BLBA to conclude, as a matter of law, that modification on behalf of a party opposing entitlement could *never* "render justice under the Act." To do so would constitute a clear abuse of discretion. Section 22 accords both a claimant and a party respondent access to the means by which an award or denial of a compensation claim may be reopened. See 20 C.F.R. §725.310. The inquiry as to whether modification is warranted must be conducted on a case by case basis. See *Duran*, 27 BRBS at 15 (1993); *Carroll*, 64 F.3d at 140 (modification proceedings properly used to remedy failure to notify carrier because due process requires opportunity to defend claim).

Accordingly, the administrative law judge's Decision and Order on Motion for Modification is vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

REGINA C. McGRANERY

Administrative Appeals Judge

Desk Book Section: PART III.G

The party opposing entitlement in a claim arising under the Black Lung Benefits Act may petition for modification pursuant to Section 22 based on a mistake in determination of fact in order to reopen an award of benefits. The Board did not reach the issue of whether a respondent to a claim may reopen an award based on a change in conditions. *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996).

The principles of *res judicata* and collateral estoppel do not apply to foreclose the reopening of an award pursuant to Section 22. *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996).

The Board, in dicta, pointed out that, in spite of the progressive nature of the disease of pneumoconiosis and the humanitarian nature of the Act, it would be an abuse of discretion to deny a petition for modification on the basis that any attempt to reopen an award of benefits would not "render justice under the Act." Such inquiries must be made on a case by case basis. *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996).