BRB No. 01-0392 BLA

RENEVA HALCOMB (Widow of ARNOLD L. HALCOMB)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED:
TRACY COAL COMPANY, INCORPORATED	)	
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 Petition for Modification of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sandra L. Mayes (Appalachian Research and Defense Fund of Kentucky), Worcester, Massachusetts, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Edward Waldman (Howard M. Radzely, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Petition for Modification (00-BLA-0001) of Administrative Law Judge Rudolf L. Jansen 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 relevant procedural history of this case is as follows: Arnold L. Halcomb, the miner, filed an application for benefits on March 5, 1980. Director's Exhibit 1. In a Decision and Order issued on September 7, 1988, Administrative Law Judge Bernard J. Gilday denied the claim. Director's Exhibit 34. The miner appealed the denial of benefits to the Board, but died on December 27, 1991, before the Board disposed of the appeal. Director's Exhibit 37. On January 22, 1993, the Board issued a Decision and Order in which it vacated the denial of benefits and remanded the case to Judge Gilday for further proceedings. *Halcomb v. Tracy Coal Co.*, BRB No. 88-3397 BLA (Jan. 22, 1993)(unpub.); Director's Exhibit 35. Judge Gilday awarded benefits on remand and denied employer's motion for reconsideration. Director's Exhibit 36. In a Decision and Order issued on August 11, 1994, the Board affirmed the award of benefits, rejecting employer's argument that Judge Gilday erred in denying employer's request to reopen the record for the submission of new evidence which conformed to the rebuttal standards set forth in *York v. Benefits Review Board,* 819 F.2d 134, 10 BLR 2-99 (6th Cir.1987) and *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988).[1] *Halcomb v. Tracy Coal Co.*, BRB No. 93-2314 BLA (Aug. 11, 1994)(unpub.); Director's Exhibit 38. Employer subsequently filed a request for reconsideration, which the Board denied. *Halcomb v. Tracy Coal Co.*, BRB No. 93-2314 BLA (Dec. 20, 1996)(unpub.); Director's Exhibit 39. The Board granted employer' second motion for reconsideration, but denied the relief requested. *Halcomb v. Tracy Coal Co.*, BRB No. 93-2314 BLA (Sept. 30, 1997)(unpub.). Employer filed an appeal with the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, which dismissed the appeal as untimely. *Halcomb v. Tracy Coal Co.*, No. 97-4355 (6th Cir. Oct. 30, 1998)(unpub.); Director's Exhibit 41.

[1]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in the Commonwealth of Kentucky. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Pursuant to 20 C.F.R. §725.310 (2000), employer filed a timely petition for modification on March 24, 1999, and submitted new medical evidence.[2] Director's

[2]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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

Exhibit 43. The district director denied employer's petition and, at employer's request, transferred the case to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 51-53. The parties appeared before Administrative Law Judge Rudolf L. Jansen (the administrative law judge) on May 18, 2000, but the administrative law judge postponed the hearing and requested that the parties submit briefs on the issue of whether granting modification would render justice under the Act. The administrative law judge subsequently issued the Decision and Order that is the subject of the present appeal, finding that the mistake in a determination of fact alleged in employer's petition did not justify modification of the award of benefits in order to render justice under the Act. Accordingly, the administrative law judge determined that a hearing was not necessary and denied employer's petition for modification. Employer argues on appeal that the administrative law judge did not properly construe its request for modification and erred in refusing to hold a formal hearing. Claimant has responded and urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has also responded and concurs with the bulk of employer's allegations of error.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

Both employer and the Director assert that the administrative law judge erred in declining to hold a hearing with respect to employer's petition for modification. This contention has merit. In *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998), the United States Court of Appeals for the Sixth Circuit held that any party that requests a hearing on modification is entitled to one. The court noted that the plain language of the Act, 30 U.S.C. §932(a), as implemented by 20 C.F.R. §725.451 (2001), "...mandates that the administrative law judge hold a hearing on any claim filed with the [district director] whenever a party requests such a hearing." 144 F.3d at 390, 21 BLR at 2-388. The court further noted that based upon the principle of deference to the party responsible for the administration of the Act, it would not disturb the Secretary of Labor's decision that the Act and the regulations require the administrative law judge to hold a hearing in a modification proceeding when requested by a party. *Id.*; *see also Robbins v. Cypress Cumberland Coal Co.*, 146 F.3d 425, 21 BLR 2-495 (6th Cir. 1998); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000). The court did not indicate that the availability of a hearing on modification depends upon the grounds upon which modification is sought or upon the administrative law judge's resolution of the issue of whether altering the prior disposition of a claim would render justice under the Act. *See Cunningham*, *supra*; *Robbins*, *supra*. We must vacate, therefore, the administrative law

judge's Decision and Order Denying Petition for Modification and remand the case to the administrative law judge to hold a hearing with respect to employer's request for modification.

Employer and the Director further maintain that the administrative law judge did not properly interpret the nature of employer's petition for modification. This contention also has merit. In his Decision and Order, the administrative law judge stated that employer's sole allegation on modification was that Judge Gilday's made a mistake when he refused to reopen the record on remand for the submission of evidence which conformed to the Sixth Circuit's "new" standard for establishing rebuttal pursuant to 20 C.F.R. §727.203(b)(2) and (b)(3). Decision and Order at 3-4. To the contrary, employer broadly alleged that there was a mistake of fact in the determination that the miner had pneumoconiosis and was totally disabled by it and employer submitted evidence in support of its assertion. Director's Exhibit 43. Based upon the Sixth Circuit's holding in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), once a party files a request for modification, no matter the grounds stated, if any, the administrative law judge has the duty to reconsider all of the evidence of record to determine if it demonstrates a mistake of fact or a change in conditions.

Finally, employer argues that the administrative law judge erred in considering whether modifying the award of benefits in the miner's claim would render justice under the Act. We disagree. Contrary to employer's assertion, United States Supreme Court and federal circuit court precedent clearly establish that an administrative law judge is required to consider whether reopening a case on modification will render justice under the Act. *See O'Keeffe v. Aerojet-General Shipyards*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982)(*per curiam*); *McCord v. Cephas*, 532 F.2d 1377, 1381, 3 BRBS 371, 377 (D.C. Cir. 1976); *see also Branham v. Bethenergy Mines, Inc. [Branham II]*, 21 BLR 1-79 (1998). In making this assessment, an administrative law judge must balance the need to render justice against the need for finality in decision making. *Id*. In so doing, the administrative law judge should consider whether the party seeking modification of the prior disposition of the claim has engaged in recalcitrant, dilatory, or egregious conduct which the party is improperly seeking to rectify in the modification proceeding. *See McCord*, *supra*; *Branham II*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge