

BRB No. 00-0272 BLA

MARION WILLIAMS)	
(Widow of WILLIAM C. WILLIAMS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
OLD BEN COAL COMPANY)	
)	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 Granting Motion to Strike and Denying Request for Modification of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Raleigh, Illinois, Charleston, West Virginia, for claimant.

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

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-131) of Administrative Law Judge Thomas M. Burke granting a Motion to Strike and denying a Request for Modification 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). The administrative law judge found that because the evidence relied upon by employer on modification was available to employer at the time of the initial proceeding and because this evidence was

acquired by misrepresentation of claimant's consent, reopening the case for modification and the use of employer's exhibits on modification would not be in the interest of justice. Accordingly, claimant's Motion to Strike was granted and employer's request for modification was denied. On appeal, employer contends that the administrative law judge erred in striking employer's medical opinion evidence, in failing to hold a hearing on its request for modification, and in failing to hold the record open for employer to have the autopsy slides reviewed. Claimant responds urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, responds, declining to submit a brief on appeal.

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

Employer initially contends that the administrative law judge erred in striking the opinions of Drs. Naeye, Caffrey, Hutchins and Kleinerman. Employer's Brief at 9-16. Upon considering claimant's Motion to Strike employer's evidence, the administrative law judge noted the circumstances surrounding employer's attempts to obtain the miner's autopsy evidence from the Saline County Coroner's office. Decision and Order at 5-6. Initially, employer, through its counsel, attempted to obtain the miner's records from the coroner's office by submitting a medical release signed by the deceased miner. The coroner refused employer's request and informed employer that it would have to provide a medical release from the miner's next of kin to obtain the miner's records. The coroner also informed claimant's counsel of employer's attempt to obtain the records using the deceased miner's medical release. Director's Exhibit 28. Employer then requested a medical release from claimant and was twice refused because the evidentiary record had been closed. Director's Exhibit 27, 28. Together with a request for the miner's autopsy records, employer then submitted to the coroner's office a medical release signed by claimant, with the date November 24, 1997 typed next to her name under the signature line. Director's Exhibit 38. Employer received the miner's autopsy slides from the coroner and had them reviewed, along

¹Claimant is Marion Williams, the widow of William C. Williams, the miner. The miner filed a claim for benefits on August 15, 1988 which was denied on February 28, 1994. Director's Exhibit 19. The Board affirmed the denial of the miner's claim on January 20, 1995. Director's Exhibit 19. The miner died on February 26, 1995 and claimant filed a survivor's claim on July 31, 1995. Director's Exhibits 1, 3. Administrative Law Judge Gerald M. Tierney issued a Decision and Order awarding benefits on the survivor's claim on June 17, 1997. Director's Exhibit 26. Employer did not appeal the award of benefits, but instead filed a petition for modification pursuant to 20 C.F.R. §725.310 on June 23, 1997. Director's Exhibit 27.

with other evidence, by Drs. Naeye, Caffrey, Hutchins and Kleinerman, whose reports were submitted by employer in support of its request for modification. Director's Exhibits 35, 36, 39, 46.

The administrative law judge considered employer's actions and rationally found that employer ignored claimant's refusal to consent to the release of the medical records and acquired the record by misrepresenting claimant's consent. Decision and Order at 6. The administrative law judge further rationally found that the reports of Drs. Naeye, Caffrey, Hutchins and Kleinerman were based on the evidence acquired by employer through misrepresentation of claimant's consent to release the medical records. *Id.* The administrative law judge then acted within his discretion in holding that "the use of these evaluations to support Employer's attempt to reverse Judge Tierney's award of benefits would not be in the interest of justice." Decision and Order at 6; *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996); *McCord v. Cephas*, 532 F.2d 1377, 174 U.S.App.D.C. 302 (D.C. Cir. 1976); *O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968). Because the administrative law judge acted within his discretion in finding that employer's use of the reports of Drs. Naeye, Caffrey, Hutchins and Kleinerman to support modification would not be in the interest of justice, we reject employer's argument and affirm the administrative law judge's granting of claimant's Motion to Strike.

Employer next contends that the administrative law judge erred in concluding that a hearing on a claim for modification was discretionary because the administrative law judge is required to hold a hearing, when requested, to determine if employer established a mistake in a determination of fact. Employer's Brief at 16-18. In considering employer's request for modification pursuant to 20 C.F.R. §725.310, the administrative law judge first inquired as to whether reopening the case for modification would render justice under the Act. Decision and Order at 4-5. In making this finding, the administrative law judge noted that every medical record that employer had reviewed by its consulting physicians was available at the time of the initial proceeding before Judge Tierney and that employer had chosen not to have that evidence reviewed as part of its case in chief. Decision and Order at 5. The administrative law judge further noted that employer, in response to a pre-hearing order, stipulated to the medical evidence on which it would rely to establish its case and that the newly submitted medical opinions were not included in that stipulation. Decision and Order at 5; Hearing Transcript of January 30, 1997 at 11-31. The administrative law judge then acted within his discretion in finding that "[j]ustice under the Act is not served by permitting the Employer to renege on its stipulation of evidence and relitigate its case under the guise of a petition for modification...." Decision and Order at 5; *Branham, supra*; *McCord, supra*; *O'Keefe, supra*; *Banks, supra*. Consequently, we reject employer's argument and affirm the administrative law judge's finding that modification pursuant to Section 725.310 would not render justice under the Act.

Employer next contends that Judge Tierney erred in failing to hold the record open to

allow it an opportunity to have the autopsy slides reviewed. Employer's Brief at 18-20. Inasmuch as employer did not challenge Judge Tierney's Decision and Order on appeal, that decision is final and not subject to review by the Board at this time. *See Skrack v. Island Creek Coal Co.*, 6 BLR 710 (1983).

Accordingly, the administrative law judge's Decision and Order granting claimant's Motion to Strike and denying employer's Request for Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge