BRB No. 98-0337 BLA

JAMES R. STILTNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WELLMORE COAL CORPORATION	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER on RECONSIDERATION
Party-in-Interest	)	*EN BANC*

Appeal of the Decision and Order on Modification - Awarding Benefits of Michael P. Lesniak, United States Department of Labor.

Lawrence L. Moise, III (Vinyard & Moise), Abingdon, Virginia, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

Gary K. Stearman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

Employer has filed a timely Motion for Reconsideration and Suggestion for Rehearing *En Banc* of the Board's Decision and Order on Modification-Awarding Benefits (97-BLA-640) of Administrative Law Michael P. Lesniak 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).

While its request for modification was pending before the administrative law judge, employer filed a Motion to Compel or Dismiss requesting that claimant be compelled to submit to a physical examination and to comply with discovery requests made by employer. On August 7, 1997, the administrative law judge issued an Order denying employer's motion. The administrative law judge found that employer's modification request was based upon a mistake in a determination of fact, and that employer had ample previous opportunity to have claimant examined and to develop evidence. Order Denying Motion to Compel or Dismiss. The administrative law judge further found that, inasmuch as employer's allegation of a mistake in a determination of fact was general rather than specific, further testing of claimant would be unnecessary and burdensome to claimant. *Id.* Subsequently, the administrative law judge, on October 30, 1997, issued his Decision and Order on Modification-Awarding Benefits. The administrative law judge concluded that the earlier determination that the evidence supported a finding of pneumoconiosis did not constitute a mistake in a determination of fact. Decision and Order on Modification at 3. The administrative law judge further found that the basis for employer's request for modification was mere disagreement with the prior weighing of the medical evidence. Decision and Order on Modification at 4. The administrative law judge reviewed the evidence and concluded that the award of benefits to claimant was proper and that employer failed to establish a mistake in a determination of fact. Accordingly, employer's petition for modification was denied.

In its original Decision and Order, the Board held that, under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), the administrative law judge is not required to compel a claimant to submit to a medical examination pursuant to an employer's request for modification. *Stiltner v. Wellmore Coal Corporation*, BRB No. 0337 BLA (Jun. 22, 1999)(unpublished). The Board acknowledged the right of any party to seek modification of a final decision pursuant to 20 C.F.R. §725.310, but held that 20 C.F.R. §718.404 vests discretion in the administrative law judge as to whether to compel claimant to undergo a medical examination pursuant to that request for modification. *Id.* The Board held that, in the instant case, the administrative law judge permissibly concluded that employer's request for modification was merely predicated on its disagreement with the prior weighing of the evidence. *Id.* The Board therefore rejected employer's assertion that the administrative law judge erred in failing to compel claimant to undergo a medical examination inasmuch as employer failed to establish an issue pertaining to the validity of the original adjudication pursuant to Section 718.404(b). *Id.* The Board further rejected employer's assertion and held that the administrative law judge's weighing of the evidence constituted a sufficient *de novo* review of the evidence pursuant to the standard established by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Jessee v.*

Director, OWCP, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). *Id*.

Nevertheless, the Board vacated the administrative law judge's Decision and Order on Modification - Awarding Benefits inasmuch as the administrative law judge failed to address a newly submitted medical opinion of Dr. Tuteur in which the physician concluded that claimant did not suffer from pneumoconiosis and that even if the existence of the disease was present, it did not contribute to total respiratory disability. Director's Exhibit 122. The Board held that such evidence, if fully credited, could be supportive of a finding of modification at Section 725.310 and, accordingly, remanded the case to the administrative law judge to address the opinion and to consider the opinion in conjunction with the other opinions of record in order to determine whether modification was established pursuant to Section 725.310. *Id*.

In its Motion for Reconsideration, employer again asserts that the administrative law judge erred in failing to compel claimant to undergo a medical examination as it made specific allegations of error and that the Board misapplied the holding of *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173 (1999) to the facts of the instant case. Employer further asserts that the Board erred in failing to make a ruling on employer's right to obtain answers to written interrogatories and requests for production of documents.

Employer contends that both the Board and the administrative law judge erred in concluding that employer failed to make specific allegations of mistakes in the prior determinations of fact. Employer asserts that the newly submitted opinion of Dr. Tuteur clearly establishes the absence of pneumoconiosis and/or total disability due to the disease and that the presence of this opinion clearly establishes a specific allegation of a mistake in the determination of fact. Employer asserts that the Board compounded its error by affirming the administrative law judge's conclusion that employer's request to have claimant re-examined was predicated on employer's disagreement with the previous weighing of the evidence. Employer also contends that the Board erred in failing to make a ruling on employer's right to obtain answers to written interrogatories and production of documents.

Specifically, employer asserts that, as a "necessary corollary" of its right to obtain *de novo* consideration of the evidence pursuant to a request for modification is the right to develop additional evidence through discovery requests of claimant. Employer contends that requiring a claimant to respond to discovery requests, pursuant to a request for modification, would only require a "minimal degree" of cooperation from claimant and would not be "unduly burdensome." Employer's Brief at 10.

Section 22 of the Longshore and Harbor Workers' Compensation Act provides for modification or reopening of final decisions awarding or denying benefits upon the request by "any party" to the claim including the employer which is liable for benefits. 33 U.S.C.

§922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), and as implemented at 20 C.F.R. §725.310; *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *see also Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27 (1996). Section 725.310(b) governs modification proceedings and provides, in pertinent part:

> Modification proceedings shall be conducted in accordance with the provisions of this part as appropriate. Additional evidence may be submitted by any party or requested by the [district director].

20 C.F.R. §725.310(b).

Section 718.404(b) states:

> An individual who has been finally adjudged to be totally disabled due to pneumoconiosis shall, if requested to do so upon reasonable notice, where there is an issue pertaining to the validity of the original adjudication of disability, present himself or herself for, and submit to, examinations or tests as provided in §718.101, and shall submit medical reports and other evidence necessary for the purpose of determining whether such individual continues to be under a disability. Benefits shall cease as of the month in which the miner is determined to be no longer eligible for benefits.

20 C.F.R. §718.404. Section 718.404(b) effectuates Section 22, as implemented by Section 725.310(b). 45 Fed. Reg. 13694 (Feb. 29, 1980). In *Selak*, *supra*, we concluded that employer's right to have claimant re-examined pursuant to a request for modification is not absolute and that the determination of whether employer is entitled to a re-examination of claimant rests within the discretion of the administrative law judge.[1] *Selak* 21 BLR at 1-177-

[1] In *Selak*, *supra*, we held that the administrative law judge failed to consider *de novo* employer's request for a re-examination and accordingly found that the failure constituted a violation of the Administrative Procedure Act (APA), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). We are not presented with a similar concern in the instant case.

178. We extend the holding of *Selak* to the facts presented in the instant case. Specifically, we conclude that employer, pursuant to a request for modification, does not have an absolute right to compel claimant to respond to discovery requests or other requests for medical evidence. By its very language, Section 718.404(b) states that its provisions are applicable to "medical reports **and other evidence**, [emphasis added]" 20 C.F.R. §718**.**404(b). We thus conclude that, on the same basis as our decision in *Selak*, employer is not entitled to an absolute right to subject claimant to discovery requests and further interrogatories pursuant to a request for modification. We hold that, in instant case, the administrative law judge's basis for rejecting employer's requests for the development of additional evidence, *i.e.*, that employer had ample previous opportunity to develop evidence and that further development of such evidence would be unfairly burdensome to claimant, constitutes a permissible exercise of his discretion. Accordingly, we now reject employer's assertion that the administrative law judge erred in rejecting its request for the further development of evidence through written interrogatories and production of documents. *See* 20 C.F.R. 718.404(b); *Selak*, *supra*. We further conclude that, with regard to employer's right to have claimant re-examined pursuant to a request for modification, employer's assertions merely represent contentions previously raised and rejected when this case was initially before the Board. There have been no changes in Board or circuit court law that would affect the Board's previous disposition of employer's contentions regarding this right.[2] Accordingly, we reaffirm the Board's prior holding that the administrative law judge properly rejected employer's request to have claimant examined pursuant to its request for modification.

Accordingly, we reject the arguments made by employer and reaffirm the holdings in the Board's previous Decision and Order.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[2] Employer asserts that the Board's application of the holding of *Selak*, *supra*, placed an "extra" burden upon employer and urges remand of the case in order that employer be given an opportunity to "make the *Selak* showing." Employer's Brief at 4, n.2. Employer has failed to convincingly demonstrate any extra burden imposed upon it by our holding in *Selak* and our reliance on the holding in our Decision and Order in the instant case. Accordingly, we reject employer's assertion in this regard.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

Deskbook Section: Part III.G. - Modifications

In a holding analogous to the holding in ***Selak v. Wyoming Pocahontas Land Co.***, 21 BLR 1-173 (1999), the Board, *en banc*, held that employer, pursuant to a request for modification, does not have an absolute right to compel claimant to respond to discovery requests or other requests for medical evidence. ***Stiltner v. Wellmore Coal Corp.***, BLR (2000) (Decision and Order on Reconsideration *En Banc*).