BRB No. 04-0591 BLA

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<tr><td>RENEVA HALCOMB
(Widow of ARNOLD L. HALCOMB)

Claimant-Respondent

v.

TRACY COAL COMPANY,
INCORPORATED

Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>DATE ISSUED: 02/14/2005

DECISION and ORDER</td></tr>
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Appeal of the Decision and Order on Remand - Denying Modification of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sandra L. Mayes, Worcester, Massachusetts, for claimant.

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

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 - Denying Modification (2000-BLA-0001) of Administrative Law Judge Rudolf L. Jansen rendered 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).[1] The miner filed this claim for benefits on March 5, 1980 and benefits were ultimately awarded. Director's Exhibits 1, 36, 38-40. His claim, which is now pending on employer's request for modification pursuant to 20 C.F.R. §725.310 (2000), is before the Board for the fourth time. The Board's prior decision in *Halcomb v. Tracy Coal Co.,* BRB No. 01-0392 BLA (Jan. 10, 2002)(unpub.), contains a full procedural history of the case. *Halcomb*, slip op. at 2-3. We now address the procedural aspects relevant to the administrative law judge's decision to deny employer's request for modification.

In a Decision and Order on Remand Awarding Benefits issued on July 1, 1993, Administrative Law Judge Bernard L. Gilday, Jr. found that the miner established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §410.490(b)(1)(i) and that employer did not establish rebuttal of the presumption by any method provided at 20 C.F.R. §727.203(b). Accordingly, Judge Gilday awarded benefits. Director's Exhibit 36.

Upon consideration of employer's appeal, the Board affirmed Judge Gilday's award of benefits. *Halcomb v. Tracy Coal Co.,* BRB No. 93-2314 BLA (Aug. 11, 1994)(unpub.); Director's Exhibit 38. The Board denied employer's two successive motions for reconsideration. Director's Exhibits 39, 40. Employer then filed an appeal, which the United States Court of Appeals for the Sixth Circuit dismissed as untimely.[2] *Halcomb v. Tracy Coal Co*., No. 97-4355 (6th Cir. Oct. 30, 1998); Director's Exhibit 41.

On March 24, 1999, employer filed a timely petition for modification pursuant to 20 C.F.R. §725.310 (2000), alleging that "there was a mistake of fact in the determination that Arnold Halcomb was totally disabled due to pneumoconiosis during his life." Director's Exhibit 43. Employer submitted a medical report by Dr. Tuteur in support of

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[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] The miner's coal mine employment occurred in Kentucky. Director's Exhibit 2. 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*).

its contention. Director's Exhibit 47. The district director denied employer's petition for modification and upon employer's request, forwarded the case to the Office of Administrative Law Judges for a hearing. Director's Exhibits 51-53. When the parties appeared before Administrative Law Judge Rudolf L. Jansen on May 18, 2000, he declined to admit into evidence additional medical reports and testimony from Drs. Broudy and Powell that employer proffered, and he postponed the hearing. Subsequently, the administrative law judge issued a Decision and Order in which he found that it did not render justice under the Act to hold a hearing or reconsider the award of benefits based upon employer's allegation of a mistake. Accordingly, the administrative law judge denied employer's request for modification.

Upon review of employer's appeal, the Board vacated the administrative law judge's Decision and Order and remanded the case for him to hold a hearing on employer's request for modification. *Halcomb*, slip op. at 4. The Board further instructed the administrative law judge:

> [E]mployer broadly alleged that there was a mistake of fact in the determination that the miner had pneumoconiosis and was totally disabled by it and employer submitted evidence in support of its assertion. Director's Exhibit 43. Based upon the Sixth Circuit's holding in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), once a party files a request for modification, no matter the grounds stated, if any, the administrative law judge has the duty to reconsider all of the evidence of record to determine if it demonstrates a mistake of fact or change in conditions.

Halcomb, slip op. at 4-5. Finally, the Board held that the administrative law judge could consider whether modifying the award of benefits would render justice under the Act. The Board instructed him that, in making this assessment, he "should consider whether the party seeking modification . . . has engaged in recalcitrant, dilatory, or egregious conduct which the party is improperly seeking to rectify in the modification proceeding." *Halcomb*, slip op. at 5.

On remand, the administrative law judge held a hearing at which employer again proffered the reports and testimony of Drs. Broudy and Powell. Tr. at 11. Claimant objected that employer's evidence was cumulative and that it would not render justice under the Act to consider it because employer could have submitted the evidence earlier. Tr. at 12. The administrative law judge withheld ruling on claimant's objection and proceeded with the hearing. Tr. 16.

On April 10, 2003, the administrative law judge issued an order excluding employer's new evidence submitted at the hearing because he found that finality concerns

prevailed. The administrative law judge noted that the Board instructed him to consider whether reopening the claim would render justice under the Act by inquiring whether employer was misusing modification to rectify recalcitrant, dilatory, or egregious conduct. The administrative law judge, however, stated that he preferred an "interest of justice" standard that gave greater weight to finality in deciding whether to reopen the claim.[3] Applying an "interest of justice" standard, the administrative law judge noted that employer's new evidence came nine years after the miner's death and twenty years after the claim filing. The administrative law judge found that employer did not explain "why the evidence was not developed earlier." Order at 7. The administrative law judge noted further that employer had the opportunity to advance arguments in the original adjudication but failed to timely appeal to the Sixth Circuit. The administrative law judge additionally noted that there was no egregious or fraudulent conduct by claimant. The administrative law judge concluded that "the need for finality clearly outweighs any other considerations under these circumstances," and excluded Employer's Exhibits 1 through 4.[4] *Id.* The administrative law judge denied employer's motion for reconsideration.

On April 14, 2004, the administrative law judge issued his Decision and Order on Remand - Denying Modification. The administrative law judge found initially that because pneumoconiosis is an irreversible disease, the change in conditions ground for modification was unavailable to employer. Reviewing the original evidence plus Dr. Tuteur's report, the administrative law judge found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §410.490(b)(1)(i), and that employer did not establish rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b). The administrative law judge concluded that "as I have found no mistake in a determination of fact, I need not reopen the record nor determine whether to do so would render justice under the Act." Decision and Order at 23.

On appeal, employer contends that the administrative law judge applied an incorrect legal standard in considering its modification request and erred in excluding new evidence that employer proffered on modification. Employer alleges further that the administrative law judge erred in his analysis of the medical evidence. Claimant

[3] The administrative law judge quoted the dissenting opinion of Judge Diane P. Wood in *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002).

[4] The administrative law judge also denied employer's motion to compel claimant to sign an authorization permitting employer to review the miner's medical records. Employer does not challenge this aspect of the administrative law judge's order on appeal.

responds, urging affirmance of the administrative law judge's denial of modification. The Director, Office of Workers' Compensation Programs (the Director), responds, and concurs with employer's contention that the administrative law judge did not properly consider employer's modification request. Employer has filed a reply brief reiterating its 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).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922 (the statute underlying 20 C.F.R. §725.310), provides in part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation . . . review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation . . . .

The Sixth Circuit court has explained that "by its plain language, 33 U.S.C. §922 is a broad reopening provision that is available to employers and employees alike." *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825, 22 BLR 2-305, 2-310 (6th Cir. 2001). When a request for modification is filed, "[t]he fact-finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence for any mistake in fact or change in conditions," *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 743, 21 BLR 2-203, 2-210 (6th Cir. 1997), including whether "the ultimate fact (disability due to pneumoconiosis) was wrongly decided . . . ." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Employer and the Director contend that the administrative law judge did not properly consider employer's modification request. This contention has merit. The Board remanded this case to the administrative law judge with instructions to conduct a *de novo* review of the record to determine whether employer established a mistake in a determination of fact or change in conditions pursuant to Section 725.310 (2000). On remand, however, the administrative law judge found at the threshold that it was not in the "interest of justice" to consider whether employer's new evidence proffered at the

hearing demonstrated a mistake of fact because employer should have submitted it earlier. The administrative law judge's approach was inconsistent with the Board's instruction and with the above cited authorities recognizing that the modification provision generally displaces finality. Therefore, we must vacate the administrative law judge's Decision and Order on Remand - Denying Modification and remand this case for him to consider all evidence for any mistake of fact, including the ultimate fact of entitlement, and for a change in conditions.[5] *Worrell*, 27 F.3d at 230, 18 BLR at 2-296. Employer in this case bears the burden of persuasion. *Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). The administrative law judge retains the discretion to then consider whether reopening this claim will render "justice under the [A]ct." *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-108 (6th Cir. 1982); *accord Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002).

In the interest of judicial economy, we briefly address a few of the issues raised by employer concerning the administrative law judge's analysis of the medical evidence. Contrary to employer's contention, the administrative law judge in this case did not mechanically rely on a "presumption of progressivity" to credit the most recent x-rays pursuant to 20 C.F.R. §410.490(b)(1)(i). Employer's Brief at 19. Rather, he found that the pattern of the x-rays in this case--early x-rays found negative followed four years later by two uncontradicted positive x-rays--was consistent with progressive pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). On remand, the administrative law judge may rely on the principle that pneumoconiosis may progress, where the evidence is consistent with that principle. *Woodward*, 991 F.2d at 319-20, 17 BLR at 2-84-85; *see also Parsons v. Wolf Creek Collieries*, 23 BLR 1-32, 1-34-35 (2004)(*en banc*)(McGranery, J., concurring and dissenting); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-25-27 (2004)(*en banc*). Employer's contention that the administrative law judge's analysis of Dr. Tuteur's opinion cannot be affirmed has merit. On remand, the administrative law judge should explain the factual basis for his inference that Dr. Tuteur's diagnosis of no "clinically significant, physiologically significant, or radiographically significant coal workers pneumoconiosis or any other coal mine dust-induced disease process" constitutes a diagnosis of pneumoconiosis.[6]

[5] The administrative law judge should bear in mind that the party seeking modification may attempt to prove "a change in condition[s] other than recovery from pneumoconiosis." *Plesh v. Director, OWCP*, 71 F.3d 103, 109, 20 BLR 2-30, 2-41 (3d Cir. 1995).

[6] In view of our disposition of this case, employer's argument that the administrative law judge violated employer's due process rights by excluding its modification evidence is moot.

Director's Exhibit 47; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

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

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