

BRB No. 10-0525 BLA

CAROLYN J. DUKE)
(o/b/o and Widow of WILLIAM R. DUKE))
)
Claimant-Respondent)
)
v.)
)
COWIN & COMPANY, INCORPORATED) DATE ISSUED: 06/09/2011
)
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's Request for Modification of Miner's Claim; and Denying Survivor's Benefits, and the Decision and Order on Reconsideration of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Walls, Weaver & Davies, LLP), Birmingham, Alabama, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Employer's Request for Modification of Miner's Claim; and Denying Survivor's Benefits¹ (Decision and Order

¹ In the miner's claim, the exhibits of the Director, Office of Workers' Compensation Programs (the Director), are referred to as "Director's Exhibits," and in the survivor's claim, the Director's exhibits are referred to as "Government's Exhibits."

Denying Modification) and the Decision and Order on Reconsideration (2008-BLA 5872 and 2008-BLA-5873) of Administrative Law Judge Adele Higgins Odegard, awarding benefits on both a miner's claim and a survivor's claim² filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). In the original decision in the miner's claim, issued on May 10, 2006, Administrative Law Judge Edward Terhune Miller credited the miner with 10.09 years of qualifying coal mine employment, and adjudicated the claim pursuant to the provisions at 20 C.F.R. Part 718. After determining that employer is the properly named responsible operator, Judge Miller awarded benefits, finding that the evidence was sufficient to establish the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(4), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Director's Exhibit 57. Upon employer's appeal, the Board affirmed Judge Miller's findings and his award of benefits. *Duke v. Cowin & Co.*, BRB No. 06-0691 BLA (Aug. 16, 2007)(unpub.); Director's Exhibit 68.

Following the miner's death, and during the pendency of the administrative processing of claimant's survivor's claim, employer submitted a request for modification of the award of benefits in the miner's claim, arguing a mistake in a determination of fact with regard to Judge Miller's finding that the miner had legal pneumoconiosis. The survivor's claim and employer's request for modification of the miner's claim were ultimately consolidated for hearing before Administrative Law Judge Adele Higgins Odegard (the administrative law judge). With regard to employer's request for modification, the administrative law judge found that reopening the miner's claim would not render justice under the Act. In making this determination, the administrative law judge considered the relevant factors discussed by the United States Court of Appeals for the Fourth Circuit in *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007),³ and found that the evidence presented by employer in support of modification

² Claimant is the surviving spouse of the miner, who died on July 19, 2007. Government's Exhibit 8. In addition to her claim for survivor's benefits, filed on August 3, 2007, claimant is pursuing the miner's claim on behalf of his estate. Government's Exhibit 2.

³ The United States Court of Appeals for the Fourth Circuit has held that an adjudicator, in considering whether to reopen a claim, must exercise the discretion granted under 20 C.F.R. §725.310 by assessing any factors relevant to the rendering of justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *see also D.S. [Stiltner] v. Ramey Coal Co.*, 24 BLR 1-33 (2008). These relevant factors include the need for accuracy, the diligence and motive of the party seeking

was not “determinative or compelling.” Decision and Order Denying Modification at 17. Accordingly, the administrative law judge denied employer’s request for modification of the miner’s award of benefits. In her adjudication of the survivor’s claim, the administrative law judge applied the doctrine of offensive nonmutual collateral estoppel to preclude relitigation of the issue of the existence of pneumoconiosis arising out of coal mine employment that had been controverted and adjudicated in the miner’s claim.⁴ The administrative law judge found, however, that the evidence was insufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor’s claim.

Claimant filed a timely motion for reconsideration, asserting that she is derivatively entitled to survivor’s benefits under the recent amendments to the Act.⁵ Upon review of claimant’s motion for reconsideration, the administrative law judge determined that claimant had established her entitlement to benefits under amended Section 422(l) of the Act, 30 U.S.C. §932(l), as her claim was filed after January 1, 2005; it was pending on March 23, 2010; and modification of the miner’s award of benefits had been denied. Accordingly, the administrative law judge awarded survivor’s benefits.

In the present appeal, employer challenges the administrative law judge’s denial of modification and her determination that reopening the miner’s claim would not render justice under the Act. With respect to the survivor’s claim, employer alleges that the administrative law judge erred by applying the doctrine of offensive nonmutual collateral estoppel in a modification proceeding to preclude relitigation of the issue of the existence

modification, and futility or mootness of a favorable ruling. *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69.

⁴ The administrative law judge also determined that the doctrine of collateral estoppel was applicable to the nonmedical issues of responsible operator, miner status, and the duration of the miner’s employment. Decision and Order Denying Employer’s Request for Modification of Miner’s Claim; and Denying Survivor’s Benefits at 10-11.

⁵ The recent amendments to the Act apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010). Section 1556 of Public Law No. 111-148 amended Section 422(l) of the Act, to provide that a qualified survivor is automatically entitled to benefits without having to establish that the miner’s death was due to pneumoconiosis, if the miner filed a successful claim and was receiving benefits at the time of his death. 30 U.S.C. §932(l), amended by Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)).

of pneumoconiosis. Claimant responds in support of the administrative law judge's denial of employer's request for modification in the miner's claim and her award of benefits in the survivor's claim. The Director, Office of Workers' Compensation Programs, has not filed a substantive response to employer's appeal.

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.⁶ 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).

Employer contends that the administrative law judge, in finding that reopening the miner's claim would not render justice under the Act, erroneously applied the factors set forth in *Sharpe*, a Fourth Circuit case, when the instant case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. Employer further maintains that, even if *Sharpe* provides the relevant standard for assessing a modification request, the administrative law judge misapplied the standard. In this regard, employer asserts that relevant precedent favors a liberal reopening standard for both employers and claimants; that accurate adjudication should be given paramount concern; that employer should not have an extra, preliminary burden before being permitted to pursue modification; that the administrative law judge's concern for claimant's potential loss of benefits is misplaced; that employer's failure to pursue an appeal of the miner's claim is not relevant to modification; that the factors of diligence and motive do not weigh against employer; and that the administrative law judge's assessment of the medical evidence was inadequate and irrational. Employer's Brief at 5-14.

After consideration of the administrative law judge's Decisions and Orders, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decisions are supported by substantial evidence, consistent with applicable law, and contain no reversible error. Initially, we reject employer's contention that the administrative law judge's reliance on *Sharpe* is misplaced. Although an administrative law judge may find a mistake in a determination of fact with regard to a prior decision and order, the administrative law judge must ultimately determine whether reopening a claim will render justice under the Act. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971). In *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), the Board held that "while the administrative law judge has the authority to reopen a case based on any mistake in fact, the administrative law judge's

⁶ The law of the United States Court of Appeals for the Eleventh Circuit is applicable, as the miner was employed in the coal mining industry in Alabama. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice.” *Kinlaw*, 33 BRBS at 72, citing *Washington Society for the Blind v. Allison*, 919 F. 2d 763, 769 (D.C. Cir. 1991). Thus, while the Fourth Circuit’s holding in *Sharpe* is not controlling, it is instructional, as the administrative law judge, in considering whether to reopen a claim, must exercise the discretion granted under 20 C.F.R. §725.310 by assessing any factors relevant to the rendering of justice under the Act, including the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. See *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69; *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *D.S. [Stiltner] v. Ramey Coal Co.*, 24 BLR 1-33 (2008).

In this case, the administrative law judge discussed the factors relevant to the rendering of justice under the Act, noting that the factor of accuracy would weigh most heavily in favor of reopening the claim, and correctly summarized the evidence submitted by employer to show a mistake in Judge Miller’s determination that Dr. Hawkins’s medical opinion established the existence of legal pneumoconiosis. The administrative law judge determined that this evidence consisted of Dr. Wheeler’s negative interpretation of a July 18, 2007 x-ray; medical treatment records; and Dr. Renn’s consultative opinion, which called into question the x-ray and smoking history upon which Dr. Hawkins relied, and concluded that the miner did not have pneumoconiosis. Decision and Order Denying Modification at 5, 8; Director’s Exhibits 69, 70; Government’s Exhibit 11; Employer’s Exhibit 1. Noting that Judge Miller specifically credited Dr. Hawkins’s medical opinion⁷ as well-reasoned because it was based on factors in addition to an abnormal x-ray, including the miner’s smoking history of two packs per day since the age of seventeen, the administrative law judge permissibly found that new evidence of negative x-rays, or a conclusion that the overall weight of the x-ray evidence is negative, “does not necessarily negate Judge Miller’s finding that the miner had [legal] pneumoconiosis.” Decision and Order Denying Modification at 9-10. Further, while Dr. Renn reviewed more evidence than that which was available in the record before Judge Miller, the administrative law judge determined that the additional medical records Dr. Renn reviewed related in large part to treatment for non-respiratory conditions and/or related more directly to the cause of the miner’s death than to the issue of whether the miner had pneumoconiosis. Decision and Order Denying Modification at 9. Consequently, the administrative law judge acted within her discretion in finding that the evidence submitted in support of modification did not constitute such highly reliable

⁷ Dr. Hawkins relied on a smoking history of two packs per day from the age of 17 until two weeks prior to his examination of the miner, and diagnosed legal pneumoconiosis based on an abnormal x-ray, exertional dyspnea, abnormal spirometry and coal dust exposure. Director’s Exhibit 57.

evidence as would be sufficiently determinative or compelling to prove a mistake in Judge Miller's determination that the miner had legal pneumoconiosis. Decision and Order Denying Modification at 9-10, 16-17; *see generally* *Kinlaw*, 33 BRBS at 72; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Given that the "paramount" factor of accuracy was not shown to be advanced through the evidence submitted by employer, we hold that the administrative law judge did not abuse her discretion in determining that reopening the claim would not render justice under the Act. *Kinlaw*, 33 BRBS at 73. We, therefore, affirm the administrative law judge's denial of employer's request for modification of the award of benefits in the miner's claim. 20 C.F.R. §725.310.

With respect to the survivor's claim, as employer has not challenged the administrative law judge's finding that claimant is derivatively entitled to benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l), we affirm the administrative law judge's award of survivor's benefits.⁸ *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁸ Employer's argument, that the doctrine of nonmutual collateral estoppel may not be applied in a modification proceeding, is not relevant, as the administrative law judge ultimately determined that claimant was automatically entitled to survivor's benefits based on the award to her deceased husband.

Accordingly, the administrative law judge's Decision and Order Denying Employer's Request for Modification of Miner's Claim; and Denying Survivor's Benefits and the Decision and Order on Reconsideration, awarding benefits in the miner's claim and the survivor's claim, are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge