BRB No. 05-0896 BLA

HAROLD D. CROWE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ZEIGLER COAL COMPANY	)	
	)	DATE ISSUED: 07/27/2006
Employer-Respondent	)	
	)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

James B. Speta (Northwestern University School of Law), Chicago, Illinois, for claimant.

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

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denial of Benefits (02-BLA-0220) of Administrative Law Judge Robert L. Hillyard 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). This case is before the Board for the fourth time. The Board discussed this claim's full procedural history in its last decision. *Crowe v. Zeigler Coal Co.*, BRB No. 03-0774 BLA, slip op. at 1-4 (Aug. 24, 2004)(unpub.). Accordingly, we now focus on the procedural history related to the administrative law judge's decision to grant employer's modification request and deny benefits.

In a Decision and Order on Remand issued on March 29, 2001, Administrative Law Judge Donald W. Mosser awarded benefits, based primarily on the opinion of claimant's treating physician, Dr. Krock. Dr. Krock diagnosed disabling asthma and bronchitis related to claimant's coal mine employment. Director's Exhibit 28 at 641.

Employer filed a timely modification petition pursuant to 20 C.F.R. §725.310 (2000) and submitted medical opinions and testimony from Drs. Dahhan, Fino, Renn, and Repsher, concluding that claimant does not have pneumoconiosis and is not totally disabled. Claimant argued to Administrative Law Judge Robert L. Hillyard that it would not render justice under the Act to reopen the claim because of employer's belated defense, and because employer had unreasonably refused to pay benefits on Judge Mosser's compensation order. The administrative law judge denied employer's modification request on July 31, 2003, based on a finding that employer did not establish a mistake in a determination of fact. Employer appealed to the Board.

The Board vacated the administrative law judge's Decision and Order and remanded the case for further consideration. [2004] *Crowe*, slip op. at 8. The Board held that the administrative law judge mechanically credited the opinion of Dr. Krock as that of claimant's treating physician, and supplied no rationale for why he found Dr. Krock's opinion well-reasoned. [2004] *Crowe*, slip op. at 5-6. Additionally, the Board held that the administrative law judge improperly denied employer's motion to compel claimant to either provide a medical authorization or undergo an examination, because he did not consider the reasonableness of claimant's refusal, as required by *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002)(Wood, J., dissenting). Additionally, the Board instructed the administrative law judge to consider employer's modification request in accordance with the standard set forth in *Hilliard*, and to make specific findings as to whether mistakes were made in the prior benefits determination. The Board denied claimant's motion for reconsideration on November 5, 2004.

On remand, employer's counsel notified the administrative law judge that employer was dissolved in a bankruptcy proceeding and that counsel was withdrawing from the case. Claimant then moved for the administrative law judge to dismiss employer's modification petition as abandoned. Claimant also renewed his argument that

because of employer's conduct, it would not render justice under the Act to reopen the claim.

In a Decision and Order on Remand - Denial of Benefits issued on July 1, 2005, that is the subject of this appeal, the administrative law judge denied claimant's motion to dismiss. The administrative law judge reasoned that although employer did not exist currently, employer had requested modification and submitted new evidence. Additionally, he considered that the Board had vacated his decision denying modification and remanded for him to reconsider employer's modification request under the proper standards. Therefore, he proceeded to adjudicate employer's modification request.[1]

The administrative law judge conducted a *de novo* review to determine whether a mistake in a determination of fact was made in the prior benefits determination. He noted that previously it was found that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(a)(3). Upon review of the record on modification, the administrative law judge found that no mistake was made at 20 C.F.R. §718.202(a)(1)-(a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Krock, Dahhan, Fino, Renn, and Repsher. The administrative law judge found that a mistake was made previously on the issue of the existence of pneumoconiosis. Decision and Order on Remand at 15. Specifically, the administrative law judge found that Dr. Krock's opinion diagnosing pneumoconiosis was not well-reasoned and merited "less weight." Decision and Order on Remand at 9. First, the administrative law judge found that in light of claimant's five-year coal mine employment history, it was unclear from Dr. Krock's reference to "recurrent" exposure to "rock dust" whether Dr. Krock based his diagnosis on an accurate understanding of claimant's coal mine dust exposure history. *Id*. Second, the administrative law judge found that Dr. Krock "failed to address the Miner's significant cigarette and pipe smoking history and its ongoing effect on and possible causation of the Miner's asthma and bronchitis." *Id*. By contrast, the administrative law judge found the opinions of Drs. Dahhan, Fino, Renn, and Repsher, that claimant does not have pneumoconiosis, to be well-reasoned and documented and he gave them great weight. Decision and Order on Remand at 12-15. The administrative law judge found that the existence of pneumoconiosis was not established.

[1] The administrative law judge found employer's motion to compel a medical authorization or an examination "moot" because employer no longer existed. Decision and Order on Remand at 5.

Pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that the objective testing and the better reasoned medical opinions did not establish that claimant is totally disabled by a respiratory or pulmonary impairment. Based on the foregoing findings, the administrative law judge found that claimant was not entitled to benefits under the Act, and denied benefits.

On appeal, claimant contends that the Board erred in remanding this case to the administrative law judge for further consideration of employer's modification request. Claimant further asserts that the administrative law judge on remand improperly denied claimant's motion to dismiss employer's modification request. Additionally, claimant contends that the administrative law judge erred in his weighing of the medical evidence. Claimant argues further that the administrative law judge did not address his argument that reopening the claim would not render justice under the Act. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs has filed a limited response arguing that the administrative law judge did not err in denying claimant's motion to dismiss employer's modification request. Claimant has filed a reply brief reiterating his 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).

The purpose of modification is to "ensure the accurate distribution of benefits. The reopening provision is not limiting as to party--it is available to employers and miners alike." *Hilliard*, 292 F.3d at 546, 22 BLR at 2-451. The administrative law judge has the authority on modification "to reconsider all the evidence for any mistake of fact," *Hilliard*, 292 F.3d at 541, 22 BLR at 2-444, including whether the "ultimate fact" was mistakenly decided. *Amax Coal Co. v. Franklin*, 957 F.2d 355, 358, 16 BLR 2-50, 2-54-55 (7th Cir. 1992). Because the modification provision embodies a Congressional policy favoring accuracy of determination over finality, an administrative law judge considering whether to reopen a claim must give great weight to accuracy. *Hilliard*, 292 F.3d at 546, 547, 22 BLR at 2-452, 2-453. An administrative law judge deciding whether to reopen a claim has the discretion to find that considerations grounded in the policy of the Act trump the statutory preference for accuracy of determination in a particular case, so long as the administrative law judge weighs those factors under the standard of whether reopening renders "justice under the Act." *Hilliard*, 292 F.3d at 541-42, 546-47, 22 BLR at 2-451-54 (Wood, J., dissenting).

Claimant contends that the Board should reconsider its 2004 decision remanding this case to the administrative law judge. Claimant's Brief at 24-31. However, claimant

essentially repeats the arguments he made in his unsuccessful motion for reconsideration. In the prior appeal, claimant argued that the Board failed to address his contentions that employer's doctors rendered opinions that were hostile to the Act, and that it did not render justice under the Act to reopen his claim. It was unnecessary for the Board to address those arguments then, because the Board remanded the case for the administrative law judge to reweigh the medical opinions and instructed him to apply the *Hilliard* modification standard. [2004] *Crowe*, slip op. at 5-7. Since the Board considered and rejected most of claimant's arguments on reconsideration, and claimant has not established any exception to the law of the case doctrine, we decline to reconsider our decision. *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).

Claimant next contends that employer's modification petition should have been dismissed as abandoned when employer was dissolved in bankruptcy and its counsel withdrew on remand. Claimant's Brief at 31-33. We conclude that the administrative law judge did not abuse his discretion in denying claimant's motion to dismiss. *See Dempsey v. Sewell Coal Co*., 23 BLR 1-47, 1-55 (2004)(*en banc*)(applying an abuse of discretion standard to procedural rulings). The administrative law judge correctly noted that employer timely filed a modification request and actively litigated it by developing and submitting new evidence. He further noted that the Board vacated his decision denying employer's modification request and remanded the case to him for further consideration. Employer's modification request was still pending on remand when employer was dissolved in bankruptcy. No bankruptcy court order was submitted to the administrative law judge requiring that the proceedings be dismissed.[2] We detect no abuse of discretion in the administrative law judge's conclusion that "[a] proper review of [employer's] newly submitted evidence analyzed under the correct modification standard is still required." Decision and Order on Remand at 4; *see Dempsey*, 23 BLR at 1-55.

Claimant argues that the administrative law judge erred in discounting Dr. Krock's opinion because Dr. Krock did not address claimant's smoking history as a possible cause of his respiratory impairment. Claimant's Brief at 34. We disagree. The weighing of medical opinions is for the administrative law judge. *See Livermore v. Amax Coal Co*., 297 F.3d 668, 672, 22 BLR 2-399, 2-407 (7th Cir. 2002). Dr. Krock diagnosed bronchitis and asthma due to dust exposure in coal mine employment. Director's Exhibit 28 at 641. As the administrative law judge found, Dr. Krock's opinion did not address claimant's smoking history, which the administrative law judge found to be one-half pack of

[2] Portions of a bankruptcy court order were submitted to the administrative law judge on remand, specifying that pending black lung claims were to proceed to final adjudication with the applicable debtor retained as a party. Director's Motion to Hold in Abeyance, Jan. 18, 2005, Attachment A.

cigarettes per day for twenty-five years and five pipefuls of tobacco per day for ten years. The administrative law judge had before him contrary opinions stating that claimant does not have pneumoconiosis and that any bronchitis he may have is due to smoking. The administrative law judge was within his discretion to find employer's experts' opinions well-reasoned and documented. *See Livermore*, 297 F.3d at 672, 22 BLR at 2-407; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Since the issue was the etiology of claimant's respiratory impairment, it was reasonable for the administrative law judge to give "less weight" to Dr. Krock's opinion that did not take into account claimant's smoking. Decision and Order on Remand at 9; *see Livermore*, 297 F.3d at 672, 22 BLR at 2-407.

Because the administrative law judge provided a valid reason for giving less weight to Dr. Krock's opinion, we need not address claimant's other arguments concerning the administrative law judge's analysis of Dr. Krock's opinion. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). We therefore affirm the administrative law judge's finding that a mistake in a determination of fact was made previously regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 725.310. Because the existence of pneumoconiosis is a necessary element of entitlement under 20 C.F.R. Part 718, we need not address the administrative law judge's finding concerning total disability. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Claimant argues that the administrative law judge did not consider his argument that reopening the claim would not render justice under the Act. Claimant's Brief at 40-42; Claimant's Reply at 13-15. An administrative law judge has the discretion to deny reopening if the administrative law judge finds that, even giving accuracy of determination great weight, other considerations grounded in the policy of the Act overcome the preference for accuracy. *Hilliard*, 292 F.3d at 546-47, 22 BLR at 2-452-53. Claimant argued to the administrative law judge that reopening the claim would not render justice under the Act because employer was not diligent in its defense of the claim, and because employer's refusal to pay benefits on Judge Mosser's compensation order reflected an unreasonable effort to use modification to delay payment. The administrative law judge did not make a finding on the issue.

Since the issue of whether reopening a claim would render justice under the Act is committed to the administrative law judge's discretion, we remand this case for the administrative law judge to address the issue and make a finding. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). On remand, the administrative law judge should "take into consideration many factors including the diligence of the parties, the number of times that the party has sought reopening, and the quality of the new evidence," while bearing mind the statutory preference for accuracy of benefits determination. *Hilliard*, 292 F.3d at 547, 22 BLR at 2-453.

Accordingly, the administrative law judge's Decision and Order on Remand - Denial of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge