BRB No. 03-0501 BLA

JAMES HILLIARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	DATE ISSUED: 04/30/2004
	)	
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 On Remand Denying Employer's Request for Modification of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), 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 On Remand Denying Employer's Request for Modification (98-BLA-0806) of Administrative Law Judge Linda S. Chapman (the administrative law judge) on employer's second request for modification of an award of benefits made in connection with 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).[1] This case is before the Board for the second time.[2] Subsequent to the Board's consideration of this case in *Hilliard v. Old Ben Coal Co.*, BRB No. 99-0933 BLA (June 30, 2000)(unpublished), employer filed a petition for review with the United States Court of Appeals for the Seventh Circuit.[3]

2002 Decision of the United States Court of Appeals for the Seventh Circuit

The Seventh Circuit held, in *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002), that a modification request cannot be denied solely because the evidence submitted on modification may have been available at an earlier stage in the proceeding. *Hilliard*, 292 F.3d at 545-547, 22 BLR at 2-449-454. The court determined that the administrative law judge's decision to deny the instant request for modification "was influenced greatly by the fact that at least some of [employer's] evidentiary submissions could have been produced at the first hearing." *Hilliard*, 292 F.3d at 546, 22 BLR at 2-452. The court further held that, contrary to the administrative law judge's finding that allowing a reopening of the case on modification "would make mincemeat of any principles of finality" and would "constitute[] piecemeal litigation and forum shopping at its worst," Administrative Law Judge's May 6, 1999 Decision and Order at 6, "finality simply is not a paramount concern of the Act." *Hilliard*, 292 F.3d at 546, 22 BLR at 2-452. The court thus determined that because the administrative law judge "gave no credence to the statute's preference for accuracy over finality, we must remand for application of the proper legal standard," *id.*, namely the

---

[1] 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant, the miner's widow, has pursued this claim, filed in 1990, on behalf of the miner since his death. The death certificate indicates that the miner died on February 23, 1995 due to chronic obstructive pulmonary disease and "AAA rupture," due to coal workers' pneumoconiosis. Director's Exhibit 54. The death certificate, signed by Dr. Khan on March 16, 1995, reflects that an autopsy was performed and that the results of the autopsy were available to Dr. Khan prior to his determination of the cause of death. *Id.*

[3]The Board's Decision and Order in *Hilliard v. Old Ben Coal Co.*, BRB No. 99-0933 BLA (June 30, 2000)(unpublished) contains a complete prior history of this case.

"render justice under the Act" standard articulated by the United States Supreme Court in *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The court held that:

> [The United States Supreme Court's] use of "under the Act" requires that an ALJ's administration of "justice" be grounded in the stated purpose of the Act: "to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or disability due to pneumoconiosis." 30 U.S.C. §901(a). Congress accomplished this goal, in part, by incorporating within the statute a broad reopening provision to ensure the accurate distribution of benefits.

Hilliard, 292 F.3d at 546, 22 BLR at 2-451.

The court next addressed employer's contention that the administrative law judge abused her discretion in denying its motion to compel claimant, the miner's widow, to sign an authorization allowing it to view the autopsy slides. The court indicated that it was persuaded by the position taken by the Director, Office of Workers' Compensation Programs (the Director), that claimant had a duty on behalf of the miner to authorize access to his medical records. *Hilliard*, 292 F.3d at 548, 22 BLR at 2-454-455. The court then discussed the newly promulgated regulation at 20 C.F.R. §725.414(a)(3)(i), as well as the former regulation at 20 C.F.R. §718.402 (2000) which was deleted from 20 C.F.R. Part 718 as duplicative of the provisions of the newly promulgated regulation at 20 C.F.R. §725.414(a)(3)(i). 65 Fed. Reg. 79,952 (Dec. 20, 2000). The court indicated that it could not say, as a matter of law, that claimant's refusal was reasonable, "although the [administrative law judge] might reach this conclusion after a more searching inquiry." *Hilliard*, 292 F.3d at 548, 22 BLR at 2-455. On remand the court instructed the administrative law judge to determine whether claimant's refusal to sign the authorization to release the miner's medical records to employer was reasonable under the circumstances. *Hilliard*, 292 F.3d at 548, 22 BLR at 2-455-456.

Administrative Law Judge's Decision and Order on Remand

The administrative law judge found that to grant employer's request for modification of the prior award of benefits would not render justice under the Act. The administrative law judge determined that employer had not adequately supported either of its requests for modification. With regard to the instant request for modification, the administrative law judge stated:

> The employer submitted additional medical evidence, in the form of readings of x-rays taken in 1980, 1984, 1987, and 1990; independent medical reviews; and deposition testimony. As I noted in my May 6, 1999

> Decision and Order, all of the medical evidence that these physicians reviewed, with the exception of the death certificate, the redundant deposition testimony of Dr. Paul, and the x-ray report of Dr. Chiardonna, was available in the first proceeding before Judge Lawrence; all of it was available before Judge Burke. Yet the Employer waited almost eight years from the time Mr. Hilliard filed his claim to develop this evidence. The record also reflects that the Employer had to be prodded on several occasions by the Director to submit evidence in support of its modification requests.

Decision and Order on Remand at 6. The administrative law judge noted that employer had chosen to submit, not the autopsy report it possessed since 1996, not readings of the two most recent x-rays, but readings of four x-rays taken between 1980 and 1990 before the 1992 award of benefits in this case and "medical reviews and deposition testimony from physicians who did not review either the two most recent x-rays, or the autopsy evidence." *Id.* The administrative law judge then stated that her finding, that employer's counsel, Scott A. White, had deliberately misled her about employer's possession of the autopsy report, was a factor in her conclusion that claimant's refusal to sign an authorization for release of the autopsy slides was not unreasonable. *Id.; see* Administrative Law Judge's January 27, 2003 Order.

The administrative law judge further found that there was no indication that to grant employer's request for modification would result in a more accurate or even different determination. The administrative law judge stated:

> The "new" evidence submitted by the Employer is manifestly incomplete, as it does not address the two most recent x-rays of record, or the autopsy report. I have denied the Employer's request for access to the miner's autopsy slides so that it could have them reviewed in the hopes that the new report will show, contrary to the autopsy prosector's report, that the miner did not have pneumoconiosis. Under these circumstances, the interests of accuracy in decision making would not be well served by granting the Employer's request for modification.

Id. at 7. The administrative law judge thus denied employer's request for modification.

Employer's Appeal

On appeal, employer contends that the administrative law judge erred in sanctioning claimant's unreasonable refusal to release the miner's medical records. Employer also alleges error in the administrative law judge's finding on remand that employer could have developed, at an earlier time, the evidence it submitted in support of the instant request for modification, and urges the Board to vacate the administrative law judge's decision on the merits of the modification request. Claimant responds in support of the decision below. Employer has filed a brief in reply. The Director has not filed a brief in the 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 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 erred in sanctioning claimant's unreasonable refusal to authorize employer's access to the miner's medical records. Employer notes that the Seventh Circuit in *Hilliard* was persuaded by the position taken by the Director that claimant has a continuing duty to authorize access to the miner's medical records. *Hilliard*, 292 F.3d at 548, 22 BLR at 2-454-455. Employer further challenges the administrative law judge's finding that employer's former counsel, Scott A. White, misled the administrative law judge and the Board by creating the impression that employer did not have the autopsy report, when employer's counsel at the time had been provided with a copy of the miner's autopsy report on January 10, 1996. Employer argues that "since the [administrative law judge] still denied [employer's] request for a medical release back in 1999, even assuming that [employer] did not have the autopsy report, any mistaken impression [held] by the administrative law judge did not make a difference" in the administrative law judge's refusal to compel claimant to authorize employer's access to the miner's autopsy evidence. Employer's Brief at 9.

After consideration of the Seventh Circuit's decision in *Hilliard*, the administrative law judge's Decision and Order on Remand, the issues raised on appeal, and the evidence of record, we conclude that the administrative law judge's denial of employer's request for modification cannot be affirmed as the administrative law judge did not apply the correct legal standard in denying employer's request for modification. The court in *Hilliard* remanded the case for the administrative law judge to apply the "render justice under the Act" standard articulated by the United States Supreme Court in *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). *Hilliard*, 292 F.3d at 546, 22 BLR at 2-451. The court also indicated that it was persuaded by the position

taken by the Director that claimant had a duty on behalf of the deceased miner to authorize access to his medical records. *Hilliard*, 292 F.3d at 548, 22 BLR at 2-454-455. The court stated that they could not say, as a matter of law, that claimant's refusal was reasonable, "although the [administrative law judge] might reach this conclusion after a more searching inquiry." *Hilliard*, 292 F.3d at 548, 22 BLR at 2-455. The court thus further remanded the case for the administrative law judge to determine, pursuant to the applicable regulations, whether claimant's refusal to sign the authorization to release the miner's medical records to employer was reasonable under the circumstances.[4] *Hilliard*, 292 F.3d at 548 n.10, 22 BLR at 2-455 n.10.

On remand, the administrative law judge found that claimant's refusal to authorize employer's access to the miner's medical records, in connection with employer's request for modification, was not unreasonable because (1) claimant had previously provided employer with a copy of the autopsy report in 1996, and (2) employer's counsel at the time had deliberately misled the administrative law judge and the Board by creating the impression that employer never had the autopsy report. Decision and Order on Remand at 6. The administrative law judge also determined that employer had shown a "lack of diligence" in developing and submitting evidence in support of its request for modification, ultimately submitting "manifestly incomplete" evidence such as not to warrant granting the modification request under *O'Keeffe*. *Id.* at 7.

The administrative law judge's findings on remand cannot be affirmed as they do not follow the court's instructions in *Hilliard*. Specifically, the court in *Hilliard* indicated that in making the determination as to whether there is justification in the instant case to overcome the Act's preference for accuracy over finality,

> the administrative law judge will no doubt need to take into consideration many factors including the diligence of the parties, the number of times that party has sought reopening, *and the quality of the new evidence the party wishes to submit.* These and other factors deemed relevant by the [administrative law judge] in a particular case ought to be weighed not under an amorphous "interest of justice" standard, but under the frequently

---

[4] Despite the United States Court of Appeals for the Seventh Circuit's contrary indication, *see Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 548, 22 BLR 2-429, 2-455 (7th Cir. 2002), it does not appear that the newly promulgated regulation at 20 C.F.R. §718.414 is applicable in this claim which was pending on January 19, 2001. *See* 20 C.F.R. §725.2(c).

> articulated "justice under the Act" standard, *O'Keeffe*, 404 U.S. at 255, 92 S.Ct. 405.

Hilliard, 292 F.3d at 547, 22 BLR at 2-453 (emphasis added). The administrative law judge on remand found no indication that modification would result in a more accurate or even different determination, notwithstanding the fact that she could not evaluate "the quality of the new evidence" employer wishes to submit by virtue of the fact that employer was prevented from developing such evidence. The administrative law judge stated, "The "new evidence submitted by the Employer is manifestly incomplete, as it does not address the two most recent x-rays of record, or the autopsy report. I have denied Employer's request for access to the miner's autopsy slides so that it could have them reviewed in the hopes that the new report will show, contrary to the autopsy prosector's report, that the miner did not have pneumoconiosis. Under these circumstances, the interests of accuracy in decision making would not be well served by granting the Employer's request for modification." Decision and Order on Remand at 7. We hold that the administrative law judge's analysis of the quality of the evidence on remand is flawed by her prejudgment of the content and import of any additional supporting evidence employer may submit on modification at 20 C.F.R. §725.310 (2000). An administrative law judge must conduct a complete analysis of a request for modification at 20 C.F.R. §725.310 (2000), including a substantive analysis of the quality of any newly submitted evidence, before determining whether the Act's preference for accuracy over finality would be served by granting the request. *O'Keeffe*, 404 U.S. at 255.

Further, the administrative law judge on remand did not determine the reasonableness of claimant's refusal to authorize employer's access to the miner's autopsy records pursuant to the applicable regulation. The regulation at 20 C.F.R. §718.402 (2000) provides, in pertinent part, that an individual shall not be determined to be entitled to benefits unless he furnishes such medical evidence as is reasonably required to establish his claim. 20 C.F.R. §718.402 (2000). The regulation also provides that a miner who unreasonably refuses to provide an employer with a complete statement of his medical history or to authorize access to his medical records shall not be found entitled to benefits under 20 C.F.R. Part 718. Because the administrative law judge on remand did not specifically apply the regulation at 20 C.F.R. §718.402 (2000), as directed by the court in *Hilliard*, we vacate her determination that claimant's refusal to authorize employer's access to the miner's medical records was not unreasonable. We remand the case for consideration under 20 C.F.R. §718.402 (2000).

Employer next contends that the administrative law judge again erred by denying employer's request for modification based on the fact that the evidence submitted by employer in support of the instant request for modification could have been obtained

earlier. Employer notes that the Seventh Circuit in *Hilliard* rejected this rationale as a sole reason upon which to deny a petition for modification. *Hilliard*, 292 F.3d at 545-547, 22 BLR at 2-449-454.

Employer's contention lacks merit. The administrative law judge permissibly found that employer could have earlier developed the evidence it submitted in support of the instant request for modification in addressing "the diligence of the parties," a factor the Seventh Circuit directed her to consider on remand. *Hilliard*, 292 F.3d at 547, 22 BLR at 2-453; Decision and Order on Remand at 5-6, 7. Specifically, the administrative law judge found that "[e]mployer waited almost eight years from the time [the miner] filed his claim to develop this evidence. The record also reflects that the Employer had to be prodded on several occasions by the Director to submit evidence in support of its modification requests." Decision and Order on Remand at 6. The administrative law judge may again consider this factor, namely the diligence of the parties, in her deliberations on remand under 20 C.F.R. §725.310 (2000).

Employer argues that administrative law judge's decision on the merits of the claim should be vacated. The administrative law judge did not, however, reach the merits of the claim, other than to assess the sufficiency of the evidence in determining whether or not it would serve the interest of justice under the Act to grant employer's request for modification. In light of the foregoing, we vacate the administrative law judge's assessment of the evidence and remand the case for further consideration of employer's request for reconsideration under *O'Keeffe*. 20 C.F.R. §725.310 (2000). Employer finally requests that the case be remanded to a different administrative law judge. However, because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Employer's Request for Modification is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge