BRB No. 11-0710 BLA

VIRGIL CLEVINGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARMAN MINING CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 07/25/2012
	)	
Employer/Carrier-Petitioners	)	
	)	
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 - Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand - Award of Benefits (2005-BLA-5166) of Administrative Law Judge Larry S. Merck rendered on a request for modification of the denial of a subsequent claim filed pursuant to the Black Lung

Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] This case has a lengthy procedural history.[2] In the last appeal, the Board affirmed the administrative law judge's findings that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement at 20 C.F.R §725.309, and a basis for modification of the denial of the subsequent claim pursuant to 20 C.F.R. §725.310. The Board also affirmed the administrative law judge's findings that the evidence established legal pneumoconiosis at 20 C.F.R §718.202(a)(4), and disability causation at 20 C.F.R. §718.204(c). *Clevinger v. Harman Mining Corp*., BRB No. 09-0842 BLA (Sept. 30, 2010)(unpub.). However, the Board found merit to employer's argument that the administrative law judge erred in failing to specifically determine whether granting claimant's petition for modification would render justice under the Act. *Id*. at 8-9. The Board observed that under Section 22 of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), the fact-finder *may*, on the ground of a change in conditions or because of a mistake in a determination of fact, reconsider the terms of an award or denial of benefits. *See* 20 C.F.R. §725.310. The Board explained that modification of a claim does not automatically flow from a finding that there has been a change in conditions, and should be made only where doing so will render justice under the Act. *See Sharpe v. Director, OWCP*, 495 F.3d 125, 131-132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007),[3] *citing Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *McCord v. Cephas*, 532 F.2d 1377, 1380 (D.C. Cir. 1976); *see also D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33 (2008). Determination of this issue is committed to the discretion of the administrative law judge, and requires analysis of relevant, and possibly competing, considerations. *Id*. For this reason, the administrative law judge was

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the miner's initial and subsequent claims were filed before January 1, 2005. *See Clevinger v. Harman Mining Corp.*, BRB No. 09-0842 BLA (June 29, 2010)(unpub. Order); Director's Exhibits 1, 5.

[2] The relevant procedural history of this claim, set forth in the Board's previous decisions in this matter, is incorporated herein. *V.C.* [*Clevinger*] *v. Harman Mining Corp*., BRB No. 07-0824 BLA, slip op. at 1-2 (July 14, 2008)(unpub.); *Clevinger v. Harman Mining Corp*., BRB No. 09-0842 BLA, slip op. at 1-2 (Sept. 30, 2010)(unpub.).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1-4, 6, 8.

instructed to exercise the discretion granted under 20 C.F.R. §725.310, by assessing factors relevant to the rendering of justice under the Act, namely, the need for accuracy, the quality of the new evidence, the diligence and motive of the party seeking modification, and the futility or mootness of a favorable ruling. *Sharpe*, 495 F.3d at 131-132, 24 BLR at 2-67-68; *Hilliard*, 292 F.3d at 533, 22 BLR at 2-429. Therefore, the Board vacated the administrative law judge's finding that claimant was entitled to modification pursuant to 20 C.F.R. §725.310, and remanded the case to the administrative law judge to render specific findings on the sole issue of whether granting the modification request would render justice under the Act.[4]

On remand, the administrative law judge found that granting modification would render justice under the Act, and awarded benefits. Employer appeals, challenging the administrative law judge's findings. Claimant responds in support of the award of benefits, to which employer replies in support of its position. The Director, Office of Workers' Compensation Programs, 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 rational, supported by substantial evidence and in accordance with applicable 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge abused his discretion in granting modification of the denial of this subsequent claim, which constitutes claimant's

[4] As a preliminary matter, we decline to address employer's challenges to the administrative law judge's finding that the evidence established that claimant is totally disabled by his legal pneumoconiosis, and employer's various arguments that the medical opinion of Dr. Rasmussen was unreliable and insufficient to support modification. Employer's Brief at 16-18, 22, 24, 25. The Board has affirmed the administrative law judge's findings that claimant established total disability at 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R §725.309. *Clevinger*, BRB No. 09-0842 BLA, slip op. at 6. Furthermore, the Board affirmed the administrative law judge's determination that Dr. Rasmussen's medical opinion established that claimant is totally disabled due to legal pneumoconiosis at 20 C.F.R §§718.202(a)(4), 718.204(c). *Id*. at 8. Consequently, the foregoing issues were previously resolved, and the Board's rulings constitute the law of the case. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). As employer has not demonstrated an exception to this doctrine, *see Williams*, 22 BRBS at 237, employer's request that the Board reconsider the merits of the claim is denied.

fifth application for benefits. Employer asserts that "here, modification is being pursued because of a lack of diligence," Employer's Brief at 16, and employer maintains that the administrative law judge relied on an incorrect legal standard in determining that granting modification in this case would render justice under the Act. Employer's Brief at 13-16. Employer argues that claimant "waited until August 15, 2003 to request modification of the denial of his fifth application, using the modification remedy to undo the proper denial of that claim and overcome the obvious lack of diligence with which it was pursued." *Id*. at 15. According to employer, therefore, the administrative law judge allowed claimant to "overcome mistakes of lawyering," in a manner inconsistent with the remedial purpose of the statute, thereby depriving employer of its "right to finality." *Id.* at 16. Employer asserts that, in the administrative law judge's view, the primary focus is on "the purpose of the statute--to award benefits--so modification [sought by a miner] is always in the interest of justice and that consideration always outweighs any interest in finality." Employer's Reply Brief at 2; *see also* Employer's Brief at 15. Employer's arguments lack merit.

In *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), the Board held that "while [an] administrative law judge has the authority to reopen a case based on any mistake in fact, [an] administrative law judge's exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw*, 33 BRBS at 72, *citing Washington Society for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991). The Board reviews an administrative law judge's findings in this regard under the abuse of discretion standard. *Kinlaw*, 33 BRBS at 73; *see also Dempsey v. Sewell Coal Co*., 23 BLR 1-47 (2004)(en banc).

In this case, the administrative law judge addressed each of the relevant factors in assessing whether reopening the claim would render justice under the Act, in accordance with the guidance and directives as explained in *Sharpe* and *Hilliard.* Initially, the administrative law judge acknowledged that claimant had filed five claims for benefits, beginning in the early 1980s, and had submitted new evidence in support of modification. In view of the progressive nature of pneumoconiosis and the statutory purpose of benefiting miners who are totally disabled due to pneumoconiosis, the administrative law judge determined that the need for accuracy weighed in favor of granting modification. Decision and Order at 5. Noting that the new evidence persuasively established claimant's total disability due to pneumoconiosis, and that the Board affirmed this finding, the administrative law judge found that the quality of the new evidence also weighed in favor of modification. *Id*. at 5-6. Next, addressing claimant's diligence and motive in seeking modification of the denial of his claim, the administrative law judge observed that claimant "timely followed the procedures set forth under [Section] 725.310(a) for requesting modification," as claimant's fifth claim was denied on July 8, 2003, and claimant sought modification on August 20, 2003. *Id.* at 6. The administrative

law judge rejected employer's argument that claimant was not diligent because he could have submitted Dr. Rasmussen's April 1, 2003 medical report while his fifth subsequent claim was still pending. Noting that a modification request cannot be denied out of hand "on the basis that the evidence may have been available at an earlier stage in the proceeding," the administrative law judge found that claimant's diligence in timely seeking modification weighed in favor of granting modification. *Id*. Addressing the "important consideration" of claimant's motive in seeking modification, the administrative law judge observed that the filing of multiple subsequent claims did not demonstrate, by themselves, an improper motive. *Id*. at 6-7. The administrative law judge also explained that claimant's age and the length of time that had passed since he left coal mine employment did not necessarily demonstrate an improper motive, as pneumoconiosis may be a progressive disease that only manifests following the cessation of coal mine employment. *Id.* at 7. The administrative law judge thus concluded that claimant's course of filing multiple claims prior to requesting modification based on new evidence did not indicate that claimant was trying to thwart employer's good faith defense. *Id.* Rather, the administrative law judge noted that claimant's submission of new evidence demonstrating a change in his condition "is the whole purpose of the modification provision," and determined that there was no evidence that claimant had an improper motive in seeking modification. *Id*. The administrative law judge concluded, therefore, that "claimant's good faith motive" weighed in favor of granting modification. *Id.* Finally, the administrative law judge found that granting claimant's modification request would clearly not be futile or moot, because a grant of modification would result in an award of benefits. *Id.*

We discern no error or abuse of discretion in the administrative law judge's analysis of the "competing equities" in determining that granting modification in this case would render justice under the Act. *See Kinlaw*, 33 BRBS at 72. Contrary to employer's arguments, the administrative law judge fulfilled his obligation to consider the matter overall, and to weigh any factors that are pertinent in the circumstances as well as the accuracy of the prior decision. *Sharpe*, 495 F.3d at 131-132, 24 BLR at 2-67-68. We reject employer's narrow characterization of the issue before the administrative law judge as "whether [claimant] was diligent in pursuing his original claim." Employer's Reply Brief at 2. Moreover, the record does not support employer's assertions that the administrative law judge imposed an improper legal standard, and that claimant "offered no good faith basis for modification." Employer's Brief at 14. The administrative law judge carefully considered whether claimant's pursuit of the claim evidenced good faith overall, and acted within his discretion in resolving this issue in claimant's favor. Decision and Order at 6-7; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Additionally, we are not persuaded by employer's citation to several cases in support of a general proposition that modification requests are not meant to correct "mistakes of lawyering," and employer's argument that finality considerations should preclude the submission of evidence that was available prior to the denial of the

subsequent claim. Employer's Brief at 16, *citing Verderane v. Jacksonville Shipyards, Inc./Aetna Causalty & Surety Co.*, 772 F.3d 775 (11th Cir. 1985); *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982); *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976). As the court noted in *Sharpe*, while "finality interests may sometimes be relevant to a proper modification ruling . . . the 'principle of finality' just does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits." *Sharpe*, 495 F.3d at 133, n.15, 24 BLR at 2-69, n.15. The administrative law permissibly rejected employer's assertion that claimant lacked diligence in failing to submit Dr. Rasmussen's April 2003 medical report at an earlier stage of the litigation, noting that "a modification request cannot be denied out of hand 'on the basis that the evidence may have been available at an earlier stage in the proceeding'." Decision and Order at 6, *citing Hilliard*, 292 F.3d at 546, 22 BLR at 2-452. As the administrative law judge properly considered each of the appropriate factors, and acted within his discretion in weighing the evidence relevant thereto, *see Sharpe*, 495 F.3d at 133, 24 BLR at 2-69; *Mays*, 176 F.3d at 756, 21 BLR at 2-591; *Kinlaw*, 33 BRBS at 73, we affirm the administrative law judge's finding that granting modification pursuant to Section 725.310 renders justice under the Act. Consequently, we affirm his award of benefits.

Accordingly, the administrative law judge's Decision and Order on Second Remand - Award of Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge