

BRB No. 97-0920 BLA

SHARLENE DANIEL)	
(Widow of BILLY R. DANIEL))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CLAIR BROTHERS, INCORPORATED)	DATE ISSUED:
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER on RECONSIDERATION

Motion for Reconsideration of the Decision and Order on Remand of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Research and Defense Fund of Kentucky, Inc.), Prestonsburg, Kentucky, for claimant.

Richard A. Dean (Arter & Hadden), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer requests reconsideration of the Board's Decision and Order in *Daniel v. Clair Brothers, Inc.*, BRB No. 97-0920 BLA (Apr. 27, 1998)(unpub.). In that decision, the Board affirmed the administrative law judge's findings that claimant

established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 and that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). Hence, the Board affirmed the administrative law judge's award of benefits on the miner's claim, with derivative entitlement to the survivor. In its Motion for Reconsideration, employer argues that liability in this case should be transferred to the Black Lung Disability Trust Fund (Trust Fund) in light of two recent cases, specifically *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), and *Venicassa v. Consolidation Coal Co.*, 137 F.3d 197, 21 BLR 2-277 (3d Cir. 1998).¹ Claimant responds, arguing that employer's motion for reconsideration fails to comply with the mandatory requirements set forth in 20 C.F.R. §802.408(a), and therefore, should be denied. The Director, Office of Workers' Compensation Programs, has not filed a response to employer's motion.

¹ Employer raised this argument in its previous appeal, but because employer failed to provide a legal basis or to cite authority for this argument, nor was one apparent, the contention was rejected. *Daniel v. Clair Brothers, Inc.*, BRB No. 97-0920 BLA, *slip op.* at 5 (Apr. 27, 1998)(unpub.). Employer now cites *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), and *Venicassa v. Consolidation Coal Co.*, 137 F.3d 197, 21 BLR 2-277 (3d Cir. 1998), in support of this argument.

On reconsideration, employer does not challenge the merits of the administrative law judge's award of benefits, or the Board's affirmance thereof. Rather, employer contends that liability for the award of benefits should transfer to the Trust Fund because employer was deprived of the opportunity to mount a meaningful defense to the proposed deprivation of its property; consequently, employer argues that it was denied due process of law. Specifically, employer argues that the administrative law judge's finding that a mistake in a determination of fact was established with respect to the length of the miner's smoking history² deprived employer of its right to due process because the miner's death precluded an opportunity to develop responsive evidence. Employer relies on the holdings in *Lockhart*³ and *Venicassa*,⁴ arguing that the case at bar is "no different" inasmuch as the deprivation of due process occurred as a result of an unnecessary delay --- here, the administrative law judge's delay in rendering a finding on an issue and in

² Employer asserts that the Board erred in affirming Administrative Law Judge Hillyard's reliance on the dispute in the evidence regarding the length of the miner's smoking history as a basis for his finding of modification and award of benefits, because the length of claimant's smoking history was not found to be in dispute in the original decision on this case. Contrary to employer's argument, however, once a request for modification is filed the administrative law judge has the authority, if not the duty, to reconsider all the evidence to determine whether there has been any mistake in fact or change in conditions. See *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

³ In *Lockhart*, the United States Court of Appeals for the Fourth Circuit vacated the designation of the employer as the party responsible for payment and substituted the Black Lung Disability Trust Fund, holding that the employer's due process rights had been violated when the Department of Labor (DOL) failed to timely notify employer of its potential liability within a reasonable time following an initial award of benefits, and prior to the miner's death.

⁴ In *Venicassa*, the United States Court of Appeals for the Third Circuit, vacated the Decision and Order of the Board reversing the award of benefits and remanding the case for the designation of a second responsible operator because claimant's due process rights were violated by Department of Labor's failure to make a timely designation of the proper responsible operator or to make a timely correction of its misdesignation of the responsible operator. The Court concluded that because of Department of Labor's failure to timely designate a responsible operator subjected claimant to substantial delay in the processing of his claim, and the potential necessity of relitigating his claim, it was reinstating the administrative law judge's initial award of benefits and holding the Black Lung Trust Fund liable for payment of benefits.

the other cases, the Department of Labor's (DOL) delay in designating the proper responsible operator or notifying employer of its potential liability.

Employer's reliance on *Lockhart* and *Venicassa* is misplaced. The instant case is distinguishable from the aforementioned cases which involved substantial denial of due process of law arguments based on DOL's untimely designation of responsible operators. *Lockhart*, 137 F.3d at 807-808, 21 BLR at 2-322; *Venicassa*, 137 F.3d at 203, 21 BLR at 2-290. The miner in the case at bar filed his application for benefits on March 4, 1980, Director's Exhibit 1, of which employer was duly notified on January 16, 1981 and May 13, 1981, Director's Exhibits 17, 18. On May 22, 1981, employer filed its controversion. Director's Exhibit 19. Contrary to employer's arguments, it has not suffered any deprivation of property or denial of due process, nor was there any "delay" on the part of the administrative law judge in rendering a finding of fact with respect to the miner's cigarette smoking history. See *O'Keeffe v. Aerojet - General Shipyards, Inc.*, 404 U.S. 254, 256 (1971)(trier-of-fact is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on evidence initially submitted"); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 464-465 (1968). *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Because the probative value of the medical reports has remained a contested issue in this case, and, a physician's consideration of the miner's smoking history is a significant factor that may affect the credibility of his/her opinion, we reject employer's arguments. See *Worrell, supra*. We likewise reject employer's contention that "the best evidence to resolve the [cigarette smoking history] conflict, Mr. Daniel's testimony, was not available" to the administrative law judge on modification inasmuch as the miner testified at the April 1985 formal hearing and the hearing transcript is contained in the evidence of record. Director's Exhibit 38; Employer's Brief in Support of Motion for Reconsideration at 3.

Accordingly, we grant employer's motion for reconsideration, but deny the relief requested and affirm our original Decision and Order affirming the administrative law judge's decision awarding benefits.⁵

SO ORDERED.

⁵ Our denial of the relief requested obviates the necessity to address claimant's contention regarding the propriety of employer's Motion for Reconsideration and Request for Briefing Order.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge