BRB Nos. 05-1005 BLA
consolidated with 06-0152 BLA

GROVER JUSTUS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
RANDY & LISA HURLEY T/A MAY BRANCH TRUCKING	)	DATE ISSUED: 08/31/2006
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Reassignment on Remand and Order on Reconsideration Denying Reassignment on Remand of John M. Vittone, Chief Administrative Law Judge, and the Second Decision and Order on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

BEFORE: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Denying Reassignment on Remand and Order on Reconsideration Denying Reassignment on Remand of Chief Administrative Law Judge John M. Vittone, and the Second Decision and Order on Remand (2002-BLA-0020) of Administrative Law Judge Linda S. Chapman 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. In the last appeal, the Board, with one judge dissenting, vacated Judge Chapman's award of benefits and her finding that claimant was entitled to invocation of the

irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and remanded this case to the Office of Administrative Law Judges (OALJ) for reassignment to a different administrative law judge for consideration and weighing of all evidence relevant to the issue of the existence of complicated pneumoconiosis consistent with the majority's interpretation of the legal standard set forth in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 1999). *Justus v. Randy & Lisa Hurley*, BRB No. 04-0537 BLA (Feb. 16, 2005)(unpub.) (McGranery, J., dissenting). On remand, Judge Vittone denied reassignment by Order issued on July 26, 2005; denied employer's motion for reconsideration by Order issued on September 9, 2005; and assigned the case to Judge Chapman for adjudication. Employer appealed these orders to the Board, and was assigned Case No. BRB No. 05-1005 BLA.

On October 14, 2005, while employer's appeal was pending, Judge Chapman issued her decision on the merits awarding benefits, again finding invocation established at Section 718.304. Employer appealed, and was assigned Case No. 06-0152 BLA. Upon employer's motion, the Board issued an Order on December 5, 2005, consolidating the two appeals. The Board subsequently accepted employer's combined Petition for Review and brief as part of the record although filed out of time, by Order dated February 10, 2006.

In the present appeal, employer challenges Judge Vittone's denial of reassignment, and contends that Judge Chapman erred in finding the existence of complicated pneumoconiosis established pursuant to Section 718.304. Claimant has not participated in this appeal. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

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. 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 initially challenges Judge Vittone's refusal to reassign this case to a different administrative law judge in accordance with the Board's instructions on remand. While acknowledging that administrative law judges are bound by the remand instructions of the Board with regard to the merits of a claim, Judge Vittone indicated that, pursuant to 29 C.F.R. §18.25, which provides that the presiding judge at a hearing held under the Act shall be designated by the Chief Administrative Law Judge, and 5 U.S.C. §554(d) of the Administrative Procedures Act (APA), which provides, *inter alia*, that the judge who presides over reception of the evidence should issue the decision unless otherwise unavailable, Judge Vittone was required to review the Board's directive

that this claim be reassigned to another administrative law judge on remand. Order Denying Reassignment at 2; Order on Reconsideration at 2. Judge Vittone noted that "under compelling (and rare) circumstances such as apparent bias, refusal to consider or reweigh evidence as directed on remand, recalcitrance, or demonstrated disrespect for a party or appellate tribunal, claims have been transferred to other administrative law judges on remand at the request of an appellate tribunal." Order on Reconsideration at 2. However, after reviewing the Board's remand instructions, Judge Vittone declined to reassign the claim, finding that the Board did not set forth any specific examples of bias, recalcitrance, disrespect, refusal to consider evidence, or mischaracterization of evidence on the part of Judge Chapman; rather, "there is only disagreement between the administrative law judge and two members of a three member panel of the Board regarding the proper *legal interpretation* of a Fourth Circuit decision," with the dissenting panel member finding no error in Judge Chapman's decision or justification for reassignment. Order Denying Reassignment at 2. On appeal, employer contends that the OALJ lacks authority to review Board orders for validity and that Judge Vittone committed error in assigning the case to Judge Chapman in contravention of the Board's second remand order. We agree.

The Board's role is that of a quasi-judicial agency, adjudicating private rights. *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir. 1983), *cert. denied*, 462 U.S. 1119 (1983). Specifically, the Board is authorized by Congress "to hear and determine appeals raising a substantial question of law or fact taken by a party in interest from decisions with respect to claims of employees" under the Act or its extensions. 33 U.S.C. §921(b)(3). The Board performs the review function which had been performed by the United States district courts prior to 1972, *see Nacirema Operating Co. Inc. v. Benefits Review Board*, 538 F.2d 73 (3d Cir. 1976), and the relationship of the Board to the OALJ is similar to that of the United States courts of appeals to the United States district courts. The United States Court of Appeals for the Ninth Circuit has stated that an appellate court may "exercise its inherent power to administer the system of appeals and remands by ordering a case reassigned on remand. The basis for the reassignment is . . . a belief that the healthy administration of the judicial and appellate processes, as well as the appearance of justice, will best be served by such reassignment." *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir. 1986), *cert. denied*, 479 U.S. 988 (1986). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has directed reassignment to a different judge on remand for a "fresh look" at the evidence where the trial judge repeated various legal errors in weighing the evidence despite remand instructions. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323 (4th Cir. 1998).

In the present case, the panel majority did not order reassignment lightly, or question Judge Chapman's ability, integrity, or impartiality; nevertheless, the majority was convinced that reassignment was appropriate for a "fresh look" at the evidence in

view of the Board's previous instructions and Judge's Chapman's failure to apply *Scarbro* as directed therein in weighing the evidence on remand. By ordering that this case be assigned to a different administrative law judge on remand, the Board did not infringe upon the right of the Chief Administrative Law Judge to assign the case to a particular judge, but merely directed that a particular judge *should not* hear the case. *See generally United States v. Yagid*, 528 F.2d 962, 965 (2d Cir. 1976). Moreover, the Board's regulations, promulgated by the Secretary of Labor at 20 C.F.R. Part 802, explicitly mandate that "[w]here a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." 20 C.F.R. §802.405(a).

It is well settled that a lower court is required to give full effect to the execution of an appellate court's mandate, both expressed and implied, and without altering, amending or examining the mandate.[1] *See generally Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414-415 (4th Cir. 2005); *Piambino v. Bailey*, 757 F.2d 1112, 1119-1120 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). As the Board stated in *Hall v. Director, OWCP*, 12 BLR 1-80 (1988), "the United States judicial system relies on the most basic of principles, that a lower forum must not deviate from the orders of a superior forum, regardless of the lower forum's view of the instructions given it." *Hall*, 12 BLR at 1-82. Once an administrative law judge issues his or her order on remand, the case may again be appealed, and if the Board has erred, the error will be corrected by the appropriate United States Court of Appeals pursuant to 33 U.S.C. §921(c).

Based on the foregoing, we hold that the Board acted within its appellate authority in directing that a different administrative law judge adjudicate this case on remand, consistent with appellate practice and the decisions of the United States Courts of Appeals, which are charged with review of the decisions of the Board. Because Judge Vittone erred in assigning this case to Judge Chapman on remand, in contravention of the Board's instructions, we reverse the Order Denying Reassignment on Remand and the Order on Reconsideration Denying Reassignment on Remand. Hence, we must vacate Judge Chapman's Second Decision and Order, and remand the case once again for reassignment to a different administrative law judge for adjudication of the claim in accordance with our prior decisions.

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[1] Deviation from the mandate rule is permitted only in a few exceptional circumstances, which are not applicable under the facts of this case: (1) when controlling legal authority has changed dramatically; (2) when significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light; and (3) when a blatant error in the prior decision will, if uncorrected, result in a serious injustice. *See Invention Submission Corp. v. Dudas*, 413 F.3d 411, 415 (4th Cir. 2005).

Accordingly, Judge Vittone's Order Denying Reassignment on Remand and his Order on Reconsideration Denying Reassignment on Remand are reversed; Judge Chapman's Second Decision and Order on Remand Awarding Benefits is vacated; and this case is remanded for reassignment and further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge