BRB No. 99-0768 BLA

ROBERT L. MELVIN	)	
	)	
Claimant-	)	
Respondent	)	
	)	DATE ISSUED:
v.	)	
	)	
OLD BEN COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
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 Denying Employer's Petition for Modification of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

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

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

Jennifer U. Toth (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand Denying Employer's Petition for Modification (94-BLA-1116) of Administrative Law Judge Clement J. Kichuk. The relevant procedural history of this case is as follows: Claimant, a living miner, filed an application for benefits on August 11, 1980. Director's Exhibit 28. This claim was ultimately denied by the district director on the ground that claimant failed to prove that he was totally disabled due to pneumoconiosis. *Id*. Claimant filed a second claim on March 21, 1990. Director's Exhibit 1. In opposition to this claim, employer submitted one negative rereading of an x-ray dated April 9, 1990. Director's Exhibit 20. In a Decision and Order issued on March 19, 1992, Administrative Law Judge Glenn Robert Lawrence awarded benefits, determining that claimant established both a material change in conditions pursuant to 20 C.F.R. §725.309 and each of the requisite elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 30. Employer initially filed an appeal with the Board, but subsequently requested that the Board dismiss the appeal and remand the case to the district director for modification proceedings pursuant to 20 C.F.R. §725.310. Director's Exhibit 31. The Board granted employer's request. *Melvin v. Old Ben Coal Co.*, BRB No. 92-1440 BLA (Dec. 14, 1992)(unpub. Order).

In support of its Petition for Modification, employer proffered rereadings of an x-ray dated August 13, 1990, Dr. Lyle's examination report dated January 22, 1991, and Dr. Tuteur's review of the evidence of record before Judge Lawrence and Dr. Lyle's report. Director's Exhibits 35, 37, 39, 41; Employer's Exhibits 1, 2. The district director denied employer's request for modification and the case was transferred to the Office of Administrative Law Judges for a hearing before Administrative Law Judge Nicodemo DeGregorio. Director's Exhibits 36, 38, 40, 42. The parties agreed to have the case decided on the record and in a Decision and Order issued on August 8, 1995, Judge DeGregorio determined that the newly submitted evidence established that the award of benefits contained a mistake in a determination of fact regarding Judge Lawrence's finding that claimant demonstrated the existence of pneumoconiosis under 20 C.F.R. §718.202(a). Judge DeGregorio further found that the evidence of record as a whole was insufficient to establish that claimant had pneumoconiosis. Accordingly, benefits were denied. Judge DeGregorio affirmed his findings in a Decision and Order on Reconsideration, rejecting claimant's arguments that he erred in considering the entire evidentiary record and in failing to determine whether granting modification in this case would be in the interest of justice.

On appeal to the Board, claimant reiterated the contentions raised on reconsideration before Judge DeGregorio and asserted that the administrative law judge did not properly weigh the x-ray and medical opinion evidence of record. The Board vacated the denial of benefits, holding that Judge DeGregorio was required to make a finding with respect to whether reopening the case based upon the existence of a mistake in a determination of fact would render justice under the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). *Melvin v. Old Ben Coal Co.*, BRB No. 96-0660 BLA (Feb. 28, 1997)(unpub.), slip op. at 3. The Board also instructed Judge DeGregorio to reconsider his findings under Section 718.202(a)(1) and (a)(4) on remand. *Id*. at 4-5. The Board declined to alter its holdings in response to employer's Motion for Reconsideration. *Melvin v. Old Ben Coal Co.*, BRB No. 96-0660 BLA (Mar. 25, 1998)(unpub.).

Due to Judge DeGregorio's unavailability, the case was assigned to Administrative Law Judge Clement J. Kichuk (the administrative law judge) on remand. The administrative law judge determined that the evidence proffered by employer in conjunction with its petition for modification was inadmissible under Sections 725.414(e) and 725.456(d) and that reopening the record under Section 725.310 would not be in the interest of justice. The administrative law judge also concluded that Judge Lawrence's 1992 Decision and Order awarding benefits did not contain a mistake in a determination of fact. Accordingly, benefits were awarded.

Employer contends on appeal that the administrative law judge erred in excluding the evidence submitted on modification and in considering whether reopening the record would render justice under the Act. Employer also maintains that even if the administrative law judge properly excluded its modification evidence, a mistake of fact was apparent in Judge Lawrence's determination that claimant established a material change in conditions under Section 725.309. Employer further argues that the State of Illinois should be held liable for the payment of benefits, as claimant worked as a state mine inspector subsequent to his tenure with employer. Claimant has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and asserts that the administrative law judge's decision to exclude the evidence that employer submitted in support of its modification request conflicts with the Board's decision in *Branham v. Bethenergy Mines, Inc.[Branham II]*, 21 BLR 1-79 (1998). With respect to the identification of the proper responsible operator, the Director urges the Board to reject employer's argument. Employer has filed reply briefs in which it essentially reiterates its position.

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).

We turn first to employer's argument that it is not the properly designated responsible operator inasmuch as claimant worked for the State of Illinois as a mine inspector subsequent to his tenure with employer. We decline to address employer's contention on the ground that it conceded its status as the responsible operator at the hearing before Judge Lawrence, *see* Hearing Transcript at 5, and did not raise this issue on modification before Judge DeGregorio or the administrative law judge. *See Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir.1997); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Grant v. Director, OWCP*, 6 BLR 1-619 (1983).

With respect to the issue of whether reopening the present case on modification would render justice under the Act, the administrative law judge stated that:

> The present case presents an example of an employer who waited to develop its case only after an award of benefits was granted...As the court in *McCord* stated, "[t]he congressional purpose in passing the law [permitting modification] 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." *McCord v. Cephas*, 532 F.2d 1377, 1381, 3 BRBS 371, 377 (D.C. Cir. 1976).
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> Upon analysis of the relevant facts, issues, and precedent, I find and conclude that is not in the interest of justice to reopen the record, as the Employer's modification evidence was available prior to the original award of benefits in March 1992 by Judge Lawrence.

Decision and Order on Remand at 14-15. We hold that the administrative law judge acted within his discretion and in accordance with the relevant case law in making this finding.

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*, *supra*; *see also Branham II*, *supra*, 21 BLR at 1-82, 1-87. In making this assessment, an administrative law judge, exercising the broad discretion granted to him as fact-finder, must balance the need to render justice against the need for finality in decision making. *Id*. In the present case, it was within the administrative law judge's discretion to find, based upon the nature and chronology of the evidence submitted by employer in support of its petition for modification, that granting modification would not render justice under the Act in this case. *See Branham II*, *supra*. Moreover, inasmuch as the administrative law judge's set forth this rationale separately from his analysis of the regulations set forth in Sections 725.414(e) and 725.456(d), we decline to address the administrative law judge's findings regarding the application of these regulations. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Finally, we reject employer's allegation that apart from the issue of granting modification based upon the newly submitted evidence, the administrative law judge should have determined that Judge Lawrence's 1992 award of benefits on the duplicate claim contained a mistake in a determination of fact. Employer maintains that Judge Lawrence's finding of a material change in conditions pursuant to Section 725.309 was in error, as he did not determine that the newly submitted evidence demonstrated an actual worsening of claimant's condition. The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that a material change in conditions is established pursuant to Section 725.309(d) where the miner did not have pneumoconiosis at the time of the first application for benefits but has since contracted it and become totally disabled by it, or where the miner's pneumoconiosis has progressed to the point of total respiratory disability since the filing of the first application. *See Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991); *see also Peabody Coal Co. v. Spese [Spese II]*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*), *modifying* 94 F.3d 369 (7th Cir. 1996), *aff'g* 19 BLR 1-45 (1995). The administrative law judge's determination that Judge Lawrence's Decision and Order did not contain a mistake of fact is supported by substantial evidence in this regard, inasmuch as Judge Lawrence noted that the evidence submitted with the initial claim tended to show that claimant was not totally disabled due to

pneumoconiosis, while the newly submitted evidence was sufficient to prove this element of entitlement. Director's Exhibit 30 at 5-6; *see McNew*, *supra*; *see also Spese II*, *supra*. Inasmuch as employer's allegation of error regarding Judge Lawrence's findings is without merit, we affirm the administrative law judge's determination that Judge Lawrence's 1992 Decision and Order awarding benefits does not contain a mistake in a determination of fact.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Employer's Petition for Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge