BRB No. 06-0794 BLA

RENEVA HALCOMB (Widow of ARNOLD L. HALCOMB, Deceased Miner)	)	
Claimant-Petitioner	)	
v.	)	
TRACY COAL COMPANY	)	DATE ISSUED: 07/16/2007
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 Second Remand – Denying Benefits 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 (Jonathan L. Snare, Acting 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] the miner's widow, appeals the Decision and Order on Second Remand – Denying Benefits (2000-BLA-0001) rendered on the miner's 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).[2] The lengthy procedural history of this case was fully set forth in the Board's prior decisions in *Halcomb v. Tracy Coal Co.*, BRB No. 01-0392 BLA (Jan. 10, 2002)(unpub.) and *Halcomb v. Tracy Coal Co.*, BRB No. 04-0591 BLA (Feb. 14, 2005). In the last appeal, the Board vacated the administrative law judge's denial of employer's request for modification pursuant to 20 C.F.R. §725.310 (2000),[3] and remanded the case for him to consider all evidence, including employer's new evidence proffered at the hearing, for any mistake of fact, including the ultimate fact of entitlement, and for a change in conditions, with employer bearing the burden of persuasion. With regard to the administrative law judge's analysis of the medical evidence, the Board indicated that, on remand, the administrative law judge may rely on the principle that pneumoconiosis may progress, where the evidence is consistent with that principle. The Board also instructed the administrative law judge to 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. (2005) *Halcomb*, slip op. at 6.

On remand, the administrative law judge applied the regulatory provisions at 20 C.F.R. §410.490, as the miner filed his claim for benefits on March 5, 1980 and established four years of qualifying coal mine employment. The administrative law judge found that the x-ray evidence of record was sufficient to establish invocation of the presumption at 20 C.F.R. §410.490(b)(1)(i), but that claimant had failed to establish that the miner's pneumoconiosis arose out of covered coal mine employment pursuant to 20 C.F.R. §410.490(b)(2), and thus, entitlement was also precluded under 20 C.F.R. Part 410, Subpart D and 20 C.F.R. Part 718. Accordingly, the administrative law judge found

[1] The miner filed his claim for benefits on March 5, 1980. Director's Exhibit 1. The miner died on December 27, 1992, while an appeal was pending before the Board, and claimant, the miner's surviving spouse, is pursuing the miner's claim on his behalf.

[2] 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.

[3] The amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2.

that employer was entitled to modification based on a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), and denied benefits.

In the present appeal, claimant challenges the administrative law judge's finding that the evidence was insufficient to establish that the miner's pneumoconiosis arose out of covered coal mine employment pursuant to Section 410.490(b)(2). Claimant also maintains that the administrative law judge was required to make an explicit finding as to whether granting modification would render justice under the Act. Employer responds, urging either affirmance of the administrative law judge's denial of benefits or the dismissal of employer as a party to this action on due process grounds. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that this case must be remanded to the administrative law judge for further findings at Sections 410.490(b)(2) and 725.310 (2000), and urging the Board not to consider employer's due process arguments, to which employer replies in support of its position.

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.[4] 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).

Claimant initially contends that the administrative law judge erred in failing to explain, with supporting legal authority from the United States Court of Appeals for the Sixth Circuit, the discrepancy between his original finding, that the opinions of Drs. Wright, O'Neill and Powell were sufficient to support a finding of disease etiology at Section 410.490(b)(2) despite the inaccurate coal mine employment histories reported, and his finding on second remand that these opinions were insufficiently reliable to establish etiology thereunder because of these same inaccurate histories. Claimant's Brief at 12-13. Employer correctly maintains, however, that the administrative law judge need not explain why he departed from prior findings; rather, the administrative law judge, in further reflecting on the appropriate weight to be assigned to the relevant evidence, may properly correct an earlier mistake in a determination of fact. Employer's Brief at 13-16; *see generally Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Bartley v. L & M Coal Co.*, 901 F.2d 1311, 13 BLR 2-414 (6th Cir. 1990). The Director urges a remand for further findings, however, on the ground that the administrative law judge impermissibly shifted the burden of proof on modification from employer to claimant. Director's Brief at 2-3. The Director's argument has merit.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

As the party seeking modification, employer is the "proponent of the order with the burden of establishing a [mistake in a determination of fact] justifying modification." *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997); *see also Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). As such, employer must prove that termination of benefits is appropriate by disproving one of the elements of entitlement previously established by claimant. *See* 20 C.F.R. §725.103; *see also* 20 C.F.R. §718.403 (2000). In the present case, the administrative law judge considered all of the evidence of record, and readjudicated the claim *de novo* with the burden on claimant to establish entitlement, rather than placing the burden of proof on employer to justify modification. Consequently, we vacate his granting of employer's request for modification at Section 725.310 (2000) and his denial of benefits, and remand this case for the administrative law judge to first consider whether employer satisfied its burden of disproving disease etiology at Section 410.490(b)(2), and, if employer did not, to consider whether employer established rebuttal of the Section 410.490 presumption. *See* 20 C.F.R. §727.203(b)(1)-(4) (2000).

Claimant next maintains that modification is discretionary, and that the administrative law judge is required to explicitly determine on remand whether granting modification would render justice under the Act. Claimant's Brief at 14-15. We disagree. Employer and the Director note that neither 33 U.S.C. §922, incorporated by 30 U.S.C. §932(a), nor 20 C.F.R. §725.310 (2000) includes a requirement that modification render justice under the Act, and that the circuit courts have adopted a preference for accuracy over finality. Employer's Brief at 17-18; Director's Brief at 3. While an administrative law judge has discretion to deny a meritorious modification request where the moving party has acted egregiously and contumaciously, *see McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-296 (6th Cir. 1994), we agree with the Director's argument that the facts of this case do not demonstrate that employer's conduct herein was sanctionable.

Lastly, employer contends that its due process rights were violated by the original administrative law judge's refusal to permit employer to conform its evidence in response to changes in the law, and by the current administrative law judge's refusal to consider employer's evidence submitted in support of modification until the last remand of this case, resulting in unnecessarily protracted proceedings. Employer asserts that changes in the law during the lengthy litigation of this case significantly altered employer's defense, and that due process considerations mandate the dismissal of employer and a transfer of liability to the Black Lung Disability Trust Fund. The Director, however, correctly maintains that this argument seeks to expand employer's rights, and thus had to be raised

in a cross-appeal rather than a response brief.[5] Director's Brief at 3; *see* 20 C.F.R. §§802.205(b), 802.212; *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). As employer did not file a cross-appeal, we need not consider its due process arguments.[6]

[5] We reject employer's argument that no cross-appeal was necessary because the administrative law judge found that employer was not liable for any benefits on the claim, and the due process issue raised by employer merely provided an alternative reason to support the same result. Employer's Reply Brief at 2 n.1. Contrary to employer's argument, the administrative law judge found that *claimant* was not entitled to benefits, and employer seeks a determination that *employer* is not liable for any benefits that may be due to claimant.

[6] Moreover, we agree with the Director's alternative position that there is no merit to employer's due process arguments, as the Board previously held that employer had ample opportunity to conform its evidence in response to changes in the law, and the record reflects that employer had both notice of the claim and a meaningful opportunity to defend itself. *See generally Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000).

Accordingly, the administrative law judge's Decision and Order on Second Remand – Denying Benefits is vacated, and this 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