

BRB No. 03-0519 BLA

NANCY L. SNIDER)
(Widow of DONALD E. SNIDER))
)
Claimant-Respondent)
)
v.)
)
ZEIGLER COAL COMPANY)
) DATE ISSUED: 04/26/2004
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 Employer Modification Request of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order--Denying Employer Modification Request (1998-BLA-0180) of Administrative Law Judge Rudolf L. Jansen rendered on a

survivor's 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 Claimant filed her application for survivor's benefits on March 25, 1994. Director's Exhibit 1. The district director denied benefits and claimant requested a hearing, Director's Exhibits 10, 11, which was held before Administrative Law Judge Mollie W. Neal on May 22, 1996. In a Decision and Order issued on April 22, 1997, Judge Neal credited the deceased miner with twenty-seven years of coal mine employment,² found that the existence of pneumoconiosis arising out of coal mine employment was established by autopsy and medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(2),(a)(4)(2000), 718.203(b)(2000), and found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2)(2000). Director's Exhibit 15. Accordingly, Judge Neal awarded benefits.

Employer initially appealed to the Board, but later filed a timely petition for modification with the district director and requested that its appeal be dismissed. Director's Exhibits 16, 17. The Board dismissed employer's appeal on July 30, 1997 and remanded the case to the district director for modification proceedings. Director's Exhibit 18.

Before the district director, employer alleged several mistakes in Judge Neal's decision and submitted medical evidence in support of its modification request. Director's Exhibits 17, 23, 24. Employer contended, *inter alia*, that the autopsy which Judge Neal had found "revealed the presence of coal workers' pneumoconiosis," Director's Exhibit 15 at 14, actually revealed that coal workers' pneumoconiosis was not present in the miner's lungs. Director's Exhibit 17. Employer also contended that the treating physician whose opinion Judge Neal had credited based on his "first-hand knowledge of the miner's condition," Director's Exhibit 15 at 14, had not seen the miner in the final four years of his life. Director's Exhibit 17.

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The record indicates that the miner's coal mine employment occurred in Illinois. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

The district director refused to examine employer's evidence, and forwarded the claim for a hearing. Director's Exhibit 25 (stating that employer's modification request "seems ludicrous"). By letter dated January 5, 1998, employer formally contested all issues.

At the November 28, 2000 hearing held before Administrative Law Judge Rudolf L. Jansen, claimant objected to the admission of all but one of employer's proposed modification exhibits on the ground that employer could have developed and submitted the evidence in the initial litigation of the claim. Hearing Transcript at 12, 14-15, 17. The administrative law judge withheld a ruling on the objections pending briefing by the parties.

Prior to the administrative law judge's ruling, the United States Court of Appeals for the Seventh Circuit held that because the modification provision embodies a Congressional policy favoring accuracy of determination over finality, a modification request cannot be denied solely "on the basis that the evidence may have been available at an earlier stage in the proceeding," and an administrative law judge considering whether to reopen a claim must give great weight to accuracy. *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 546, 547, 22 BLR 2-429, 2-452, 2-453 (7th Cir. 2002)(Wood, J., dissenting).

In an order issued on September 17, 2002, the administrative law judge admitted most of employer's proposed modification exhibits. In so doing, the administrative law judge ruled that "[a]lthough these exhibits could have been developed at the time of the initial hearing, there is no evidence of misconduct or unsavory motivations on Employer's part to outweigh the concern for accuracy." Order, Sept 17, 2002 at 8, citing *Hilliard*. The administrative law judge excluded four sets of hospital records that he found were obtained by employer while the claim was initially before the district director in 1994, but withheld until employer submitted them to the administrative law judge on modification. Order, Sept. 17, 2002 at 8-9; 20 C.F.R. §725.456(d)(2000)(requiring "extraordinary circumstances" for the admission of evidence withheld by a party while a claim is pending before the district director). The administrative law judge denied employer's motion for reconsideration on January 6, 2003.

In a Decision and Order--Denying Employer Modification Request issued on April 11, 2003, the administrative law judge found that reopening the record to consider employer's modification request would not render justice under the Act. The administrative law judge found that considering modification would not render justice under the Act because employer was not diligent in its initial defense of the claim, and because employer had withheld the hospital records in violation of 20 C.F.R. §725.456(d)(2000). Consequently, the administrative law judge denied employer's modification request.

On appeal, employer contends that the administrative law judge erred in denying its modification request. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, contending that the administrative law judge erred in denying employer's modification request. Claimant has filed a reply brief opposing the Director's Motion to Remand.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The purpose of modification is to "ensure the accurate distribution of benefits. The reopening provision is not limiting as to party--it is available to employers and miners alike." *Hilliard*, 292 F.3d at 546, 22 BLR at 2-451. The administrative law judge has the authority on modification "to reconsider all the evidence for any mistake of fact," *Hilliard*, 292 F.3d at 541, 22 BLR at 2-444, including whether the "ultimate fact" was mistakenly decided. *Amax Coal Co. v. Franklin*, 957 F.2d 355, 358, 16 BLR 2-50, 2-54-55 (7th Cir. 1992). An administrative law judge deciding whether to reopen a claim has the discretion to find that considerations grounded in the policy of the Act trump the statutory preference for accuracy of determination in a particular case, so long as the administrative law judge weighs those factors under the standard of whether reopening renders "justice under the Act." *Hilliard*, 292 F.3d at 541-42, 546-47, 22 BLR at 2-451-54 (Wood, J., dissenting). In considering whether reopening will render justice under the Act, the administrative law judge "will no doubt need to take into consideration many factors including the diligence of the parties, the number of times that the party has sought reopening, and the quality of the new evidence which the party wishes to submit." *Id.*

Employer and the Director argue that substantial evidence does not support the administrative law judge's finding that employer was not diligent in its initial defense of the claim because employer unreasonably delayed its submission of evidence. Employer's Brief at 20; Director's Brief at 6. The administrative law judge found that employer was not diligent because employer "waited one year and three months after the notice of potential liability before submitting evidence." Decision and Order at 8.

Substantial evidence does not support the finding that employer displayed a lack of diligence. 33 U.S.C. §921(b)(3). The record reflects that employer was notified of the survivor's claim on April 5, 1994, Director's Exhibit 8, and timely controverted. Director's Exhibit 9. On May 31, 1994, the district director denied the claim because the evidence did not establish that the miner's death was due to pneumoconiosis. Director's Exhibit 10. Claimant requested a hearing on June 6, 1994, Director's Exhibit 11, but no

further activity was recorded in the case until April 7, 1995, when claimant submitted additional evidence. Claimant's Exhibits 1-3. Claimant's submissions came ten months after the administrative denial and more than one year after employer was notified of the claim. Within three months of claimant's submissions, employer submitted four x-ray readings negative for pneumoconiosis, along with the readers' credentials, Employer's Exhibits 1-12, and within four months submitted a pathologist's report that the miner did not have pneumoconiosis, along with the pathologist's credentials. Employer's Exhibits 13, 14. The record reflects that employer's evidence was timely submitted and exchanged. Viewed in context, the record timeline does not support a finding that employer delayed its defense for one year and three months. Consequently, we vacate the administrative law judge's finding that it would not render justice under the Act to reopen this claim, and we remand the case to him for further consideration of employer's modification request in accordance with *Hilliard*.

The Director additionally argues that the administrative law judge erred in finding that employer was not diligent because employer submitted more evidence on modification than it submitted in the initial proceeding. Director's Brief at 5, 7. The administrative law judge found that employer "put forth a half-hearted effort in defending against this claim" because it initially submitted four x-ray readings and a pathologist's report, but on modification "flood[ed] the record" with "twenty-three pieces of evidence . . ." Decision and Order at 8, 9.

Modification cannot be denied solely because evidence could have been presented earlier. *Hilliard*, 292 F.3d at 547, 22 BLR at 2-454. In the circumstances of this case, the administrative law judge's comparison of the amounts of employer's modification evidence and initial evidence is tantamount to a finding that the modification evidence should have been submitted earlier.³ Because the administrative law judge's analysis is not in accord with *Hilliard*, we vacate his finding as to the comparative amounts of evidence submitted by employer.

Employer and Director argue that the administrative law judge erred in finding that employer's withholding of hospital records from the district director in 1994 justified a finding that reopening the claim would not render justice under the Act. Employer's Brief at 5 n.6; Director's Brief at 6. The administrative law judge noted that he had

³ Moreover, the administrative law judge compared the four x-rays and one report initially submitted by employer, to every document submitted by employer on modification, whether or not the document contained medical evidence. Decision and Order at 8. If all documents submitted in both rounds of litigation are compared, in the initial proceedings employer submitted fourteen exhibits and on modification, twenty-three exhibits.

excluded the hospital records pursuant to 20 C.F.R. §725.456(d)(2000), and found that “[t]o allow modification in this claim would . . . encourage misconduct.” Decision and Order at 10.

In the circumstances of this case, we agree that it was not consistent with *Hilliard* to deny modification on this ground. The administrative law judge had already excluded the hospital records from the record on modification. Order, Sept. 17, 2002 at 8-9. Further, as to the modification evidence that the administrative law judge admitted into the record, he had already ruled that “there [was] *no evidence of misconduct* or unsavory motivations on Employer’s part to outweigh the concern for accuracy.” Order, Sept. 17, 2002 at 8, citing *Hilliard* (emphasis added). Consequently, we vacate the administrative law judge’s determination to deny modification based on employer’s withholding of hospital records from the district director in 1994.

Finally, the Director argues that although the administrative law judge recited the *Hilliard* standard for assessing a modification request, he did not correctly apply the standard in this case. Director’s Brief at 6. The Director argues that the administrative law judge did not consider the quality of employer’s evidence, or that this was employer’s first modification request, and did not give great weight to accuracy. *Id.*

The Director’s argument has merit. In *Hilliard*, the Seventh Circuit court held that an administrative law judge deciding whether there are reasons that overcome the preference for accuracy “will no doubt need to consider many factors including the diligence of the parties, the number of times that the party has sought reopening, and the quality of the new evidence which the party wishes to submit.” 292 F.3d at 547, 22 BLR at 2-453. Here, the administrative law judge focused on only two factors, employer’s diligence in defending the claim initially, and the fact that employer withheld hospital records from the district director in 1994. Decision and Order at 7-10. The administrative law judge did not consider that this was employer’s first request to reopen. Nor did he examine “the quality of the new evidence,” *Hilliard*, 292 F.3d at 547, 22 BLR at 2-453, which included pathologists’ reports stating that the autopsy conducted on the miner revealed no pneumoconiosis, and physicians’ opinions and testimony that the miner did not have pneumoconiosis and that pneumoconiosis did not hasten his death. Director's Exhibits 23, 24; Employer's Exhibits 1, 2, 4, 6, 8, 10, 16-20. Because the administrative law judge did not address the quality of this evidence, he did not consider whether the evidence might result in a more accurate benefits determination in this case. *Hilliard*, however, requires that accuracy of determination be given “great weight” in deciding whether to reopen. 292 F.3d at 547, 22 BLR at 2-453. Because the administrative law judge did not conduct the kind of analysis required by *Hilliard* when he found that reopening would not render justice under the Act, we instruct him to consider employer’s modification request in accordance with *Hilliard*. In assessing the quality of employer’s evidence with accuracy of determination in mind, the

administrative law judge should address employer's assertion that mistakes were made in the previous benefits determination. *See Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27, 1-34 (1996).

Accordingly, the administrative law judge's Decision and Order--Denying Employer Modification Request is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge