BRB No. 11-0798 BLA

DENNY NEACE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ADENA PROCESSING CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 08/29/2012
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification and Order Denying Employer's Motion for Reconsideration to Vacate Decision and to Recuse of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

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/carrier (employer) appeals the Decision and Order Denying Request for Modification and Order Denying Employer's Motion for Reconsideration to Vacate Decision and to Recuse (09-BLA-5050) of Administrative Law Judge Theresa C. Timlin on a subsequent 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*)).[1] Claimant's prior claim for benefits, filed on December 27, 1999, was finally denied on October 8, 2002, because claimant failed to establish any element of entitlement. Director's Exhibit 1. On April 2, 2004, claimant filed his current claim, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of his previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

On December 6, 2004, the district director awarded benefits. Director's Exhibit 44. Employer challenged the award, and declined to pay benefits. Director's Exhibit 45. Therefore, the Black Lung Disability Trust Fund (the Trust Fund) began paying interim benefits to claimant.

At employer's request, the claim was forwarded to the Office of Administrative Law Judges for a hearing. In the initial decision, issued on March 5, 2007, Administrative Law Judge Paul H. Teitler credited claimant with twelve years of coal mine employment[2] pursuant to the parties' stipulation, and adjudicated the claim pursuant to the regulatory provisions at 20 C.F.R. Part 718. Director's Exhibit 77. Judge Teitler found that the medical evidence developed since the prior denial of benefits established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[3]

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not affect this case, as it involves a miner's claim filed before January 1, 2005.

[2] 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, 1-202 (1989)(en banc).

[3] A finding of either clinical pneumoconiosis or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to

and thus established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Considering the merits of entitlement, Judge Teitler found that the evidence established the existence of clinical and legal pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b). Judge Teitler further found that claimant is totally disabled and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, Judge Teitler awarded benefits. Director's Exhibit 77.

Employer appealed Judge Teitler's decision to the Board, but its appeal was dismissed as untimely. Director's Exhibit 80. Employer then filed a petition for modification with the district director, alleging a mistake in a determination of fact, pursuant to 20 C.F.R. §725.310. Director's Exhibit 84.

During the modification proceedings, employer declined repeated requests from the district director to assume payment of benefits, and to reimburse the Trust Fund for interim benefits and medical benefits paid to claimant by the Trust Fund. Employer requested a hearing on the medical benefits issue. Director's Exhibit 129. On October 8, 2008, the district director consolidated employer's modification request and the payment of medical benefits dispute and forwarded the case to the Office of Administrative Law Judges, where it was assigned, without objection, to Administrative Law Judge Theresa C. Timlin (the administrative law judge) for a hearing on all contested issues. Director's Exhibits 130-132.

Prior to the hearing, claimant moved to dismiss employer's request for modification, on the grounds that modification would not "render justice under the Act." Additionally, employer moved to remand the medical benefits dispute to the district director, asserting that the issue was not ripe for resolution while its modification petition was being adjudicated.

The administrative law judge held a hearing on December 8, 2009. Following the hearing, the record was held open for the submission of briefs addressing employer's right to seek modification, and briefs addressing the "medical issues of entitlement." Further, on January 6, 2011, the administrative law judge held a telephone conference to

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that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

discuss her ethical concerns regarding certain actions taken by employer's counsel in refusing to pay medical bills submitted to employer.

In a decision dated June 8, 2011, the administrative law judge conducted a *de novo* review of the record, including both the original evidence and the new evidence submitted by the parties on modification, and found that employer did not establish a mistake in a determination of fact. The administrative law judge further found that, assuming a mistake in fact had been established, modification of the prior award would not render justice under the Act. The administrative law judge also denied employer's request for a remand on the medical benefits issue, and ordered employer to reimburse the Trust Fund for medical benefits. Finally, the administrative law judge concluded that the actions of employer's counsel in refusing to pay medical bills submitted to employer did not constitute a reportable ethical offense. Accordingly, the administrative law judge denied employer's request for modification pursuant to 20 C.F.R. §725.310, upheld the award of benefits, and ordered employer to reimburse the Trust Fund for all black lung benefits paid in connection with this claim, all medical benefits determined payable by the district director in its August 6, 2008 Notice of Determination, plus interest, and all appropriate payments made since that date.

Employer requested reconsideration, asserting that the administrative law judge erred in denying its request for modification, and failed to afford employer an opportunity to submit evidence to support its position that certain medical bills were not for the treatment of pneumoconiosis. Employer further asserted that the administrative law judge's questioning of employer's counsel's conduct indicated bias against employer, and requested that the administrative law judge recuse herself from this case. By Order dated August 5, 2011, the administrative law judge denied employer's requests for reconsideration and for recusal.

On appeal, employer contends that the administrative law judge was biased against employer's counsel and should have recused herself from this case. Employer also challenges the administrative law judge's denial of modification, arguing that the weight of the evidence of record is insufficient to support a finding of pneumoconiosis or disability causation at 20 C.F.R. §§718.202(a), 718.204(c). Finally, employer challenges the administrative law judge's determinations that modification of the prior award would not render justice under the Act, and that employer must reimburse the Trust Fund for medical benefits. Claimant responds, urging affirmance of the award of benefits in all respects. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's determination that employer is liable for medical benefits. In a combined reply brief, employer reiterates its previous contentions.

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).

First, we address employer's contention that the administrative law judge's determination to hold a telephone conference on January 6, 2011, to discuss a letter written by employer's counsel to claimant's treating physician, evinced bias against employer. Employer contends that this bias tainted all of the administrative law judge's rulings, and deprived employer of fair adjudication, such that the administrative law judge should have recused herself from this case.

At the telephone conference, in which employer's counsel, claimant's counsel, and counsel for the Director participated, the administrative law judge stated that a July 24, 2008 letter written by employer's counsel to claimant's treating physician, Dr. Chaney, gave her "great concern" about employer's counsel's intentions in writing the letter. Telephone Conference Tr. at 3, 5. In the letter, employer's counsel stated that Dr. Chaney miscoded his treatment for chronic bronchitis, chronic obstructive pulmonary disease (COPD), and asthma as treatment for "pneumoconiosis." Director's Exhibit 124. Employer's counsel wrote, "You may not simply code everything as pneumoconiosis. Employer will not pay bills that are miscoded, and it is not responsible for bills simply because you code them as treatment for ICD 500." Director's Exhibit 124. Counsel added, "We also wish to point out to you that intentionally miscoding a bill to obtain payment from the United States may be a federal crime." Director's Exhibit 124.

The administrative law judge explained that, under the facts of this case, in which benefits had been awarded by Judge Teitler, she questioned whether employer's counsel misled Dr. Chaney by suggesting to him that treatment for chronic COPD and asthma related to coal mine dust exposure would not be treatment for pneumoconiosis. Telephone Conference Tr. at 9. The administrative law judge also explained that she was concerned that employer's counsel had referred to possible criminal charges in order to intimidate the doctor. The administrative law judge stated that either scenario would be a violation of the D.C. Rules of Professional Conduct, and indicated that she scheduled the conference call "looking for guidance" from the parties as to whether employer's counsel's conduct constituted a reportable disciplinary action. Telephone Conference Tr. at 11. The administrative law judge allowed the parties thirty days to submit written statements outlining their positions. Telephone Conference Tr. at 11. Claimant and employer submitted briefs.

Employer's counsel asserted that he made no false statements to Dr. Chaney, and that no threat was implied. Claimant's counsel asserted that, because he was copied on

the letter to Dr. Chaney and was able to confer with the physician regarding its content, employer's counsel did not commit a reportable offense. After considering the parties' responses, the administrative law judge concluded that, while she was not persuaded by employer's counsel's arguments, she agreed with claimant's counsel that employer's counsel did not commit a reportable offense.

On appeal, employer asserts that, by raising her concerns regarding the letter to Dr. Chaney, in a telephone conference, the administrative law judge "ambushed" employer's counsel with "accus[ations] . . . of ethical lapses on the record, with no notice" and that "[o]nly after springing these accusations, did the [administrative law judge] request that the parties address her 'grave concern' that the conduct ran afoul of various rules of professional conduct." Employer's Brief at 15, 17. Employer contends that the administrative law judge's actions and words "went far beyond frustration or impatience," Employer's Brief at 17, that they "are personal and impugn [employer's] counsel's ethical and professional competence without cause," Employer's Brief at 26, and "do not reflect the fair, impartial or unbiased adjudication that the [Administrative Procedure Act] provides to all parties." Employer's Brief at 26. We disagree.

Addressing judicial bias, the United States Supreme Court has held:

> Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555 (1994). This standard is applicable to administrative hearings. *Beiber v. Dep't of the Army*, 287 F.3d 1358, 1361 (Fed. Cir. 2002). In addition, the United States Court of Appeals for the Sixth Circuit has held that judicial recusal must be predicated on extrajudicial conduct rather than on judicial conduct, and on a personal bias arising out of the judge's background and association, and "not from the judge's view of the law." *Consolidated Rail Corp. v. Yashinsky*, 170 F.3d 591, 597 (6th Cir. 1999). Further, "[a] court's statement to counsel that indicates frustration with counsel's behavior is not enough to establish bias or prejudice." *Yashinsky*, 170 F.3d at 597. Finally, the Board has held that charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992).

In the instant case, employer has not met its burden to establish bias or prejudice. While employer points to actions and statements by the administrative law judge that it believes indicate personal bias against employer's counsel, none of these actions or

statements indicates any bias arising from interaction outside the context of this case. Rather, the statements all concern employer's counsel's conduct in the case, and the administrative law judge's view of the law. Nothing in the tone or tenor of the administrative law judge's Decision and Order, or Order on Reconsideration indicates that she retains "a deep seated favoritism or antagonism" that made it impossible for her to render a fair judgment of the issues presented in this case. *Liteky*, 510 U.S. at 555. Nor has employer shown how initiating a discussion on the record among the parties about possible unprofessional conduct by employer's counsel, and then allowing the parties an opportunity to brief the issue, calls into question the administrative law judge's impartiality. Moreover, the administrative law judge ultimately concluded that employer's counsel did not commit a reportable ethical offense. Thus, employer has failed to demonstrate that the administrative law judge was biased against it. *See Liteky*, 510 U.S. at 555; *Beiber*, 287 F.3d at 1361.

Turning to the merits of employer's petition for modification, under Section 22 of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), the fact-finder may, on the ground of a change in conditions or because of a mistake in a determination of fact, reconsider the terms of an award or denial of benefits. See 20 C.F.R. §725.310. The intended purpose of modification based on a mistake in a determination of fact is to vest the fact-finder "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." *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). As the proponent of the request for modification, employer bears the burden to demonstrate a mistake in a determination of fact, as required by 20 C.F.R. §725.310. *Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Employer asserts that the administrative law judge erred in crediting Dr. Baker's opinion, that claimant's disabling COPD is due in part to coal mine dust exposure, at 20 C.F.R. §§718.202(a)(4), 718.204(c), over the contrary opinion of Dr. Rosenberg, submitted by employer on modification, that claimant's obstructive lung disease is due to entirely to cigarette smoke-induced emphysema and asthma.

Initially, we reject employer's assertion that the administrative law judge erred in discounting Dr. Rosenberg's opinion. Employer's Brief at 20-21, 23-25. In explaining the basis for his opinion that claimant's emphysema is unrelated to coal mine dust

exposure, Dr. Rosenberg stated, in part, that emphysema related to coal mine dust is associated with parenchymal scar tissue formation, which would be visible on a computerized tomography (CT) scan. Employer's Exhibit 8 at 15-16. After reviewing Dr. Wiot's readings of two CT scans dated September 20, 2004 and May 6, 2008, Dr. Rosenberg concluded that the lack of CT scan evidence of parenchymal scarring associated with claimant's emphysema was one basis for concluding that claimant's emphysema was not associated with coal mine dust exposure. Employer's Exhibit 8 at 16. As the administrative law judge observed, however, Dr. Wiot opined that the May 6, 2008 high resolution CT scan revealed the presence of both centrilobular emphysema and "bilateral apical pleural parenchymal scarring," Employer's Exhibit 6, and Dr. Rosenberg did not address this discrepancy. Decision and Order at 11; Decision and Order on Reconsideration at 3. The administrative law judge therefore concluded, as was within her discretion, that Dr. Rosenberg did not sufficiently explain how he eliminated the miner's twelve years of coal mine dust exposure as a source of his COPD, in concluding that claimant does not suffer from legal pneumoconiosis. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge, therefore, properly discounted the opinion of Dr. Rosenberg. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

As the administrative law judge provided a valid reason for discounting the opinion of Dr. Rosenberg, the only medical opinion submitted by employer on modification,[4] we affirm her finding that employer failed to establish a mistake in the prior determination of fact that claimant established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). We, therefore, need not address employer's additional allegations of error regarding the administrative law judge's evaluation of Dr. Baker's opinion, submitted by claimant in response to employer's modification petition. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Employer next asserts that the administrative law judge erred in granting claimant the benefit of the presumption at 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of his coal mine employment. Decision and Order at 12; Order on Reconsideration at 2; Employer's Brief at 23. Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203(c), as her

[4] Employer does not challenge the administrative law judge's finding that there was no mistake in a determination of fact in Judge Teitler's evaluation of the medical evidence that was initially submitted by the parties. Decision and Order at 17.

finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 11. Therefore, any error by the administrative law judge in finding that claimant also established that his legal pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b), is harmless. We, therefore, reject employer's argument to the contrary. Employer's Brief at 23.

To the extent that employer challenges the administrative law judge's finding that there was no mistake in the prior determination that legal pneumoconiosis is a substantially contributing cause of claimant's total disability, pursuant to 20 C.F.R. §718.204(c), employer's argument lacks merit. The same reasons the administrative law judge gave for discrediting the opinion of Dr. Rosenberg, that claimant does not suffer from legal pneumoconiosis, also undercut his opinion that claimant's impairment is unrelated to his coal mine employment. *See Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 16-17; Decision and Order on Reconsideration at 3; Employer's Brief at 20-21, 23-25. Because the opinion of Dr. Rosenberg is the only opinion submitted on modification that is supportive of a finding that claimant's pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish a mistake in the prior determination of fact, pursuant to 20 C.F.R. §718.204(c).

Employer raises no other arguments with respect to the merits of the administrative law judge's weighing of the medical evidence submitted on modification. Because employer, as the proponent of the request for modification, has failed to demonstrate a mistake in a determination of fact, as required by 20 C.F.R. §725.310, we affirm the administrative law judge's denial of modification.

Employer also asserts that the administrative law judge erred in denying its request for modification of the award of benefits on the alternative basis that modification would not render justice under the Act. Employer's Brief at 18. Contrary to employer's argument, the administrative law judge's determination that there was no mistake of fact in Judge Teitler's award of benefits obviated the need to determine whether granting modification of the award would render "justice under the Act." Decision and Order at 18. We, therefore, need not address employer's challenge to the administrative law judge's alternative finding that, assuming employer could establish a mistake in the prior award, justice would not be served by allowing employer to relitigate the claim. Employer's Brief at 18-20.

We next address employer's contentions that the administrative law judge erred in finding that employer is liable for the payment of monthly benefits and medical benefits to claimant, and for reimbursement to the Trust Fund of benefits paid to claimant on

employer's behalf. Employer's Brief at 22, 25-26. In her Decision and Order, the administrative law judge noted that employer had not yet commenced paying benefits, contending that it was not required to do so because its modification petition prevented Judge Teitler's Decision and Order awarding benefits from becoming final. Decision and Order at 19. Contrary to employer's contention, the administrative law judge properly found that benefits under the Act shall be paid when they become due, which is after an "effective order" requiring payment has been issued by a district director, administrative law judge, the Board, or a court. 20 C.F.R. §725.502(a)(1); Decision and Order at 19. The regulations further provide that an administrative law judge's decision shall become "effective" when filed in the office of the district director, and "unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the Order shall become final at the expiration of the 30th day after such filing." 20 C.F.R. §725.479(a). A modification request does not affect the finality of a Decision and Order . *See* 20 C.F.R. §725.310; *Westmoreland Coal Co. v. Sharpe*, No. 10-2327, 2012 WL 3553629, at *12 (4th Cir., Aug. 20, 2012). Rather, an employer may only avoid paying benefits during the pendency of an appeal or modification proceeding by seeking a stay by the Board or appropriate court. 20 C.F.R. §725.502(a)(1).

Here, as the administrative law judge properly found, employer failed to contest Judge Teitler's decision within thirty days as required by 20 C.F.R. §725.479(a), *see* Director's Exhibit 80, nor was the payment of benefits stayed by the Board or an appropriate court, pursuant to 20 C.F.R. §725.502(a)(1). Thus, we affirm the administrative law judge's determination that the Trust Fund is entitled to reimbursement, with interest, of all black lung benefits paid to claimant pursuant to 20 C.F.R. §725.608(b).

We further reject employer's contention that the administrative law judge erred in ordering employer to pay claimant's medical benefits. The administrative law judge properly found that a miner who is eligible for black lung benefits is also entitled to medical benefits, payable by the responsible operator. 20 C.F.R. §725.701(f); Decision and Order at 20. Recoverable costs are those related to the miner's treatment for pneumoconiosis. If the miner is treated for a pulmonary disorder, there is a rebuttable presumption that such disorder is caused or aggravated by pneumoconiosis. 20 C.F.R. §725.701(e); Decision and Order at 20. The administrative law judge correctly noted that the district director submitted claimant's treatment records and prescriptions to a pulmonary consultant, Dr. Miller, for review, and followed Dr. Miller's recommendations as to which medications were not associated with the treatment of COPD or pneumoconiosis and thus should not be billed to employer. Decision and Order at 21; Director's Exhibit 122. The administrative law judge thus found that the district director made a thorough and reasoned determination of medical benefits due, based on the opinions of Dr. Chaney, claimant's treating physician, and Dr. Miller, the pulmonary consultant. The administrative law judge further found that employer submitted no

medical evidence to rebut the presumption that the claimed expenses were incurred for the treatment of pneumoconiosis. Therefore, the administrative law judge concluded that employer is liable for reimbursing the Trust Fund for medical benefits in the amount of $34,522.87, as set forth in the district director's August 6, 2008 Notice of Determination, plus interest. Decision and Order at 21. The administrative law judge further found that employer is also liable for reimbursement of any medical benefits accrued since Dr. Miller's review, provided those charges are consistent with Dr. Miller's findings or are found compensable by another independent consultant. Decision and Order at 21.

On appeal, employer asserts that the administrative law judge erred in adjudicating the medical benefits dispute without providing employer a hearing on the issue. Employer's Brief at 22. Employer contends that the administrative law judge denied employer "the opportunity to contest the medical bills previously at issue or that had accrued after [the Department of Labor's] consultant issued his report in 2008." Employer's Brief at 22. Employer's contentions lack merit.

As the Director asserts, and as the administrative law judge found in her Order on Reconsideration, the record reflects that the district director repeatedly demanded payment of medical benefits from employer, Director's Exhibits 96, 99, 108, 112, 115, 116, 119, 121, and indicated that the payment of medical benefits was a contested issue when the case was forwarded to the Office of Administrative Law Judges for a hearing. Director's Exhibit 132. Thus, the administrative law judge correctly concluded that employer was on notice that medical benefits were at issue, and that the issue of medical benefits would be before the administrative law judge at the hearing.[5]

In addition, employer received ample opportunity to submit medical evidence contesting its liability for medical benefits. The district director repeatedly provided employer the opportunity to submit medical evidence in support of its refusal to pay medical benefits. Director's Exhibits 111, 112. Employer declined to submit medical evidence, and instead asserted, incorrectly, that the request for payment was premature because the issue of claimant's entitlement to benefits was not finally adjudicated. Director's Exhibits 108 at 11, 114, 117, 120, 123, 124, 128, 129. Moreover, when the administrative law judge raised the issue of medical benefits during the December 8, 2009 hearing, employer again asserted, incorrectly, that the issue was not ripe for adjudication. Hearing Tr. at 20-21. Following the hearing, by Order dated March 29, 2010, the administrative law judge provided employer an opportunity to submit

[5] Employer concedes that the district director consolidated its request for a hearing on the issue of medical benefits with its request for a hearing on the issue of modification, and "sent them to an [administrative law judge] for a hearing." Employer's Brief at 2-3.

additional briefing on the "medical issues of entitlement" in this claim, but employer did not address the issue of claimant's entitlement to medical benefits.

Thus, substantial evidence supports the administrative law judge's finding that employer had ample opportunity to submit medical evidence and argument contesting the medical bills "previously at issue" when the case was before the district director, and before the administrative law judge, yet declined to do so. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 21; Order on Reconsideration at 3; Employer's Brief at 22. Moreover, the administrative law judge found that employer is liable for reimbursement of any medical benefits accrued since Dr. Miller's 2008 review, "provided those charges are consistent with Dr. Miller's findings or are found compensable by another independent reviewer." Decision and Order at 21; Order on Reconsideration at 4. Thus, there is no merit to employer's contention that the administrative law judge denied employer "the opportunity to contest the medical bills . . . that had accrued after [the Department of Labor's] consultant issued his report in 2008." Employer's Brief at 22. Therefore, we affirm the administrative law judge's determination that employer is liable for medical benefits in the amount of $34,522.87, as set forth in the district director's August 6, 2008 Notice of Determination, plus interest.

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification and Order Denying Employer's Motion for Reconsideration to Vacate Decision and to Recuse are 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