BRB No. 01-0915 BLA

HOMER L. HAMPTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
CUMBERLAND MOUNTAIN SERVICES CORPORATION (formerly MOUNTAIN DRIVE COAL COMPANY)	)	
	)	
and	)	
	)	
USF&G	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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--Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John E. Anderson (Cole, Cole & Anderson PSC), Barbourville, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand--Denial of Benefits (1995-BLA-0842) of Administrative Law Judge Daniel J. Roketenetz 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] This case is before the Board for the fourth time.

Initially, the administrative law judge credited claimant with twelve years of coal mine employment and found that the medical evidence established that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ??718.202(a), 718.203(b), 718.204. Accordingly, he awarded benefits. Employer moved for reconsideration, arguing that the administrative law judge did not consider two medical opinions that employer had mailed to the Chief Administrative Law Judge for inclusion in the record. The administrative law judge denied reconsideration, explaining that he did not consider these opinions because employer?s counsel never proffered them at the hearing so as to afford claimant an opportunity to object to their admission, and thus had not made the opinions part of the record.

Pursuant to employer?s appeal, the Board held that the administrative law judge did not abuse his discretion in not considering the opinions, as employer?s counsel did not meet his affirmative duty to ascertain that all of the documents supporting his case were put into evidence. *Hampton v. Mountain Drive Coal Co*., BRB No. 88-2564 BLA (Feb. 27, 1990)(unpub.). The Board affirmed the award of benefits as supported by substantial evidence, and denied employer?s motion for reconsideration.

Employer then requested modification pursuant to 20 C.F.R. ?725.310(2000) and submitted additional medical evidence. Employer resubmitted its earlier opinions, and additionally submitted two new medical reports by Dr. A. Dahhan, one a report of a new physical examination, and the other a review of all the medical evidence. Employer also submitted medical record reviews by Drs. Bruce Stewart and Peter Tuteur, and several new x-ray readings negative for pneumoconiosis.

On modification, the administrative law judge found that employer was precluded from establishing a change in conditions, and found that employer?s evidence submitted on modification did not demonstrate that the administrative law

[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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

judge made a mistake in awarding benefits. Accordingly, he denied employer?s modification request.

Pursuant to employer?s appeal, the Board vacated the administrative law judge?s decision and remanded the case for him to address the change in conditions issue and to conduct a *de novo* review of the record to determine whether the ultimate fact of entitlement was correctly decided. *Hampton v. Mountain Drive Coal Co*., BRB No. 95-2156 BLA (Feb. 25, 1997)(unpub.). The Board indicated that the administrative law judge should also consider ?whether reopening the claim in this instance will ?render justice?? under Section 22 of the Longshore and Harbor Workers? Compensation Act, 33 U.S.C. ?922 (the Longshore Act). [1997] *Hampton*, Slip op. at 4.

On remand, the administrative law judge conducted a *de novo* review of the record and found that the weight of the x-ray readings by qualified readers and the better-reasoned medical opinions by highly qualified physicians did not establish the existence of pneumoconiosis pursuant to Section 718.202(a). Consequently, the administrative law judge found that the ultimate fact of entitlement was mistakenly decided previously. In so finding, the administrative law judge suggested that employer was attempting to obtain modification based on evidence which it should have developed previously. Nevertheless, the administrative law judge found that the record on modification did not establish the existence of pneumoconiosis. Accordingly, he denied benefits.

Claimant appealed, by counsel, arguing only that the administrative law judge made no factual finding as to whether modification of claimant?s award of benefits would render justice under the Act. Finding merit in claimant?s contention, the Board did not disturb the administrative law judge?s finding that a mistake in a determination of fact had been made, but remanded the case for him to determine whether modification in this case would render justice under the Act. *Hampton v. Cumberland Mountain Services Corp*., BRB No. 99-0186 BLA (May 31, 2000)(unpub.). The Board denied employer?s motion for reconsideration by order issued January 10, 2001.

On remand, the administrative law judge made an explicit finding that modification would render justice under the Act because it would be unfair to require employer to pay benefits to claimant when the evidence demonstrates that claimant is not entitled to benefits under the Act. Accordingly, the administrative law judge again denied benefits.

On appeal, claimant, by counsel, points to favorable evidence in the record

and argues that he has demonstrated the existence of pneumoconiosis and that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. ??718.202(a), 718.204. Claimant also argues that ?a modification proceeding is distinct from a trial *de novo*,? and states that an administrative law judge ?retains the discretion to determine whether reopening a claim will ?render justice?. . . .? Claimant?s Brief at 5. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

The Board?s scope of review is defined by statute. The administrative law judge?s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. ?921(b)(3), as incorporated into the Act 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 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 . . . or at any time prior to one year after the rejection of a claim, 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 . . . .

?[B]y 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, --- BLR --- (6th Cir. 2001). ?The purpose of this section is to permit a[n] [administrative law judge] to modify an award where there has been ?a mistake in a determination of fact [which] makes such a modification desirable in order to render justice under the act.?? *Blevins v. Director, OWCP*, 683 F.2d 139, 142, 4 BLR 2-104, 2-108 (6th Cir. 1982), quoting *Banks v. Chicago Grain Trimmers Association, Inc*., 390 U.S. 459, 464 (1968); *see also Branham v. BethEnergy Mines, Inc*., 21 BLR 1-79, 1-82-84 (1998)(McGranery, J., dissenting). The administrative law judge has the authority on modification ?to reconsider all the evidence for any mistake of fact,? 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).

As was the case in the previous appeal, claimant now raises no challenge to the administrative law judge?s evaluation of the medical evidence in finding that the existence of pneumoconiosis was not established by the record on modification. Rather, claimant contends generally that the medical reports of Drs. Glen Baker, Bruce Matheny, and Robert Penman demonstrate the existence of pneumoconiosis. Claimant?s Brief at 3-4. General assertions of entitlement are insufficient to invoke the Board?s review. *See* 20 C.F.R. ?802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Because claimant raises no specific legal or factual challenge to the administrative law judge?s weighing of either the x-ray readings or the medical opinions, we affirm the administrative law judge?s finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. ?718.202(a).[2]

Claimant?s apparent contention that the administrative law judge erred in conducting a *de novo* review of the record and therefore erred in finding a mistake in a determination of fact lacks merit. The administrative law judge has the authority to reconsider all the evidence for any mistake of fact, and is authorized to correct any mistake of fact, including the ultimate fact of entitlement. *Worrell, supra*. Therefore, we reject claimant?s contention that the administrative law judge exceeded the scope of his authority on modification, and we affirm the administrative law judge?s finding that a mistake of fact was established pursuant to Section 725.310.

Claimant challenges the administrative law judge?s determination that granting modification renders justice in this case. Claimant seems to suggest that the administrative law judge improperly permitted employer to relitigate the case. Claimant's Brief at 5-6. Whether reopening the claim renders justice is a determination committed to the administrative law judge?s discretion, based on all

[2] We note briefly that substantial evidence supports the administrative law judge?s finding that the weight of the x-ray readings by physicians qualified as both Board-certified Radiologists and B-readers was negative for the existence of pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Substantial evidence also supports his discretionary determination that the weight of the better documented and reasoned medical opinions by physicians with superior credentials did not establish the existence of pneumoconiosis. *See Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993); *Dillon v. Peabody Coal Co*., 11 BLR 1-113, 1-114 (1988).

the facts and circumstances of the case. *Kinlaw v. Stevens Shipping and Terminal Co*., 33 BRBS 68, 72 (1999). Here, the administrative law judge explained that the record on modification demonstrated that claimant does not suffer from pneumoconiosis, and that ?[t]hus, under the Act and the regulations he is not entitled to benefits.? Decision and Order on Remand at 6. The administrative law judge found that ?under the circumstances of this case,? it would be ?unjust to impugn liability to an employer for a claimant who fails to qualify for benefits under the Act.? Decision and Order on Remand at 7. The exercise of the authority to review compensation cases is discretionary, *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 956, 22 BLR 2-46, 2-69 (6th Cir. 1999), and the Board has recognized that ?[o]ne could hardly find a better reason for rendering justice than that it would be unjust or unfair to require an employer to pay benefits to a miner who does not meet the requirements of the Act.? *Branham*, 21 BLR at 1-83. Under the circumstances of this case, we conclude that the administrative law judge properly exercised his discretion in determining that reopening the case would render justice under the Act, and we therefore affirm his finding.

Accordingly, the administrative law judge?s Decision and Order on Remand--Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge