BRB No. 03-0774 BLA

HAROLD D. CROWE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ZEIGLER COAL COMPANY	)	
	)	DATE ISSUED: 08/24/2004
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 - Award of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

James B. Speta (Northwestern University School of Law), Chicago, Illinois, for claimant.

Gary B. Nelson (Feirich, Mager, Green, Ryan), Carbondale, Illinois, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (02-BLA-0220) of Administrative Law Judge Robert L. Hillyard denying employer's request for modification of an award of benefits 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 is before the Board for the third time. Claimant filed an

[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

initial application for benefits on February 1, 1981, which was denied as abandoned on August 12, 1981 because claimant failed to submit documentation necessary to process his claim. Director's Exhibit 26. On August 15, 1990, claimant filed the current application for benefits. Director's Exhibit 1. Because claimant's second application was filed more than one year after the prior denial, the district director processed the second application as a duplicate claim subject to the requirement that claimant establish a "material change in conditions" since the denial of his prior claim. 20 C.F.R. §725.309(d) (2000).

Administrative Law Judge Donald W. Mosser initially denied benefits, but after a remand from the Board for further consideration, he awarded benefits. Director's Exhibit 28 at 426, 485; *Crowe v. Zeigler Coal Co.*, BRB No. 94-0902 BLA (Mar. 17, 1995) (unpub.); Director's Exhibit 28 at 412. Thereafter, employer filed a motion for reconsideration. On reconsideration, Judge Mosser reversed his prior determination and denied benefits because he found that claimant could not establish a material change in conditions as defined in *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991).[2] Director's Exhibit 28 at 393. Upon consideration of claimant's appeal, the Board affirmed the denial of benefits. Director's Exhibit 28 at 376; *Crowe v. Zeigler Coal Co.*, BRB No. 96-0827 BLA (Feb. 26, 1997)(unpub.). Claimant then filed a petition for review with the United States Court of Appeals for the Seventh Circuit.

The Seventh Circuit court held, in *Crowe v. Director, OWCP*, 226 F.3d 609, 22 BLR 2-80 (7th Cir. 2000), that "Sahara Coal does not apply to the specific and unique facts of this case," because claimant's 1981 claim was denied on procedural grounds, not on its merits. *Crowe*, 226 F.3d at 614, 22 BLR at 2-88. Consequently, the court held, the denial of claimant's 1981 claim lacked res judicata effect, unlike the prior denial in *Sahara Coal [McNew]*, which had been a denial on the merits. Accordingly, the court concluded that claimant "was not required to demonstrate a 'material change in conditions' in his 1990 claim," and remanded the case for the administrative law judge to "address the merits of the petitioner's 1990 claim for black lung benefits." *Crowe*, 226 F.3d at 614, 615, 22 BLR at 2-89, 2-92.

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant's coal mine employment occurred in Illinois. Director's Exhibit 2. 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*).

In a Decision and Order on Remand issued on March 29, 2001, Judge Mosser awarded benefits. Director's Exhibit 28 at 230. In finding claimant totally disabled due to pneumoconiosis arising out of coal mine employment, Judge Mosser relied primarily on the July 1981 opinion of claimant's treating physician, Dr. Krock, diagnosing industrially-related asthma and bronchitis. Director's Exhibit 28 at 641. Judge Mosser awarded benefits as of July 1, 1981, the month in which Dr. Krock diagnosed claimant as totally disabled due to pneumoconiosis. Subsequently, Judge Mosser denied employer's motion for reconsideration and remanded the case to the district director for a determination of whether claimant's benefits should be augmented to reflect three dependent children. Director's Exhibit 28 at 727.

On September 20, 2001, employer filed a petition for modification with the district director, alleging a change in conditions and a mistake in the determination of the ultimate fact of entitlement. 20 C.F.R. §725.310 (2000); Director's Exhibit 28 at 161. In support of the petition, employer submitted the medical reports and deposition testimony of Drs. Dahhan, Fino, Renn, and Repsher. Director's Exhibit 28 at 5, 34, 82, 138, 167; Employer's Exhibits 2-5. Based on a review of the medical evidence of record, which spanned the period from 1976 to 1992, Drs. Fino, Renn, and Repsher stated that there was no objective evidence of asthma or any other respiratory impairment, and concluded that claimant has neither clinical nor legal pneumoconiosis and is not totally disabled. All three physicians disagreed with Dr. Krock's view that coal dust or rock dust could cause asthma. Employer's Exhibit 3 at 15; Employer's Exhibit 4 at 14; Employer's Exhibit 5 at 10-11. These physicians added that claimant may have chronic bronchitis by history, but they attributed the possible bronchitis to smoking and not to his five years of coal mine employment. Dr. Dahhan also reviewed the available medical evidence and concluded that claimant has neither clinical nor legal pneumoconiosis but has allergic asthma unrelated to coal dust inhalation. Director's Exhibit 28 at 82; Employer's Exhibit 2. Dr. Dahhan concluded that claimant appears to have a temporarily disabling respiratory impairment only when he suffers an allergic episode. Employer's Exhibit 2 at 10.

While employer's petition for modification was pending with the district director, employer requested that claimant provide an updated medical history and sign an authorization allowing employer access to claimant's more recent medical records so that they could be reviewed by employer's physicians. Director's Exhibit 28 at 159. Claimant refused to sign a medical authorization; employer then requested that claimant undergo a physical examination scheduled with Dr. Dahhan. Claimant refused to undergo the examination. By this time, the district director had denied modification, employer had requested a hearing, and the case had been referred to Administrative Law Judge Robert L. Hillyard. Director's Exhibit 28 at 78, 118, 127, 135, 153. Consequently, employer requested that the administrative law judge compel claimant to either undergo a physical examination or sign a medical authorization.

By order issued on August 14, 2002, the administrative law judge denied employer's motion to compel, ruling that "[e]mployer has had ample time to produce medical evidence . . . and has not shown sufficient cause why the Claimant should be required to submit to another medical examination or why additional medical records need be gathered." Order dated Aug. 14, 2002 at 1. Employer filed a motion for reconsideration, attaching the Seventh Circuit's opinion in *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002)(Wood, J., dissenting). In *Hilliard*, the Seventh Circuit held, in part, that the administrative law judge erred by denying the employer's motion to compel the claimant to sign a medical authorization on modification without considering the reasonableness of claimant's refusal to sign it. The administrative law judge ruled that employer "ha[d] not shown sufficient cause to warrant reconsideration . . . ." Order dated Aug. 30, 2002 at 2. At the hearing employer renewed its motion to compel, which the administrative law judge denied for the reasons that he gave previously. Tr. at 37-38.

In a Decision and Order - Award of Benefits issued on July 31, 2003, the administrative law judge denied employer's modification request at 20 C.F.R. §725.310 (2000). The administrative law judge found that employer could not demonstrate a change in conditions because employer submitted no medical evidence post-dating Judge Mosser's 2001 decision awarding benefits. The administrative law judge further found that employer did not demonstrate a mistake in a determination of fact because "the opinions of Drs. Renn, Fino, Dahhan, and Repsher are outweighed by the opinion of Dr. Krock . . . . As the Claimant's treating physician, Dr. Krock's well-reasoned opinion is entitled to substantial weight because he was able to personally observe the Claimant." Decision and Order at 18. Consequently, the administrative law judge denied employer's modification request and ordered employer to pay benefits commencing July 1, 1981.

On appeal, employer contends that the administrative law judge erred in according greatest weight to Dr. Krock's opinion based on his status as claimant's treating physician, and gave no rationale for finding Dr. Krock's opinion well-reasoned. Additionally, employer alleges that the administrative law judge did not consider all of the evidence to determine whether a mistake in a determination of fact occurred previously. Employer argues further that the administrative law judge erred in denying employer's motion to compel an examination or a medical release. Employer also contends that the administrative law judge erred in awarding benefits commencing prior to the date of filing, and erred in failing to order an offset of claimant's award of benefits under the Act in light of funds received in settlement of his state claim. Claimant responds, urging affirmance of the decision below, and the Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal. Employer has filed a reply brief reiterating its contentions.

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'Keeffe 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). 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. *Hilliard*, 292 F.3d at 546, 547, 22 BLR at 2-452, 2-453.

Employer contends that the administrative law judge erred in giving determinative weight to Dr. Krock's opinion based on his status as claimant's treating physician from 1979 to 1981. We agree that the administrative law judge's analysis cannot be affirmed. An administrative law judge must have a medical reason for crediting a treating physician's conclusions over those of another physician. *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469-70, 22 BLR 2-311, 2-318-19 (7th Cir. 2001). A finding that the treating physician is by definition more familiar with the miner's condition is not a medical reason for preferring the treating physician's opinion. *Id*. The administrative law judge found that Dr. Krock's opinion merited greater weight "because he was able to personally observe the Claimant," and as a treating physician, "is more likely to be familiar with the miner's condition . . . ." Decision and Order at 18. The administrative law judge's finding does not comply with *McCandless* because the administrative law judge did not identify a medical reason for crediting Dr. Krock's conclusions.

Employer additionally contends that the administrative law judge did not comply with 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), because he did not supply a rationale for finding Dr. Krock's opinion to be well documented and reasoned. Employer's Brief at 28-31. Employer's contention has merit. The Board has held that "[u]nder the requirements of the APA, the administrative law judge must explain his rationale for finding a medical report reasoned and documented." *Collins v. J & L Steel*, 21 BLR 1-181, 1-189 (1999). The administrative law judge stated that "Dr. Krock's well-reasoned opinion is entitled to substantial weight," and that "where, as here, the treating physician's report is well-documented and

reasoned, more weight may be accorded," Decision and Order at 18, but the administrative law judge did not explain why he found Dr. Krock's opinion well documented and reasoned. Because the administrative law judge did not explain his rationale for determining that Dr. Krock's opinion was well-documented and reasoned, and because he did not give a valid reason for crediting Dr. Krock's opinion, we must vacate the administrative law judge's analysis of the conflicting opinions and remand this case for him to reconsider the evidence in accordance with Collins and *McCandless*.

Employer contends that the administrative law judge did not consider all of the evidence of record to determine whether mistakes were made in the prior benefits determination at each element of entitlement. In this regard, employer alleges that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c), that claimant is totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b), and that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, however, did not make specific findings on these elements of entitlement; he simply found that no mistake in a determination of fact was established because Dr. Krock's opinion outweighed those of Drs. Dahhan, Fino, Renn, and Repsher. Decision and Order at 18. Because we herein vacate the administrative law judge's assessment of the evidence, we instruct him on remand to consider employer's modification request in accordance with the standard set forth in *Hilliard*. 20 C.F.R. §725.310 (2000).

Employer next argues that the administrative law judge erred in denying employer's motion to compel without considering the reasonableness of claimant's refusal to authorize employer's access to his medical records or to undergo a physical examination. We agree that the administrative law judge did not apply the correct standard to ruling on employer's motion to compel. In *Hilliard*, the Seventh Circuit indicated that it was "persuaded by the [Department of Labor's] position" that there is "a continuing duty on the part of the miner to 'authorize access to his or her medical records.'" *Hilliard*, 292 F.3d at 548, 22 BLR at 2-455. The Seventh Circuit noted that under the applicable regulations, a miner's claim may be denied as abandoned if the miner "'unreasonably refuses . . . [t]o provide the Office or the designated responsible operator with a complete statement of his or her medical history and/or to authorize access to his or her medical records . . . .'"[3] *Id.* Because the administrative law judge in

[3] The Seventh Circuit based its analysis on the revised regulation at 20 C.F.R. §725.414(a)(3)(i), which is not applicable to this claim which was pending on January 19, 2001. *See* 20 C.F.R. §725.2(c). The Sixth Circuit observed, however, that the former regulations contained a similar provision at 20 C.F.R. §718.402 (2000), and concluded that "both the former and current regulations articulate the same standard for evaluating

Hilliard denied the employer's motion to compel the claimant to sign a medical authorization "without considering the reasonableness of Mrs. Hilliard's refusal," a remand was required "for a determination of whether Mrs. Hilliard's refusal was reasonable under the circumstances." *Hilliard*, 292 F.3d at 548, 22 BLR at 2-455-56. In the instant case, the administrative law judge found that "[e]mployer has had ample time to produce medical evidence" and did not show "sufficient cause why Claimant should be required to submit to another medical examination or why additional medical records need be gathered." Order, Aug. 14, 2002. The administrative law judge did not determine the reasonableness of claimant's refusal "to authorize access to his medical records, or . . . to submit to an examination or test requested by the . . . coal mine operator," as required by 20 C.F.R. §718.402 (2000). *See Hilliard*, 292 F.3d at 548, 22 BLR at 2-455-56. Consequently, we vacate the administrative law judge's finding and instruct him on remand to consider employer's motion to compel under 20 C.F.R. §718.402 (2000) and *Hilliard*.

We next address two additional matters raised by employer. We reject employer's contention that, in the event that benefits are awarded on remand, benefits may not commence prior to August 15, 1990, the filing date of claimant's current claim. Employer's argument ignores the Seventh Circuit's holding in this case that the procedural denial of claimant's prior claim lacks *res judicata* effect in the current proceedings. *Crowe*, 226 F.3d at 614, 22 BLR at 2-88. Employer additionally contends that the administrative law judge did not consider whether claimant's award of benefits under the Act should be offset to reflect a payment of $28,000.00 received by claimant in settlement of his state claim against employer for total disability due to asthma arising out of coal mine employment.[4] Claimant responds that employer waived the offset issue by failing to raise it with the district director. We disagree with claimant: "[T]he issue of offset may be raised at any stage of the proceedings" because "[o]ffset is part of the computation of an award; questions regarding offset are appropriately considered once a claimant is determined to be entitled to benefits." *Crider v. Dean Jones Coal Co.*, 6 BLR 1-606, 1-610 (1983). Consequently, if benefits are awarded on remand, the administrative law judge should address the offset issue pursuant to 20 C.F.R. §725.535.

[a claimant's] refusal" to provide a medical history or authorize access to medical records. *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 548 and n.10, 22 BLR 2-249, 2-455 and n.10 (7th Cir. 2002)(Wood, J., dissenting).

[4] Employer submitted the settlement agreement into the record and raised the offset issue before the administrative law judge. Employer's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order - Award of Benefits 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

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BETTY JEAN HALL
Administrative Appeals Judge