

BRB No. 97-0454 BLA

FLOYD J. MURPHY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
ZIEGLER COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order on Remand of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Thomas H. Odom (Arter & Hadden), Washington, D.C., for employer.

Jennifer U. Toth (J. Davitt McAteer, 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, the United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (83-BLA-4871) of Administrative Law Judge Edward Terhune Miller awarding 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). This case is before the Board for the third time.

On March 12, 1982, Administrative Law Judge David W. DiNardi issued a Decision and Order dismissing employer as the responsible operator and transferring liability to the Black Lung Disability Trust Fund (the Trust Fund) pursuant to the 1981 Amendments to the Act. Director's Exhibit 35. The administrative law judge awarded benefits and ordered the case remanded to the district director for payment. *Id.* The Director, Office of Workers' Compensation Programs (the Director), moved for reconsideration based on a medical report that the Director argued was submitted by claimant after a Department of Labor (DOL) letter informed him that the claim would be processed based on the information then in the file unless he submitted additional evidence. The Director asserted that claimant's timely submission of this evidence barred transfer by preventing DOL's initial letter from becoming a final denial. The administrative law judge denied the motion on the grounds that the record did not unambiguously show that claimant had filed additional medical evidence within one year of DOL's letter, which he concluded became a final denial.<sup>1</sup> Director's Exhibit 36. The Director did not appeal the administrative law judge's initial decision or the denial of reconsideration.

Approximately seven months later, a district director reviewed the file and issued a "Proposed Modification" of the administrative law judge's Decision and Order. Director's Exhibit 38. Based on his review, the district director concluded that the administrative law judge erred by dismissing employer and transferring liability to the Trust Fund. The district director relied on a DOL claim examiner's reference to a letter from claimant's attorney that was not in the record to conclude that transfer was precluded. *Id.* Pursuant to 20 C.F.R. §725.310, the district director proposed to modify the administrative law judge's Decision

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<sup>1</sup> The medical report that the Director characterized as new evidence predated DOL's December 4, 1974 letter to claimant. Director's Exhibit 15. After DOL's 1974 letter, the record contains no further correspondence from claimant to DOL until September 3, 1976. Director's Exhibit 26. In 1977, a DOL claims examiner made reference to a letter from claimant's counsel to DOL dated December 10, 1974. DOL Letter dated July 27, 1977 at 2 (unstamped exhibit). However, the dated correspondence referred to by the claims examiner was not made part of the official record.

and Order by “[r]eaffirm[ing] the status of Zeigler Coal Co. as the responsible operator.” *Id.* Claimant and employer objected to the district director's proposed modification. Director's Exhibits 39, 40. The case was referred to the Office of the Administrative Law Judges.

The case was assigned to Administrative Law Judge Michael H. Schoenfeld, who denied the district director's proposed modification on the grounds that the record did not demonstrate a mistake in a determination of fact. The administrative law judge concluded that Judge DiNardi properly made his findings based on the record before him. The administrative law judge found that the Director was at fault for failing to submit into the record all evidence in his possession relevant to the transfer issue, and concluded that the Director's “lack of diligence” in failing to place into the record relevant “correspondence to or from the Director's office . . . which took place long before Judge DiNardi issued his Order,” did not constitute a mistake in fact by Judge DiNardi. [1986] Decision and Order at 6. The administrative law judge also found that the Director failed to show that the interests of justice required an exception to the policy favoring the finality of decisions. He therefore denied modification and ordered the case remanded to the district director for payment in compliance with Judge DiNardi's Decision and Order.

Pursuant to the Director's appeal, the Board held that Judge Schoenfeld erred in denying the district director's proposed modification. *Murphy v. Zeigler Coal Co.*, BRB No. 86-0814 BLA (May 31, 1988)(unpub.). Without specific discussion of Judge Schoenfeld's findings, the Board held that the record supported the district director's position that Judge DiNardi made a mistake in a determination of fact regarding the procedural history of the miner's claim, and concluded that transfer was precluded. [1988] *Murphy*, slip op. at 2-3. The Board reversed Judge Schoenfeld's decision, reinstated employer as the responsible operator, and remanded the case for proceedings on the merits.<sup>2</sup> *Id.*

On remand, the case was assigned to Judge Miller, who awarded benefits under 20 C.F.R. Part 727. [1991] Decision and Order. The Board vacated that award and remanded the case for further proceedings on the merits. *Murphy v. Zeigler Coal Co.*, BRB Nos. 92-2282 BLA/A (Aug. 30, 1994)(unpub.). On second remand, Judge Miller reconsidered the merits and again awarded benefits. [1996] Decision and Order.

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<sup>2</sup> The Board rejected employer's contention that the district director lacked the authority to review and propose modification of Judge DiNardi's decision. [1988] *Murphy*, slip op. at 2 n.1.

On appeal, employer contends that the district director lacked the authority under Section 22 of the Act to propose modification of Judge DiNardi's decision transferring liability to the Trust Fund.<sup>3</sup> Employer also challenges Judge Miller's findings on the merits of entitlement. Claimant responds, concurring with employer's argument regarding the district director's proposed modification, and urging affirmance of the award of benefits on second remand. The Director responds, urging the Board to reject employer's contention regarding modification.

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 law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Based on our review of the record and of Judge Schoenfeld's decision denying modification, we conclude that it is unnecessary to resolve the issue regarding the propriety of the district director's proposed modification. After further reflection upon our 1988 Decision and Order, we hold that Judge Schoenfeld offered ample justification for his denial of modification, and that his decision should have been affirmed. Substantial evidence supports his finding that relevant evidence was not timely placed into the record for Judge DiNardi's consideration in his initial decision or on reconsideration. Based on the record before him, Judge DiNardi was not persuaded that the miner kept his initial claim pending. On modification, Judge Schoenfeld focused appropriately on the lack of diligence in developing the record when he determined that the Director had not shown that Judge DiNardi made a mistake under Section 725.310, or that justice required the departure from the principle of finality in the judicial process. See *Wilkes v. F & R Coal Co.*, 12 BLR 1-1 (1988)(evidence not contained in the record before the administrative law judge is inadmissible absent extraordinary circumstances and does not provide a basis for reinstating dismissed employer pursuant to 20 C.F.R. §725.310).

Under the law of the case doctrine, "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Cale v. Johnson*, 861 F.2d 943, 947 n.8 (6th Cir. 1988)(citations omitted). Review of our 1988 holding convinces us that the reversal of Judge Schoenfeld's well-supported denial of modification was clearly erroneous and results in manifest injustice by characterizing as a "mistake," many years after the fact, the Director's failure to submit all relevant evidence on the transfer issue, resulting in the imposition of liability on employer. See *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting). Therefore, we now depart from our 1988 holding, and we affirm as supported by substantial evidence Judge

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<sup>3</sup> Employer attaches an unpublished decision by the United States Court of Appeals for the Sixth Circuit in support of its argument.

Schoenfeld's denial of modification.

Accordingly, the Board's 1994 and 1988 decisions are vacated, and Judge Schoenfeld's Decision and Order denying modification is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge