BRB No. 97-0334 BLA

L. C. BRANHAM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	DATE ISSUED: ______________
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

R. Roland Case (Friend & Case), Pikeville, Kentucky, for claimant.

John W. Walters (Jackson & Kelly), Lexington, Kentucky, for employer.

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

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand (92-BLA-1669) of Administrative Law Judge David W. Di Nardi (the administrative law judge) denying 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 second time on modification. In the original Decision and Order on Motion for Modification, the administrative law judge found that modification proceedings pursuant to 20 C.F.R. §725.310[1] are unavailable to employer. Accordingly, the administrative law judge denied employer's request to modify

[1]Claimant filed his claim on April 19, 1985. Director's Exhibit 1. On March 3, 1989, Administrative Law Judge Robert E. Kendrick issued a Decision and Order awarding benefits, Director's Exhibit 68, which the Board affirmed, *Branham v. Bethenergy Mines, Inc.*, BRB No. 89-1055 BLA (Aug. 23, 1991)(unpub.). Employer filed a request for modification on November 20, 1991. Director's Exhibit 84.

Administrative Law Judge Robert E. Kendrick's prior award of benefits. In response to employer's appeal, the Board vacated the administrative law judge's holding that modification proceedings at 20 C.F.R. §725.310 are unavailable to employer, and remanded the case to the administrative law judge to consider the merits of employer's request for modification. The Board concluded that the administrative law judge's invocation of the doctrine of *res judicata* as a reason to foreclose modification in this instance was incorrect. Hence, the Board instructed the administrative law judge to address specifically employer's assertion that a mistake in a determination of fact was demonstrated. Further, the Board instructed the administrative law judge to determine whether reopening the claim will render justice under the Act. *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996).

On remand, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The administrative law judge also found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Accordingly, the administrative law judge found the evidence sufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. Additionally, the administrative law judge found that reopening the claim as requested by employer will render justice under the Act. Thus, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred by finding that employer established a mistake in a determination of fact at 20 C.F.R. §725.310 based upon the newly submitted evidence of record. Claimant also contends that the administrative law judge erred by finding that reopening the case will render justice under the Act. Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has declined to participate in this 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).

Claimant contends that the administrative law judge erred by finding that employer established a mistake in a determination of fact at 20 C.F.R. §725.310. Specifically, claimant argues that employer should not be permitted to modify an award of benefits merely by submitting additional evidence. In the previous decision awarding benefits, Judge Kendrick found the evidence sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis. However, on modification,[2] the administrative law

[2]The pertinent regulations provide that "[u]pon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner may, at any time before one year from the

judge considered the newly submitted x-ray readings and medical opinions of record along with the previously submitted medical evidence of record, and found the evidence insufficient to establish a totally disabling respiratory impairment due to pneumoconiosis. In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by ***wholly new evidence***, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971)(emphasis added); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 296 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 724, 18 BLR 2-26, 2-28 (4th Cir. 1993). Thus, we reject claimant's argument that the administrative law judge erred by relying on the newly submitted evidence of record to establish a mistake in a determination of fact at 20 C.F.R. §725.310. In addition, we reject claimant's argument that employer's request for modification is a collateral attack on Judge Kendrick's award of benefits. As the Board noted in its prior decision, the modification provisions of the Act were implemented by Congress "to displace traditional notions of *res judicata* and collateral estoppel." *Branham*, 20 BLR at 1-32.

Finally, claimant contends that employer's bare claim of a need to reopen the record to serve the interest of justice is insufficient, when balanced against the need for finality in decision making. As previously noted, the administrative law judge was specifically instructed on remand to determine whether reopening the claim will render justice under the Act. In addressing this issue, the administrative law judge stated that "[t]he evidence presented...in support of the petition for modification is uncontradicted as it has established that [claimant] did not and does not suffer from a disabling lung impairment due to pneumoconiosis." Decision and Order on Remand at 18-19. The administrative law judge further stated that "it is not just or fair that an employer be compelled to pay benefits to a miner who does not meet the requirements of entitlement to black lung benefits under the Act and its regulations." *Id.* at 19.

A finder of fact must not lightly consider reopening a case at the behest of a party who, right or wrong, could have presented its side of the case at the first hearing. *See General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 25, 14 BRBS 636, 639-40 (1st Cir. 1982); *McCord v. Cephas*, 532 F.2d 1377, 1381, 3 BRBS 371, 377 (D.C. Cir. 1976). Claimant asserts that employer did not present any evidence in support of its request for modification which was not available at the time of the original hearing. Contrary to claimant's assertion, employer provided the medical reports of physicians who, subsequent to the original hearing, **recanted** their prior opinions that claimant was totally disabled due to pneumoconiosis.[3] As such, this evidence was not available at the time of the original

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date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits." 20 C.F.R. §725.310(a).

[3]The administrative law judge stated that "[e]mployer rests its mistake in fact argument on the recanting of [the] prior opinions by Drs. T. L. Wright, Ballard [W]right and

hearing.

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by Dr. Myers." Decision and Order on Remand at 15. In a May 8, 1992 report, Dr. Ballard Wright opined that claimant is not totally disabled due to pneumoconiosis. Director's Exhibit 89. Further, in a deposition dated April 23, 1993, Dr. Ballard Wright opined that claimant does not suffer from a functional disability due to pneumoconiosis. Employer's Exhibit 32. Similarly, in a deposition dated April 13, 1993, Dr. T. L. Wright opined that claimant does not suffer from a functional disability due to pneumoconiosis. Employer's Exhibit 41. Dr. Myers, in a June 11, 1992 report, opined that claimant does not suffer from a respiratory functional impairment. Director's Exhibit 91.

We find our colleague's disagreement with the administrative law judge's "justice under the Act" determination puzzling. One could hardly find a better reason for rendering justice than that it would be unjust or unfair to require an employer to pay benefits to a miner who does not meet the requirements of the Act. In any event, we note that this concept is not statutory and has been developed through case law, not as a separate inquiry, but as a general finding to be made, on balance, with the circumstances of each case. *See O'Keeffe*, 404 U.S. at 255-56; *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 464 (1968). Only where there has been recalcitrance or egregious conduct by the petitioner have the courts scrutinized this concept. *McCord* exemplifies such a situation. In *McCord*, employer refused to appear, defend or supply information to the deputy commissioner,[4] who found for the claimant. Sometime later, this recalcitrant employer sought modification on the grounds that the deputy commissioner had made a mistake in fact with respect to claimant's employment with employer. The award was reversed on this basis by an administrative law judge. Claimant appealed to the Board, which vacated the administrative law judge's decision on the merits and reinstated the original award in favor of claimant on the basis that the administrative law judge did not have jurisdiction to grant employer's request for modification because of a mistake in a determination of fact. However, in response to employer's appeal, the United States Court of Appeals for the D.C. Circuit found that while there was authority to reopen the case, "there is no reason to think that there should be an automatic reopening simply because the Deputy Commissioner or the Administrative Law Judge found a mistake in a determination of fact." *McCord*, 532 F.2d at 1380, 3 BRBS at 376. Only then, given the egregious circumstances of the case before it, did the D.C. Circuit remand the case for a determination as to whether granting modification would "'render justice under the [A]ct.'" *Id.* at 1381, 3 BRBS at 377. The court stated: "It would be difficult to describe a history of greater recalcitrance, of greater callousness towards the processes of justice, and of greater self-serving ignorance, than the attitude displayed by McCord in the four-plus years from the time of Cephas' death on January 1, 1969, to January 31, 1973, when McCord, after receiving notice of the Deputy Commissioner's adverse award, first began to assert his defenses." *Id.* This is not the case at hand. In the instant case, claimant's reexamination by employer is consistent with the Act, the regulations and relevant case law, and is contemplated by them. There is no evidence of record indicative of any impropriety by employer. Accordingly, the administrative law judge's interest of justice determination is well founded.

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[4]The deputy commissioner is now titled the district director. *See* 20 C.F.R. §725.101(a)(11); 55 Fed. Reg. 28606 (Jul. 1990).

The case before us is almost exactly on point with *O'Keeffe,* where the deputy commissioner, some months after his initial rejection of the claim, reversed his position and awarded benefits. "On the basis of testimony by the employee's personal physician and a commission-appointed doctor, petitioner (the deputy commissioner) concluded, contrary to his initial determination, that the disabling condition had in fact been 'materially aggravated and hastened' by the circumstances of employment." *O'Keeffe*, 404 U.S. at 254. The Supreme Court reversed the decision of the United States Court of Appeals for the Fifth Circuit which held that in the absence of changed conditions or new evidence clearly demonstrating a mistake in the initial determination, the statute simply does not confer authority upon the deputy commissioner to receive additional, but cumulative evidence, and change his mind. In holding that the statute permits reopening within one year because of a mistake in a determination of fact, the Supreme Court stated, "There is no limitation to particular factual errors, or to cases involving new evidence or changed circumstances." *O'Keeffe*, 404 U.S. at 255. In discussing the 1934 Amendment to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), which expanded the Section's coverage to include mistake in fact as well as a change in conditions as a basis for seeking modification, the Court concluded that "[t]he plain import of this amendment was to vest a deputy commissioner with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe*, 404 U.S. at 256. Based on the foregoing analysis, we conclude that in the instant case the administrative law judge properly exercised his discretion in determining that reopening the case will render justice under the Act.[5]

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

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[5]The administrative law judge's finding that the newly submitted evidence of record is sufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 is also supported by substantial evidence, and therefore affirmed.

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's order granting employer's request for modification and denying benefits. Section 22 of the Act provides the district director (formerly the deputy commissioner) with broad discretion to grant or deny petitions for modification. The petition should be granted "'when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the [A]ct.' S. Rep. No. 588, 73d Cong., 2d Sess., 3-4 (1934); H. R. Rep. No. 1244, 73d Cong., 2d Sess., 4 (1934);" quoted in *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255-56 (1971). Obviously, if every change in result would *per se* "render justice under the [A]ct," there would be no discretion vested in the district director; he would be required to grant every petition which would change the result. But in Section 22, the Congress gave the district director discretion in exercising his authority over petitions for modification. I think that the administrative law judge in the case at bar failed to understand how to exercise his discretion because the reason he gave for granting modification was that the evidence before him persuaded him that claimant was not entitled to benefits. His explanation demonstrates his failure to understand the proper exercise of his discretion because his rationale makes redundant a separate inquiry into whether granting modification would render justice under the Act.

The administrative law judge determined that the prior administrative law judge, Judge Kendrick, had made a mistake in fact in finding that claimant suffered from totally disabling pneumoconiosis. In support of this finding the administrative law judge relied upon evidence which employer submitted subsequent to the original hearing.

Judge Kendrick had found the existence of pneumoconiosis established by x-ray evidence and medical reports. The administrative law judge revisited only the issue of pneumoconiosis established by x-ray. In connection with its petition for modification, employer submitted several new x-ray readings, all negative, and several new medical reports. Claimant, who was represented by counsel, did not submit additional evidence. The administrative law judge held that Judge Kendrick had made a mistake in finding the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(1) because the vast majority of B-readers and radiologists with superior credentials, whose readings are now in the record, state that the evidence is insufficient to justify a diagnosis of coal workers' pneumoconiosis. Decision and Order at 15. Since the administrative law judge did not consider the evidence at 20 C.F.R. §718.202(a)(4), Judge Kendrick's finding of the existence of pneumoconiosis at that section still stands. Hence, the administrative law judge's denial of benefits must rest upon his analysis at 20 C.F.R. §718.204(c)(4).

The administrative law judge determined that Judge Kendrick had also made a mistake in fact in finding claimant totally disabled pursuant to 20 C.F.R. §718.204(c)(4). For this argument, employer relied upon three doctors' recanting of their prior opinions:

Drs. Myers, Ballard Wright and T. L. Wright. Dr. Myers had opined in 1985 that claimant's "pulmonary condition or cardiovascular condition historically would appear to limit arduous labor." (Kendrick Decision and Order at 13). In 1992, Dr. Myers stated, after reviewing his records, "that [claimant] had no respiratory function impairment as of October 2, 1985." (1996 Di Nardi Decision and Order at 16).

Similarly, Dr. Ballard Wright explained that his 1985 diagnosis of total disability was "based upon what would be considered optimal medical hygiene." (1996 Di Nardi Decision and Order at 16). Finally, although in 1982 Dr. T. L. Wright had considered claimant to be occupationally disabled for coal mining, after reviewing his pulmonary function study and Dr. Dahhan's 1993 pulmonary function and blood gas studies, he concluded that claimant retains the functional respiratory capacity to work as a coal miner. (1996 Di Nardi Decision and Order at 17).

In holding that Administrative Law Judge Kendrick had made a mistake in finding total disability, the administrative law judge relied upon the retractions of those three doctors and his own analysis of the opinions of Drs. Nash and Clarke, which Judge Kendrick had credited. The administrative law judge dismissed those opinions because they were not supported by the underlying documentation. (1996 Di Nardi Decision and Order at 17-18). By contrast, Judge Kendrick had credited Dr. Clarke's finding of a mild impairment sufficient to support his finding that claimant was totally disabled from performing his usual coal mine employment. (Kendrick Decision and Order at 9-10). Judge Kendrick had likewise credited Dr. Nash's diagnosis that claimant was disabled from heavy, manual labor on the basis of his depressed pulmonary function study results, although his blood gas study results were within normal limits. (Kendrick Decision and Order at 11).

When Judge Kendrick had credited the findings of total disability by Drs. Clarke and Nash, they were corroborated by the reports of Drs. Myers, Ballard Wright and T. L. Wright. These five opinions he found outweighed the two opinions offered by employer's doctors. (Kendrick Decision and Order at 17-18). Judge Kendrick's decision withstood employer's attack and was affirmed on appeal. *Branham v. Bethlehem Mines Corp.*, BRB No. 89-1055 BLA (Aug. 23, 1991)(unpub.). Less than three months later, employer's new counsel petitioned for modification. Employer's new counsel persuaded three doctors to recant their testimony and turned employer's defeat into victory. The case at bar is a classic example of a party who is chagrined by defeat and obtains new counsel to retry the case by petitioning for modification. It is not in the interest of justice to grant modification under these circumstances.

It is well established that the "purpose of [§22] is to permit . . . modif[ication of] an award where there has been 'a mistake in a determination of fact [which] makes such a modification desirable in order to render justice under the [A]ct.'" *Blevins v. Director, OWCP*, 683 F.2d 139, 142 (6th Cir. 1982)(quoting *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 464 (1968). That determination involves a weighing process: "In deciding whether to reopen a case under §22 [33 U.S.C. §922], a court must balance the

need to render justice against the need for finality in decision making." *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 25, 14 BRBS 636, 639 (1st Cir. 1982)(*per curiam*). As the First Circuit declared in *General Dynamics*:

> The congressional purpose in passing the law would be thwarted by any lightly considered reopening at the behest of an employer who, right or wrong, could have presented his side of the case at the first hearing and who, if right, could have thereby saved all parties a considerable amount of expense and protracted litigation.

General Dynamics, 673 F.2d at 25-26, 14 BRBS at 639-40 (quoting *McCord v. Cephas*, 532 F.2d 1377, 1380-81, 3 BRBS 371, 377 (D.C. Cir. 1976). In a similar vein, Professor Arthur Larson cautioned against permitting the allegation of mistake "to become a back-door route to retrying a case because one party thinks he or she can make a better showing on the second attempt." 3 A. Larson, Workmen's Compensation Law, §81.52(b).

In the instant case, employer obtained new counsel who asked a few more questions of three doctors, questions which could have been asked at the first hearing, and who obtained more x-ray readings, more medical tests and doctors' reports. Employer did not thereby prove that Judge Kendrick had made a mistake in fact. In the words of Professor Larson, employer simply made "a better showing on the second attempt." *Id*. Claimant had previously won by a preponderance of the evidence. Employer, with its superior resources, shifted the balance. Apparently claimant had exhausted his resources, employer had not. Under these circumstances, the interest of justice was not served by granting modification.

REGINA C. McGRANERY
Administrative Appeals Judge