BRB No. 04-0506 BLA

ROBERT L. MELVIN (Deceased)[1]	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	
	)	DATE ISSUED: 07/11/2005
Employer-Petitioner	)	
	)	
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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

Michelle S. Gerdano (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

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[1] Claimant is Robert L. Melvin, who died during the processing of his claim. His claim is being pursued by Anna A. Melvin, his widow.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (94-BLA-1116) of Administrative Law Judge Stephen L. Purcell awarding benefits on employer's request for modification of 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). The procedural history of this case may be found in *Melvin v. Old Ben Coal Co.*, BRB No. 99-0768 BLA (Apr. 28, 2000)(unpub.) and (Order on Motion for Recon. and Motion to Publish) (Apr. 10, 2001)(unpub.). Employer appealed to the United States Court of Appeals for the Seventh Circuit from the Board's 2001 Decision and Order and Order on Motion for Reconsideration and Motion to Publish. The court summarily remanded the case for further proceedings in light of its opinion in *Old Ben Coal Company v. Director, OWCP* [*Hilliard*], 292 F.2d 533, 23 BLR 2-249 (7th Cir. 2002). *Old Ben Coal Co. v Melvin*, No. 01-2403 (7th Cir. Oct. 1, 2002)(unpub.). In an Order issued on February 5, 2003, the Board remanded the case to the administrative law judge for further consideration. *Melvin v. Old Ben Coal Co.*, BRB No. 99-0768 BLA (Feb. 5, 2003)(Order)(unpub.).

On remand, the case was assigned to Administrative Law Judge Stephen L. Purcell (the administrative law judge), who issued his Decision and Order on Remand on January 23, 2004. The administrative law judge noted the procedural history of this case and discussed the holding of the Seventh Circuit in *Hilliard*. The administrative law judge determined that employer had been "less than diligent" in defending this claim. He found that the evidence submitted by employer is not likely to alter the award of benefits, and he stated that employer's pursuit of modification since Administrative Law Judge Glenn Lawrence's 1992 award of benefits "appears to be nothing more than an attempt to delay payment of benefits to Claimant." Decision and Order at 6. The administrative law judge therefore denied employer's request for modification of Judge Lawrence's 1992 award of benefits.

On appeal, employer asserts that the administrative law judge impermissibly found that its trial counsel's conduct precludes modification. Employer maintains that the administrative law judge erred in finding that the newly submitted evidence is a "rehash" of the evidence in the original claim. Claimant responds, urging affirmance of the administrative law judge's denial of modification. The Director, Office of Workers' Compensation Programs (the Director), filed a letter indicating that he would not participate in this appeal.

Subsequently, claimant filed a Motion to Dismiss Appeal and Remand to District Director. In this motion, claimant notes that employer's counsel had provided notice that his firm no longer represents employer because Horizon Natural Resources (HNR), which had acquired employer, was dissolved in bankruptcy on or about September 30,

2004.[2] Claimant states that "Old Ben is out of the case and no other party contests the 2003 award." Motion to Dismiss Appeal and Remand to District Director at 2. Claimant, therefore, requests that the appeal be dismissed and the case remanded to the district director for processing as an award of benefits.

The Director responded to claimant's motion in a letter dated February 1, 2005, stating that he had received employer's counsel's letter announcing his withdrawal from representation in this case. The Director asserts that counsel's withdrawal does not affect this appeal. The Director notes that employer's liability for this claim is secured by a surety bond, and contends that employer, therefore, remains capable of assuming liability for this claim despite its dissolution. Director's Letter of February 1, 2005. Thus, the Director requests that the Board adjudicate this case.[3]

Claimant filed a Response to Director's 2-1-05 Letter and Renewed Motion to Dismiss Appeal and Remand to District Director. Claimant suggests that the Director has confused an insurance contract with an indemnity contract. Claimant maintains that the issuer of an indemnity bond does not qualify as a party to a black lung claim, and urges the Board to dismiss the claim and remand the case to the district director for processing as an award of benefits, to be paid by the Black Lung Disability Trust Fund (Trust Fund).

The Director filed a Director's Motion to Accept Response to Claimant's Motion Out of Time, along with the Director's Response to Claimant's Renewed Motion to

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[2] Claimant attached a copy of employer's counsel's letter dated January 10, 2005 and addressed to the administrative law judge, wherein Mark Solomons stated that Greenberg Traurig "withdraws as counsel for the employer in this case, at the direction of Horizon National Resources Inc. ("Horizon"). Horizon was liquidated in bankruptcy effective September 30 or October 1, 2004." January 10, 2005 letter from Mark Solomons. (At the time this letter was written to the administrative law judge, the case was pending before the Board.) Claimant's counsel notes that employer's notice was "mistakenly addressed to Judge Purcell, but all parties were served." Motion to Dismiss at 2, n.1. However, the Board's docket sheet does not indicate that the Board has received any notice from employer's counsel of its intent to withdraw, as required by 20 C.F.R. §802.202, which states "Any attorney…who intends to withdraw from representation shall file prior written notice of intent to withdraw from representation of a party or of substitution of counsel or other representative." 20 C.F.R. §802.202(c).

[3] The Director also states "By copy of this letter, the Director hereby notifies both Peerless and the Horizon Liquidating Trust of their interest in the outcome of this case." Director's Letter of February 1, 2005.

Dismiss Appeal and Remand for Payment of Benefits. The Director asserts that dismissal of employer is not necessary and maintains that employer's appeal properly remains before the Board. The Director contends that a surety may qualify as a party pursuant to 20 C.F.R. §725.360(d) and the Director asserts that the non-existent self-insured operator's liability is secured by the surety. Finally, the Director contends that retaining employer as a party in this case "is a prerequisite for any claim the Director may later have against either the Horizon Liquidating Trust or the surety."[4] Director's March 23, 2005 Response at 3 (unpaginated).

Claimant has filed Claimant's Reply to Director's Response. Claimant asserts that the surety does not qualify as a party pursuant to 20 C.F.R. §725.360. In addition, claimant asserts the conditions of intervention set out in 20 C.F.R. §802.214 have not been met, and cannot be met in this case. Claimant notes that no person or entity has filed a petition to intervene, and claimant asserts that even if Horizon Liquidating Trust had a right to intervene, that right was waived long ago. Claimant urges the Board to deny the Director's request to retain employer as the responsible operator.

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).

As an initial matter, we consider claimant's contention that the surety cannot qualify as a party, nor can it be allowed to intervene in this case. In addition, we consider claimant's arguments that the case should be dismissed because HNR, which acquired employer, has been dissolved in bankruptcy and there is no party contesting the award of benefits. Because the surety has neither requested to be made a party to this case, nor filed a petition to intervene, we hold that claimant's contentions are moot. *See* 20 C.F.R. §§725.360, 802.214. Moreover, since there has not been a final determination regarding employer's ability to pay benefits, we decline to dismiss employer or its appeal to the Board. We will, therefore, consider the arguments raised by employer in its brief to the Board, which was filed prior to employer's counsel's notice of withdrawal of representation to the administrative law judge.

As discussed previously, the Seventh Circuit remanded this case for further processing in light of *Hilliard*. In *Hilliard*, the United States Court of Appeals for the

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[4] We grant the Director's motion and accept out of time, the Director's Response to Claimant's Renewed Motion to Dismiss Appeal and Remand for Payment of Benefits.

Seventh Circuit considered the standard for evaluating modification petitions. The court noted that the administrative law judge, in that case, was "influenced greatly" by the fact that some of employer's evidence could have been submitted at the first hearing. The court stated:

> finality simply is not a paramount concern of the Act. Because the ALJ gave no credence to the statute's preference for accuracy over finality, we must remand for application of the proper legal standard.

Hilliard, 292 F.3d at 546, 23 BLR at 2-452. The court stated that in evaluating a petition for modification:

> the ALJ will no doubt need to take into consideration many factors including the diligence of the parties, the number or times that the party has sought reopening, and the quality of the new evidence which the party wishes to submit. These and other factors deemed relevant by the ALJ in a particular case ought to be weighed not under an amorphous "interest of justice" standard, but under the frequently articulated "justice under the Act" standard. This distinction is not simply one of semantics. The latter formulation cabins the discretion of the ALJ to keep in mind the basic determination of Congress that accuracy of determination is to be given great weight in all determinations under the Act.

Hilliard, 292 F.3d at 547, 23 BLR at 2-453 (citations omitted). The court also stated:

> It is important to note that we do not require that the ALJ give no weight to the concern of finality of decision. Nor do we preclude the possibility that, in a given case, it might be quite appropriate to permit this consideration to prevail in the adjudication of a case. We simply hold that, given the unique command of this statute, *a modification request cannot be denied solely because it contains argument or evidence that could have been presented at an earlier stage in the proceedings; such a concern for finality simply cannot be given the same weight that it would be given in a regular civil proceeding in a federal district court.*

Hilliard, 292 F.3d at 547, 23 BLR at 2-454 (emphasis added).

After consideration of the administrative law judge's Decision and Order, the arguments made on appeal, and the evidence of record, we affirm the administrative law judge's Decision and Order denying modification as it is supported by substantial

evidence and is consistent with the Seventh Circuit's holding in *Hilliard*. We reject employer's assertion that it cannot be held responsible for the actions or failings of its trial counsel, *i.e.*, employer's counsel's failure to submit information regarding the status of claimant's state claim as discussed at the hearing, *see* Hearing Transcript at 4-6, 33; Decision and Order at 7, n.1, and his piecemeal submission of evidence after employer requested modification, *see* Director's Exhibits 35-42, 44; Decision and Order at 7, n.1-2. The general rule is that a party is bound by the actions of its attorney, no matter how negligent or incompetent, and that a party dissatisfied with the actions of its freely chosen counsel has a separate action against such counsel in another forum for his negligence. *See Link v. Wabash Railroad Co.*, 370 U.S. 630 (1962); *Helm v. Resolution Trust Corp*., 84 F.3d 874 (7th Cir. 1996); *Collins v. Director, OWCP*, 795 F.2d 368, 9 BLR 2-58, 2-63 (4th Cir. 1986); *Howell v. Director, OWCP*, 7 BLR 1-259 (1984). Therefore we hold that it was not unreasonable for the administrative law judge to consider the actions of employer's trial counsel in his assessment of whether modification is in the interest of justice under the Act.

Regarding the question of an offset for an award of state benefits,[5] we hold that the administrative law judge reasonably found that "Whether [employer's] counsel's conduct was intentional, or simply negligent, it was not the result of having been misled by Claimant or his attorney," Decision and Order at 7-8, and we reject employer's challenge to the administrative law judge's finding. As the administrative law judge found, although employer raised the question of an offset for an award of state benefits, *see* Hearing Transcript at 4, and indicated that it would investigate that matter, see Hearing Transcript at 4-6, 31, 33, employer did not submit any evidence or arguments to Judge Lawrence on the matter. In addition, we hold that the administrative law judge correctly found that employer did not submit any evidence or argument to Judge Lawrence in support of its position opposing entitlement, prior to the issuance of Judge Lawrence's March 26, 1992 Decision and Order. In view of employer's failure to submit evidence or documentation to Judge Lawrence, and its subsequent piecemeal submission of the evidence in support of modification, *see* Decision and Order at 7, n.2, it was reasonable for the administrative law judge to find that "Although perhaps not 'sanctionable conduct,' Employer's actions show a clear disregard for the administrative process and are not consistent with the remedial purposes of the Act." Decision and Order at 7.

We also reject employer's assertion that the administrative law judge impermissibly found that the evidence submitted since Judge Lawrence's Decision and

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[5] At the hearing, employer's counsel stated "this is a case in which there will be an offset in the event of an award of benefits." He requested ninety days to calculate the amount of any offset and address "some evidentiary matters." Hearing Transcript at 4, *see also* Hearing Transcript at 5-6, 33.

Order is simply a "rehash" of the proof in the original claim. In *Hilliard*, the Seventh Circuit stated that, in determining whether reopening the case under modification is in the interest of justice under the Act, the administrative law judge "will no doubt need to take into consideration many factors including…the quality of the new evidence which the party wishes to submit." *Hilliard*, 292 F.2d at 547, 23 BLR at 2-453. We hold that the administrative law judge's consideration of the quality and quantity of the evidence submitted in support of employer's request for modification, Decision and Order at 8-9, and his determination that the newly submitted evidence does not warrant modification, satisfy the requirements of *Hilliard*. *See Hilliard,* 292 F.2d 533, 23 BLR 2-249; Decision and Order at 8-9.

Finally, we decline to address the administrative law judge's finding that employer's pursuit of modification may be an attempt to delay its obligation to pay benefits. This finding goes beyond the scope of the remand order, which instructed the administrative law judge to consider the facts of this case in view of *Hilliard*. Therefore, these findings are not relevant and are not reviewable. Further, employer's comment that Judge DeGregorio did not find sanctionable conduct on the part of its counsel is not pertinent in this appeal. The only Decision and Order currently on appeal before the Board is the administrative law judge's Decision and Order issued in 2004.

Accordingly, we affirm the administrative law judge's Decision and Order on Remand awarding benefits.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting in part:

I respectfully dissent from the majority opinion, as I do not believe the administrative law judge's cursory analysis of the evidence is adequate under the

requirements of *Old Ben Coal Company v. Director, OWCP* [*Hilliard*], 292 F.2d 533, 23 BLR 2-249 (7th Cir. 2002). I would therefore vacate the administrative law judge's denial of modification, and I would remand the case to the administrative law judge for a more complete analysis of the evidence in accordance with *Hilliard*. In all other respects, I agree with the majority opinion.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge