

BRB No. 09-0429 BLA

FLORENCE CROWE)	
(o/b/o HAROLD D. CROWE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ZEIGLER COAL COMPANY)	DATE ISSUED: 03/18/2010
)	
Employer/Respondent)	
)	
and)	
)	
THE TRAVELERS COMPANIES)	
)	
Intervenor)	
)	
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 of Donald W. Mosser, 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.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (2002-BLA-0220) of Administrative Law Judge Donald W. Mosser (the administrative law judge) granting modification and denying benefits on a miner's duplicate claim, filed on August 15, 1990, 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 This case is before the Board for the fifth time. The Board discussed this claim's earlier procedural history in its last two decisions. *Crowe v. Zeigler Coal Co.*, BRB No. 05-0896 BLA, slip op. at 2-4 (July 27, 2006)(unpub.); *Crowe v. Zeigler Coal Co.*, BRB No. 03-0774 BLA, slip op. at 1-4 (August 24, 2004)(unpub.). Accordingly, we now focus on the procedural history relevant to the administrative law judge's decision to grant employer's modification request and deny benefits.

Following the administrative law judge's award of benefits, issued on March 29, 2001, employer filed a timely modification petition pursuant to 20 C.F.R. §725.310 (2000), and submitted additional evidence. The case was assigned to Administrative Law Judge Robert L. Hillyard, and the miner opposed modification on the ground that it would not render justice under the Act to reopen the claim due to employer's belated defense, and because employer had unreasonably refused to pay benefits on the administrative law judge's compensation order. Judge Hillyard denied employer's modification request on July 31, 2003, based on a finding that employer failed to establish a mistake in a determination of fact. On appeal, the Board vacated and remanded the case for further consideration, instructing Judge Hillyard, *inter alia*, to consider employer's modification request in accordance with the standard set forth by the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, in *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002)(Wood, J., dissenting), and to make specific findings as to whether mistakes were made in the prior benefits determination. [2004] *Crowe*, slip op. at 6. The Board denied the miner's motion for reconsideration on November 5, 2004.³

¹ Claimant is the widow of the miner, whose present claim for benefits was pending at the time of his death on August 20, 2009. On December 23, 2009, claimant filed a motion for intervention and adopted the arguments and briefs previously tendered by the miner. Claimant's motion for intervention is hereby granted. *See* 20 C.F.R. §725.360(d).

² The miner's initial claim for benefits, filed on February 1, 1981, was denied on August 12, 1981, by reason of abandonment. Director's Exhibit 26; *see Crowe v. Director, OWCP*, 226 F.3d 609, 22 BLR 2-80 (7th Cir. 2000).

³ Employer was dissolved in bankruptcy on September 30, 2004. On November 22, 2004, the Director, Office of Workers' Compensation Programs (the Director), requested that the case be held in abeyance pending his determination of whether a surety

On remand, employer's counsel notified Judge Hillyard that employer was dissolved in a bankruptcy proceeding and that counsel was withdrawing from the case.⁴ The miner then moved for dismissal of employer's modification petition as abandoned, and 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, Judge Hillyard denied the miner's motion to dismiss, reasoning 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 the case for reconsideration of employer's modification request under the proper standard. Therefore, he proceeded to adjudicate employer's modification request. After conducting a *de novo* review of the evidence, Judge Hillyard determined that a mistake of fact was made in the prior determination that pneumoconiosis was established at 20 C.F.R. §718.202(a), and denied benefits. On appeal, the Board held that Judge Hillyard did not abuse his discretion in denying the miner's motion to dismiss, as no bankruptcy court order had been submitted requiring that the proceedings be dismissed. The Board also affirmed his finding that a mistake in a prior determination of fact was made pursuant to 20 C.F.R. §725.310 (2000), but remanded the case for a determination of whether reopening the claim would render

bond covered the claim against employer. By letter to the Board, dated February 7, 2005, the Director indicated that a surety bond was issued by Aetna Casualty and Surety Company (Aetna) that covered employer's liability in this claim, and further requested that the Board retain employer as the responsible operator and proceed to adjudication. Aetna was acquired by The Travelers Companies (surety) on July 1, 1997.

⁴ The Joint Liquidating Plan and Joint Plan of Reorganization confirmed by the Bankruptcy Court provides:

[A]ll claims for benefits under the [Black Lung Benefits Act] . . . pending as of . . . September 30, 2004, shall not be dismissed but instead, allowed to proceed to final adjudication with the applicable Debtors as parties. Finally adjudicated claims that result in benefit awards will not be enforced against the Debtors but rather will form the basis for collection from any other responsible parties there, including without limitation, the Debtors' sureties under the Black Lung Benefits Act.

justice under the Act pursuant to *Hilliard*. The Board denied the miner's motion for *en banc* reconsideration on August 16, 2007.

On remand, the case was reassigned to the administrative law judge, who issued an order on January 16, 2008, allowing the parties the opportunity to file briefs pertaining to the issues to be addressed on remand. On February 14, 2008, employer's surety filed a protective motion for conditional intervention. In a Decision and Order on Remand issued on January 30, 2009, the administrative law judge denied the motion to intervene, and found that granting modification would render justice under the Act. Accordingly, the administrative law judge granted employer's petition for modification and reversed the prior award of benefits.

In the present appeal, claimant contends that the modification proceeding should be dismissed due to employer's dissolution in bankruptcy.⁵ Claimant also challenges the administrative law judge's decision that modification would render justice under the Act, contending that his decision was arbitrary and capricious. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief. Claimant has replied in support of her 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. 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).

Initially, claimant contends that the modification petition should be dismissed on the ground that no party has standing to seek affirmative relief herein. In this regard, claimant argues that, consistent with the Seventh Circuit's decision in *Old Ben Coal Co. v. Director, OWCP [Melvin]*, 476 F.3d 418, 23 BLR 2-424 (7th Cir. 2007), employer lacks standing because it was dissolved in bankruptcy in 2004, and employer's surety lacks standing because its motion to intervene in this proceeding was untimely. Claimant's Brief at 16-20; Claimant's Reply Brief at 3-8. Claimant's arguments are without merit.

In *Melvin*, the Seventh Circuit dismissed an employer's appeal for lack of jurisdiction, as the employer was dissolved in bankruptcy, had no assets nor successor, and no petition for intervention had been filed. While holding that there was no real

⁵ Following claimant's appeal, the surety filed a motion for intervention with the Board on May 29, 2009, which was granted on October 21, 2009.

party-in-interest to pursue that appeal, the court observed that any entity that would be prejudiced by an award of black lung benefits, such as an insurance company or a surety, was entitled to intervene in the administrative proceeding with the rights of a party, and could also seek intervention in the circuit court. *Melvin*, 476 F.3d at 420, 23 BLR at 2-428; see 20 C.F.R. §725.360(a)(4), (d). In the instant case, employer's surety filed a protective motion for conditional intervention upon remand to the administrative law judge in 2008 and, after its motion was denied, sought intervention before the Board in the instant appeal, which was granted. As the surety had no reason to believe that intervention was necessary to protect its interests until after the Seventh Circuit issued its 2007 decision in *Melvin*, we reject claimant's argument that any motion to intervene herein was untimely, particularly since the regulations do not include any requirement that such a motion be filed within a specific time frame. See 20 C.F.R. §§725.360(a)(4), (d), 802.214; *Zeigler Coal Co. v. Director, OWCP [Griskell]*, 490 F.3d 609, 610, 24 BLR 2-38, 2-41 n.1 (7th Cir. 2007).

Claimant next contends that the administrative law judge's determination, that granting employer's request for modification would render justice under the Act, was arbitrary and capricious. Claimant argues that the administrative law judge failed to adequately explain why he found that employer exercised due diligence in its defense of the claim, despite noting in previous decisions that employer had sought extensions of time to develop medical evidence in the initial proceeding, and then submitted nothing. Claimant's Brief at 21-22. Claimant additionally maintains that the administrative law judge arbitrarily excused employer's willful refusal to pay benefits. Claimant's Brief at 24-26. Claimant's arguments lack merit.

In setting forth his findings on the issue of whether modifying the award of benefits would render justice under the Act, the administrative law judge addressed the diligence of the parties, the number of times that employer sought reopening, and the quality of the evidence, as directed by the Board pursuant to the Seventh Circuit's holding in *Hilliard*, 292 F.3d 533, 22 BLR 2-429. With respect to employer's diligence, the administrative law judge reviewed the procedural history of the case and concluded that, at all times, employer had "acted in a diligent manner to insure that its position was protected." Decision and Order on Remand at 5. The administrative law judge determined that, although employer developed limited medical evidence initially, when the evidence of record favoring the miner was found to be insufficient to establish entitlement, employer subsequently developed additional evidence after the Seventh Circuit remanded the case for the administrative law judge to reconsider the medical evidence under a different standard of proof. Decision and Order on Remand at 4-5. The administrative law judge further found that employer timely sought reconsideration and/or modification of all unfavorable decisions. *Id.* With respect to the number of times employer sought reopening and the quality of the evidence, the administrative law judge found that "both of these factors strongly favor employer, as it did not pursue

modification lightly, [but] diligently developed substantial medical evidence from highly qualified pulmonary specialists.” Decision and Order on Remand at 6.

The administrative law judge identified and considered the relevant criteria set forth in *Hilliard*, and he explained the reasons and bases for his decision. We find no abuse of his discretion in finding that reopening serves the statutory preference for accuracy of benefits determination, and that modification would render justice under the Act. Decision and Order on Remand at 6; *see Amax Coal Co. v. Franklin*, 957 F.2d 355, 358, 16 BLR 2-50, 2-54 (7th Cir. 1992); *Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996). Claimant presents no reason to disturb the administrative law judge’s discretionary determination. Therefore, we reject claimant’s allegations of error and affirm the administrative law judge’s finding that reopening the claim rendered justice under the Act.

Accordingly, the administrative law judge’s Decision and Order on Remand granting modification and denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge