BRB No. 13-0272 BLA

TRULA M. EDWARDS (Widow of BILLY J. EDWARDS) Claimant-Respondent v. GRACE COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/31/2014 DECISION and ORDER

Appeal of the Decision and Order on First Remand Granting Modification and Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., 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 McGRANERY, Administrative Appeals Judges.

Employer appeals the Decision and Order on First Remand Granting Modification and Benefits (2008-BLA-05951) of Administrative Law Judge Pamela J. Lakes, rendered on survivor's claim filed on August 6, 2001, pursuant to provisions of the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] This case is before the Board for a third time. In the most recent Decision and Order, issued upon disposition of employer's Motion for Reconsideration En Banc, the majority of the Board remanded the case to the administrative law judge with instructions to determine the admissibility of the reports of Drs. Naeye and Green, and the content of the record, by resolving the parties' evidentiary designations in accordance with 20 C.F.R. §725.414. *Edwards v. Grace Coal Corp.*, BRB No. 10-0681 BLA, slip. op. at 4 (July 2, 2012) (unpub. Decision and Order on Reconsideration En Banc) (McGranery and Hall, JJ., dissenting). The majority also vacated, therefore, the administrative law judge's finding that the miner's death was due to legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), 718.205(c), and her determination that claimant established a basis for modification by proving a mistake in a determination of fact at 20 C.F.R. §725.310.[2] *Id*. The majority advised the administrative law judge that, if she determined that Dr. Green's autopsy report was admissible, she could reinstate her findings at 20 C.F.R. §§718.202(a), 718.205(c) and 725.310. *Id*. at 5. The majority also instructed the administrative law judge to render new findings on the relevant elements of entitlement if she deemed Dr. Green's opinion inadmissible. *Id*. The entire Board agreed that, prior to awarding benefits, the administrative law judge was required to determine whether granting claimant's modification would render justice under the Act. *Id*.

On remand, the administrative law judge issued a Notice of Assignment on Remand and Order in which she gave the parties the opportunity to file any pertinent motions or briefs with regard to their evidentiary designations. The administrative law judge also asked the parties to address whether employer's counsel's tactics mandated that sanctions be imposed upon employer or its counsel and, if so, what form those sanctions should take. In the subsequent Decision and Order on First Remand Granting Modification and Benefits, which is the subject of this appeal, the administrative law judge initially determined that she would not impose sanctions on employer. With regard to the evidentiary issues, the administrative law judge found that Dr. Naeye's report was an initial autopsy report and that Dr. Green's report could properly be deemed a rebuttal autopsy report. Alternatively, the administrative law judge determined that, regardless of how the reports of Drs. Naeye and Green were designated, good cause existed for

[1] On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Those amendments do not apply to this case, based on the filing date of the claim.

[2] The remainder of the procedural history of the case is set forth in *Edwards v. Grace Coal Corp.*, BRB No. 10-0681 BLA, slip op. at 2-3 (July 2, 2012) (unpub. Decision and Order on Reconsideration En Banc) and *Edwards v. Grace Coal Corp.*, BRB No. 10-0681 BLA, slip. op. at 1-4 (Aug. 26, 2011) (unpub.).

admitting them. The administrative law judge also reinstated her previous findings and again found that claimant established death causation and a mistake in a determination of fact in the prior denial. The administrative law judge further found that granting modification would render justice under the Act. Accordingly, the administrative law judge granted claimant's petition for modification and reaffirmed her prior award of benefits.

On appeal, employer alleges that the administrative law judge erred in ruling that Dr. Naeye's report could not be considered as a rebuttal autopsy report. Employer also argues that the administrative law judge's erroneous characterization of Dr. Naeye's report resulted in her erroneous consideration of Dr. Green's report. In addition, employer challenges the administrative law judge's finding that good cause existed to admit Dr. Green's report. Employer further contends that the administrative law judge erred in finding that granting claimant's modification request was in the interest of justice. Employer requests that, when the case is remanded for reconsideration of the evidence, the case be assigned due to a different administrative law judge, due to the present administrative law judge's demonstrated bias against employer. Additionally, employer reiterates it contentions, rejected in the previous appeal, that the administrative law judge erred in finding the existence of legal pneumoconiosis established at 20 C.F.R. §718.202(a)(4) and death causation established at 20 C.F.R. §718.205(c).

Claimant responds in support of the administrative law judge's award of benefits, urging affirmance of the admission of Dr. Green's report, and further urges affirmance of her finding that granting modification would render justice under the Act. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that, even if Dr. Green's autopsy report is excluded, the portion of his opinion that constitutes a medical report supports claimant's entitlement to benefits. Employer filed replies to each response, disagreeing with the parties' arguments and reiterating its contentions on 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.[3] 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). The Board reviews the administrative law judge's procedural and evidentiary

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

rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

I. EVIDENTIARY LIMITATIONS

The evidentiary issues before the administrative law judge on remand arose from the parties' submissions in conjunction with claimant's survivor's claim and her requests for modification. In support of her survivor's claim, claimant submitted the March 23, 2001 autopsy report of Dr. Segen. Director's Exhibit 7. In conjunction with her second modification request, claimant submitted a medical report from Dr. Green dated May 7, 2009, based on a review of the miner's autopsy slides and medical records, and a supplemental report from Dr. Green dated July 15, 2009.[4] Claimant's Exhibits 1, 2. Claimant's counsel designated, as affirmative evidence, the March 23, 2001 autopsy report of Dr. Segen and the May 7, 2009 medical report of Dr. Green. *See* Claimant's Black Lung Evidence Summary. Employer submitted an autopsy report by Dr. Naeye dated January 1, 2004, during the adjudication of claimant's first modification request, but did not designate this evidence on its Black Lung Evidence Summary form. Director's Exhibit 50; *see* Employer's Black Lung Evidence Summary.

In the Decision and Order on Reconsideration En Banc, the majority of the Board held that, "whether or not Dr. Naeye's report was properly submitted by employer as an autopsy rebuttal report remains a factual issue to be resolved by the administrative law judge." *Edwards*, BRB No. 10-0681 BLA, slip op. at 4. The majority further indicated that the administrative law judge's findings as to the designation and admissibility of Dr. Naeye's report would determine the admissibility of Dr. Green's report. *Id*. at 4-5. On remand, the administrative law judge determined that Dr. Naeye's autopsy report was submitted by employer as affirmative evidence, citing as support for her ruling the manner in which Dr. Naeye's report was referenced by employer's counsel during the adjudication of claimant' modification request, and how it was presented to the Board, prior to employer's request for reconsideration en banc. *Id*. at 12-13. With respect to Dr. Green's report, the administrative law judge agreed with the Director that it could be admitted as rebuttal evidence in response to Dr. Naeye's autopsy report. *Id*. at 11.

Employer argues that, contrary to the administrative law judge's determination, Dr. Naeye's opinion was not proffered as affirmative evidence, but was submitted as a rebuttal autopsy report in response to Dr. Segen's report. Employer further asserts that,

[4] These two submissions were treated as one report, albeit as both a medical report and an autopsy report. 2010 Decision and Order at 10-11, 13-14, 15; *Edwards*, BRB No. 10-0681 BLA, slip op. at 4-5 (Aug. 26, 2011) (unpub.).

because the administrative law judge failed to properly characterize Dr. Naeye's report as a rebuttal autopsy report, she erred in treating Dr. Green's report as a rebuttal autopsy report and admitting it.

An administrative law judge is empowered to conduct formal hearings and is given broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc); *Clark*, 12 BLR at 1-149; *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Thus, a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion. *Clark*, 12 BLR at 1-153. We hold that employer has not met its burden in this case, as the administrative law judge's determinations regarding the reports of Drs. Naeye and Green, represented a permissible exercise of her discretion. *Id*. Based on employer's omission of Dr. Naeye's report from its Black Lung Evidence Summary, the descriptions of Dr. Naeye's report in the adjudication of claimant's first request for modification, and employer's subsequent silence on the nature of Dr. Naeye's report, it was reasonable for the administrative law judge to infer that employer submitted Dr. Naeye's report as affirmative autopsy evidence.[5] *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229

[5] In the Decision and Order Granting Motion for Modification and Awarding Benefits, Administrative Law Judge Mollie W. Neal stated:

> The [e]mployer submitted a consultation report by Dr. Richard L. Naeye, a board-certified pathologist, who reviewed the death certificate, autopsy report and slides from the autopsy. . . . Dr. Naeye was the only other physician [besides Dr. Robinette] to provide an opinion as to the cause of the miner's death. However, I assign less weight to his opinion, notwithstanding his credentials as a pathologist, because he was less familiar with the miner's condition and admitted that he had no knowledge of the miner's coal mining or smoking histories.

2003 Decision and Order at 4, 7. Administrative Law Judge Stuart A. Levin, who reconsidered claimant's first request for modification on remand from the Board, stated:

> Turning to Dr. Naeye's evaluation, it is his opinion that the pneumoconiosis present was too mild to have any measurable effect on the miner's lung function and, for that reason, had no role in causing his death. Dr. Naeye cited medical literature which concludes that a miner's severe chronic bronchitis and centrilobular emphysema are rarely associated with coal mine dust exposure in non-smoking miners, and that coal mine dust exposure does not pre-dispose a person to carcinoma. Finally, Dr. Naeye opined that the miner's coal mine dust exposure played no role in his fatal

(2007)(en banc)*; Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting). Moreover, although employer argues that Dr. Naeye's report could meet the requirements of a rebuttal autopsy report, employer does not point to any specific evidence in the record to support its assertion that Dr. Naeye's report was proffered as an autopsy rebuttal report. We affirm, therefore, the administrative law judge's admission of Dr. Naeye's report as employer's affirmative autopsy report at 20 C.F.R. §725.414(a)(3)(i). Because we have affirmed the administrative law judge's finding with respect to Dr. Naeye's report, we also affirm her finding that Dr. Green's report was admissible as claimant's rebuttal autopsy report at 20 C.F.R. §725.414(a)(2)(ii).[6]

II. MODIFICATION/ENTITLEMENT

There is also no merit in employer's contention that the administrative law judge erred in determining that Dr. Green's opinion was sufficient to establish that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.[7] The administrative law judge

---

> myocardial infarction although a history of cigarette smoking could play a major role as established by the medical literature. Dr. Naeye's conclusions clearly do not establish the miner's death was hastened by pneumoconiosis or that pneumoconiosis contributed to his death which was due to a myocardial infarction and arteriosclerotic heart disease.

2007 Decision and Order at 3. Judge Levin found that it did not appear that the factors mentioned by Judge Neal detracted from the credibility of Dr. Naeye's opinion as to whether pneumoconiosis contributed to the miner's death and concluded that claimant did not satisfy her burden at 20 C.F.R. §718.205(c). *Id*.

[6] Based on our affirmance of the administrative law judge's admission of Dr. Naeye's autopsy report as affirmative evidence and Dr. Green's autopsy report as rebuttal evidence, we need not address employer's arguments regarding the administrative law judge's alternative finding that there was good cause for admitting both reports. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] Employer does not challenge the admissibility of the medical report portion of Dr. Green's submissions in the present appeal. In employer's prior appeal, the Board

properly reinstated her findings at 20 C.F.R. §§718.202(a), 718.205(c) and 725.310, based on her determination, on remand, that Dr. Green's autopsy report was admissible. *See Edwards*, BRB No. 10-0681, slip op. at 4 (unpub. Decision and Order on Reconsideration En Banc). We decline to disturb the Board's previous holdings affirming the administrative law judge's findings on this issue, as they constitute the law of the case and employer has not established an exception to the application of this doctrine. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). We, therefore, affirm the administrative law judge's finding that the medical opinion evidence establishes the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease caused by coal mine dust exposure, death due to pneumoconiosis and a mistake in a determination of fact pursuant to 20 C.F.R. §§718.202(a), 718.205(c) and 725.310.

III. JUSTICE UNDER THE ACT

The Board instructed the administrative law judge that she was required to consider whether granting claimant's request for modification and awarding benefits would render justice under the Act. *See Edwards*, BRB No. 10-0681, slip op. at 5 (unpub. Decision and Order on Reconsideration En Banc), citing *Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968); *Sharpe v. Director, OWCP* (*Sharpe I*), 495 F.3d 125, 131-132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007). The administrative law judge acknowledged this instruction and determined that this criterion was satisfied, as the modification of the prior denial of benefits would not be futile, claimant established a mistake in a determination of fact while exercising diligence in seeking benefits and acting in accordance with appropriate motives. Decision and Order on First Remand at 17.

Employer contends that the administrative law judge erred in finding that claimant was diligent in pursuing her claim for benefits and, therefore, granting modification would render justice under the Act. This allegation is without merit. As the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, recognized in *Sharpe I*, the decision whether to grant or deny a request for modification is committed to the discretion of the administrative law judge. *Sharpe I*, 495 F.3d at 133, 24 BLR at 2-69. In particular, the administrative law judge, as fact-finder, is charged with rendering a finding as to whether granting a request for modification would render justice under the Act. *Id*.; *see also Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292

---

held that Dr. Green's opinion complied with the evidentiary limitations on medical reports. *Edwards*, BRB No. 10-0681 BLA, slip op. at 6 (Aug. 26, 2011) (unpub.).

F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976). The Fourth Circuit has identified factors that the administrative law judge is to consider in making a finding on this issue, including the moving party's motive and diligence and whether the request for modification is futile. *Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F. 3d 317, 327-28, 25 BLR 2-157, 2-173-174 (4th Cir. 2012), *cert. denied*, 570 U.S. (2013); *Sharpe I*, 495 F.3d at 133, 24 BLR at 2-69-70. The administrative law judge addressed these factors at length in her Decision and Order and made findings that are rational and supported by substantial evidence. *Sharpe I*, 495 F.3d at 133, 24 BLR at 2-69-70. Moreover, employer does not identify anything specific in the record to support its allegation that claimant has not been diligent in seeking benefits, but generally asserts that the evidence that claimant submitted on modification was available when her claim for benefits was filed. This is not a ground for denying modification. *See Hilliard*, 292 F.3d at 547, 22 BLR at 2-454. Because we discern no error or abuse of discretion in the administrative law judge's determinations, we affirm the administrative law judge's determination that granting modification would render justice under the Act. *See Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

IV. ALLEGATIONS OF BIAS

Employer alleges that the administrative law judge's bias against its counsel and, by extension, it, requires that the Board vacate the award of benefits and remand the case for reassignment to a different administrative law judge. Employer bases its contention on the administrative law judge's statements criticizing the decision of the majority in the Board's Decision and Order on Reconsideration En Banc and her comments regarding employer's defense of the present survivor's claim. Employer maintains that the administrative law judge's comments establish that she was not an impartial adjudicator. We disagree.

The Board has held that a party alleging bias or prejudice on the part of the administrative law judge has a heavy burden to satisfy. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107-08 (1992). Although the administrative law judge criticized Board's decision to remand this case and the actions of employer's counsel, she followed the Board's remand instructions and explained the basis for her findings. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because we discern no bias against employer in the manner in which the evidentiary issues were resolved, we reject employer's request that the award of benefits be vacated and the case remanded for assignment to another administrative law judge. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 620, 23 BLR 2-345, 2-358 (4th Cir. 2006), *citing Liteky v. U.S.*, 510 U.S. 540, 555 (1994) (expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display, do not establish bias or partiality).

Accordingly, the administrative law judge's Decision and Order on First Remand Granting Modification and Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge