

BRB No. 10-0404 BLA

FRANKLIN D. MARTIN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
JIM WALTER RESOURCES,)	DATE ISSUED: 03/17/2011
INCORPORATED)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Employer's Request for Modification of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

John C. Webb, V. (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Employer's Request for Modification (08-BLA-5954) of Administrative Law Judge Adele Higgins Odegard rendered on a subsequent claim¹ filed pursuant to the provisions of Title IV of the Black

¹ Claimant filed his first claim on March 7, 1997. Director's Exhibit 1. On July

Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Public L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(I)) (the Act). The pertinent procedural history of this case is as follows: The instant claim was filed on December 18, 2002. Director's Exhibit 3. The district director denied benefits on August 12, 2003 because claimant did not establish any of the elements of entitlement. Director's Exhibit 15. Claimant filed a letter on July 29, 2004, which the Department of Labor construed as a request for modification. Director's Exhibits 16, 17. The district director denied claimant's request for modification on May 5, 2005. Director's Exhibit 30. By letter dated June 3, 2005, claimant requested a formal hearing. Director's Exhibit 31. The Department of Labor denied claimant's request for a hearing because it was untimely. Director's Exhibit 32. Claimant filed a request for modification on October 27, 2005. Director's Exhibit 33. The district director denied claimant's request for modification on February 15, 2006. Director's Exhibit 35. Claimant filed a request for modification on April 6, 2006. Director's Exhibit 37. The district director granted claimant's request for modification on September 11, 2006, determining that claimant was entitled to benefits. Director's Exhibit 40. By letter dated September 21, 2006, employer requested a formal hearing. Director's Exhibit 41. On October 2, 2007, Administrative Law Judge Ralph A. Romano issued a Decision and Order awarding benefits. Director's Exhibit 55. In support of an appeal of Judge Romano's award of benefits, employer filed a Motion for Leave to file Petition for Review dated December 5, 2007. Director's Exhibit 57. By Order, the Board dismissed the appeal as untimely. *Martin v. Jim Walter Resources, Inc.*, BRB No. 08-0274 BLA (Jan. 18, 2008)(unpub. Order). Employer filed a request for modification on January 30, 2008. Director's Exhibit 59. The district director denied employer's request for modification on May 30, 2008. Director's Exhibit 64. By letter dated June 10, 2008, employer requested a formal hearing. Director's Exhibit 66. Judge Odegard (the administrative law judge) held a hearing on February 25, 2009 and issued a Decision and Order on February 9, 2010. In her decision, the administrative law judge found that employer's request for modification was timely filed pursuant to 20 C.F.R. §725.310(a), as benefits were being paid to claimant. The administrative law judge also found that granting employer's request for modification would not render justice under the Act. Accordingly, the administrative law judge denied employer's request for modification.

On appeal, employer challenges the administrative law judge's denial of its request for modification, based on her finding that a grant of modification would not render justice under the Act. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the

19, 1999, Administrative Law Judge Gerald M. Tierney issued a Decision and Order denying benefits. *Id.* Judge Tierney's denial was based on claimant's failure to establish the existence of pneumoconiosis. *Id.* Claimant filed this claim on December 18, 2002. Director's Exhibit 3.

interest in an accurate determination and the fact that employer's modification request would not be futile overcome employer's lack of diligence and motive in requesting modification.² Specifically, the Director notes that employer has not demonstrated recalcitrance or engaged in egregious behavior. Additionally, the Director notes that even the administrative law judge acknowledged that employer's evidence casts doubt on the award of benefits in this case. The Director therefore asserts that the Board should reverse the administrative law judge's denial of employer's request for modification because it would not render justice under the Act, and remand the case to the administrative law judge to adjudicate the merits of employer's request for modification.

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.³ 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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 intended purpose of modification based on a mistake in a determination of fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v.*

² Subsequent to the issuance of the Decision and Order Denying Employer's Request for Modification by Administrative Law Judge Adele Higgins Odegard (the administrative law judge), amendments to the Act, which became effective on March 23, 2010, were enacted, affecting claims filed after January 1, 2005. Because the instant claim was filed before January 1, 2005, the recent amendments to the Act do not apply in this case.

³ The record indicates that claimant was employed in the coal mining industry in Alabama. Director's Exhibit 4. Accordingly, the law of the United States Court of Appeals for the Eleventh Circuit is applicable. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Aerojet-General Shipyards, Inc., 404 U.S. 254 (1971); *see Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987). However, the modification of a claim does not automatically flow from a finding that a mistake was made on an earlier determination, and should be made only where doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (recognizing that the purpose of modification under the Longshore Act, also applicable to the Black Lung Benefits Act, is to “render justice.”); *Sharpe v. Director, OWCP*, 495 F.3d 125, 128, 24 BLR 2-56, 2-66 (4th Cir. 2007).

Employer contends that the administrative law judge erred in finding that a grant of modification would not render justice under the Act. The administrative law judge noted that the United States Court of Appeals for the Fourth Circuit, in *Sharpe*, addressed the issue of what factors should be weighed in determining whether to grant a request for modification. Specifically, the administrative law judge noted that the court directed that, in addition to considering the factual accuracy of the prior decision, an administrative law judge should consider the diligence and motive of the party in seeking modification and whether a favorable ruling could be futile, because the party seeking modification would be unable to obtain meaningful relief. The administrative law judge then found that employer’s request for modification was not futile, as there was a financial incentive for it.⁴ The administrative law judge also found that Dr. Castle’s opinion casts doubt on the accuracy of Judge Romano’s Decision and Order awarding benefits.⁵ Hence, the administrative law judge found that the factors of futility and accuracy weighed in employer’s favor. Nevertheless, the administrative law judge found that the factors of diligence and motive weighed against employer.⁶ The administrative law judge

⁴ The administrative law judge noted, “Were the [e]mployer to prevail, under the statute the [c]laimant’s entitlement to benefits would cease, and the [e]mployer would be relieved of its current obligation to pay benefits.” Decision and Order at 6.

⁵ After finding that the accuracy factor weighed in employer’s favor, the administrative law judge stated, “[h]owever, in applying the Board’s guidance in [*M.A.S. v. Westmoreland Coal Co.*, BRB No. 08-0563 BLA (June 17, 2009)(unpub.)], I also find that the type of evidence the [e]mployer has presented is not definitive on the specific issue to be determined (that is, whether the [c]laimant has complicated pneumoconiosis), and that no highly probative evidence (such as a biopsy report) was submitted.” Decision and Order at 10.

⁶ The administrative law judge stated: “The [e]mployer’s request for modification followed closely on the heels of the Board’s denial of the [e]mployer’s appeal as untimely. DX 58. In his Motion for leave to file an untimely petition for review to the Board, the [e]mployer’s counsel stated that he believed the appeal had been timely filed

specifically stated:

Under the facts presented in this case, where the circumstances that prevented a timely appeal, while unfortunate, are not truly exceptional, and where the evidence presented is not compelling, I conclude that the interest in justice under the Act would not be advanced, if I were to exercise my discretion to grant the [e]mployer's request for modification.

Decision and Order at 11.⁷ The administrative law judge therefore denied employer's request for modification.

In *Sharpe*, the Fourth Circuit court held that an administrative law judge, in exercising her discretion on modification, should weigh any factors that are pertinent in the circumstances, as well as the accuracy of the prior decision. *Sharpe*, 495 F.3d at 128, 24 BLR at 2-68. Specifically, the court stated that “[t]hese include not only accuracy, but also the requesting party's diligence and motive, and whether a favorable ruling would nonetheless be futile.” *Id.* With regard to the diligence factor, the court noted that the United States Court of Appeals for the Seventh Circuit, in *Hilliard*, has recognized that the diligence of the party seeking modification should be considered in a modification determination. *Id.* Further, with regard to the motive factor, the court noted that “[t]he requesting party's motive may be an appropriate consideration in adjudicating a modification request, in that ‘if the party's purpose in filing a modification is to thwart a claimant's good faith claim or an employer's good faith defense, the remedial purpose of the statute is no longer served.’” *Sharpe*, 495 F.3d at 133, 24 BLR at 2-68-69, quoting *Hilliard*, 292 F.3d at 546).

In this case, the administrative law judge did not find that employer was not diligent in pursuing its request for modification. Rather, the administrative law judge denied employer's request for modification because of its lack of diligence in pursuing an appeal to the Board. In so finding, the administrative law judge stated, “[i]n the absence of unusual circumstances, permitting an employer to bypass an appeal, but then to pursue

by another member of his firm during an absence precipitated by counsel's father's death, but he later learned that a notice of appeal had not been filed. DX 57.” Decision and Order at 6.

⁷ The administrative law judge stated: “The Board's denial of the [e]mployer's untimely appeal reflects that the Board did not excuse counsel's dereliction. In its request for modification, the [e]mployer has not provided any additional facts to explain the failure to timely file a notice of appeal. Consequently, I also find that there are no exceptional circumstances to excuse the [e]mployer's lack of diligence in ensuring that a notice of appeal was timely filed.” Decision and Order at 6-7.

a request for modification, serves to undermine the reliability of the benefits determination process.” Decision and Order at 7. However, as acknowledged by the administrative law judge, there is no prohibition to a party’s decision to file a request for modification instead of an appeal.⁸ Further, we agree with the Director that there is no evidence in the record that employer demonstrated recalcitrance or engaged in egregious behavior. Thus, although she found that the factors of diligence and motive weighed against employer, based on her consideration of *Sharpe*, the administrative law judge did not address the factors of diligence and motive in the manner directed by the Fourth Circuit in *Sharpe. Banks*, 390 U.S. at 464; *Sharpe*, 495 F.3d at 132-33, 24 BLR at 2-68-69. Consequently, we reverse the administrative law judge’s finding that granting employer’s request for modification would not render justice under the Act, and remand this case for the administrative law judge to consider the merits of employer’s request for modification.

⁸ The administrative law judge stated: “I do recognize that, under the factual circumstances set forth here, there is absolutely no indication the [e]mployer deliberately chose to ignore the appellate process. Nevertheless, [there] is no doubt in this case that the [e]mployer’s principal motive for requesting modification is because it failed to timely appeal [Judge Romano’s] Decision and Order to the Board.” Decision and Order at 10-11.

Accordingly, the administrative law judge's Decision and Order Denying Employer's Request for Modification is reversed and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge