BRB No. 09-0770 BLA

PAUL A. WILSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 08/11/2010
	)	
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Elizabeth Ashley Bruce and Ronald K. Bruce, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington D.C., for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (08-BLA-5581) of Administrative Law Judge Daniel F. Solomon awarding benefits, and denying employer's request to modify the award of benefits, on a claim filed pursuant to the provisions of the

Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a claim filed on February 7, 2003. In the initial decision, Administrative Law Judge Robert L. Hillyard credited claimant with twenty years of coal mine employment,[1] and found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Judge Hillyard further found that the medical opinion evidence established the existence of legal pneumoconiosis,[2] in the form of chronic obstructive pulmonary disease due to both smoking and coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). Judge Hillyard also found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Judge Hillyard determined that the evidence established that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, Judge Hillyard awarded benefits.

Pursuant to employer's appeal, the Board affirmed Judge Hillyard's finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[3] *Wilson v. Peabody Coal Co.*, BRB No. 06-0211 BLA (Nov. 20, 2006) (unpub.). In so holding, the Board rejected employer's argument that the administrative law judge ignored the radiological qualifications of its physicians, Drs. Wiot and Spitz. Specifically, the Board noted that there was no evidence in the record that either doctor was a Board-certified radiologist. Although the Board affirmed Judge Hillyard's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the Board vacated his finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[4] The Board instructed Judge Hillyard, on remand, to weigh all the

[1] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[2] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[3] In light of its affirmance of Judge Hillyard's finding of clinical pneumoconiosis, the Board declined to address employer's contention that he erred in finding that the medical opinion evidence established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Wilson v. Peabody Coal Co.*, BRB No. 06-0211 BLA (Nov. 20, 2006) (unpub.).

[4] No party challenged Judge Hillyard's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii).

relevant evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b). Although the Board remanded the case for reconsideration of whether the evidence established total disability pursuant to 20 C.F.R. §718.204(b), the Board affirmed Judge Hillyard's finding that claimant's disability, if any, was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

On remand, due to Judge Hillyard's unavailability, the case was reassigned, without objection, to Administrative Law Judge Joseph E. Kane. However, while the case was pending before Judge Kane, employer requested modification, alleging a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Director's Exhibit 53. In support of its request, employer submitted the full radiological qualifications of Drs. Wiot and Spitz. In response, Judge Kane remanded the case to the district director for consideration of employer's modification request.[5] Director's Exhibit 57.

The district director noted that employer's request for modification was based upon an alleged mistake in a determination of fact in a decision issued by the Office of Administrative Law Judges. Director's Exhibit 59. Consequently, the district director referred the case to the Office of Administrative Law Judges without ruling on employer's modification request. *Id.*

In a Decision and Order on Remand dated July 27, 2009, Administrative Law Judge Daniel F. Solomon (the administrative law judge) first addressed the issues identified in the Board's 2006 Decision and Order. Specifically, the administrative law judge found that the pulmonary function study evidence established the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge also found that all of the relevant evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b). In regard to employer's request for modification, the administrative law judge found that reopening this case would not render justice under the Act. Accordingly, the administrative law judge denied employer's request for modification, and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). Employer also contends that the administrative law judge erred in finding that reopening

[5] Claimant appealed Administrative Law Judge Joseph E. Kane's Order of Remand to the Board. However, the Board dismissed claimant's interlocutory appeal, holding, *inter alia*, that Judge Kane's actions would be fully reviewable after a final decision was issued. *Wilson v. Peabody Coal Co.*, BRB No. 07-0855 BLA (Sept. 12, 2007) (Order) (unpub.).

this case would not render justice under the Act. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.[6]

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Total Disability

In remanding the case, the Board instructed the administrative law judge to consider whether claimant's March 9, 2004 pulmonary function study was reliable, despite the absence of a statement of claimant's cooperation and comprehension. *Wilson*, slip op. at 5. On remand, the administrative law judge found that, given the lack of a statement of cooperation and comprehension associated with the March 9, 2004 study, claimant's qualifying pre-bronchodilator values were unreliable.[7] Decision and Order on

[6] By Order dated May 10, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Employer and the Director, Office of Workers' Compensation Programs, have responded, and they correctly state that the recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to this claim because it was filed before January 1, 2005.

[7] As further instructed by the Board, the administrative law judge explained the method that he used to determine the applicable qualifying values for a miner, such as claimant who is over the age of 71, the maximum age listed in the tables at 20 C.F.R. Part 718, Appendix B. Given claimant's advanced age, the administrative law judge permissibly utilized the qualifying values for a 71 year old miner. Decision and Order on Remand at 6; *see K.L.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40 (2008).

Remand at 6. The administrative law judge, however, found that the non-qualifying post-bronchodilator values were reliable. *Id.* In assessing all of the pulmonary function study evidence, the administrative law judge found that claimant's most recent study, a qualifying study conducted on March 26, 2005, was "dispositive in this case as it is more reflective of [c]laimant's current condition." *Id.* at 7. The administrative law judge, therefore, found that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Because employer does not challenge this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Although the administrative law judge, on remand, found that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii),[8] the administrative law judge found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found that Dr. Baker's opinion, that claimant is totally disabled by his moderate pulmonary impairment, was entitled to the greatest weight because the doctor relied upon the most recent qualifying pulmonary function study evidence.[9] Decision and Order on Remand at 9; Director's Exhibit 33. Because it is not challenged on appeal, we affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Skrack*, 6 BLR at 1-711.

Employer, however, contends that the administrative law judge failed to properly weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.204(b)(2). Employer's Brief at 22. In addressing all of the relevant evidence, the administrative law judge found that:

> [A]s a result of the preponderantly qualifying pulmonary function studies and Dr. Baker's well-reasoned opinion stating that Claimant suffers a total respiratory disability, I find that [c]laimant has successfully established total disability under 20 C.F.R. §718.204(b)(2).

Decision and Order on Remand at 9.

[8] The record does not contain any evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii).

[9] The Board previously held that it was permissible for Judge Hillyard to credit Dr. Baker's opinion that claimant is totally disabled from a pulmonary standpoint. *Wilson*, slip. op. at 6.

Regarding the contrary probative evidence of record, employer maintains that the administrative law judge did not properly perform the requisite weighing when he determined that the evidence as a whole established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer argues specifically that the administrative law judge should have explained the weight accorded to claimant's non-qualifying blood gas studies conducted on May 28, 2003 and March 9, 2004. Director's Exhibits 11, 29. Employer's contention has no merit. Because blood gas studies and pulmonary function studies measure different types of impairment, the administrative law judge was not required to find that the non-qualifying blood gas studies called into question the more recent qualifying pulmonary function study evidence, nor Dr. Baker's diagnosis of total disability. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Sweet v. Jeddo-Highland Coal Co.*, 7 BLR 1-659 (1985); *Whitaker v. Director, OWCP*, 6 BLR 1-983 (1984). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Since the Board previously affirmed the finding that all of the other elements of entitlement were established, claimant has established his entitlement to benefits.

Employer's Request for Modification

While employer may establish a basis for modification of the award of benefits by establishing either a change in conditions since the issuance of the previous decision or a mistake in a determination of fact in the previous decision, 20 C.F.R. §725.310(a); *see Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993), the burden of proof to establish a basis for modifying the award of benefits rests with employer. Claimant does *not* have the burden to reestablish his entitlement to benefits. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997). Employer, as the proponent of an order terminating an award of benefits, bears the burden of disproving at least one element of entitlement. *Id.*; *see also Branham v. BethEnergy Mines*, 20 BLR 1-27 (1996).

An administrative law judge has the authority to reconsider all of the evidence for any mistake of fact or change in conditions, *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994), but the exercise of that authority is discretionary. *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 456, 22 BLR 2-46, 2-69 (6th Cir. 1999). In this case, employer sought modification based upon a mistake in a determination of fact, namely, Judge Hillyard's determination that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[10]

[10] Employer does not seek modification based upon a change in conditions.

Judge Hillyard's Finding

In his 2005 Decision and Order, Judge Hillyard considered seven interpretations of three x-rays taken on May 28, 2003, March 9, 2004, and March 26, 2005. Judge Hillyard properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 11.

While Dr. Willgibes, a Board-certified radiologist, and Dr. Brandon, a B reader and Board-certified radiologist, interpreted the May 28, 2003 x-ray as positive for pneumoconiosis, Dr. Wiot, a B reader, according to the record at that time, interpreted this x-ray as negative for pneumoconiosis.[11] Judge Hillyard credited Dr. Brandon's positive interpretation of the May 28, 2003 x-ray over Dr. Wiot's negative interpretation, based upon his superior qualifications. 20 C.F.R. §718.202(a)(1); *see Adkins*, 958 F.2d at 52, 16 BLR at 2-65; *Sheckler*, 7 BLR at 1-131; Decision and Order at 11.

Because Drs. Repsher and Westerfield each interpreted the March 9, 2004 x-ray as unreadable, Judge Hillyard accorded the interpretations of this x-ray "no probative value." Decision and Order at 11.

While Dr. Baker, a B reader, interpreted the March 26, 2005 x-ray as positive for pneumoconiosis, Dr. Spitz, an equally qualified physician, according to the record at that time, interpreted it as negative. Because this x-ray was interpreted as positive and negative for pneumoconiosis by equally qualified physicians, Judge Hillyard found that the March 26, 2005 x-ray was "in equipoise." Decision and Order at 11.

Because there was "one positive x-ray, one unreadable x-ray, and one x-ray in equipoise," Judge Hillyard found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 12.

The Board's Affirmance of Judge Hillyard's Finding

In its appeal to the Board, employer contended that Judge Hillyard's analysis of the x-ray evidence was undermined by his failure to recognize that Drs. Wiot and Spitz, in addition to being qualified as B readers, were also Board-certified radiologists. The Board rejected this argument, noting that employer cited to no evidence in the record to support its contention that Drs. Wiot and Spitz are dually qualified physicians. *Wilson*,

[11] Dr. Barrett, a B reader and Board-certified radiologist, interpreted the May 28, 2003 x-ray for quality purposes only. Director's Exhibit 12.

slip op. at 3. The Board also held that the administrative law judge properly "excluded" the x-ray readings contained in claimant's treatment records because, *inter alia*, they failed to conform to the quality standards at 20 C.F.R. §718.102. *Id.* The Board, therefore, affirmed Judge Hillyard's finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Id.*

Employer's Arguments in Support of Its Request for Modification

Employer contended that Judge Hillyard's finding that the x-ray evidence established the existence of clinical pneumoconiosis was based upon a mistake in a determination of fact with respect to the radiological qualifications of Drs. Wiot and Spitz. In support of its request for modification, employer submitted evidence documenting that Drs. Wiot and Spitz are each dually qualified as a B reader and a Board-certified radiologist.[12] Director's Exhibit 53.

The Administrative Law Judge's Finding

In this case, the administrative law judge determined that reopening this claim would not render justice under the Act. In making this determination, the administrative law judge explained that he was influenced, *inter alia*, by employer's lack of diligence in submitting evidence of its physicians' radiological qualifications, and by employer's improper motives in requesting modification. Decision and Order on Remand at 11.

Render Justice Under The Act

Although an administrative law judge may find a mistake in a determination of fact, the administrative law judge must ultimately determine whether reopening a claim will render justice under the Act. *O'Keeffe, v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1971). In *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), the Board held that "while [an] administrative law judge has the authority to reopen a case based on any mistake in fact, [an] administrative law judge's exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw*, 33 BRBS at 72, *citing Washington Society for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991).

Those courts, which have addressed the issue, have recognized that an adjudicator,

[12] Employer also submitted evidence documenting that Dr. Sellers is a B reader and Board-certified radiologist. Director's Exhibit 53. Dr. Sellers interpreted a March 9, 2004 CT scan as negative for pneumoconiosis. Director's Exhibit 29-8.

in considering whether to reopen a claim, must exercise the discretion granted under 20 C.F.R. §725.310 by assessing any factors relevant to the rendering of justice under the Act.[13] *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*] , 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33 (2008). These relevant factors include the need for accuracy, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *Id.*

Employer's Lack of Diligence

The administrative law judge found that employer "showed a lack of diligence from the beginning of this claim when it disregarded – either through ignorance or indifference – the well established rule that a party must prove the credentials of its experts." Decision and Order on Remand at 11. The administrative law judge found that employer failed to take advantage of several opportunities to "cure its mistake," noting that employer "should have realized the significance of submitting Dr. Wiot's credentials after the [d]istrict [d]irector issued [his] Proposed Decision and Order on January 21, 2004." *Id.* at 11-12. The administrative law judge observed that employer also failed to correct the record by submitting Dr. Wiot's qualifications when the case was before Judge Hillyard. *Id.* at 12. In fact, the administrative law judge noted that employer "repeated [its] offense" by submitting a negative x-ray interpretation by Dr. Spitz to the administrative law judge without evidence of his dual qualifications. *Id.*

Employer argues that a modification request cannot be denied solely "on the basis that the evidence may have been available at an earlier stage in the proceeding." Employer's Brief at 12, *citing Hilliard*, 292 F.3d at 546, 22 BLR at 2-452. However, in *Kinlaw*, the Board recognized that the interest in arriving at the "correct" result does not always override the interest in finality. *Kinlaw*, 33 BRBS at 73. The Board held that:

> the language of Section 22 itself . . . and the judicial interpretations of the "mistake in fact" provision clearly demonstrate the discretionary nature of reopening, and that in deciding whether to reopen a case, the administrative law judge should consider whether reopening will render justice under the Act, a consideration which requires a weighing of competing equities. The Board will review the administrative law judge's findings in this regard under the abuse of discretion standard.

[13] Given the relative lack of guidance provided by the Sixth Circuit in addressing whether reopening a case renders justice under the Act, the administrative law judge found "persuasive authority in the other circuits and . . . recent Board decisions to be helpful." Decision and Order on Remand at 10 n.7.

Kinlaw, 33 BRBS at 73 (citations omitted). In this case, the administrative law judge acknowledged that "a petition for modification should not be denied solely because new evidence submitted to prove a mistake could have been submitted during the original hearing." Decision and Order on Remand at 12. However, the administrative law judge explained that employer's failure to submit its evidence in the prior proceedings was not the only factor at issue in this case:

> The nature of the evidence omitted and the repeated disregard of opportunities to submit the evidence despite clear indication from the tribunals of its importance cannot be ignored. . . . While I am not insensitive to the [e]mployer's predicament, at some point, . . . a party must be bound by the actions of its freely chosen attorney. Fostering this type of behavior, from either the parties or their attorneys, would defeat the purpose of the Act in administering efficient, and most importantly, accurate distributions of benefits.

Decision and Order on Remand at 13 (case citation omitted).

The facts here – where the employer failed to submit critical evidence, then attempted to use modification to correct the oversight – are similar to those in *Kinlaw*, where the Board upheld the administrative law judge's finding that reopening the claim would not render justice under the Act, because the employer there was attempting to correct its own mistake in failing to develop its expert's testimony in the initial litigation. *Kinlaw*, 33 BRBS at 73-75. Detecting no abuse of discretion, we affirm the administrative law judge's finding that employer exhibited a lack of diligence in establishing the radiological qualifications of its experts.

Employer's Motive for Requesting Modification

The administrative law judge also found that employer had an improper motive in requesting modification. Specifically, the administrative law judge found that employer sought modification, not in order to correct a mistake in a determination of fact, but to remedy its own failure to timely submit the radiological qualifications of its experts, *i.e.*, its own litigation mistake. The administrative law judge found that it was not in the interest of justice to allow employer to correct its own mistake of belatedly submitting the radiological qualifications of Drs. Wiot and Spitz. Decision and Order on Remand at 13; *see Wolf Creek Collieries v. Sammons*, 142 F. App'x 854 (6th Cir. June 9, 2005) (unpub.) (recognizing that evidence that could and should have been obtained earlier is not "new evidence"). The administrative law judge acted within his discretion in determining that employer's motive in seeking modification was improper.

Given the two valid bases provided by the administrative law judge for his finding (employer's lack of diligence in presenting its evidence, and employer's improper motive in seeking modification), we hold that administrative law judge did not abuse his discretion in determining that reopening this case would not render justice under the Act.[14] *Kinlaw*, 33 BRBS at 73. We, therefore, affirm the administrative law judge's denial of employer's request for modification. 20 C.F.R. §725.310.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits, and denying employer's request for modification, is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[14] Given the fact that the administrative law judge provided two permissible bases in support of his finding that reopening the case would not render justice under the Act, we decline to address a third basis that the administrative law judge provided, namely, that the miner's claim would have been meritorious even if the full radiological qualifications of Drs. Wiot and Spitz had been considered.