BRB No. 99-0933 BLA

JAMES HILLIARD	)	
	)	
Claimant-Respondent	)	
	)	
	)	DATE ISSUED:
v.	)	
	)	
OLD BEN COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Arter & Hadden LLP), for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-0806) of Administrative Law Judge Linda S. Chapman 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). The relevant procedural history of this case is as follows: The miner filed a claim on November 20, 1990. Director's Exhibit 1. The district director notified employer of the claim by letter dated November 27, 1990. Director's Exhibit 21. Attorney Wayne R. Reynolds entered his appearance on behalf of employer on January 9, 1991. Director's Exhibit 20.

The district director initially denied the miner's application for benefits on January 30, 1991, on the ground that the miner did not establish any of the elements of entitlement. Director's Exhibit 16. After further development of the evidence, which included employer's submission of a number of x-ray readings and the reports of Dr. Tuteur and Paul, the district director determined that the miner was entitled to benefits. Director's Exhibit 24.

The case was transferred to the Office of Administrative Law Judges (OALJ) for a hearing, which was held before Administrative Law Judge Glenn R. Lawrence on June 9, 1992. In a Decision and Order issued October 20, 1992, Judge Lawrence determined that the miner established the existence of complicated pneumoconiosis and, therefore, was entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. Director's Exhibit 33. Judge Lawrence also found that the miner established entitlement to benefits on the merits pursuant to 20 C.F.R. §§718.202(a)(2), (a)(4), 718.203(b), and 718.204(b) and (c). *Id.* Accordingly, benefits were awarded.

Employer, represented by Mr. Reynolds, initially filed a Notice of Appeal with the Board, but subsequently requested that the appeal be dismissed and the case remanded to the district director for modification proceedings. The Board granted employer's request and employer's petition for modification went before the district director. *Hilliard v. Old Ben Coal Co.*, BRB No. 93-0465 BLA (Apr. 26, 1993)(unpub. Order). After being informed that the district director had no record of the petition for modification, Mr. Reynolds submitted a request for modification dated August 13, 1993. In support of the petition, Mr. Reynolds proffered the deposition testimony of Dr. Paul regarding his examination of the miner on October 17, 1991, an x-ray reading and pulmonary function study concerning someone other than the miner, Dr. Chiardonna's reading of an x-ray obtained on October 17, 1991, and the miner's death certificate. Following an informal conference, the district director issued a Memorandum in which he determined that employer failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310(a). Director's Exhibit 44. Employer requested a hearing and the case was transferred to the OALJ and assigned to Administrative Law Judge Nicodemo DeGregorio. Prior to the case being scheduled for a hearing, Mr. Reynolds notified Judge DeGregorio that Mrs. Hilliard was pursuing a claim for survivor's benefits. Director's Exhibit 50. At Mr. Reynolds's request, Judge DeGregorio remanded the case to the district director for consolidation with the survivor's claim. Director's Exhibit 51.

After ascertaining that Mrs. Hilliard had not applied for benefits, the case

was sent back to the OALJ and assigned to Administrative Law Judge Thomas M. Burke. At the widow's request, and without objection from employer, Judge Burke decided the case on the record. In a Decision and Order issued on January 10, 1997, Judge Burke determined that the prior denial of benefits did not contain a mistake of fact based upon his finding that the evidence of record was sufficient to establish both invocation of the irrebuttable presumption set forth in Section 718.304 and entitlement on the merits. Director's Exhibit 58. Judge Burke also concluded that the record did not support a finding of a change in conditions. Accordingly, Judge Burke denied employer's petition for modification pursuant to Section 725.310(a).

On February 7, 1997, Scott A. White of the law firm of Keefe & DePauli appeared on behalf of employer and filed a Notice of Appeal. Director's Exhibit 59. Mark E. Solomons of Arter & Hadden informed the Board that he would represent employer on appeal in a letter dated February 12, 1997. Director's Exhibit 60. Subsequently, pursuant to a motion filed by counsel from Arter & Hadden, the Board dismissed employer's appeal and remanded the case to the district director for modification proceedings. *Hilliard v. Old Ben Coal Co.*, BRB No. 97-0673 BLA (July 14, 1997)(unpub. Order); Director's Exhibit 66.

In support of employer's request for modification, counsel cited Mr. Reynolds's abandonment of his law practice during the period in which employer's initial request for modification was being adjudicated and his subsequent disbarment. The district director issued a Proposed Decision and Order Denying Request for Modification on October 24, 1997. Director's Exhibit 68. Mark E. Solomons objected to the district director's action and stated that Scott A. White would represent employer during the modification proceedings. Director's Exhibit 69. In order to acquire a copy of the report of the miner's autopsy, Mr. White attempted to obtain Mrs. Hilliard's signature on a medical records release form. Mrs. Hilliard's attorney informed Mr. White that Mrs. Hilliard would not sign any medical releases. Director's Exhibit 72. Mr. White asked the district director to order Mrs. Hilliard to allow employer to procure the autopsy report. The district director responded that Mrs. Hilliard was not required to sign an authorization "since she had done so in the past." Director's Exhibit 75.

After the case was transferred to the OALJ and assigned to Administrative Law Judge Linda S. Chapman (the administrative law judge) for a hearing, Mr. White filed a motion requesting that the administrative law judge order Mrs. Hilliard to sign a medical records release. The administrative law judge denied the motion and employer's request for reconsideration. Following a hearing, the

administrative law judge issued a Decision and Order in which she determined that modification could not be established on the basis of a change in conditions, as the miner died before the issuance of Judge Burke's denial of employer's first request for modification. With respect to the issue of whether the prior denial contained a mistake in a determination of fact, the administrative law judge determined that reopening the claim would not serve the interests of justice, inasmuch as the evidence proffered by employer, which included numerous x-ray readings and the reports of Drs. Fino, Castle, and Renn, could have been obtained when the miner's claim for benefits was being adjudicated or when employer's first request for modification was before Judge Burke. The administrative law judge also concluded that there was no mistake of fact in the prior proceedings. Accordingly, the administrative law judge denied employer's second petition for modification.

Employer argues on appeal that the administrative law judge erred in relying upon the threshold requirement that reopening the case on modification serve the interests of justice. Employer also maintains that the administrative law judge erred in denying its request that Mrs. Hilliard permit employer to obtain a copy of the miner's autopsy report and in determining that Judge Burke's Decision and Order did not contain a mistake in a determination of fact with respect to the issue of the existence of simple and complicated pneumoconiosis and total disability due to pneumoconiosis. Claimant has responded and urges affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[1]

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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1]We affirm the administrative law judge's finding that a change in conditions cannot be established under 20 C.F.R. §725.310(a), as this finding has not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer initially contends that the administrative law judge's consideration of whether modification would serve the interest of justice has no basis in the Act or the implementing regulations and is not recognized by the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, as a threshold requirement for granting modification under Section 725.310(a). Employer further asserts that injustice would result if employer is not permitted to ameliorate the damage caused to its defense of the miner's claim by its original trial counsel's abandonment of his law practice without notice to his clients, including employer. Employer's contentions are without merit. Employer is apparently correct in stating that the Seventh Circuit has not explicitly held that "the interest of justice" inquiry is required under Section 725.310(a). However, the United States Supreme Court has recognized that Section 22 of the Longshore and Harbor Workers' Compensation Act, from which the modification provision implemented by Section 725.310 is derived:

> at one time did authorize reopening only on the "ground of a change in conditions,"44 Stat. 1437, but was amended in 1934 expressly to "broaden the grounds on which a deputy commissioner can modify an award...when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the act."

O'Keeffe v. Aerojet-General Shipyards, 404 U.S. 254, 255-56 (1971), quoting S. Rep. No. 588, 73d Cong., 2d Sess., 3-4 (1934); H.R. Rep No. 1244, 73d Cong., 2d Sess., 4 (1934). The Supreme Court, federal circuit and district courts, and the Board have also held that the administrative law judge's assessment of a request for modification involves a balancing of the interest in maintaining the finality of decisions against the interest in rendering justice under the Act. *See O'Keeffe, supra*; *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982)(*per curiam*); *McCord v. Cephas*, 532 F.2d 1377, 1381, 3 BRBS 371, 377 (D.C. Cir. 1976); *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999); *Branham v. Bethenergy Mines, Inc.[Branham II]*, 21 BLR 1-79 (1998). Moreover, the Seventh Circuit has recognized that motions to reopen a case "are appeals to the discretion" of the administrative law judge. *See*, *e.g.*, *Amax Coal Co. v. Franklin,* 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992). Thus, the administrative law judge's application of the "interest of justice" inquiry in exercising her discretion in the present case did not contravene the law of the United States Court of Appeals for the Seventh Circuit.

In the alternative, employer argues that the administrative law judge's

analysis was flawed in that she did not address fully the circumstances surrounding its original trial counsel's failure to defend the claim adequately. Apparently without notice to employer, employer's counsel, Wayne R. Reynolds, abandoned his law practice at some point during the consideration of employer's first request for modification, which was denied by Judge Burke. Employer asserts that under these circumstances, it would be unjust to allow an award of benefits when the evidence of record clearly does not support a finding of entitlement. We reject employer's argument, as 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).

Accordingly, we affirm, as within her discretion, the administrative law judge's determination that reopening the present case pursuant to Section 725.310 would not render justice under the Act. The administrative law judge rationally based her finding upon the fact that the evidence proffered by employer, which included numerous readings of x-rays dated prior to the initial Decision and Order awarding benefits and the reports of Drs. Fino, Castle, and Renn concerning reviews of evidence of the same vintage, could have been obtained before the miner's claim for benefits was adjudicated or when employer's first request for modification was before Judge Burke. *See Branham II*, *supra*. In addition, the administrative law judge properly extended this reasoning to employer's request for permission to obtain the report of the miner's autopsy. The miner died two years before Judge Burke's denial of employer's first petition for modification. Thus, employer could have sought and submitted this report at an earlier juncture.

With respect to employer's allegation that the administrative law judge erred in determining that the prior proceedings did not contain a mistake in a determination of fact, we hold that the administrative law judge did not abuse her discretion in making this finding. The administrative law judge indicated her awareness of the contents of each Decision and Order and the relevant evidence and acted rationally in determining that there was no mistake of fact under Section 725.310. *See O'Keeffe*, *supra*; *Franklin*, *supra*; *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Accordingly, the administrative law judge's Decision and Order denying employer's request for modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge